JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Civil Appeal No 5 of 2017

(Being Case Management Case No. 4131of 2016)

THE STATE

(1st APPELLANT)

and

GEORGE CHAPONDA

(2ND APPELLANT)

and

THE STATE PRESIDENTOF MALAWI

(3RD APPELLANT)

EXPARTE

MR. CHARLES KAJOLOWEKA

(1ST RESPONDENT)

And

THE REGISTERED TRUSTEES OF YOUTH AND SOCIETY

(2ND RESPONDENT)

And

THE REGISTERD TRUSTEES OF CCAP SYNOD

(CHURCH AND SOCIETY PROGRAMME)

(3RD RESPONDENT)

And

THE REGISTERD TRUSTEE OF CENTRE FOR THE DEVELOPMENT OF PEOPLE

(4TH RESPONDENT)

CORAM: JUSTICE D F MWAUNGULU, JA

Hon. Kalekeni Kaphale, SC, Counsel for the Appellant

W. Mwafulirwa, Counsel for the Respondent

Minikwa, Official Court Interpreter

Mwaungulu, JA

JUDGMENT

Précis

This is an application by Dr Chaponda to vacate an injunction, that never was, with a tinge of something unusual, which in the course of hearing the appeal, raised jurisdictional questions. It is important to state at the outset that there was no order for stay of proceedings and there is no injunction, interim or otherwise, against the president. There is an interim injunction that was never applied for. The court below, in its order, gave a full blown injunction without notice of proceedings or hearing on the other party. There is injustice where a party obtains a full remedy under the law without notice of any proceedings on the other party or obtains an interim relief not applied for. On the principles in *American Cyanamid Co. v Ethicon Ltd.*, [1975] 1 All ER 504, on which this court, even as an appellate court, grants interim reliefs, the injunction, if an interim injunction, should not have been granted. On the whole, therefore, on procedural and substantive considerations, the order of injunction must be vacated while the full Court considers the appeal. The facts, except for detail, are not complex and, in so far as they assist in resolving the issue, are as follows.

Background

On 1 January, 2017 the President, acting under section 89 (1) (g) of the Constitution, appointed a Commission of Inquiry. The people appointed to and the terms of reference for the commission of inquiry are fundamental to the application being considered and the substantive issues before the full court. It is, therefore, necessary to reproduce the contents of the appointing and commissioning instrument:

> Whereas it is deemed that it would be for the public welfare that an inquiry be held in the matter of the procurement of maize by Admarc from the Republic of Zambia;
>
> NOW, THEREFORE, in exercise of the powers conferred by section 2 of the Commissions of Inquiry Act, and subject to the provisions of that Act, I, PROFFESSOR ARTHUR PETER MUTHARIKA, President of the Republic of Malawi, do hereby issue this Commission and appoint a Commission of Inquiry as follows –
>
> 1. The following persons are hereby appointed to be Commissioners and the Secretary of the Commission of Inquiry-
> (a) Retired Chief Justice Anastasia Msosa, SC – Chairperson
> (b) Dr. Janet L. Banda, SC – Member
> (c) Mr. Isaac Kayira – Member
> (d) Mr. Mike Chinoko – Secretary
> 2. (1) The Commissioners shall act in accordance with the provisions of the Act and, subject thereto, shall have power to consider, determine and inquire into all aspects of the procurement of maize by ADMARC from the Republic of Zambia including, but not limited to collecting and reviewing all relevant documentation and information relating to the matter.
> 3. The Commissioners shall complete the inquiry within a month and, upon completion of the Inquiry, the Commission shall make a written report of their findings and recommendations to the President.
> 4. The Commissioners shall have power to determine-
> (a) Their own procedure;
> (b) Their own quorum at hearings and meetings;
> (c) The place or places where, and the time or times within which, the inquiry shall be held;
> (d) Whether or not the inquiry shall be held in public, with reservations nevertheless to the Commissioners to exclude any person or persons

or any matters or particular, if they deem fit for the due conduct of the inquiry, the preservation of order and for any other reason;

(e) The form of the report the Commissioners will render upon completion of the inquiry; and

(f) Such other matters as the Commissioners deem expedient for the purpose of the inquiry.

5. The Commissioners may co-opt, for such period or periods as they think fit, any number of experts or other persons as, in view of the Commissioners, are required to assist in the performance of their functions.

6. Upon completion of the inquiry, the Commissioners shall make a written report of their findings to the President.

The application for permission for judicial review

On 11 January 2017, the respondents, Mr Kajoloweka, the Registered Trustees of Youth and Society, the Registered Trustees of CCAP Synod of Livingstonia (Church and Society Program) and the Registered Trustee of the Centre for Development of People, filed, without notice on the other party, an application for permission to move for judicial review and for injunctory relief. The application for leave for judicial review bases on two pillars. The first, which relates to the President, is twofold. The President should not appoint the two commissioners, Dr Janet Banda, now the Solicitor General, and Mr Isaac Kayira, a civil servant, because they are junior to a Minister. Secondly, the president should have dismissed, suspended or asked Dr Chaponda to resign after instituting a Commission of Inquiry. The second pillar is that Dr Chaponda should have resigned to pave way for the investigations. The application, purportedly, was made under Order 53 of the Rules of the Supreme Court, 1965.

The application should have been made under the Civil Procedure Rules, 1998

Section 29 of the Courts Act was amended in 2004, five years after the Civil Procedure Rules, 1998 when the rules of the High Court were the Rules of the Supreme Court, as defined the Rules of the Supreme Court, 1999, the Civil Procedure Rules 1998, effective 26 April, 1999. The reason why the Civil Procedure Rules, 1998 were the Rules of the Supreme Court, 1999, is because of section 2 of the Courts Act, 1958, which provided;

> Rules of the Supreme Court" means the Rules of the Supreme Court, 1883 in England and includes any rules or orders substituted therefor or added thereto and being in force from time to time in force in England.

Section 8 of the Supreme Court of Appeal Act is the equivalent section for the Supreme Court of Appeal:

> The practice and procedure of the Court shall be in accordance with this Act and any rules of court made thereunder:
>
> Provided that if this Act or any rules of court made thereunder does not make provision for any particular point of practice and procedure then the practice and procedure of the Court shall be—
>
> (a) in relation to criminal matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England;
>
> (b) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed by the Court of Appeal in England.

Section 29 of the Courts Act, 1958, before the amendment, read:

> Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court:
>
> Provided that—
>
> (a) the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act;
>
> (b) any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general

application in force in England on the eleventh day of August, 1902, and any such Acts as have been applied to or are from time to time in force in Malawi shall not have any application in Malawi;

(c) if any provision of the Rules of the Supreme Court is inconsistent with any provision of any rules of court, the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void.

Section 29 of the Courts Act, as amended in 2004, reads:

Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court, 1999:

Provided that—

(a) the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act;

(b) any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general application in force in England on the eleventh day of August, 1902, and any such Acts as have been applied to or are from time to time in force in Malawi shall not have any application in Malawi;

(c) if any provision of the Rules of the Supreme Court is inconsistent with any provision of any rules of court, the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void.

1999 cannot mean 1965

The only amendment, therefore, is the addition of the year, 1999. The amendment, however, also removed the definition of "Rules of the Supreme Court. The bar, the bench and academia either inadvertently overlooked or ignored the amendment and continued to use the Rules of the Supreme Court, 1965. There is no way, even by strain of imagination, that "1999" can mean "1965."

The statement of the Minister of Justice to the House

In fact, the statement of the Minister of Justice, who introduced the bill to the house, through the Attorney General, supporting the amendment bill, clearly refers to the year 1999. The situation prompting the amendment was promulgation of new rules in England (and Wales) in 2000 as amendments, reviews or addenda to the Civil Procedure Rules, 1998 effective 26 April 1999. From 26 April 1999, based on the interpretation section in the Courts Act, the Civil Procedure Rules, 1998, effective 26 April 1999, were the Rules of the Supreme Court as on 26 April 1999. The Minister of Justice, in a memorandum supporting the bill, states clearly that the rules of court in 2004, the year of amendment, should not be the rules of court, namely the Rules of the Supreme Court, in 2000, but the Rules of the Supreme Court on (26 April) 1999 – the Civil Procedure Rules, 1998.

The Civil Procedure (Amendment No 4) Rules 2000 (S.I. 2000 No 2002) introduced substantive changes to the Civil Procedure Rules 1998 that were made on 10 December 1998, laid before the (UK) Parliament on 17 December 1998 and coming into force on 26 April 1999. These changes capture the Chief Justice's and the Minister of Justice's attention. The statement to the Courts Act Amendment Bill, therefore, tabled to the house, refers to confusion caused by the 2000 amendments:

The Bill also seeks to provide interim measures for civil procedural law applicable to the High Court, which law is currently under review. The position in Malawi is that in terms of section 29 of the Act, the High Court has been applying the Practice and Procedure provided in the Rules of the Supreme Court of the United Kingdom. However, since the year 2000, new Rules of Procedure have been promulgated in the United Kingdom and a decision having been misunderstanding amongst lawyers and the Judiciary as to which rules of procedure to apply. This Bill, therefore, seeks to clarify the position before review is finalized.

The Bill, in Clause 2 seeks to delete the definition of "Rules of the Supreme Court" and in Clause 4 seeks to provide and specify that the Rules of Procedure to be used in civil

> matters in Malawi are the Rules of the Supreme Court, 1999... Section 29 of the principal Act is amended by inserting, immediately after the expression "Rules of the Supreme Court" where that expression first appears, the following words "1999".

The Rules of the Supreme Court, 1999 were the Civil Procedure Rules 1998

The Minister of Justice carefully avoids mentioning that, in the United Kingdom, it is the Civil Procedure Rules 1998 that applied from to the High Court in Malawi on 26 April 1999 to 2000. The Minister of Justice's statement refers to "Rules of the Supreme Court of the United Kingdom" as being the rules of the High Court. Those Rules of the Supreme Court at the time of the statement were none other than the Civil Procedure Rules, 1998! The Minister of Justice then refers to the 'new Rules of Procedure that 'have been promulgated' since the year 2000. The Minister of Justice's statement does not refer to the Civil Procedure Rules, 1998, as the new rules. The new rules are the ones being promulgated, not in force, in 2000. The Civil Procedure (Amendment No 4) Rules 2000 (S.I. 2000 No 2002) introduces these rules.

Disapplying the 2000 amendments to the Civil Procedure Rules, 1998

The Minister of Justice, therefore, confirms, in 2004, that the 2000 changes should not apply and that what were the Rules of the Supreme Court in 1999 should apply. The Minister of Justice proposes that the year '1999' should be added to the words 'Rules of the Supreme Court' in section 29 of the Courts Act and proposes repealing the definition of the words 'Rules of the Supreme Court' in section 2 of the Courts Act, 1958.

What were the Rules of the Supreme Court in 1999

The question, therefore, is not just what do the words "Rules of the Supreme Court 1999 mean?" Rather the question is what the Rules of the Supreme Court were in 1999. According to section 2 of the Courts Act, as on 26 April 1999, the words "Rules of the Supreme Court" meant "the Rules of the Supreme Court, 1883, in England, including any Rules or Orders substituted therefor or added thereto and being in force from time to time in force in England." These were neither the Rules of the Supreme Court 1883 nor the Rules of the Supreme Court 1965. These were the Civil Procedure Rules, 1998.

No intention to revive the Rules of the Supreme Court 1883 or 1965

The Minister of Justice has no intention to revive the Rules of the Supreme Court 1883, which are mentioned directly in section 2 of the Courts Act or the Rules o the Supreme Court, 1965, not mentioned anywhere in the Act, that became the rules of the Supreme Court only because of section 29 read together with section 2 of the Courts Act, 1958. The 2004 amendments to section 29 of the Courts Act revived neither the Rules of the Supreme Court 1883 nor the Rules of the Supreme Court 1965

Introduction of the words 'Rules of the Supreme Court 1999' in the 2004 amendment to section 29 of the Courts Act was not to revive the Rules of the Supreme Court 1965. The legislature would have, because of section 10 of the General Interpretation Act, since the Civil Procedure Rules 1998 on the law as it was in 1999 and 2004, repealed the Rules of the Supreme Court 1965, added the words in the amending section 29 reviving the Rules of the Supreme Court 1883 or Rules of the Supreme Court 1965. Here is section 10 of the General Interpretation Act:

> "Where any written law repealing in whole or in part any former written law is itself repealed, such last repeal shall not revive the written law or provisions before repealed unless words be added reviving such written law or provisions.

The Minister of Justice, the promoter of the legislation, and the legislature, therefore, never intended to revive the Rules of the Supreme Court 1965 by adding words "reviving such written law or provisions." Instead the legislature added the year 1999 to the Rules of the Supreme Court.

Why 1999

The Minister of Justice did not divine the year 1999. Section 2 of the Courts Act defined Rules of the Supreme Court as "the Rules of the Supreme Court, 1883, in England, including any Rules or Orders substituted therefor or added thereto and being in force from time to time in force in England,' and section 29 of the Courts Act applied the Rules of the Supreme Court the High Court. The answer, therefore to the question what are the Rules of the Supreme Court in 1999, when the Rules of the Supreme Court 1965, were amended or repealed by the Civil Procedure rules 1998 and in 2004 when section 29 of the Courts Act was amended, is the same. The Rules of the Supreme Court in 1999 were not the Rules of the Supreme Court 1965 but "the Rules of the Supreme Court, 1883, in England, including any Rules or Orders substituted therefor or added thereto and being in force from time to time in force in England.' The Minister of Justice could not in 1999 or 2004 have stated that "the Rules of the Supreme Court, 1883, in England, including any Rules or Orders substituted therefor or added thereto and being in force from time to time in force in England" were the Rules of the Supreme Court 1965. The Rules of the Supreme Court 1965 were not "the Rules of the Supreme Court, 1883, in England, including any Rules or Orders substituted therefor or added thereto and being in force from

time to time in force in England,' in 1999 or 2004 because the Civil Procedure Rules 1998 were the 'Rules of the Supreme Court' in England that "substituted therefor [the Rules of the Supreme Court 1883] or added thereto[the Rules of the Supreme Court 1883 and being in force from time to time in force in England,' were the Rules of the Supreme Court 1999. Consequently, the Minister of Justice, when amending section 29, states that it must be what the Rules of the Supreme Court were in 1999 that are the rules of court of the High Court.

On 26 April 1999, the Civil Procedure Rules 1998 composed of the Rules of the Supreme Court in the First Schedule and amendments to other orders not in the first schedule. The Minister of Justice, by restricting the rules of court as the Rules of the Supreme Court in 1999, demonstrates unambiguously that subsequent amendments in the United Kingdom are not part of our law. Consequently, Part 52.10 of the Civil Procedure Rules 1998, introduced by Civil Procedure (Amendment No 4) Rules 2000 (S.I. 2000 No 2002, do not apply to Malawi.

The Civil Procedure Rules 1998 retained Order 44-52 of the Rules of the Supreme Court 1965 as RSC 45-52 with the same orders. PART 50A (3) of the Civil Procedure Rules, retaining most orders in the Rules of the Supreme Court 1965, providing for the application of the Schedules, provides:

> A provision previously contained in the Rules of the Supreme Court 1965—
>
> (a) is headed "RSC";
>
> (b) is numbered with the Order and rule numbers it bore as part of the RSC; and
>
> (c) unless otherwise stated in the Schedules or the relevant practice direction, applies only to proceedings in the High Court."

SCHEDULE 1 retains the following Orders of the Rules of the Supreme Court 1999: RSC Order 10 Service of Originating Process: General Provisions; RSC Order 11 Service of Process, Etc., Out Of The Jurisdiction; RSC Order 15 Causes of Action, Counterclaims And Parties; RSC Order 17 Interpleader; RSC Order 23 Security for Costs; RSC Order 30 Receivers; RSC Order 31 Sales, etc. Of Land By Order Of Court: Conveyancing Counsel of the Court; RSC Order 44 Proceedings under Judgments and Orders: Chancery Division; RSC Order 45 Enforcement of Judgments and Orders: General; RSC Order 46 Writs Of Execution: General; RSC Order 47 Writs of Fieri Facias; RSC Order 48 Examination of Judgment Debtor, etc.; RSC Order 49 Garnishee Proceedings; RSC Order 50 Charging Orders, Stop Orders, etc.; RSC Order 51 Receivers: Equitable Execution; RSC Order 52 Committal; RSC Order 53 Applications for Judicial Review; RSC Order 54 Applications for Writ of Habeas Corpus; RSC Order 55 Appeals to High Court from Court, Tribunal or Person: General; RSC Order 56 Appeals, etc., to High Court by Case Stated: General; RSC Order 57 Divisional Court Proceedings, etc.: Supplementary Provisions; RSC Order 58 Appeals from Masters, Registrars, Referees and Judges; RSC Order 59 Appeals to the Court Of Appeal; RSC Order 60 Appeals to Court Of Appeal from The Restrictive Practices Court; RSC Order 61 Appeals from Tribunals To Court Of Appeal By Case Stated; RSC Order 62 Costs; RSC Order 64 Sittings, Vacations and Office Hours; RSC Order 70 Obtaining Evidence for Foreign Courts, etc.; RSC Order 71 Reciprocal Enforcement of Judgments And Enforcement of European Community Judgments And Recommendations Etc. Under The Merchant Shipping (Liner Conferences) Act 1982; RSC Order 74 Applications and Appeals under The Merchant Shipping Act 1995; RSC Order 77 Proceedings by and against The Crown; RSC Order 79 Criminal Proceedings; RSC Order 82 Defamation Claims; RSC Order 87 Debenture Holders' Claims: Receiver's Register; RSC Order 88 Mortgage Claims; RSC Order 91 Revenue Proceedings; RSC Order 92 Lodgment, Investment, Etc., Of Funds In Court: Chancery Division; RSC Order 93 Applications And Appeals To High Court Under Various Acts: Chancery Division; RSC Order 94 Applications and Appeals To High Court Under Various Acts: Queen's Bench Division; RSC Order 95 Bills Of Sale Acts 1878) and 1882And The Industrial And Provident Societies Act 1967; RSC Order 96 The Mines (Working Facilities And Support) Act 1966, Etc.; RSC Order 97 The Landlord And Tenant Acts 1927, 1954 And 1987; RSC Order 98 Local Government Finance Act 1982, Part Iii; RSC Order 99 Inheritance (Provision For Family And Dependants) Act 1975; RSC Order 101 The Pensions Appeal Tribunals Act 1943; RSC Order 106 Proceedings Relating To Solicitors: The Solicitors Act 1974; RSC Order 108 Proceedings Relating to Charities: The Charities Act 1993; RSC Order 109 The Administration Of Justice Act 1960; RSC Order 110 Environmental Control Proceedings; RSC Order 111 The Social Security Administration Act 1992; RSC Order 112 Applications for Use of Blood Tests in Determining Paternity; RSC Order 113 Summary Proceedings for Possession of Land; RSC Order 114 References to the European Court; RSC Order 115 Confiscation and Forfeiture in Connection With Criminal Proceedings.

For the rules of court for the High Court of Malawi, therefore, the Rules of the Supreme Court 1965 had been amended (added to, repealed varied or substituted) by the Civil Procedure Rules 1998 effective 26 April 1999 as described. On 26 April 1999, the Civil Procedure Rules 1998 composed of the Rules of the Supreme Court in the First Schedule and amendments to other orders not in the first schedule. This is why the year 1999 is significant and pivotal in understanding the 2004 amendment in adding 1999 to the words Rules of the Supreme Court.

The result is the same seen from amendment

Even from the amendment perspective, the Civil Procedure Rules 1998 would be the Rules of the Supreme Court 1965 as amended as between 1 January 1999 to December 31 1999. According to section 2 of the General Interpretation Act, a

calendar year means "the period from the 1st January to the 31st December in the same year including both those days." According to section 2 of the General Interpretation Act amendment "includes repeal, addition, variation and substitution." If, as some suggest, the legislature intended to incorporate the Rules of the Supreme Court 1965 and all amendments to it in (the calendar) year 1999, from the definition of 'amendment,' one has to bring an unusual and sophisticated argument that the Civil Procedure Rules 1998 were not amendments that should be incorporated to the Rules of the Supreme Court 1965 either as repealing or adding to the Rules of the Supreme Court 1965. Section 12 of the General Interpretation Act provides:

> "Where in any written law a reference is made to another written law, such reference shall, unless a contrary intention appears, be deemed to include a reference to such last-mentioned written law as the same may be, from time to time, amended."

The words "Rules of the Supreme Court" as received law must be interpreted as in England in 2004

The meaning, therefore, of the words "Rules of the Supreme Court" did not change because of repealing the definition of "Rules of the Supreme Court." The definition was superfluous because of section 12 of the General Interpretation Act. In any case, Rules of the Supreme Court, being received law, the term "Rules of the Supreme Court" or even "Rules of the Supreme Court 1999, remained, because of section 57 (2) of the General Interpretation Act, considered later, as understood in the United Kingdom on 26 April, 1999, 2004 and 2017.

There is, therefore, no contradiction between what the National Assembly debated and what the amendment was, after all. If, as it is contended in *Nippo Corporation v Shire Construction* (2011) Civil Cause No. 672 (unreported), the legislature wanted the Rules of the Supreme Court 1965 to apply, the legislation that it passed, unanimously, added the year 1999 to incorporate all amendments to the Rules of the Supreme Court occurring in the calendar year from 1 January to 31 December 1999. The legislature must then have, just as the Minister of Justice, stated in the statement accompanying the bill, debated that the Civil Procedure (Amendment No 4) Rules 2000 (S.I. 2000 No 2092 should not apply and that what are the Rules of the Supreme Court 1965 as amended by the Civil Procedure Rules 1998 on 26 April 1999 should apply. What *Nippo Corporation v Shire Construction* never determined was what the Rules of the Supreme Court 1965 are in 2004 when section 29 was amended. The Rules of the Supreme Court 1965 have to include all amendments in the calendar year 1 January to 31 December 1999. That cannot exclude the Civil Procedure Rules 1998 made on 10 December 1998 laid before the (UK) Parliament on 17 December 1998 and came into force on 26 April 1999. There is, therefore, no contradiction between *Nippo Corporation v Shire Construction* (2011) and the decisions to which it is perceived to be contrary to in the court below (*Reserve Bank of Malawi v Finance Bank of Malawi Ltd* (2010) Constitutional Case No 5 (unreported, the case of *Chingeni v Msosa* (2010) Miscellaneous Civil Cause No. 18 (unreported); *Mawaya v Mawaya* (2011) Civil Cause No 48 (unreported) and *Re Sakhama Village Headman* (2013) Civil Cause No. 85 (unreported).

The only difference, it may be guessed, is in the use of legislative history and material in aiding interpretation, discussed at length in *Mawaya v Mawaya*. Courts can and do use legislative history to aid interpretation (*Pepper v Hart* [1993] A.C. 593; *Robinson v Secretary of State of Northern Ireland* [2002] UKHL 32, followed in *Mawaya v Mawaya*). In *Nippo Corporation v Shire Construction,* the court below, it never occurred that it is really what the Minister of Justice said to the house rather than what the members debated that is the real clue and cue in aiding courts combing through the legislative history. In *Pepper v Hart* Lord Justice Brown-Wilkinson laid three considerations in what is the *ratio decidendi* of the case:

> "My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or another promoter of the Bill is likely to meet these criteria."

In relation to the amendment, therefore, it is not what the members of the house meant, it is what the Minister of Justice said, discussed at length prior, that counts.

The interpretative approach to the words 'Rules of the Supreme Court 1999' must, before resorting to legislative history, must conform first to the statutory prescription. If there was ambiguity, which there was not, before resorting to legislative history, strictly accepted in as done in *Nippo Corporation v Shire Construction,* there was a statutory duty to interpret the words 'Rules of the Supreme Court' as the law was in England at the time of the legislation. Section 57 (2) of the General Interpretation Act provides:

> "Every applied law shall be construed in accordance with the law relating to the interpretation of such applied law which was in operation in the place where and at the time when the law was made."

The Rules of the Supreme Court 1999 are applied laws. As at 2004, when the amendment was made, the Rules of the Supreme Court were "the Rules of the Supreme Court, 1883, in England, including any Rules or Orders substituted therefor or added thereto and being in force from time to time in force in England," these were the Civil Procedure Rules 1998, including, of course, the amendments introduced by Civil Procedure (Amendment No 4) Rules 2000 (S.I. 2000 No 2092. The effect of section 29 of the Courts Act as amended, therefore, was to proscribe the Civil Procedure (Amendment No 4) Rules 2000 (S.I. 2000 No 2092).

Civil Procedure Rules, with no subsidiary legislation enacted, remain as subsidiary legislation after the amendment

Moreover, assuming, as most do, that the 2004 was a repealing provision of, even the Civil Procedure Rules, since the Rules of the Supreme Court, repealed, were not revived, there are *cul de sacs* in section 14 (1) (e) and section 29 of the Courts Act, as amended. Section 14 (1) (e) of the General Interpretation Act provides:

> 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 ... 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.

Section 29 of the Courts Act provides:

> Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court, 1999 ... provided that ...the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act.

Since the Minister of Justice's statement of intent to the legislature in 2004, to date, those rules are not in situ. They were actually concluded in 2016. They have not been implemented yet. Consequently, since there is no action under section 29 of the Courts Act, section 14 (1) (e) of the General Interpretation Act applies. Curiously, the section also points to the necessity to replace subsidiary legislation. The applicable rules of court for the High Court in 2004 were the Civil Procedure Rules 1998. These rules were applied to Malawi under the same section 29 of the Courts Act. They are not, therefore, contradictory and are capable of being made under the amended section. As subsidiary legislation, therefore, the Civil Procedure Rules 1998, from all four walls, are the rules of court for the High Court.

The application should have been made under Part 54 of the Civil Procedure Rules

The application for permission for judicial review should, therefore, have been made under Part 54 of the Civil Procedure Rules, 1998. There is no consequence to mending the application based on the wrong law – the court can always, without much ado, point, as this court just did, the parties to the correct law.

The ex parte application

The actual *ex parte* application for permission for judicial review, however, has implications on the substantive appeal, which will be before a full court, and the application for vacation of an injunction which this court, sitting as a single member of the court, must determine. It is important, therefore, to examine the application itself. It is headed "*Ex parte* Summons on application for leave to move for judicial review and for injunctory relief. It states and in doing so underlines the words an application for "an order of stay and injunction against the respondents." It then has a certificate of urgency. It then attaches the Notice of Application for judicial review; the grounds on which the relief is sought, the statement of facts and an affidavit. That is all the documentation on the file that formed the basis of the order of injunction. There are two aspects of this documentation which form part of the basis on why the order for injunction must be vacated. These should be mentioned early.

Neither the *ex parte* application nor certificate of extreme urgency applies for an interlocutory injunction. They condescend on either "injunctory relief' or "injunction." Secondly, however one considers the documents, there is no evidence supporting an interlocutory injunction. The actual application that talks about "*ex parte* summons on an application for leave for judicial review and for injunctory relief" can be read omnibously with the collection of documents constituting the motion for judicial review. Read that way, there is no application for an interlocutory injunction. The affidavit that verifies facts for judicial review cannot be an affidavit for an application for an interlocutory injunction. Moreover, since there is no application for an interlocutory injunction, an application for an injunction – full blown cannot be made ex parte. If the former document is read separately, it does not apply for an interlocutory injunction, it applies for an injunction – full blown – that requires a hearing. Even if it be assumed to be applying for an interlocutory injunction, there is no affidavit supporting it.

The order of the court on the ex parte order

It is equally important to reproduce the actual order of the court below which, as is a habit of some judges, was endorsed on top of the application for permission for judicial review. The court below used some abbreviations. The wording of the order, in some parts, is unclear. On hearing this application, therefore, there was consensus among the court and the parties as to the exact wording. As we see shortly, there are discrepancies among the application for permission for judicial review, the order given by the court below, as described, and the actual order of injunction the court issued which the first appellant, Dr. Chaponda, Minister of Agriculture, Irrigation and Water Development, claims was never as in ever served on him. The lower court's order read:

> Order for leave to move for judicial review is hereby granted. The applicants should file the necessary notice of motion for judicial review. The order for injunction is also granted.

Again, it might be important at the outset to mention that this order talks of an "injunction" being granted. It does not talk of an "interlocutory injunction" being granted. The court could not grant an injunction –full blown – *ex parte*. The court below could not grant an 'interlocutory injunction' that was not applied for. Moreover, even though the certificate of urgency mentions stay, this order does not grant stay of proceedings.

The interlocutory injunction

On 12 January, 2017 the court issued an "Order of Interlocutory Injunction and further directions of the case." The material paragraph read:

> An order of interlocutory injunction is hereby granted against the first respondent restraining him from discharging his duties as a cabinet minister until the finalization of the investigations by a Commission of Inquiry set by the 3rd Respondent or until a further order of the court.

There was no application for an interlocutory injunction. The originating process has, as one of its causes of action, an injunction. If the respondents wanted, based on their application for an injunction in their main action, an interim injunction, they should have applied for an interlocutory injunction. They never did. The court below could not grant it. In any case, assuming, there was one, there is no evidence to support it.

Moreover, albeit the order of injunction refers to "further directions of the case," there are two things, according to the entire application that this interlocutory order for an injunction does not do. First, this interlocutory order of injunction does not cover the President. There is, therefore, no interlocutory order to compel the President to suspend or discharge the Minister. Secondly, despite that there is mention of stay of proceedings, the interlocutory injunction does not order for stay of proceedings. There is, therefore, an injunction only against the Minister of Agriculture, Irrigation and Water Development or Dr Chaponda.

The Appellants' application to vacate the injunction

On 12 January 2017, the appellants unsuccessfully applied to the court below to vacate the permission for judicial review. Neither in the application nor arguments in the court below is the injunction ever raised or considered. The appellants were so imbued, and confidently, for that matter, in the prospect of success of the application to set aside permission for judicial review that the injunction actually granted never preoccupied them. There were three issues in the appellants' application for vacation of the permission for judicial review.

The first related to whether executive or administrative actions are amenable to judicial review by the courts. The court below based on sections 4, 5, 9, 11 (1), 12 (1) (f), 89 (5) and 108 of the Constitution, thought the decisions were reviewable. The second issue was the inclusion of the Attorney General as a party. The Court agreed with the Attorney General and removed the Attorney General as a party to the proceedings. On the third issue, the court below determined that the respondents had *locus standi*. The issue of an injunction, not being raised, the court never covered it in its ruling of 31 January, 2017.

Notice of Appeal to the Supreme Court against the refusal by the court below to vacate the permission for judicial review

On 31 January, 2017 the appellants filed a notice of appeal in this court against the lower court's refusal to vacate permission for judicial review. The appeal itself tangentially covers the injunction in the first ground. The appellants pray this court to set aside the grant of permission for judicial review and order that the 2nd, 3rd and 4th respondents, the Registered Trustees of Youth and Society, the Registered Trustees of CCAP Synod of Livingstonia (Church and Society Program) and the Registered Trustee of the Centre for Development of People, have no *locus standi*. They raise seven issues.

First, they argue that the court below erred in failing to contextualize the proceedings by recognising that (i) the non-binding nature of Commission of Inquiry findings on the President and (ii) to also consider the powers (e.g. to summon witnesses and compel production of documents) and duties (e.g., of impartiality) of members of Commissions of Inquiry vis-à-vis the allegation of potential interference in the Commission's work by the first appellant and, consequently, as there was no evidence on record of efforts to interfere with the Commission's work, to hold that there was no necessity for the President to ask the first appellant to resign from his office or for the first appellant to voluntarily resign from his office pending the commission of inquiry and that, therefore, there was no triable issue fit for a full judicial review.

The appellants also contend that the court below erred in failing to find that, though some executive actions may be judicially reviewable under the new constitutional order, presidential powers of appointment, suspension can only be reviewed on very narrow and limited grounds of legality and that the current judicial review proceedings raised no such issue.

The appellants further contend that the court below erred in failing to find that there was no triable issue of legality of the exercise of the presidential powers of the appointment or suspension (or failure to do so) of the first appellant that the respondents Form 86A raised and which merited further inquiry in a main judicial review proceeding .

Additionally, the appellants argue that the court below erred, in the light of the law on the reviewability of presidential powers of appointment or suspension of Ministers, and in the light of the powers of the commissions of inquiry and the duties of commissioners, which issue or issues he found to be triable on a full judicial review application and why.

Moreover, the appellants charge, the court below erred in failing to identify which constitutional provisions would be subject to judicial review in light of the facts so far disclosed, at the main judicial hearing.

Finally, the appellants deride the court below in that, based on binding precedent from this court, and in view of the facts disclosed in the application, the second, third and fourth respondents have no *Locus standi* to remain as parties to the judicial review proceedings.

Application to vacate the interim injunction

The appellants, now that there is an appeal to this court, apply to vacate the interim injunction granted by the court below because, they contend, the interim injunction was issued without demonstrating any reasonable grounds, in fact and in law, for fear that Dr Chaponda would interfere with the investigation and also on the ground that the first appellant has already been invited to give evidence at the Commission of Inquiry, and that, therefore, there is no need for continuation of the interim injunction. To this end, Dr Chaponda has sworn that, as a diligent citizen, he has no intention to interfere with the Commission of Inquiry, and he himself already appeared before the Commission of Inquiry on 19 January 2017 when summoned on 18 January 2017.

The appellants; submissions

It is argued, by the Attorney General, on behalf of Dr Chaponda, that, while interim reliefs can be granted without notice on the other party, the interim injunction in this matter was without considering the general principles on which such interim relief is granted as discussed in *American Cyanamid v Ethicon Ltd.* The Attorney General, who thinks that the interim injunction here is *in timeo* is based on unfounded and unsubstantiated fear. The Attorney General relies on a statement in *Merck Sharp Dohme v Teva Pharma BV* [2013] EWHC 1959:

> "The principle I derive from these authorities is that the question the court is asking in every case is whether, viewed in all the relevant circumstances, there was a strong probability that an injunction would be required to prevent harm to the claimant to justify bringing the proceedings. In adding the word sufficiently to the word strong... I am seeking to encapsulate the idea that the degree of probability required will vary from case to case depending on all the circumstances but that mere possibilities are not enough. To justify coming to court requires there to be a concrete, strong and tangible risk that an injunction is required in order to do justice in all the circumstances.

> If a defendant really does, at the date of the proceedings, have no intention to do the act then in the majority of cases that will be conclusive of the question whether there was sufficient strong probability to justify proceedings. However, it seems to me that the question is not confined to the defendant's subjective intentions. A defendant's overt acts must be capable of being relevant. To take an extreme case, if man began taking actual preparatory steps to commit some unlawful act seriously damaging to the claimant and in infringement of the claimant's rights and did so in full view of the claimant and well aware that the claimant would see them, be could hardly complain if the claimant started proceedings and the court decided to grant a formal injunction to prevent it."

The Attorney General argues that in this case the likelihood that Dr Chaponda would interfere with witnesses is ameliorated in two respects. First it is from different provisions in the Commission of Inquiry Act. Section 5 of the Commission of Inquiry, The Attorney General contends, Commissioners make and subscribe to an oath affirmation where they swear or solemnly sincerely affirm that they would faithfully and impartially and do the best in their ability to discharge the trust and perform the duties devolving upon them by the Commission. They then under section 7 of the Act they have to conduct the inquiry in accordance with the direction, if any. To this end, the Attorney General argues that they have, under section 10 of the Act, the same powers of the High Court over witnesses and evidence. On the other hand the Attorney General argues, under the Act there are similar obligations concerning witnesses who should appear before the Commission. Under section 11 of the Act they are amenable to prosecution for perjury; they are compellable to attend; under section 12 (2) of the Act they are amenable to fines for various lapses in the section. Finally the Attorney General contends that Commissioners and witnesses have to be presumed to act impartially and where this is not the case, there must be evidence, which in this case, was not there, to support any suggestion of a *scintilla* of impartiality or bias.

Respondents' submissions

The respondents, on the substantive matters, contend that on the principles in the *American Cyanamid v Ethicon Ltd*, the injunction was and is justified and should, therefore not be vacated. They contend specifically that the balance of justice/convenience leave in favour of maintaining the *status quo*. They argue that in this case they are entitled to cry, *timeo*. They submit that a *quai timet* order is granted where the applicant, not harmed at the time, is threatened to be harmed or, albeit compensated for the harm, there is prospect for more harm. They rely on *Redland Bricks Limited v Morris* [1970] AC652. They submitted that *quia timet* may be mandatory, perpetual or interlocutory. They also, rely on a statement by Lord Dunedin in *Attorney General for the Dominion of Canada v Ritchie Contracting Company* [1919] AC 999, 1005. They submit that *quia timet* bases, as was stated in *Attorney General v Manchester Corporation* [1893] 2 Ch 87 that there should be a strong case of probability that the anticipated infringement will occur. They quote this passage at page 92:

> [A] plaintiff should show that there is imminent danger and that the apprehended damage would be substantial.

Which, between this court and the court below should hear this application?

The respondent, before hearing this application, purported to dismiss the appellant's application because, from paragraph 29/1A/14 in The Supreme Court Practice, Sweet & Maxwell, 99 edition, on Order 19 Rule (1) of the Rules of the Supreme Court, 1965, the application should have been first made to the court below. The respondents argue, therefore, that this court lacks jurisdiction. The Attorney General argues that, in view of Order 3, rule 19 of the Supreme Court of Appeal Rules, this application and many, which, according to the Attorney General, are surprisingly heard by the court below, should actually be heard by this court. Before listening to argument, the court was informed that the matter would not be pursued because the respondent's counsel considered that based on Order 3, rule 19 of the Supreme Court of Appeal Rules, this application and many like it should be made to this court in any event. This court, naturally, was not convinced because, assuming the arguments were correct, the jurisdictional question arose which, nevertheless, this court should address.

Order 3, rule 19 of the Supreme Court of Appeal Rules provides that after an appeal has been entered and until it has been finally disposed of, the Court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the Court and not to the Court below. Counsel thought that all applications, once there is a notice under Order 3, rule 2 of the Supreme Court of Appeal Rules, must, as a matter of course, commence in this court. Order 3, rule 19 of the Supreme Court of Appeal Rules applies to applications which, generally or by rule, must be made to the Supreme Court of Appeal. These include applications for extension of time in which to appeal, raising jurisdictional questions, under section 23 (2) of the Supreme Court of Appeal Act and Order 3, rule 4 of the Supreme Court of Appeal Rules. There are, however, applications which, again, by rule or generally, can be made only to the court below. These are applications, for example, under Order 3, rule (9) (2) of the Supreme Court of Appeal Rules where, while the preparation of the record is subject to the supervision of the Court below, the parties may submit any disputed question to the decision of a Judge of the Court below in chambers who shall give such directions thereon as the justice of the case may require. There are, moreover, applications where this court and the court below have concurrent jurisdiction. For example, under section

24 of the Supreme Court of Appeal Act, only this court can determine an application for bail pending appeal. Under Order 4, rule 13 (1) of the Supreme Court of Appeal Rules, the court below can exercise jurisdiction. These are covered by Order 1, rule 18 of the Supreme Court of Appeal Rules which provides that whenever an application may be made either to the Court below or to this Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court. For these kinds of applications, therefore, Order 1, rule 18 of the Supreme Court of Appeal Rules, not the Rules of the Supreme Court, 1999, the Civil Procedure Rules, 1998, require that applications be made first in the court below.

Where, however, an application, which should first have been made in the court below, is made to this court, there is, in essence, non-compliance with the rules of court. This court, therefore, under Order 5, rule 1 of the Supreme Court of Appeal Rules, has discretion between two approaches. For a no-compliance, a court, in the interests of justice, can either order compliance or waive the non-compliance. The practice and the law are not any different from judicial decisions by the English Court of Appeal. In *Warren v T Kilroe & Sons and another*, [1988] 1All ER 638, 639 Donaldson, MR, with who Lloyds and Balcombe, LJJ agreed, said:

> The application of the first defendant now is that we rule that the appeal should not and, indeed, could not have been set down and declare that there is no appeal outstanding. The basis of that very surprising application is that, so it is said, the words 'without the leave of the court or tribunal in question' in s. 18 (1) (h) mean 'without the leave of the judge who made the decision under appeal'. For my part I am quite unable so to read them. The 'tribunal in question' means the type or species of tribunal; the 'court in question' means the species of court, High Court, county court, Employment Appeal Tribunal or whatever. It does not mean, and it does not say, 'the judge who tried the case'. Accordingly, I can see nothing in s. 18 (1) (h) which prevented Roch J did not in fact give leave, albeit it is not properly recorded in his order.
>
> Even if that were wrong, which it is not, it would still have been open to this court (we offered to do so) to exercise its power under s. 18 (1) (h) by ourselves giving leave to appeal.

Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd (2010) Criminal Appeal No 45 (MSCA) (unreported), *Gadabwali v Republic* and *Patel v Gondwe* (2015) Criminal Appeal No 31 (MSCA) (unreported)) are decisions where this court ordered compliance. *Muluzi v Director of the Anti Corruption Bureau* (2005) Criminal Appeal No 17 (MSCA) (unreported); *The state and 5 Others ex parte Right Honourable Dr. Cassim Chilumpha,* [2006] MLR 433; and *Mangulama v Speaker of the National Assembly,* [2007] M L R 139) are where the court waived non-compliance. In the dissenting judgment of this Court in *State v The Controller of Financial Services* ex *parte Prime Insurances* Ltd (2016) Civil Appeal No 41 (MSCA) (unreported), this court said:

> *Patel v Gondwe*, unlike *Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd* never considered Order 5, rule 1 of the Supreme Court of Appeal Rules. *Patel v Gondwe* never considered *Mangulama v Speaker of the National Assembly.* This Court in *Patel v Gondwe* did not because it thought that it had no jurisdiction. Since this Court has jurisdiction, it must be that failure to apply to this court under Order 1, rule 18 of the Supreme Court of Appeal Rules, is subject to Order 5, rule 1 of the Supreme Court of Appeal Rules. *Mangulama v Speaker of the National Assembly* was a case where, on the facts, the court exercised its jurisdiction to waive the non-compliance. *Patel v Gondwe,* therefore, is *per incuriam* Order 5, rule 1, *Muluzi v Director of the Anti Corruption Bureau, The state and 5 others ex p Right Honourable Dr. Cassim Chilumpha* and *Mangulama v Speaker of the National Assembly. Mangulama v Speaker of the National Assembly* is actually consistent with *Muluzi v Director of the Anti Corruption Bureau* and *The State and 5 others ex parte Right Honourable Dr. Cassim Chilumpha.* The two cases that are inconsistent are *Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd* and *Patel v Gondwe.* These decisions never considered the earlier decisions and are, therefore, *per incuriam.* They are not the correct law. They can, therefore, be reconciled on the broader principle. They are decisions where this court has, in view of Order 5, rule 1 of the Supreme Court of Appeal Rules, depending on the circumstances, discretion.

Moreover, apart from discretion under Order 5, rule 1 of the Supreme Court of Appeal Rules, this court can under Order 1, rule 4 direct a departure from these Rules in any other way when this is required in the interests of justice. *Kaudzu and others v Republic* (2016) Criminal Appeal Case Non 16 (MSCA) (unreported); *Dzole v Republic* (2016) Criminal Appeal Case Non 16 (MSCA) (unreported); *Letasi v Republic* (2016) Criminal Appeal Case Non 16 (MSCA) (unreported); and *Kaudzu and*

others v Republic (2016) Criminal Appeal Case Non 16 (MSCA) (unreported) are cases where Order 1, rule 4 of the Supreme Court of Appeal Rules were invoked. The non-compliance was, therefore, waived. Order 1, rule 18 of the Supreme Court of Appeal Rules was departed from. The application to vacate an injunction, being after the appeal was lodged, could only be an application to vacate the injunction pending appeal. The court below and this court had concurrent jurisdiction. This court will, therefore, determine the application for vacation of the injunction.

Reasoning: The appeal will be considered by the full court

The question, therefore, is whether the order for interlocutory injunction should be vacated? It might be useful to state questions that are not before me and which, as it must be will be determined by the full court. Essentially, it will be to the full court to determine whether permission for judicial review should be granted in the circumstances in which the parties find themselves. Crucially, this court will not determine any of the matters raised in the appeal itself. The reliefs, therefore, sought are not for determination by this application. The question before this court is whether the specific interlocutory injunction should be vacated. Conversely, the question before this court is whether this injunction should have been granted or, if granted, whether it should be maintained. Reference to grounds of appeal will only be necessary to deal with the different stages in applying the principles on which injunctions are granted or refused.

The question whether, as already granted, the interim injunction should be maintained, can easily be resolved first. This is because the pretext on which the Attorney General does not want the interim injunction to be sustained is far from convincing. As long as the inquiry is going on, unless it is shown that the inquiry has not concluded, the prospect of Dr Chaponda interference with the witnesses, is not answered fully by the suggestion, which is Dr Chaponda's, that Dr Chaponda has already testified to the Commission unless, of course, it is demonstrated that Dr Chaponda was the last witness to be called. The evidence suggests nothing. The interim injunction, therefore, cannot be vacated based, as it is, on that Dr Chaponda has already testified before the Commission of Inquiry.

The question for determination, therefore, narrows to considering whether the interim injunction should be vacated. Whether it should be vacated depends on whether the interim injunction, if there was properly one in law and fact, was obtained without notice on the other party or, if with notice on the other party, there was a hearing by both parties. Where the application was without notice on the other party, unless there was a *Joubertina* hearing, a procedure where an application without notice is heard with the other party present after the order of the court or the request of the parties, suggested in *Joubertina Furnishers (Pty) Limited t/a Carnival Furnitures v Lilongwe City Mall* (2013) Misc Civil Cause No. 41 (HC) (PR) (unreported), or where the application, being on notice, the other party, having received notice, is absent, the normal course is to apply for vacation of the interim injunction and before the court that granted it. Where there was a determination with parties present, there cannot be an application to vacate the interim injunction but an appeal from that order except where the application is made on emerging and new facts. Where, for some reason, the matter is before the appeal court, the appeal court and the court below have jurisdiction to hear an application to vacate an injunction. The appeal court derives its powers from that the appeal court is seized of the matter, Order 3, rule 19 of the Supreme Court Matters and has inherent powers to consider all matters attending the appeal. The lower court is not *functus officio,* by that there is an appeal, to consider necessary orders after delivering its judgment.

All these considerations, however, depend on whether, there was or there should have been an interlocutory injunction in the first place. A court, whether on appeal or at first instance may, as a matter of course, vacate an interim relief which should not have been granted or is granted irregularly.

There was an application for an injunction in the originating process

In this case, the interim injunction was made in the context of an application for judicial review. Part 54.6 of the Civil Procedure Rules provides:

> (1) In addition to the matters set out in rule 8.2 (contents of the claim form) the claimant must also state –
>
> (a) the name and address of any person he considers to be an interested party;
>
> (b) that he is requesting permission to proceed with a claim for judicial review; and
>
> (c) any remedy (including any interim remedy) he is claiming; and
>
> (d) where appropriate, the grounds on which it is contended that the claim is an Aarhus Convention claim.

(Rules 45.41 to 45.44 make provision about costs in Aarhus Convention claims.)

(Part 25 sets out how to apply for an interim remedy)

(2) The claim form must be accompanied by the documents required by Practice Direction 54A.

Part 54.6 of the Civil Procedure Rules 1998 makes it clear that an application for interim reliefs like injunctions under it must be made as under Part 25.

There was no application for an interlocutory injunction

Part 25.1 (e) of the Civil Procedure Rules 1998 provides for applications for interim injunctions. Part 25.3 of the Civil Procedure Rules 1998, with little variance on Order 53, rule 10 (b) of the Rules of the Supreme Court 1965, which provides for how applications for interim reliefs should be made, provides:

(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.

(2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.

(3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given.

Part 36.1 part 32.6(1) of the Civil Procedure Rules, 1998 provides that, generally "evidence at hearings other than the trial", for example proceedings for an interim remedy before or after trial is to be by witness statements unless the court, a practice direction or any other enactment provides otherwise.

In this matter, as has been said so many times before, there was no application for an interim injunction. All documents talk about injunction or injunctory relief. It is peremptory that in applications for judicial review, just as it is in other causes of action, injunctions, if sought, should be included as a cause of action in the proceedings by their inclusion in the originating process.

Part 54.2 of the Civil Procedure Rules, 1998, provides for the instances in which judicial review procedure must be used:

"The judicial review procedure must be used in a claim for 54.2 judicial review where the clamant is seeking –A mandatory order; A prohibiting order; A quashing order or an injunction under section 30 of the Senior Courts Act 1981 (restraining a person from acting in any office in which he is not entitled to)".

Part 54.3 provides additional circumstances where judicial review may be used and provides that damages could be claimed in a judicial review action:

(1) The judicial review procedure may be used in a claim for judicial review where the claimant is seeking- A declaration; or An injunction (GL). (Section 31(2) of the Senior Courts Act 1981 sets out the circumstances in which the court may grant a declaration or injunction in a claim for judicial review) (Where the claimant is seeking a declaration or injunction in addition to one of the remedies listed in the rule 54.2, the judicial review procedure must be used)

(2) A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone.
(Section 31(4) of the Senior Courts Act 1981 sets out the circumstances in which the court may award damages, restitution or the recovery of a sum due on a claim for judicial review)

This inclusion does not automatically redound into an interim relief. A party, therefore, seeking interim relief must specifically apply, according to the rules, for interim relief. It is not surprising, therefore, that the respondents, in the documents just analyzed, included a claim for an injunction. What is conspicuously absent from these processes is an application for interim

relief. Since, therefore, there was no application for interim relief, there is no evidence proffered for it. There was no application and no evidence for an interim injunction. The court, therefore, could not grant an interlocutory injunction. The interlocutory injunction that the court granted was, therefore, based on no application. Curiously, the actual order endorsed on the *ex parte* application does not order an interlocutory injunction. It orders for an injunction.

A court cannot order a full blown injunction ex parte and without a hearing

A court cannot order a substantive injunction, like the one applied for by the appellants and acceded by the court, on an application *ex parte*. The court can only grant a substantive injunction upon hearing the parties. Even where a party has received notice and has not acknowledged service or having acknowledged service, has not put a notice of intention to defend, a court can only determine the application for injunction when the applicant has put a notice of hearing for entering judgment. It is significant that a party who has not given notice of intention to defend can still be heard at the subsequent hearing. An *ex parte* order can be given, however, where a party, with notice, does not appear at the subsequent hearing. If, therefore, the intention of the court below was to order an injunction, which it is that was ordered, the court below could not grant a full blown injunction on an application *ex parte*. There is no evidence on the record that there was evidence on the substantive injunction even though the substantive injunction was what was asked for in the originating process. On the contrary, the court signed for an interlocutory injunction, not an injunction.

There was no application for an interim injunction

There was no application for an interlocutory injunction. There was no evidence supporting the interlocutory injunction. The court below, therefore, could not issue an interim injunction. The interlocutory injunction, therefore, was irregular or should not have been granted in the first place.

There was no stay of proceedings

The other consideration is the discrepancy between the application for an injunction, if there was one, the order of injunction made by the court below and the actual interlocutory injunction issued by the court below. The order of interim injunction against the first appellant probably hinges on this paragraph in the actual judicial review application:

> If leave to move for judicial review is granted, then the same should operate as an interlocutory injunction restraining the first respondent from discharging his duties as Cabinet Minister pending further order of this court.

There was, if this is the only basis of the order of interim injunction the court below eventually granted, no application for an interim injunction. Granting permission for judicial review, however, can only operate as a stay of proceedings because of rules 54.10 (1) and (2) of the Civil Procedure Rules 1998 repealing Order 53, rule 10 of the Rules of the Supreme Court, 1965. Granting of leave cannot operate as an interlocutory injunction. The latter, at a certain level of construction, suggested that granting permission for judicial review, where the judicial review remedy is a quashing order, certiorari, under the Rules of the Supreme Court, automatically stayed proceedings. Order 53, rule 10 of the Rules of the Supreme Court, 1965, provided:

> Where leave to apply for judicial review is granted, then ... if the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise orders ...

Grant of permission, even under the Rules of the Supreme Court, 1965, could only result in stay of proceedings. It could not result into an interlocutory injunction. The new rule is clear that the court must order stay – the court may or may not order stay of proceedings. Rule 54.10 (1) and (2) of the Civil Procedure Rules provides that, where permission to proceed is given, the court may also give directions and directions under paragraph (1) may include stay of proceedings to which the claim relates.

This court can only but approve the decision in the court below in *The State v The Malawi Revenue Authority Ex Parte Blantyre Printing and Publishing* (2013) Judicial Review Case No 11 (MHC) (PR) (unreported) that the word 'proceedings' in Rule 54.10 (2) of the Civil Procedure Rules 1998 refers to proceedings affected by the decision under review and not actual court proceedings. The contrary view was expressed by the Privy Council of the House of Lords, now the United Kingdom Supreme Court, in *Ex p. Avon City Council* because of the decision of the Privy Council in *R. v Secretary of State for* in *Minister of Foreign Affairs, Trade and Industry v Vehicle Supply Ltd* [1991] 1 WLR 550.

The Court of Appeal, in view of the Privy Council's decision, reconsidered the matter in *R (H) v Ashworth Hospital Authority* [2003] 1 WLR 127 and held that the word 'proceedings' used in both sets of rules must be given a wide meaning. Dyson L.J., said:

> The purpose of a stay in a judicial proceeding is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the *status quo*. This will aid the judicial process and make it more effective. It will ensure, so far as is possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell LJ A said that the phrase 'stay of proceedings' must be given a wide interpretation so as to apply to administrative decisions. In my view, it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in Vehicles and Supplies would appear to deny jurisdiction even in an [appropriate case]. That would indeed be regrettable, and, if correct, would expose serious shortcomings in the armoury of powers available to the court when granting permission to apply for judicial review.

In *Re P.J. and Another v Minister for Justice, Equality and Law Reform* Hogan J said:

> "For my part, I find the reasoning in *Avon County Council* more compelling than that contained in *Vehicle and Supplies*. It is true that the language ...referred only to pending judicial proceeding, as distinct from administrative decisions. Nevertheless given that ... [this]is essentially a remedial, procedural provision designed to protect the rights of litigant, it seems appropriate that it should be interpreted as 'widely and liberally as can fairly be done': see e.g., *Bank of Ireland v Purcell* [1989] I.R. 327,333 per Walsh J. As Dyson L.J., pointed out in *Ashworth Hospital Authority*, any other conclusion would severely impact on the courts power to grant interim relief to maintain the *status quo* pending to grant interim relief to maintain the *status quo* pending the outcome for the judicial review application. This in turn would have an implication for the court's ability to secure an effective remedy as required by Article 40.3.2 of the Constitution (and) the citizen's constitutional right of access to the courts ..."

Having said that Hogan J recourses the purposive approach to the interpretation of the phrase 'stay of proceedings':

> It follows, therefore, that I am of the view that the phrase 'stay of proceedings' should be interpreted by reference to its underlying purpose, namely, to ensure that the High Court can make an order with suspensive effect in respect of both administrative as well as judicial decisions. This in turn means that a purely administrative decision such as a deportation order is capable of being stayed by an order made under [the] order.

Grant of permission for leave for judicial review does not automatically result into an injunction

Under this rule, grant of permission for judicial review, can, only if the court orders, result in stay of proceedings. Certainly, grant of permission for judicial review cannot result in an interim injunction. A party seeking judicial review who wants the ancillary interim relief of an injunction must apply for an injunction in the application for judicial review and also apply for an interim relief. An interim injunction does not follow immediately from grant of permission for judicial review.

Rule 54.6 (1) (c) of the Civil Procedure Ruled 1998 replaced its equivalent in the Supreme Court of Appeal Rules 1965 without any materiality. Rule 54.6 (1) (c) of the Civil Procedure Rules 1998 provides that, in addition to the matters set out in rule 8.2 (contents of the claim form), a claimant must also state any remedy (including any interim remedy) he is claiming. Rule 54.6 (1) (c) of the Civil Procedure Ruled 1998 stresses that paragraph 25 sets out how to apply for an interim remedy. The former rule and replacing rule require a specific application for interim injunction within or without the motion. The application must be supported by evidence raising facts justifying granting of an interim injunction. In this case, there was no application for an injunction. The statement just considered cannot in law and in fact be an application for an interlocutory injunction.

The court below, therefore, cannot have ordered that the interim injunction is also granted. There was no application for an interim injunction. The court could not, therefore, have ordered one. The order of injunction does not automatically follow from granting permission.

There is, assuming there was, based on the statement just considered, an application for an interim injunction, discrepancy between the interim injunction applied for and, therefore, ordered by the judge, and the one eventually signed by a judge. The respondents requested that the interim injunction 'pending further order.' The court below, therefore, ordered the interim injunction should run 'pending further order.' The interim injunction eventually signed from the court reads "until the finalization of the investigations by the Commission of Inquiry set by the 3rd respondent or until further order." The words "until the finalization of the investigations by the Commission of Inquiry set by the 3rd respondent" are added to the interim injunction.

The duty of the court to draw orders

The duty to draw orders is the courts', not the parties'. Rule 40.3 of the Civil Procedure Rules provides

> Every judgment or order will be drawn up by the court unless—
>
> (a) the court orders a party to draw it up;
>
> (b) a party, with the permission of the court, agrees to draw it up;
>
> (c) the court dispenses with the need to draw it up; or
>
> (d) it is a consent order under rule 40.6.
>
> (2) The court may direct that—
>
> (a) a judgment or an order drawn up by a party must be checked by the court before it is sealed (GL); or
>
> (b) before a judgment or an order is drawn up by the court, the parties must file an agreed statement of its terms.
>
> (3) Where a judgment or an order is to be drawn up by a party—
>
> (a) he must file it no later than 7 days after the date on which the court ordered or permitted him to draw it up so that it can be sealed (GL) by the court; and
>
> (b) if he fails to file it within that period, any other party may draw it up and file it.

The court below could not draw an order inconsistent with the application. Orders of injunction are, by nature, inconveniencing and at best, unjust in that they, before rights are determined, require parties to act or desist from acting with the prospect that their rights could be vindicated one way or another. The requirement in interim applications that they resolve on balance of convenience or justice render truth to that such orders can be inconveniencing and result in unfathomable damage to parties. That is why interim reliefs are made on the usual undertaking as to damages. The Attorney General observes, properly, in this court's view, that the interim injunction sought to be vacated has no undertaking as to damages. Interim injunction orders must be meticulously, perspicaciously, deliberately, deliberatively, cautiously couched.

The practice that has emerged is that parties present tentative orders for signature by the court or judge. This, however, does not absolve the court from the responsibility, which is its, to draw the order. Where, therefore, a legal practitioner, as was in this case, is involved in drawing the order, the care required, is not subsumed in that the duty is the courts. The legal practitioner cannot, thereby, choose to or inadvertently mislead the court. The consequences of the injunction, as eventually signed by the court, can be substantial. Equally, an uncertain or much generalized injunction can inadvertently lead the person to whom it is directed to unknowingly commit contumely.

Injunctions must be clear

Certainly, an injunction up to "until the finalization of the investigations by the Commission of Inquiry set by the 3rd respondent" is casting the net far and wide. Normally, interim injunctions are for the lis and until the determination of the lis. The lis before the court below was an application for judicial review. The interim relief was, therefore, supposed to last until the determination of the application for judicial review. Of course, if the judicial review outlasts the commission of inquiry, the interim injunction is otiose. There would, however, be no justification, to bind, after the one affected by the injunction is successful, a party to the time when the commission of inquiry finishes its business. Equally an interim injunction to a further order of the court looms uncertainty. In the United Kingdom Supreme Court, Lord Nicholls in *Attorney General v Punch Ltd* [2002] UKHL 50 at paragraph 35, said:

> An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is

> prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute.

In *Rhodes v OPO (by his litigation friend BHM) and another* [2015] 2 WLR 1373]; [2016] AC 219], Lady Hale and Lord Toulson, with whom Lord Clarke and Lord Wilson agreed, relying on this passage, said:

> Any injunction must be framed in terms sufficiently specific to leave no uncertainty about what the affected person is or is not allowed to do.

The respondents' response to these patent defects and deficiencies is basically that all these, like the unusual suggestion, which now it is contended to be a typographic error that the President should resign, are up and apt for amendment. If it is in my power to amend, this court would have no problem amending the typographic error about resignation of the President. Certainly, the uncertainty and ambiguity about the scope and extent of the injunction cannot be amended or at least not that easily. This, as seen, was an interim injunction that was not even asked for. The uncertainty emanates from the original application in that it is unclear that the applicant was asking for a stay of proceedings based on that permission was granted. If it was an application for stay of proceedings, definitely, the court below never ordered stay of proceedings and ordered, instead, an injunction which was not applied for. The proceedings are incorrigible by amendment and this court, because of this, cannot take that course. Moreover, adding an undertaking as to damages would be more than amending the order of injunctions. On these considerations alone, the interim injunctions should be vacated. Justice is not served at all in obtaining an injunction of whatever description without notice on another party. There is great injustice where a party obtains an order from a court on an application never made.

The court wants to assume, just for a moment, that the respondents, in the beleaguered paragraph discussed, wanted stay of proceedings as under Rule 54.10 (1) and (2) of the Civil Procedure Rules. The application impugned the appointments themselves, preferring for a different and better panel. The consequence, besides that the court below actually made no such order, would have been to stay the proceedings – the establishment of and the appointment of members to the Commission of Inquiry. In short, there would be no commission of inquiry at all. There would be no need, therefore, for the President to dismiss *the Minister or Dr Chaponda*, who is in these proceedings not as Minister of Agriculture, Irrigation and Water Development to resign or persuade the President to dismiss him.

Should, based on the principles in American Cyanamid, have been made?

The interim injunction should, besides these procedural considerations, be vacated on broader considerations. The interim injunction that the court below ordered was based on no application and, therefore, no evidence (affidavits) in support. More importantly, the interim injunction set for vacation, premises on that it was obtained without notice on the other party. An application to vacate an injunction, therefore, is, in whole or in part, a consideration of whether the interim injunction should have been granted in the first place. Where matters are before it, this court has jurisdiction to order an interim injunction. *A fortiori* where the matter is before it, a court may affect an injunction granted by the court below, even though there is no appeal against the order of injunction. When this happens, the courts proceed on the principles in *American Cyanamid Co. v Ethicon Ltd* with the slight difference that at this stage the question is whether there is a serious issue on appeal – an issue with real prospect of success.

Is there an issue on appeal

The first consideration, therefore, is whether there is an issue on appeal. There is an issue, obvious from the face of the action. Judicial review is at the instance and initiative of the state, on behalf of a citizen, against a public officer. Judicial review cannot be against a person – Dr George Chaponda. In this case, therefore, if anything, the matter should have been by the State, against the Minister of Agriculture, Irrigation and Water Development so that the court is able to target the decisions made or supposed to be made as a public officer. Certainly, as we see shortly, the decision to resign from the office of Cabinet Minister is a personal decision and not a decision in execution of the duties of his office as to be amenable to judicial review. Dr Chaponda is not responsible for deciding whether he should be dismissed or not. Neither does Dr Chaponda have a duty to request the President who appointed him to dismiss Dr Chaponda. The decision to dismiss Dr Chaponda is the President's and that, as we see shortly, is, probably, reviewable. That, however, cannot be a basis for granting permission against Dr Chaponda.

Of course, as was found by the court below sections 4, 5, 9, 11 (1), 12 (1) (f) and 108 (1) and (2) Section 108 (2) of the Constitution, however, is more revealing in terms of what can be reviewed – decision, action and law. Section 108 (2) of the Constitution is limited in scope – it is restricted to decisions and actions of government and laws. Under section 2 of the General Interpretation Act, "act" used with reference to an offence or civil wrong includes an omission and extends to a series of acts and omissions. The acts or decisions in question must, in relation to Dr Chaponda, must be those that relate to government. The decision to resign is not a government action. The court below, therefore, should not have preoccupied itself with the question

whether certain actions were or were not reviewable, it should have considered, in relation to Dr Chaponda, whether any of the actions on which the application hinged were actions of government so that they are reviewable. Failure to designate the public office as the party subject of judicial review masquerades the real issue about Dr Chaponda that he was brought in on a matter not related to functions which are, in law and in fact, not amenable to judicial review. Curiously, the President was not designated as Professor Peter Arthur Wamuthalika but as President because the decisions not to dismiss was not personal but by virtue of that office. Moreover, as we see shortly, the permission to review Dr Chaponda's omission to resign will have to be considered in the light of the nature of commissions of inquiry. They do not have serious intended effect. There are, therefore, serious matters for consideration on the appeal.

Are damages an adequate remedy

The second consideration is whether damages would be an adequate remedy for the applicant. There cannot be any doubt that where one is required to desist from performing functions of a public office, damages are variegated and incalculable and, therefore, imperfectly compensated by money. It is, therefore, unnecessary to consider whether the parties can pay damages on the usual undertaking as to damages. The matter, therefore, centres on considering the balance of convenience or justice. The formulation 'balance of justice or convenience' bases on the polarization on what is the true test. Balance of justice or convenience involves determination of a course of conduct that optimizes justice or convenience or reduces the risk of injustice or inconvenience. The first course of action to consider is whether injustice or inconvenience would be reduced by maintaining the status quo.

Should the status quo be maintained

Courts will only maintain a *status quo* that is just. Where, therefore, maintaining the *status quo*, redounds in injustice, courts will not pursue maintaining the *status quo*. The *status quo* sought for maintenance by the application to vacate the injunction is that Dr. Chaponda should continue as Minister of Agriculture, Irrigation and Water Development in any event – even during the inquiry. The respondents fear that Dr Chaponda would interfere with evidence and witnesses for the commission. The appellants contend that fear cannot be a basis for granting an interim injunction. They contend, correctly, in the court's judgment, that even if fear was a matter, there is no evidence or basis of that fear. Both these are formidable considerations. They, however, where the issue is granting an injunction on considering the *status quo*, confirm that the matter in this particular case cannot be resolved by essaying to consider the *status quo* in regarding the balance of convenience or injustice. The next consideration, therefore, is whether injustice would be reduced by granting the injunction on considering the relative strength of the parties' cases.

The relative strength of the parties' cases

The rationale for opting for an order favourable with the party with a relatively stronger case is really a choice of what is a better evil but one that clearly bases on that where injustices are unequal, the proper course is to opt for an order that has a lesser risk of injustice. This will, *ceteris paribus,* be the case with a better and more prospect of success. The court, on this consideration, is aware that it is not determining the appeal; that should be done at the appeal hearing. There is, however, great wisdom in the suggestion that considerations of the prospect or likelihood of success on appeal could resolve the question of whether interim relief should or should not be given while an appeal is pending.

On this consideration, one can only consider the general premise on which the application for permission for judicial review for Dr Chaponda hinges. As we have seen, judicial review proceedings cannot be commenced against him personally, but in relation to the public office. The fulcrum of proceedings against Dr Chaponda is that the President, after appointing a commission of inquiry, should at the time or simultaneously, have dismissed or suspended Dr Chaponda as Minister of Agriculture, Irrigation and Water Development. There are two reasons accounting for the weakness in this argument.

The first consideration comes from the instrument of the Commission of Inquiry itself. In the course of the hearing, the court observed that if there was anything important in all this, it was the instrument of the Commission of Inquiry. The instrument itself was never disclosed in all affidavits or documentation in the court below or in this court. The hearing proceeded on an undertaking that the instrument would be furnished to the court by the respondents by 10:00 am on 9 February 2017. It was not available. Using the general powers to deal with a case justly under Rules 1 to 3 of the Civil Procedure Rules 1998, which in relation to this court, apply because of section 8 (b) of the Supreme Court of Appeal Act, a further order was made requiring either or both parties make it available. Under the same rules, this court is encouraged to use technology in conduct of the business. The copy of the instrument was, with quite some excitement, furnished by the Attorney General electronically– it does not have a Government Notice Number. The respondent's counsel attended to the court directly and confirmed liaison with the Attorney General after the respondent's counsel confirmed that the instrument was not gazetted. Section 49 of the General Interpretation Act provides that where the fiat, consent or authority of the President, a Minister, the Attorney General, the Solicitor General or the Director of Public Prosecutions is necessary before any prosecution, action or other proceeding is commenced, any document purporting to bear the fiat, consent or authority of the President, Minister, Attorney General, Solicitor General or Director of Public Prosecutions shall be received as *prima facie* evidence in any proceeding without proof being given

that the signature to such fiat, consent or authority is that of the President, Minister, Attorney General, Solicitor General or Director of Public Prosecutions.

The Commission of Inquiry concerns the purchase of maize at the Agricultural Development and Marketing Corporation. What we have is, what in the Attorney General's words, is fear that Dr Chaponda may interfere with the evidence. There is, however, a possibility that Dr Chaponda could cooperate with the investigations and inquiry. The latter aspect is not to speculate. It is to demonstrate that the converse point is as speculative. The premise most countenanced, however, is that the President should, after commissioning an inquiry, have dismissed Dr Chaponda to pave way for fair investigations. This premises on that there must be some principle to the effect that those who are inquired into by a commission of inquiry must be dismissed or suspended. However many times and manner I framed the proposition the respondents' counsel stated that there cannot be such a principle. The most that counsel could go was that there is a possibility to state a general principle with exceptions. The principle cannot, because of the nature of a commission of inquiry, be formulated at all.

The principle would be *non-sequiter*. It would premise on the generalization that people who are subject of a commission of inquiry or connected to a commission of inquiry are prone to or could interfere with the process. The generalization is weak and unempirical. Such people could actually cooperate and, subject to the right against self-incrimination, prove a boon to the inquiry. Moreover, such a principle would not justify external incursions from the court into the activities of a commission of inquiry.

The functions of commissions of inquiries, whether by prerogative or statute, are to investigate and make recommendations. Those recommendations would include a recommendation to the appointing authority that criminal investigations be commenced. The reports themselves cannot be evidence of criminal proceedings. To that end the legislature, in passing the Commission of Inquiry Act, envisaged giving a commission of inquiry quasi-judicial powers that include the power to regulate proceedings and evidential matters contingent to the inquiry. Consequently, a commission of inquiry has sufficient powers to deal with those who would interfere with its process. The instrument of the Commission of Inquiry in this matter is not bereft of these sumptuous powers – the commission of inquiry actually has the withal and all it needs. The consequence of the interim injunction on Dr Chaponda is that it gags the work of the commission of inquiry. Where the commission of inquiry would want information or evidence from the minister – Dr Chaponda – Dr Chaponda, who has been crippled to exercise the powers and prevented from remaining a minister, would, if called, flag the injunction in the face of the Commission of Inquiry, against doing anything that would appear to be performing the functions of a minister.

Dr Chaponda's chances of having the court reverse the permission for judicial review are higher and better than the respondents' chances of maintaining the permission. If there were pitfalls in the lower court's decision, it was the failure to segregate the two subjects whose actions come under review and the actions themselves which were coming for review. The court below could not use a blanket consideration where, in fact and law, two different people and totally different actions were subject of review.

The court below was supposed to examine the application for permission for judicial review for each separately and determine whether permission should be granted for each one separately on their different applications. The court below treated the public officials omnibously. The President, based on the application, was the only one who had the power and, by extension, the duty to dismiss. The facts on which permission for judicial review were made against the President cannot be used for permission for judicial review against Dr Chaponda. Dr Chaponda had no duty to dismiss himself. The President could dismiss him. What then was the basis of Dr Chaponda's permission to have his actions – which include omissions – judicially reviewed?

The mischief of Dr Chaponda that comes for review is that he did not resign to pave way for the Commission of Inquiry. The question in such a case is not, as the court below saw it, simply whether the action, which includes an omission, or decision of Government or Public official is reviewable. The question is beyond that. The question also becomes whether the specific act or omission or decision is one that is amenable to judicial review. The question, therefore, in this context, is whether the omission by Dr. Chaponda not to resign is amenable to judicial review.

The court below, in granting permission for judicial review, never considered the question. The matter, this court can presume, was subsumed in the omnibus way in which the court below considered the question of permission for judicial review. The decision to resign cannot have been premised on exercise of duties and functions by Dr. Chaponda as a public officer – Minister of Agriculture, Irrigation and Water Supply. Such a decision can only be personal. Suggesting otherwise means that the decision to resign would itself be amenable to judicial review. In other words, if for germane, condign and legitimate reasons minister resigns, it would be open to anyone to review the decision. There is a sense in which for someone in public office it may be desirable to resign. That, however, makes it only desirable. There is no obligation and the law would not, *per force*, require a court to order a person to resign. Moreover the requirement to resign may not be necessary in all the cases.

Commissions of inquiry cover all sorts of concerns, some benign and beneficent. A commission of inquiry, for example, could be set to improve capacity or operations. Such a question could presuppose inefficiencies or bottlenecks. It would, in those circumstances inane to require resignation of staff as a matter of course. It is possible, but rare, that all

commissions of inquiries should require resignation of those the subject of or those connected to a commission of inquiry. One practical problem that arises with such a requirement is that it is difficult to determine in an institution as the Ministry of Agriculture is known to be to determine where the buck is extended and what manner and degree of subject matter and level of staff to require resignation – the matter is therefore better left at a point before a court.

On resignation or removal from office of those involved or connected to the commission of inquiry, section 89(1) (g) of the Constitution which provides for the power of the President to order the commissions of inquiry and the Commission of Inquiry Act do not empower the President to require anyone to resign for purposes of involvement or connection to a commission of inquiry. The legislations of most states surveyed do not provide for such. Neither does ours. If there was such a provision, the decision would be reviewable.

In the absence of such a provision in our legislature, the President's decision whether or not to dismiss a person involved or connected with commission of inquiry maybe inadvisable and unreviewable. The same considerations apply *mutatis mutandis* to the requirement that the person involved or connected with the investigations must resign for purposes of a commission of inquiry. If the truth has to be told, most inquiries whether under statute or by legislative committees conduct and transact without these unusual requirements. Suppose, for purposes of conversation, there was a commission of inquiry about a President operations, it would be unusual to suggest that such cases, the President has set up a Commission of Inquiry, must suffer resignation.

The reasons why there are no stringent requirements as suggested by these proceedings are because of the nature, structure and texture of commissions of inquiry. It is noteworthy that in relation to legislators, even where there are criminal proceedings, including corruption proceedings, section 63 (3) of the Constitution preserves and protects the office:

> The Speaker may, upon a motion of the National Assembly, postpone the declaration of a vacant seat for such period as that motion prescribes so as to permit any member to appeal to a court or other body to which an appeal lies against a decision which would require that member to vacate his or her seat in accordance with this section.

Curiously, even more pointed investigations, criminal and formal, are never conducted in the context of what is suggested by the injunction, namely, resignation or dismissal of those involved. That is, as it should be, left to the appropriate authority, not the court, to act. Consequently, even if there is a principle that those investigated can be compelled by the court to resign, that principle will have not to apply to a commission of inquiry or applied in very special and exceptional circumstances indeed.

Commissions of Inquiry bind no one. They are not of evidential value. They cannot replace real investigations. Here are useful excerpts from the decision of the Supreme Court of India in *State of Karnataka v Union Of India & Another*, on 8 November, 1977Equivalent citations: 1978 AIR 68, 1978 SCR (2) 1):

> A Commission of Inquiry could not properly be meant, as is sometimes suspected, to merely white-wash ministerial or departmental action rather than to explore and discover, if possible, real facts. It is also not meant to serve as a mode of prosecution and much less of persecution. Proceedings before it cannot serve as substitutes for proceedings which should take place before a Court of law invested with powers of adjudication as well as of awarding punishments or affording reliefs. Its report or findings cannot relieve Courts which may have to determine for themselves matters dealt with by a Commission. Indeed, the legal relevance or evidentiary value of a Commission's report or findings on issues which a Court may have to decide for itself is very questionable. The appointment of a Commission of Inquiry to investigate a matter which should, in the ordinary course, have gone to a Court of law is generally a confession of want of sufficient evidence- as in the case of the appointment of the Warren Commission in the U.S.A. to inquire into facts concerning the murder of the late President Kennedy- to take it to Court combined with an attempt to satisfy the public need and desire to discover what had really gone wrong and how and where if possible. A Commission of Inquiry has, therefore, a function of its own to fulfill. It has an orbit of action of its own within which it can move so as not to conflict with or impede other forms of action or modes of redress. Its report or findings are not immune from criticism if they are either not fair and impartial or are unsatisfactory for other reasons as was said to be the case with the Warren Commission's report.

Quoting from Lionel Cohen Lectures, the Supreme Court of India stated:

> It is clear from these provisions and the general scheme of the Act that a Commission of Inquiry appointed under the Act is a purely fact-finding body which has no power to pronounce a binding or definitive judgment. It has to collect facts through the evidence led before it and on a consideration thereof it is required to submit its report which the

appointing authority may or may not accept. There are sensitive matters of public importance which, if left to the normal investigational agencies, can create needless controversies and generate an atmosphere of suspicion. The larger interests of the community require that such matters should be inquired into by high-powered commissions consisting of persons whose findings can command the confidence of the people. In his address in the Lionel Cohen Lectures, Sir Cyril Salmon speaking on "Tribunals of Inquiry" said:

> In all countries, certainly in those which enjoy freedom of speech and a free Press, moments occur when allegations and rumours circulate causing a nation-wide crisis of confidence in the integrity of public life or about other matters of vital public importance. No doubt this rarely happens, but when it does it is essential that public confidence should be restored, for without it no democracy can long survive. This confidence can be effectively restored only by thoroughly investigating and probing the rumours and allegations so as to search out and establish the truth. The truth may show that the evil exists, thus enabling it to be noted out, or that there is no foundation in the rumours and allegations by which the public has been disturbed. In either case, confidence is restored.

It is that commissions of inquiries do not have the clout we suppose they have that should taper or moderate our enthusiasm and expectations of this mode of investigation. The Supreme Court of India, despite the benefits, warns us not to take these to obscure or obfuscate what commissions of inquiry really are, not investigations that should result all the time in resignation or suspension of those inquired into:

> The Act merely empowers the Central Government to appoint a Commission of Inquiry for the purpose of collecting facts with a view to informing its own mind; and the report of the Commission, not being binding on any one, has no force of its own. Revelations before the Commission may conceivably produce an impact on the credibility of the State Government, but the inquiry is directed not to the manner in which the State Government or the State executive conducts itself in the discharge of its constitutional functions but to the manner in which, if at all, its ministers have used their office as a cloak for committing acts of corruption and favouritism. It is possible that a Commission may accept the accusations against the minister and in fairness emphasise that the private doings of the minister have nothing to do with the public administration of the States' executive affairs. Indeed, the Commission may reject the allegations as totally baseless and frivolous. These are all imponderable and they cannot influence the decision of the basic question as to the nature of the Commission's functions.

The relative strength, therefore, of the case of the appellant's to set aside the permission for judicial review for the case against Dr. Chaponda, as opposed to the permission for judicial review for the President, are higher and better than those of the respondents having the permission for judicial review maintained against the case of Dr. Chaponda who, as we have seen was, for purposes of this judicial review, unwittingly or inadvertently joined in his own name and not the public office whose actions are reviewable. A public officer needs not be dismissed or resign for a commission of inquiry.

Refusing or granting an injunction would give the full remedy

Were it not that this court has resolved against granting the injunction based on the relative strengths of the parties' cases, the next consideration is whether granting the injunction in this case does not actually give the full remedy which the action is about. This is closely linked to the way the injunction was finally given by the court. The purport of the judicial review questions the president authority to institute a Commission of Inquiry as described and the minister's failure to resign because of connection or involvement of the purchase of maize by ADMARC. If the judicial review succeeds, the Commission of Inquiry would have to proceed without the minister up to the determination. Granting the interim injunction, therefore, means that, even if the judicial review does not succeed, respondents will have received the full remedy. It is therefore important to consider whether an interim injunction should be granted in these circumstances. The Attorney General argues that this interim injunction is almost if not completely a permanent injunction. The respondents would, therefore, have had a full remedy. The converse, however, is true, if the injunction is vacated, the appellants would equally be having a full remedy. Sitting at first instances and now on appeal, I have always understood that it matters less that granting or refusing an injunction has the effect of granting the full remedy sought in the main action. The duty of the court is to consider whether injustice or inconvenience is avoided with or without such an order and, whatever the case, the court should order accordingly. In this particular case, where the president has not dismissed the minister and there is no injunction against the President by way of compelling the president to and there is no order to stay proceedings, the court may not have to make an order which has the consequence of the minister having to leave

office. The president, it can be assumed, after considering all, decided that the Minister should not leave office. Alternatively, the Minister thought, there is no reason to resign. It would be unfair in these circumstances, for any reason, for the court to interfere with that decision. Moreover, the court below, in breach of a fundamental tenet of our Constitution and law, granted an injunction – full blown injunction - without notice of the proceedings and without giving the adversary the right to be heard on a substantive injunction. The court below granted an interim injunction when there was no application for an interlocutory injunction. There is great injustice already that should not any longer be continued or countenanced.

Quick and speedy hearing of the appeal

Finally, there are certain requests for interim injunctions which are better resolved by ordering a quick and speedy trial which consequently, courts faced with such a situation invariable suffer granting of injunctions and order quick and speedy hearing. In this particular case, the record of appeal is ready and, therefore, the full court can sit, in view of the urgency quickly and quickly dispose of the appeal for leave for judicial review. If the full court finds that there should be permission for judicial review, it would be minded to either order stay of proceedings under Rule 54 of the Civil Procedure Rules or an injunction if prayed. The interim injunction is, therefore, vacated. It is ordered that the Registrar of the Supreme Court should vigorously work for setting down the appeal in the next seven days.

Made this 8th day of February 2017

D F Mwaungulu

JUSTICE OF APPEAL