REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA MISCELLANEOUS CIVIL APPLICATION No. 65 OF 2023
(being Civil Causes No. 227 and 189 of 2023, High Court of Malawi, Lilongwe District Registry, Civil Division)

In the Matter Between:

GREZELDER JEFFREY	1ST APPLICANT
HON. KONDWANI NANKHUMWA, MP	2ND APPLICANT
CECILIA CHAZAMA	3RD APPLICANT
and	
PROF. ARTHUR PETER MUTHARIKA	1ST RESPONDENT
DR. CLEMENT MWALE	2ND RESPONDENT
DEMOCRATIC PROGRESSIVE PARTY	3RD RESPONDENT

RULING

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nyaKaunda Kamanga, JA.,

1. The Applicants herein bring a summons seeking interim injunctive relief against the First Respondent's decision to remove them from their original positions and assign them new positions. The summons is indicated to be brought under Section 7 of the Supreme Court of Appeal Act, Chapter 3:01 of the Law of Malawi, as read with Order I Rule 18 of the Supreme Court of Appeal Rules (hereinafter the Rules). According to the affidavit evidence, the First Applicant is Grezelder Jeffrey, a member of the Democratic Progressive Party and its Secretary General, a position she was elected to at the political Party's National Political Conference in July 2018, making her a member of the political Party's National Governing Council. The Second Applicant is Honourable Kondwani Nankhumwa, a Member of Parliament and Parliamentary Leader of the Opposition, also a member of the Democratic Progressive Party and its Vice President for the South, who was elected at the Party's National Political

Conference in July 2018 and is automatically a member of the Party's National Governing Council. The Third Applicant is Cecilia Chazama, also a member of the Democratic Progressive Party, and its National Director of Women. She was elected to this position at the Party's National Political Conference in July 2018 and therefore automatically became a member of the Party's National Governing Council. The First Respondent is the President of the Democratic Progressive Party (the Third Respondent) and he assigned the First Applicant to be the Vice President responsible for the Central Region and assigned Dr. Clement Mwale to be Secretary General.

2. The Applicants seek the following reliefs in the summons filed on 31st December 2023:
    i. An interlocutory order suspending the decisions of the First Respondent to remove the Applicants from their positions as Secretary General, Vice President for the Southern Region, and National Director of Women, respectively, of the Democratic Progressive Party and/or assign them to the positions of Vice President responsible for the Central Region, in case of the First Applicant and Presidential Advisors in the case of the Second and Third Applicants, until the determination of this matter or further order of the Court.
    ii. An interlocutory order suspending the decision of the First Respondent to appoint the Second Respondent to the position of Secretary General of the Democratic Progressive Party until the determination of this matter or a further order of the Court.
    iii. An order of interlocutory injunction restraining the Second Respondent either by himself, his servants, agents or howsoever otherwise from exercising the powers and functions of the position of Secretary General of the Democratic Progressive Party and the First and Third Respondents either by themselves, their agents or howsoever otherwise from stopping the Applicant from exercising her powers and functions as Secretary General of the Democratic Progressive Party or interfering with such exercise of powers and functions or recognizing the Second Respondent as Secretary General of the Democratic Progressive Party.
    iv. An order of interlocutory injunction stopping or otherwise restraining the Respondents, from implementing or taking any action based on the resolutions and decisions that were passed at the meeting of the National Governing Council on the 13th day of December, 2023 or an interim order nullifying the said resolutions and decisions or doing anything with the like effect until the determination of this matter or a further order of the Court.

The Applicants claimed that the application was extremely urgent because the Third Respondents had called them to appear before a disciplinary hearing the next day, on Thursday, January 4, 2024, because they had called for and attended the National Governing Council

meeting on 6th December 2023: as shown in letters marked 'GJ 13', 'KC 5'. The Applicants allege undemocratic tendencies within the party and expressed reservations about the summoning authority as well as the formation and composition of the disciplinary panel. The Applicants avers that the First Respondent "seeks to transform the party into a one-man show where he can appoint and remove members of the National Governing Council": paragraph 22 of the First Applicant's sworn statement and paragraph 17 of the Second and Third Applicants' sworn statement in support of the application.

3. After perusing the *ex parte* summons that was filed on 31st December 2023, the Court directed that an *inter partes* hearing be held on 1st January 2024, which was adjourned to 3rd January 2024 at the request of the Respondents' legal practitioner. This decision is made after hearing both parties' arguments through their legal practitioners. The Court appreciates the parties' prompt filing of skeleton arguments which were substantiated by oral arguments.

The Background

4. The background to this matter is spelled forth Hon. Justice Pemba's ruling, which was delivered on 28th December 2023, in the High Court, Lilongwe Registry. In brief, the Applicants served as the Third Respondent's Secretary General, Vice President South, and Director of Women until early December 2023, when they were assigned to other positions by the First Respondent. According to the sworn statements filed in support of the summons, the First Applicant has been assigned to the position of Vice President Central and she received her letter and notice of communication to that effect on 8th December 2023. The notice and letter further stated that the Second Respondent, Dr. Clement Mwale, had been assigned to the position of the Third Respondent's Secretary General with immediate effect. The affidavit evidence also reveals that the Second and Third Applicants only heard and saw a notice of assignment on social media by the First Respondent removing the Second Applicant from the position of Vice President South to the position of Presidential Advisor and the Third Applicant from the position of National Director of Women to the position of Presidential Advisor South.

5. These decisions by the First Respondent did not please the Applicants thus on 9th December 2023, the First Applicant applied to challenge the decision before the High Court Lilongwe District Registry, Civil Division, and the same was heard on 12th December 2023. Later, while the First Applicant's application was pending a decision, the Second and Third Applicants also made applications at the High Court Principal Registry, Civil Division in Blantyre. Considering that the applications arose from similar facts, that some of the orders sought by the Second and Third Applicants were similar to those sought by the First Applicant, and that both teams of Applicants sued the same Respondents in the present matter, the High Court ordered that the two applications be consolidated and heard simultaneously on 19th December 2023.

6. The court below delivered its ruling dismissing the Applicants' applications on 28th December 2023. The High Court determined that the Applicants failed to demonstrate that they have a good and arguable claim to the right they sought to protect. There was no demonstration of a serious question to be tried as no political right of theirs has been violated by the First Respondent's decision to assign them to different positions other than those they previously held.

7. Aggrieved with the High Court's decision, the Applicants have brought the same application for interim relief before this Supreme Court of Appeal contending that this appeal Court has concurrent jurisdiction with the High Court under Order I rule 18 of the Rules.

8. Before delving into the merits of the Applicants' summons for interlocutory orders, this Court must first resolve a preliminary issue concerning its jurisdiction to adjudicate the proceedings. The court made it clear in *Mbale v Maganga* (Misc. Civil Appeal 21 of 2013) [2015] MWSC 1, that the issue of jurisdiction can be raised at any stage of the proceedings. The determination of jurisdiction is critical since it constitutes the basis of a court's "power and authority": *Mulli Brothers Ltd v Malawi Savings Bank Ltd* [2013] MLR 243. The case of *Portland Cement Company (1974) Ltd v Gilton Chakhaza* [2010] MLR 272 (SCA) notes that jurisdiction is a matter of law. As enunciated in *Yiannakis v Rep* [1995] 2 MLR 505 the Supreme Court of Appeal's jurisdiction emanates from the Constitution and the Court's powers are provided in the Supreme Court of Appeal Act: *Chihana v Rep* (2) [1992] 15 MLR 86 (SCA).

The Applicants' Arguments

9. The Applicants' legal practitioners contended that the facts in this case establish that the Applicants were elected to the Democratic Progressive Party's National Governing Council during the National Political Conference in July 2018. According to Article 8(3)(c) and Article 10(2) of the Democratic Progressive Party's Constitution, a person can only become Secretary General of the Party or a member of the National Governing Council after being elected at the National Political Conference. According to the Party's Constitution, neither the Applicants nor any other member of the National Governing Council may be removed by the First Respondent. On the recommendation of the Disciplinary Committee, the Central Committee has the authority to remove a member of the National Governing Council; the First Respondent is not authorized to do so. Furthermore, the Applicants contend that the first Respondent essentially appointed the second Respondent as Secretary General. He has no such power under the Third Respondent's Constitution, which provides election by the National Political Conference as the only route to become a member of the National Governing Council, as well as Secretary General. It is apparent that the Central Committee, under Article 9(5)(a), has the authority to make interim appointments to the National Governing Council subject to endorsement by the National Political Conference. As a result of this procedure, a person

becomes a member of the party's National Governing Council by appointment by the Central Committee after receiving endorsement from the National Political Conference.

10. According to the Applicants, the aforementioned points establish that there are triable issues in the present matter. The Applicants rely on the following constitutional provisions in support of their assertions: Section 10(1) of the Constitution of Malawi which provides that '*in the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority*.' Furthermore, Section 15(1) of the Republic of Malawi Constitution requires every legal and natural person to respect the human rights enshrined in the Constitution. Consequently, when determining the correctness of the First Respondent's decision-making, the court should refer to the Constitution as the ultimate guidance. Where the first respondent has not provided a rationale for his decision the decision was made arbitrarily and without justification and is a violation of section 43 of the Republic of Malawi's Constitution. The Applicants further contended that Section 40 of the Constitution of the Republic of Malawi allows everyone the right to make political choices. Concerning the Third Respondent, its members, including Applicants, exercise this right at the National Political Conference, when they elect members of the National Governing Council. The decisions of the First Respondent herein take away that right from the members of the Third Respondent as well as the Applicants who participated in the election of members of the National Governing Council during the National Political Conference in July 2018.

11. The Applicants submitted that damages would be an insufficient remedy because the Respondents' losses would be difficult to quantify the Applicants' losses in monetary terms. They asserted that if the Respondents' decisions and actions are suspended and do not take effect, one of the purposes of interlocutory orders would be realized, which is to preserve the status quo. It was argued that an interlocutory order suspending the decision herein and prohibiting the Second Respondent from excising the powers and functions of the Secretary General's office, as well as stopping or restraining the Third Respondent from implementing or taking actions based on the resolutions and decisions of the National Governing Council herein, would be just. According to the Applicants, the balance of convenience favors granting the interlocutory reliefs sought.

12. The Court observes that the Applicants' sworn statements are irregular as the contents do not comply with rules of practice and procedure as they are not restricted to factual issues and contain extensive legal arguments that should have been restricted to skeleton arguments to avoid making them lengthy and some paragraphs do not fully indicate the sources of some of their statements and beliefs: *National Democratic Alliance v The Electoral Commission and others* [2004] MLR 217 (HC); *Bon Elias Kaotcha Kalindo and others v Springstone Company*

Ltd and another [2013] MLR 25 (HC); *Aubrey Likhusa and eight others v Reunion Insurance Company Ltd and another* [2013] MLR 4 (HC).

The Respondents' Arguments

13. The Respondents' principal contention in the skeletal argument is that the present matter is political and hence non-justiciable. The Respondents rely on High Court decisions of *Chakuamba v Ching'oma* [1996] MLR 425 and *Hassan Hilale Ajinga v United Democratic Front*, Civil Cause Number 2466 of 2008, which, as Counsel for the Respondent admits, are not binding on this Court. In *Chakuamba v Ching'oma* [1996] MLR 425, the court made the following observations about handling political party disputes:

> "The independence of the judiciary will be seriously undermined and the basis of our new democracy shaken if political parties use the courts, and the courts allow themselves to be used, as a political football pitch. The forum for resolving political conflicts and issues which are purely political lies elsewhere, and not in these courts".

14. The Respondents further argued and submitted that, by its very nature, an injunction is an equitable remedy, and that an applicant seeking such an equitable remedy is obliged to provide the Court with full and frank disclosure of all material facts. This Court must apply equity principles which include "*He who seeks equity must do equity*" and "*He who comes to equity must come with clean hands*." The Respondents contended that the Applicants came to equity with soiled hands because they violated the Third Respondent's Constitution by holding their own NGC meeting on 6th December 2023 and calling for their own elective National Political Conference without the authority of the Central Committee, blatantly disregarding the Third Respondent's Constitution. The Respondent contends that the Applicants' application before this Court is only designed to assist the Applicants in escaping accountability for their actions under the Code of Conduct established by Article 6 of the Third Respondent's Constitution. According to the Respondents, the Applicants simply desire this Court to validate their misconduct. Consequently, the Respondents strenuously oppose the application for orders of injunction and pray that this Court dismiss the Applicants' motion with costs.

The Issues for Determination

15. After considering the summons, the affidavit evidence, and the Applicants' and Respondents' arguments, the Court identified the following two procedural issues for preliminary determination:

    i. Whether section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 of the Rules can be utilised as the legal basis or enabling provision for the present application; and

    ii. Whether the courts should be the primary port of call for resolving intra-political party disputes among the Applicants and the Respondents.

    It is critical to address these issues at the preliminary stage because Hon. Justice Katsala, JA, reiterated in the case of *Ngwira & Chiumia v Ngwira*, MSCA Civil Appeal No.16 of 2020, that procedural justice is crucial to substantive justice and that failure to comply with procedural prescriptions is an abuse of the court process.

    Whether section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 of the Rules can be utilised as the legal basis or enabling provision for the present application

16. Section 7 of the Supreme Court of Appeal Act reads as follows:

> *"A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal: Provided that—*
>
> *(b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court".*

    Section 22(1) of the Act specifies the powers alluded to in the clause. This Court is of the view that the Applicants' summons cannot be made under section 7 of the Supreme Court of Appeal Act since the provision only grants general jurisdiction to the single member of this Court to hear applications that do not dispose of the appeal. In the present matter, the applicants have not pointed to a law that confers the right to make a fresh application to this Court for an order of interlocutory injunction.

17. Turning to Order I rule 18 of the Rules, it provides that:

> "*Whenever an application may be made either to the Court below or to the 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*"

Order I, rule 18 of the Rules is a general provision that guides the Court when to consider an application that has been denied in the court below. The provision states that applications must be heard by the court below and if it denies them, only then will this Court consider them following the relevant rules: *Malawi Communications Regulatory v Joy Radio* [2009] MLR 328 (SCA). The rule does not provide for the making of a new application for orders of injunctions before this Court and cannot be used as a basis for the Applicants to lodge their summons. The requirement for including an enabling provision was discussed in the case of *NBS Bank PLC v Dean Lungu t/a Deans Engineering Co Ltd* (MSCA Civil Appeal 83 of 2019) [2019] MWSC 11, in which a single member of the Court explained that:

> "With respect to the Respondent's preliminary objection that the Appellant's application herein was wrongly made pursuant to Order I rule 18 of the Supreme Court of Appeal Rules, it is pertinent to observe that Order 1 rule 18 merely provides that "*whenever an application may be made either to the court below or 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 this Court*". In accordance with proviso (b) to section 8 of the Supreme Court of Appeal Act, the Appellant's application herein should have been made under Part 52.16 of the Civil Procedure Rules, and not under Order I, rule 18 of the Supreme Court of Appeal Rules."

Unsurprisingly, the Applicants relied on Section 7 of the Supreme Court of Appeal Act and Order I Rule 18 of the Rules without specifically referring to an appropriate provision. This is because the present application is not properly before the court. The Applicants should have cited a specific rule or statute that provides that an applicant may file a fresh application for an order of injunction in this Court for proceedings commenced by summons. The rule's applicability may be exemplified by the process of applying for leave to appeal. A party desiring to appeal under Order I rule 18 of the Rules may be obliged to apply to the court below, and if the court below declines the motion, he or she may apply to this Court. However, the party intending to appeal cannot rely on Order I Rule 18 of the Rules as the enabling clause; instead, an application for leave to appeal must be filed under Order III Rule 3 of the Rules.

The summons herein was filed under the wrong provisions and was not legally supported. The correct course of action was for the applicants to file an appeal against the High Court's judgment, apply for a stay of the court's decision, and seek suspension of the First Respondent's decisions pending the appeal's hearing and determination.

18. The Applicants' concerns that they were unable to appeal the High Court ruling are unfounded, as section 21 of the Supreme Court of Appeal Act allows appeals against interlocutory orders or interlocutory judgments under the following terms:

> *"And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—*
>
> *(d) an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases—*
>
> *(i) ....*
>
> *(ii) **where an injunction** or the appointment of a receiver **is granted or refused**;"* [emphasis supplied]

The law provides that where the Court below denies an application for injunction application, the Appellant must file an appeal without seeking leave to appeal. The issue therefore becomes, why should the Court entertain a fresh application for an order of injunction when the Court below has denied it? In other words, why are the Applicants not appealing? The Applicants cited the case of *The State (on the application of the Malawi Revenue Authority) v Chairperson of the Industrial Relations Court and Mbilizi*, MSCA Misc Civil Case Number 56 of 2021, in which a single member of the Court allowed an application to vacate an interim relief order of the High Court, which had been declined by the Court below. In *The State (on the application of the Malawi Revenue Authority) v Chairperson of the Industrial Relations Court and Mbilizi*, the Justice of Appeal distinguished that case with *Esa Arab & Another v NBS Bank*, and the same must be done in the present case. The single member Justice of Appeal who presided over the abovementioned case noted that:

> "The Respondent brought to our attention our decision in *Esa Arab & Another v NBS Bank* and sought to rely on it as authority for the proposition that this application should have been brought by way of appeal. And that not having been so brought it is improperly before us. The *Esa Arab & Another v NBS* case is, with the greatest respect, clearly distinguishable. It was not about judicial review, leave and interim reliefs." [emphasis supplied]

Similarly, the case of *The State (on the application of the Malawi Revenue Authority) v Chairperson of the Industrial Relations Court and Mbilizi*, on which the Applicants relied, is distinguishable since the interim reliefs sought were in support of a judicial review application. The present case, on the other hand, was commenced by summons and is not about judicial review or leave.

19. Having distinguished the present case from *The State (on the application of the Malawi Revenue Authority) v Chairperson of the Industrial Relations Court and Mbilizi*, which was a judicial review matter, it remains pertinent to mention that in judicial review proceedings, there is a specific or enabling provision under Part 54.12 of the Civil Procedure Rules of England 1998, which applies under proviso (b) to section 8 of the Supreme Court of Appeal Act. The provision allowing an applicant to file a new application is as follows:

> *"Where permission has been refused in a civil case after a hearing by the High Court, the person seeking permission may apply to the Court of Appeal within 7 days of the decision of the High Court refusing permission (CPR r. 52 15). The Court of Appeal may, on considering that application, grant permission to apply for judicial review and, if so, the claim will proceed in the High Court in the usual way (CPR r. 52 15 (3) and (4)).*"

20. The Applicants further contend that the High Court decisions on interlocutory reliefs are inchoate and hence not appealable to the Supreme Court of Appeal, as only final judgments are appealable to the Supreme Court of Appeal. The Applicants cite *JTI Leaf (Malawi) Limited v Kapachika* (MSCA Civil Appeal 52 of 2016) [2021] MWSC 1 (13 April 2021). The Supreme Court's judgment in *JTI Leaf (Malawi) Limited v Kapachika*, like all others on inchoate decisions, must be understood in context. The Supreme Court of Appeal was not invalidating Section 21 of the Supreme Court of Appeal Act, which provides for appeals on interlocutory judgments. To avoid hearing multiple appeals on the same matter the Supreme Court of Appeal developed this concept based on best practices in case management. The case-flow management principle is best articulated in *Toyota Malawi Limited v Mariette*, MSCA Civil Appeal No. 62 of 2016 (unreported), where the Court stated:

> "The maxim *interest reipublicae ut sit finis litium*, in our view does not advocate an idle principle. It is, as the maxim espouses, in the interests of the public that litigation should come to an end. Why handle two more appeals in one and the same matter when one appeal can easily conclude the said matter with finality and within a reasonable time? Why spend so many years on the suit before the parties find closure to their issues in such matter. Why allow a case to go on and on without any end coming within site due to permitting a practice of splitting what

> could be one wholesome and complete appeal into several appeals. It is for these reasons that we believe we should stop entertaining appeals on inchoate judgments. Henceforth, we think it is best to only entertain appeals on complete and enforceable judgments. A judgment pending assessment of damages only becomes a complete and enforceable judgment once the assessment has been done and there is an enforceable quantum of damages that can be recovered or otherwise enforced".

The Applicants erroneously argue that interlocutory reliefs are not appealable to the Supreme Court of Appeal, which breaches section 21 of the Supreme Court of Appeal Act. Interlocutory reliefs are not appealable to this Court if the matter has not been fully disposed of by the High Court. Interlocutory orders, as in this case, can at times resolve a matter. The High Court determined that there are no triable issues in this case and this matter cannot proceed to trial. Although the Applicants sought interim relief, the Judge found that there were no triable issues and delivered what is known as an 'interlocutory judgment' under section 21 of the Supreme Court of Appeal Act. As a result, the Judge's ruling of 28th December 2023, cannot be described as inchoate. The question that arises is, what other ultimate judgment will be rendered in this matter?

21. In *The Attorney General v Sunrise Pharmaceuticals and Chombe Foods Ltd,* MSCA Civil Appeal No. 11 of 2013 (unreported) the court defined interlocutory orders and judgments as follows:

> "Interlocutory orders are orders which do not by their nature finally dispose of the matters between the parties. In that case, interlocutory orders are distinct from interlocutory judgments, like summary judgments of the kind under consideration, which are final on the issues between the parties, and interlocutory judgments that are final on liability except for certain aspects of the determination. These are judgments, interlocutory judgments, they are not interlocutory orders envisaged in section 23 (1) (a) of the Supreme Court of Appeal Act. Section 23 (1) (a) deals with judgments that are interlocutory orders – it does not deal with judgments that are 'interlocutory judgments.' Section 23 (1) (b) covers interlocutory judgments and, of course, final judgments so to speak. Since, as the single member of this Court concludes, summary judgments are interlocutory judgments, their notices of appeal are covered by section 23 (1) (b) of the Supreme Court of Appeal Act."

Understandably, the ruling of the High Court is an interlocutory judgment that ultimately resolves the disputes between the parties before that court. It's not an inchoate judgment. Therefore, the Applicants have no justification to file their present application claiming that the High Court's decision was inchoate.

Whether the courts should be the primary port of call for resolving intra-political party disputes among the Applicants and the Respondents.

22. Moving to the second procedural issue, whether the courts should be the first port of call for resolving intra-political party disputes involving the Applicants and the Respondents. The Applicants allege that there is no democratic structure in place to resolve disputes and that the Respondents are acting with speed to expel them from the political party hence the need for the court to intervene. The Respondents in turn argue that political party disputes between the parties are non-justiciable. This argument was highlighted as well in paragraph 11 of the High Court's ruling. The Respondents are advancing the political questions doctrine and the justiciability principle, which, besides commonly applying at the intersection of law and public policy, also apply to political party disputes and pre-election matters (Egbewole and Olatunji, 2012:128)[1].

23. An examination of article 18 of the Third Respondent's Constitution, which is attached to the sworn statement of the First Respondent and marked "GJ1", shows that it makes provision for an internal conflict settlement process. Article 18 of the Third Respondent's Constitution states as follows:

> *"Resolution of Conflicts*
>
> 1. *Disputes involving differences in interpretation of the Constitution shall be referred to the Legal Affairs Committee for resolution. The decision of the Legal Affairs Committee shall be subject to approval by the National Governing Council.*
> 2. *The decision of the National Governing Council shall be final and binding upon members concerned.*

The Applicants' argument clearly shows that they are challenging the Respondents' interpretation of the provisions of articles 10(2) and 10(8) of the Third Respondent's Constitution. Article 10(2) of the Third Respondent's Constitution states:

[1] Egbewole, Wahab O., and Olugbenga A. Olatunji. "Justiciability Theory versus Political Question Doctrine: Challenges of the Nigerian Judiciary in the determination of electoral and other related cases." *Journal of Jurisprudence* 14 (2012): 117.

> *"The members of the National Governing Council shall be elected at the National Political Conference of the Party for a period of five years and shall continue to hold office until the election of new office bearers, notwithstanding the expiry of their term of office."*

While article 10(8) of the Third Respondent's Constitution provides as follows:

> *"The President shall have power to assign a member of the National Governing Council to any public or political office. Unless otherwise directed by the President, a member so assigned or so appointed, shall cease to hold his original office or to exercise or to perform the functions of that original office in the National Governing Council."*

The Applicants argue that the First Respondent has no power to assign them to different positions such as Vice President Central, Presidential Advisor, and Presidential Advisor South. Furthermore, the First Respondent cannot assign the position of Secretary-General to the Second Respondent. These arguments concern the interpretation of the Third Respondent's Constitution as envisaged by Article 18. It would have been proper for the Applicants to have referred this dispute to the Legal Affairs Committee as the internal political party conflict mechanism.

24. At this juncture, it must be stated that political parties are formed in terms of their constitutive instruments: constitutions, rules, or regulations. As a result, political party instruments are vital as they represent "the terrain upon which confrontations, negotiations, and power games with other organizational actors will take place" (Panebianco, 1988:33-36)[2]. Any analysis of the conflict resolution infrastructure within political parties must always begin with a review of the relevant constitutive instruments.

25. In the cases of *Dr. Peter Chiona v Hon. Gwanda Chakuamba* MSCA Civil Appeal No. 40 of 2000 (unreported), *Hassan Hilale Ajinga v United Democratic Front* Civil Cause Number 39 of 2007 (unreported), *Gondwe and 3 Others v Hon. Dr Lazarus Chakwera, President of Malawi Congress Party* (Civil Cause 28 of 2018) [2018] MWHCCiv 9 (6 March 2018) and *Bandawe v Malawi Congress Party* (Civil Cause 1010 of 2018) [2019] MWHC 3 (8 January 2019), both the Supreme Court of Appeal and High Court have underscored the need to adhere to the constitutional provision on alternative dispute resolution and political parties' constitutive instruments when managing political party disputes. In some of the cases, such as *Dr. Peter Chiona v Hon. Gwanda Chakuamba*, the approach has been restrictive whereas in *Bandawe v Malawi Congress Party*, the approach is permissive and tones down the application

[2] Panebianco, Angelo. *Political parties: organization and power*. CUP Archive, 1988.

of the "political questions" doctrine while giving effect to the justiciability principle and rule of law (Egbewole and Olatunji, 2012:126-127)[3].

In the case of *Dr. Peter Chiona v Hon. Gwanda Chakuamba*, the Supreme Court of Appeal applied the "political questions" doctrine and narrowed down the scope of justiciability principle when it stressed the importance of political disputes being resolved politically by a careful analysis of their governing policies, where the Hon. Lord Chief Justice Richard Banda, SC, explained that:

> "The issue of who is the legitimate leader of Malawi Congress Party is a political question which must be resolved by the generality of the membership of the party. This Court cannot be the proper forum for it. Nor can this Court be the proper forum to resolve the deep divisions which now exist in the Malawi Congress Party."

26. In *Hassan Hilale Ajinga v United Democratic Front,* the court analyzes the essence of political parties and establishes factors that might delimit the province of the judicial function and that disputes within the framework of political parties should be handled in the following manner:

> "Political parties are no more than clubs. Membership is voluntary. Members are free to leave in much the same way they are free to join. The members conduct however is regulated by the clubs' rules/constitution which acts like some contract between the members and the club and between the members themselves. The clubs (in this case the parties activities are regulated by the clubs rules/constitution. In the case of party primaries they must be run in accordance with the party's rules/constitution. If there are disputes they should be resolved in accordance with the party's rules/constitution. The courts should be slow, again very slow, to intervene in a party's internal dynamics. It should instead allow the party and its membership to deal with the matters in dispute using their own internal dispute resolution mechanisms. Where a member is not happy either with the party's conduct or a fellow member's conduct he is free to leave the club/party and join one that accords with his ideals. Or be without a club or party. The only time a court should intervene in a club's or party's activities is where the club/party fails to comply with its own rules/constitution,

[3] Egbewole, Wahab O., and Olugbenga A. Olatunji. "Justiciability Theory versus Political Question Doctrine: Challenges of the Nigerian Judiciary in the determination of electoral and other related cases." *Journal of Jurisprudence* 14 (2012): 117.

> where it acts in breach of the rules of natural justice or when it or its members conduct themselves in breach of the laws of the country ..."

27. The High Court dismissed the claimants' action in *Gondwe and Others v Hon. Dr Lazarus Chakwera, President of Malawi Congress Party* because their action was premature, the claimants having commenced the matter before exhausting the internal remedies provided in the Malawi Congress Party's Constitution. The court made the following pertinent observations:

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

As observed by the judge in the preceding case the law and practice encourage ADR and the Constitution of the Republic of Malawi includes peaceful settlement of disputes as one of the principles of national policy. Section 13(l) of the Constitution provides that:

> *The State shall actively promote the welfare and development of the people of Malaŵi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—*
>
> > *(l) To strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.*

28. *Bandawe v Malawi Congress Party* is significant in that after reviewing several cases including *Hassan Hilale Ajinga v United Democratic Front*; *Dr. Peter Chiona v Hon. Gwanda Chakuamba*; *Gondwe and Others v Hon. Dr Lazarus Chakwera, President of Malawi Congress Party*; *Ishmael Chafukira v John Zenus Ungapake Tembo and Malawi Congress Party* Civil Cause No. 371 of 2009 (unreported), the court notes the justiciability of political party disputes when it discusses why judges should not be perceived as avoiding their obligation under

section 9 of the Constitution to hear cases even if they involve "political disputes" that pose judicial concerns. Most crucially, the decision modifies the political question doctrine and establishes the following four guidelines for how political party disputes should be handled:

> "Firstly, disputes between a political party and its members should be resolved in accordance with the party's constitutive document and rules made thereunder.
>
> Secondly, the mere provision in a political party's constitutive document for internal resolutions of disputes, without prohibiting an aggrieved party that has exhausted internal remedies from seeking the intervention of courts of law, does not amount to ouster of the jurisdiction of the courts. The point being made is that an attempt to have the matter resolved internally as provided by the political party's constitutive document should first be made: a political party or its members should not rush to court.
>
> Thirdly, a political party or its members will be allowed to have recourse to a court of law regarding disputes relating to activities of the political party where (a) the political party is in breach of its constitutive document or rules made thereunder, (b) the political party acts in breach of the rules of natural justice, (c) the political party or its members act in breach of the laws of Malawi, (d) the political party or its members conduct themselves in a capricious or arbitrary way.
>
> … and perhaps more importantly, it is not uninteresting to note that the language used in the cited cases is cautious and well measured such as "*... the courts should be slow ...", "... parties should not rush to court..", "...the present case is premature...",* etc. That courts have used such language and not framed their respective holdings in absolute terms is not surprising: there is no denying that courts have jurisdiction over "political disputes" that raise issues of judicial nature: see section 103(2) of the Constitution."

Bandawe v Malawi Congress Party finds that the general bracket categorisation of 'political disputes' as non-justiciable, as argued by the Respondent in the present matter, is in principle erroneous. This Court agrees with the High Court's rationale because justiciability has been recognised to provide an opportunity for judges to "bridge the gap between law and society for protecting the constitution and democracy" (Barak, 2006)[4].

[4] Barak, Aharon. Chapter Eight. Non-Justiciability, or "Political Questions". In *The Judge in a Democracy* (pp. 177-189). Princeton: Princeton University Press, 2006.

29. When presented with "political disputes" that raise issues of a judicial nature, it is procedurally important for the courts when applying the permissive approach to cross-check and be satisfied that the parties underwent some form of primary justice by following the guidelines set out in *Bandawe v Malawi Congress Party*. A fundamental drawback of the Political Parties (Registration and Regulation) Act is the lack of any framework for settling political party disputes and the requirement to exhaust internal dispute resolution processes before approaching the courts. *Bandawe v Malawi Congress Party* is a solid precedent that intra-political party disputants must demonstrate an honest attempt to pursue a party's internal conflict resolution system. As pointed out in *Gondwe and Others v Hon. Dr Lazarus Chakwera, President of Malawi Congress Party* members of political parties should not rush to the courts to circumvent their internal conflict resolution procedure.

30. In the present case, the Applicants having come to court directly should have demonstrated in the High Court that, despite article 18 of the Third Respondent's Constitution for the internal conflict resolution mechanism, the organ to resolve the dispute was non-existent, if it was available that it was inoperative, fraught with conflict of interest, obstructive, in perpetual paralysis, or subject to inordinate delays that could jeopardize the subject matter of the dispute. During the hearing on this summons, Counsel for the Applicants, while admitting in one breath that the Applicants did not use the internal conflict resolution system, also failed miserably in their efforts to explain why the internal dispute resolution mechanism was not honestly attempted. The record reveals that the Applicants never followed the prescribed procedure for resolving the dispute under the Third Respondent's Constitution, hence the matter was premature for litigation.

Summary

31. In summary, after considering the documents and skeleton arguments filed by both the Applicants and Respondents, as well as hearing their oral arguments, this court concludes that the summons for interlocutory declaratory orders of injunction was unprocedural for being improperly brought before this Court and the High Court. In the present matter, the so-called “fresh” summons was made under the wrong provisions and the Applicants' procedural approach was likewise unsupported by law. It has already been explained that the two provisions cited by the Applicants as the legal basis of their motion before this Court, namely Section 7 of the Supreme Court of Appeal Act and Order I Rule 18 of the Rules, do not authorize the Applicants to seek remedy in the manner that they have.

Basically, the summons is premature since there is no appeal pending in this court and this court lacks jurisdiction to hear and determine it. This Court can only hear matters that have been properly filed. The proper approach would have been for the Applicants to file an appeal against the High Court's ruling and apply for a stay of the said ruling as well as the suspension of the First Respondent's decisions pending the hearing and determination of the appeal.

32. In any event, the record shows that the Applicants never followed the prescribed procedure for resolving the political party dispute under the Third Respondent's Constitution, and they also failed to demonstrate an attempt to invoke the party's internal conflict resolution mechanism, so this Court concludes that the dispute was premature for litigation.

33. Accordingly, the summons and the interim injunctive reliefs sought by the Applicants against the Respondents are dismissed with costs.

Pronounced on this 3rd day of January 2024 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga
JUSTICE OF APPEAL

Case information:

Date of hearing and ruling	:	3rd January 2024
Mr. C. Chidothe & Mr. P. Minjale	:	Legal practitioner for the Applicants.
Mr. C. Mhango	:	Legal practitioner for the Respondents.
Mr. Shaibu	:	Senior Judicial Research Officer.
Mrs. Mthunzi/Mr. Maluwa/ Mr. Minikwa	:	Law / Court Clerks.