IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2509 OF 2001

BETWEEN

GWANDA CHAKUAMBA PLAINTIFF

AND

JOHN TEMBO DEFENDANT

CORAM: D.F. MWAUNGULU (JUDGE).

Mbendera, a legal practitioner, for the plaintiff

Jumbe and Chalamanda, legal practitioners, for the defendant

Balakasi, the Official Court Interpreter

Mwaungulu, J.

ORDER

THE APPLICATION

In this matter Mr. Chakuamba, the plaintiff, applies for an interim (a term the Civil Procedure Rules, replacing the Rules of the Supreme Court, prefers to 'interlocutory') injunction. On 1ST October 2001 Mr. Chakuamba issued an originating summons for an information in the nature of quo warranto and an injunction to restrain the defendant, Mr. Tembo, acting or continuing to act as President of Malawi Congress Party and Leader of the Opposition in the National Assembly. The plaintiff applied for an interim injunction so that, till this Court determines the information in the nature of quo warranto, Mr. Tembo should not act as President of the Malawi Congress Party and Leader of the Opposition in the National Assembly. This action, one among many in this Court, and the subsequent interim injunction application arise from a long background.

BACKGROUND

Mr. Chakuamba and Mr. Tembo are, respectively, the President and Vice President of

the Malawi Congress Party, the largest opposition party in the National Assembly. At the beginning of this Parliament's life, following the last general elections, the National Assembly and the Speaker recognised Mr. Chakuamba and Mr. Tembo as leader and deputy leader of the opposition, respectively.

In June 2000, the National Assembly, for reasons unimportant to this application, suspended Mr. Chakuamba from the House up to June 2001. Mr. Tembo, as Vice President of the Malawi Congress Party and deputy leader of the opposition, assumed the functions of the Leader of the Opposition in the National Assembly. The Speaker and the National Assembly recognised these arrangements. The National Assembly recognised Mr. Tembo leader of the opposition until Mr. Chakuamba's suspension expires in June 2001.

Mr. Chakuamba in Civil Cause No 68 of 2000 challenged the National Assembly's decision. This Court ruled the suspension unconstitutional. It ordered Mr. Chakuamba back to the House. Meanwhile, Mr. Tembo as deputy leader of the opposition and Vice President of Malawi Congress Party started consolidating his position in the National Assembly and for leadership of the Malawi Congress Party nationwide. This split the party in two camps. Consequently, the party held two parallel conventions, apparently to solve the leadership question. This Court, in Civil Cause No. 2568 of 2000, ruled both parallel conventions breached the Malawi Congress Party's private law, the Malawi Congress Party Constitution. The consequence of this Court's decision was that the party leadership remained as before the conventions, namely, Mr. Gwanda and Mr. Tembo were, respectively, President and Vice President of the Malawi Congress Party.

The parliamentary party voted the defendant leader of the opposition in the National Assembly when the National Assembly resumed sitting in November 2000. The plaintiff, for reasons, considers the parliamentary party's

decision wrongful. First, he contends, the parliamentary party acted without

hearing him. Secondly, the parliamentary party never followed the Malawi Congress Party's constitution which requires the Malawi Congress Party convention to decide who the House should recognise a leader of the opposition in the National Assembly. The plaintiff further contends that the National Assembly's Members Hand Book makes (and recognises) the leader of the largest opposition party, if in parliament, a leader of the opposition in the National Assembly. Finally, the plaintiff accuses the parliamentary party of failure to comply with demands of administrative justice and equality before the law the Malawi Constitution requires.

On 4th June 2001 the Malawi Supreme Court of Appeal delivered its judgement on this Court's decision nullifying the two conventions to determine the Malawi Congress Party's leadership. The Supreme Court of Appeal confirmed this Court's decision and emphasized the Malawi Congress Party's leadership was as on 6th August 2000, before the abortive conventions.

The affidavits do not suggest that the High Court, whose order it was, or the Supreme Court, as of course, besides the formal judgement, informed the Speaker of this Court's or the Supreme Court's decisions. The Speaker has never acted on the Supreme Court's

decision. Mr. Tembo continued as leader of the Opposition in the National Assembly and, as the plaintiff now complains, Mr. Tembo claims he, not the plaintiff, is President of the Malawi Congress Party inside and outside Parliament and leader of the opposition in the National Assembly.

The Plaintiff sued the Speaker in Civil Cause No. 68 of 2000 for contempt. This Court dismissed the proceedings because, among other things, the Speaker is immune from contempt of court proceedings. By this time the plaintiff, in Miscellaneous Civil Cause No. 113 of 2000, applied for judicial review of the Speaker's decision letting Mr. Tembo continue as leader of the Opposition with the plaintiff in the House. The decision in Miscellaneous Civil Cause No. 68 of 2000 made, at least to the plaintiff's legal practitioners, because of the Speaker's immunity, proceedings under Civil Cause No. 113 unnecessary. It is unnecessary to consider the propriety of the plaintiff's legal practitioner's advice. It suffices to say that, because of the Speaker's immunity, the plaintiff commenced proceedings against the defendant who, at least the plaintiff thinks, does not have the blanket immunity the Malawi Constitution gives the Speaker.

THE NATURE OF THE REMEDY

The plaintiff resorted to an old common law remedy, an information in the nature of quo warranto, confirmed in section 15 of the Judicature Act 1884. Under an information in the nature of quo warranto a court, to decide a right to a franchise or office, could inquire from any person who claimed an office, franchise or liberty on what authority he supported his claim. At equity, no doubt, an injunction lay if the claimant or usurper failed to support claim to the office or franchise (See Halsbury Laws of England, 4th. ed. Vol. 1 (1), para.267, 'Administrative Law.' It is clear from Darley v R, (1846) 12 Cl & Fin 520, HL, and R v Shepherd, (1791) 4 Term Rep 381 that the office must be held under or created by the Crown. The duties of the office must be of a public nature. A privy counselor was held in R v St. Martins Guardians, (1851) 17 QB 149. Lord Justice Campbell, C.J., said:

"Is the office of a public nature? We must look to the functions, and compare them with those which were held to constitute such an office in Darley v R, (1846) 12 Cl & Fin 520, HL. The House of Lords laid down no criterion in that case; but they held that the office there in question was public within the rules laid down."

The office must be substantive. In Darley v R the House of Lords held an information in the mature of Quo warranto never lies where the claimant performs the functions of a deputy or at the will and pleasure of others. An information, according to in R v Speyer, R v Cassel, [1916] 1 KB 858, affirmed by the Court of Appeal in [1916] 2 KB 437, in the nature of Quo warranto, even if the position was held at the pleasure of others, will lie provided the office was one of a public and substantive nature The information was

available to the Attorney General and to private citizens alike. In R v Speyer, R v Cassel, Lord Justice Reading, C.J., rejected the Attorney General's contention that the information lay only at the aegis of the Attorney General:

"This decision is an authority against the proposition argued by the Attorney General. It establishes that, whereas formerly a quo warranto was held to lie only where there was an usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindall C.J., and subject always to the discretion of the Court to refuse or grant it."

Judicial reasoning and dictates of justice, propriety and fairness require such a remedy. In Darley v R Boughman, L.J., said:

"I mean, that if there is not this remedy, there really is no other. It is necessary that there should be this remedy, or else a case like the present would be remediless."

In England and Wales the legislature under the Administration of Justice (Miscellaneous Provisions) Act abolished all informations in the nature of quo warranto. Section 9 of the Act provided that in all proceedings where an information in the nature of quo warranto lay, the court at the application of anyone entitled to the application, could grant an injunction against any person who acted in an office in which he was not entitled to act. The Court could also declare the seat vacant. The legislature in England and Wales replaced the 1938 Act with section 30 of the Supreme Court Act 1981. The 1938 Administration of Justice (Miscellaneous Provisions) Act 1988 and the Supreme Court Act of 1981 are not our law. The Judicature Act of 1884 was a statute of general application in London and Wales before 1902 and therefore part of this Country's received law. Mrs Jumbe and Mr. Chalamanda contended vehemently that statutes of general application, although part of our law before 1966, is no longer our law because sections 3 of the Republic of Malawi (Constitution) Act, 1966 having repealed the Malawi Independence Order 1964, repealed all laws having force and validity under the 1964 Order.

Part 54, rule 2 of the Civil Procedure Rules 1998, our rules because of section 38 of the Courts Act, replacing Order 53, rule 1 of the Rules of the Supreme Court, carries through the changes to quo warranto proceedings. Under the Rules, a claimant seeking an injunction under Section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act) must proceed by judicial review. Consequently, apart from changes to the common law, an information in the nature of quo warranto under the Civil Procedure Rules, just as the predecessor Rules of the Supreme Court, require a claimant to proceed by way of judicial review where she wants to proceed by information in the form of quo warranto as amended.

If, as the defendant suggests, an information in the nature of quo warranto is not part of our law, it follows a fortiori that a plaintiff cannot commence these proceedings in this Court. The objection itself raises a complicated point of law this Court should determine. I should consider the question because of the application. The Plaintiff commenced

proceedings in which, among other things, he seeks a permanent injunction to stop the defendant from performing the functions of a leader of the opposition in the National Assembly and leader of the Malawi Congress Party inside and outside the National Assembly. He however seeks an interim injunction to the same effect so that the defendant ceases performing the functions he now preforms for the Malawi Congress Party in the National Assembly and posing as leader of the Malawi Congress Party. The application is therefore interlocutory.

THE QUESTION FOR DETERMINATION

The question to determine is whether the plaintiff is entitled to the interim relief ere this Court determines the action. The principles on which this Court restrains a party from pursuing a course of conduct before the court decides the disputes are based on justice and fairness. The principles recognise that the court has not determined the rights of the parties and, at the application, the court cannot tell where justice's pendulum will rest. Restraining or not restraining a party from pursuing a certain course of conduct while the court determines the matter savours prospects of injustice to either party.

Certainly, a party seeking a court to restrain another from pursuing a course of conduct will bear the blunt of injustice if the court avoids restraining the other and it turns out at the trial that the party seeking the restraint was right in the first place. Conversely, a party the court improperly restrains will feel that the court never regarded her rights should it turns out at the trial she was right in the first place. The court, under a duty to do justice between the parties, cannot, on such an application, resign to inaction because of the prospect of injustice explained. A court should do the most and best to minimise injustice and increase justice in the circumstances.

The House of Lords in American Cynamid Co. v Ethicon Ltd., [1975] 1 All ER 504, a decision this Court always follows, suggested the court's approach. Once the applicant raises a triable issue and damages are an inadequate remedy or, if an adequate remedy, the parties cannot pay, justice demands that the court achieve the status quo until the court finally disposes the matter. This general proposition requires a court to conduct a sort of inquiry that this Court explains in its many decisions. The interlocutory nature of the proceedings means the court should not, at this stage, delve into details of law and facts essential to the case. That should be done at the trial. In American Cynamid Co. v Ethicon Ltd. Lord Diplock said:

"It is no part of the court's function at this stage to try to resolve conflicts of evidence on affidavits as to fact on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

From Jauncey, L.J.'s remarks in the House of Lords in R v Secretary for State for Transport, ex parte Factortame Ltd. (No. 2) [1991] AC 603 and the decision in Bristol & West Building Society v Marks and Spencer plc [1991] EG 139, courts, where necessary, delve into the law and facts to resolve matters necessary to the interlocutory proceeding.

This should be the case where, like here, parties contend the injunction should or should not be granted because there is no defence to the action or the action does not raise a matter to be tried, as the case may. It is only for this reason that I consider certain aspects of law and facts in the affidavits.

Is there a triable issue?

In American Cynamid Co. v Ethicon Ltd. the House of Lords, overruling earlier decisions requiring the applicant to raise a prima facie case, opted for the applicant to raise a triable issue. The action must not be frivolous and vexatious and must have some prospect of success. Re Cable [1975] 1 WLR 37 and Smith v ILEA [1978] 1 All ER 411 confirm this. Mr. Mbendera, the plaintiff's legal practitioner, argues there is a matter for trial with all prospect of success. He contends that information in the nature of quo warranto proceedings in its common law or statutory form, even if abolished in England and Wales in 1938, is available in Malawi though its modified forms in England and Wales never apply to Malawi. He contends that on the facts Mr. Tembo's assumption of the functions of the leader of the opposition in the National Assembly hinges on a nebulous premise because Mr. Tembo's position in the Malawi Congress Party and the National Assembly is undermined by the private law of the Malawi Congress Party, the Malawi Congress Party's Constitution, and the National Assembly's standing orders. Mrs Jumbe and Mr. Chalamanda contend for Mr. Tembo that the interim injunction should fail because Mr. Chakuamba's action is frivolous and vexatious and has no prospect of success. These formidable contentions go to the root of the interlocutory relief the plaintiff seeks and it is necessary for the interim application to examine them in a bit of detail. Mrs Jumbe and Mr. Chalamanda argue three points on why Mr. Chakuamba's action is frivolous and vexatious and unlikely to succeed at the trial.

The first point Messrs. Chalamanda take for the defendant is that this Court cannot entertain an information in the nature of quo warranto. An information in the nature of quo warranto bases on section 15 of the Judicature Act, 1884. Messrs. Jumbe and Chalamanda concede the Judicature Act 1984 is a statute of general application before 1902. They contend, however, that the Act is no longer part of our law because the Republic of Malawi (Constitution) Act 1966 repealed the Malawi Independence Order 1964. Consequently, Messrs. Jumbe and Chalamanda argue, all our received laws, statutes of general application before 1902 and the principles of the common law and doctrines of equity, whose force emanated from the 1964 Order are not our law. I found the submission, albeit ingenuous, strange. I was informed, however, that the argument occupies serious academic contention. Both counsel, to show the intensity of the discourse and divergent views, produced the material to me. Fortunately, the debate, a real academic preoccupation, has not surfaced in this Court or the Supreme Court of Appeal. This is the first time the matter comes for determination by the Courts.

In the first place courts and practitioners have proceeded and assumed, probably without reason, that statutes of general application before 1902 and the principles of the common

law and doctrines of equity are our received law. I know of no contrary decision of this Court or the Supreme Court. If Courts and practice understand this as the effect of the Republic of Malawi (Constitution) Act, Messrs. Jumbe and Chalamanda have an uphill battle with the argument. Courts do not depart from established principles and laws not in controversy that establish and settle rights and duties new or abrupt change in understanding may affect.

On the other hand, what Messrs. Jumbe and Chalamanda suggest leads to absurdity in the corpus of our laws. If, which is not true, section 3 of the Republic of Malawi (Constitution) Act repealed all existing laws, no or very few laws covered aspects of our laws statutes of general application before 1902 covered at the time of the Act. Moreover, such rendition creates absurdity in interpreting other important provisions in the Act. Section 3 of the Republic of Malawi Constitution Act reads:

“The existing laws specified in Column 1 of the First Schedule are revoked or repealed to the extent specified in Column 2 of the schedule.”

Among the existing laws specified in Column 1 is the Malawi Independence Order 1964. The Malawi Independence Order of 1964 had similar provisions. Section 2 of the Order is worded as section 3 in the 1966 Act. The Second Schedule to that Order has, like the First Schedule to the 1966 Act, previous Constitution Acts or Ordinances the Order repealed. Messrs. Jumbe and Chalamanda argue that the 1966 Republic of Malawi (Constitution) Act repealed the 1964 Independence Order. Consequently, all laws having force under the 1964 Independence Order are repealed. That argument looks complicated. It is, however, untenable.

First, the reasoning is fallacious because of the definition of ‘the existing laws’ in section 2 (1) of the Republic of Malawi (Constitution) Act. ‘The existing laws’ mean “All Acts, Orders in Council, laws, rules, regulations, resolutions, orders or other instruments in writing having the effect of law in any part of Malawi immediately before the appointed day.’ Statutes in the First Schedule, like all Acts, Orders in Council, laws, rules, regulations, resolutions, orders or other instruments in writing having the effect of law in any part of Malawi immediately before the appointed day, were existing laws at the time of the Act. Section 3, to my mind, isolates from the corpus of ‘the existing laws’ the specific ones the Act intends to revoke or repeal. Parliament would have used clear wording to expressly or impliedly repeal all or other existing laws if, as Messrs. and Jumbe argue, Parliament intended to repeal all the existing laws.

Messrs. Jumbe and Chalamanda base their argument on that the Malawi Independence Order of 1964 and previous Constitution Acts gave force to statutes of general application before 1902 and the principles of common law and doctrines of equity. This is untrue. The existing laws existed in spite of and alongside the existing laws Column 1 the First Schedule specified. The 1964 Independence Ordinance did not repeal existing laws. The 1966 Act like its predecessor Order meant only to affect the specific statutes in the First Schedule. Parliament intended to repeal the specific statues in the First Schedule and not the existing laws, namely, all Acts, Orders in Council, laws, rules, regulations, resolutions, orders or other instruments in writing having effect of law in any part of Malawi immediately before the appointed day. The rule of interpretation is what has not

been mentioned was never intended to be included. The First Schedule never mentions the specific Order in Council or indeed any other Order in Council the basis of our received law. It gives specific Acts that it repeals. The existing laws the basis of our received laws are not specified in the Schedule. Parliament never intended to repeal them.

The converse of this interpretation rule is that inclusion of one thing is exclusion of that which has not been mentioned. This Court applied these rules of interpretation in Re Ombudsman ex parte The trustees of Malawi Against Disabilities Misc. Civ Cas No 22 of 2000, unreported. It said:

“The Constitution would have included the Ombudsman and the Human Rights Commission in subsections 3 and 4 if it was intended to allow them have the power to order or direct these remedies. The interpretation principle is what is excluded was never to be included. The remedies the Ombudsman can give are limited. They do not include, in my judgement, power to make orders, including compensation, section 46 expressly leaves to courts.”

Parliament intended only to repeal the existing laws in the First Schedule and no more. Parliament never intended to repeal other existing laws, including the Orders in Council the basis of our received laws, not mentioned in the First Schedule.

On the contrary, Parliament intended to save all existing laws nor repealed by section 3 of the Republic of Malawi (Constitution) Act. Section 5 (1) of the Republic of Malawi (Constitution) Act confirms that this is what Parliament intended 1:

“Subject to the provisions of this section, and so far as is consistent with the provisions of the Constitution, the existing laws shall continue in force after the appointed day as if they had been made in pursuance of the Constitution, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution, and in particular any reference there in to the crown shall be construed as a reference to the Government.”

Section 5 (2) gives the President power by order under his hands made anytime before the 6th of July 1967 to amend any existing law, namely, all Acts Orders in council, laws, rules, regulations, resolutions orders or other instruments in writing having effect of law in any part of Malawi immediately before the appointed day, when necessary or expedient to bring the law to conform with the provisions of the Act or the Constitution. Parliament, on reading sections 5, subsections (1) and (2), intended to retain the existing laws as described. Statutes of general application are received laws through various Acts and Orders in Council section 3 of the Republic of Malawi (Constitution) Act never specifically repealed. Consequently, all statutes of general application in England and Wales before 1902, includes the Judicature Act of 1884, are part of our laws to the extent that our Parliament has not varied or substituted them.

Mr. Mbendera is right that an information by way of quo warranto is, apart from statute, and common law proceeding. Common law always expands to reflect changes in

society's general thinking. The common will and good expressed through legislative enactments reflect such trends. In Marinho v S.G.S.(Blantyre) Pvt. Ltd. Civ. Cas. No. 508 of 1996, this Court referred to a Jenkins, L.J.'s statement in Vine V. National Dock Labour Board [1956] 1 All. E.R. 1, 10:

"Finally it was urged that any order made would run counter to the policy or trend of previous practice. At the risk of reiterating views expressed in my judgment on other subject matters, it seems appropriate to repeat that in matters of practice and discretion it is essential for the courts to take into account all the important changes in the climate of general opinion which is so hard to define but so plainly manifests itself from generation to generation. In that behalf account must, inter alia, be taken of the trend of the views of the legislature expressed on behalf of the community in its enactments and also of the trend of judicial decisions. Over the last two decades there has been a marked trend towards shielding the employee, where practicable, from undue hardships he may suffer at the hands of those who may have power over his livelihood-employers and trade unions. So far has this now progressed and such is the security granted to an employee under the Industrial Relations Act 1971 that some have suggested that he may now be said to acquire something akin to a property in his employment. It is surely is then for the courts to review and where appropriate to modify, if that becomes necessary, their rules of practice in relation to the exercise of a discretion such as we have today to consider so that its practice conforms to the realities of the day."

No doubt in years past an information by nature of quo warranto was useful for challenges that, subject to the rules of pleading and ways of instituting proceedings in those days, applied. The 1938 changes, also altered in 1981, were a necessary development. While in Malawi similar developments, for many reasons, have not occurred, the common law of Malawi should, if it has not done so already, have shifted. This Court's power to grant an injunction under section 11 of the Courts Act is wide enough to cover situations where any right needs protection. It matters less, in my judgment, that the right relates to property, office or duty. This court grants injunctions where, for example, a directorship of a company is in question. All these decisions, in my judgment, base on that this Court grants injunctive relief where necessary to protect a right. This principle applicable to the common law and equity of England and Wales, Malawi and common law jurisdictions. Section 15 of the Republic of Malawi (Constitution) Act reserve this Court's powers at common law and at equity:

"Until Parliament otherwise provides, the civil and criminal jurisdiction of the Supreme Court of Appeal, the High Court and all subordinate Courts (including Local Courts) shall, subject to the provisions of this Act and any law in force in Malawi, be exercised in conformity with the existing laws and substance of the common law and the doctrines of equity."

Consequently, if part of the common law, notwithstanding section 3, this court would entertain an information in the nature of quo warranto. It is in the spirit of the common law and the doctrine of equity to grant an injunctive relief where a person questions another's right to an office under public or private law.

The second reason for contending that the plaintiff's action is frivolous and vexatious is

that matters the plaintiff raises are res judicata. Messrs. Jumbe and Chalamanda argue that these matters were or should have been covered in previous proceedings. The parties agree on matters previous proceedings covered. The first action was a judicial review of the Speaker's suspension of the plaintiff. The plaintiff could not have raised the leadership question in proceedings against the Speaker's decision. The second action concerned the parallel convention. In that action validity of two conventions created by the plaintiff and the defendant's camps were in issue. This Court, as seen, declared both conventions invalid. The Supreme Court confirmed this Court's decision. The leadership question favoured the plaintiff. Surprisingly, the Speaker never acted on the Supreme Court's decision. Consequently, the plaintiff, to enforce the decisions of the High Court and the Supreme Court, commenced contempt proceedings against the Speaker. The defendant was brought in. The plaintiff commenced judicial review proceedings against the Speaker's decision recognising the defendant as leader of the opposition in the House. The plaintiff withdrew this action because this Court declared the Speaker immune from contempt proceedings.

On the recounted proceedings, Messrs. Jumbe and Chalamanda cannot rightly raise the defence res judicata. The plaintiff has not relitigated on matters previously litigated or litigated on maters he should have litigated previously. On the one case on which the leadership question arose, if at all, the plaintiff has the decision of this Court and the Supreme Court on his side. The Speaker has not implemented this Court's and the Supreme Court's decisions. Messrs. Jumbe and Chalamanda rely on several cases that must be distinguished on this pretext and, more importantly, because res judicata does not lie on judicial review proceedings.

The defendant's defence of res judicata is met by the answer that some proceedings the defendant relies on were judicial review proceedings. The defence of res judicata never applies to judicial proceedings. There is a statement of May, L.J., in R v Secretary of State for the Environment ex parte Hackney London Borough Council [1983] 1 WLR 524, 538:

"We respectfully think that similar considerations apply to proceedings for judicial review. In such proceedings, there are no formal pleadings and it will frequently be difficult if not impossible to identify a particular issue which the 'first' application will have decided. Moreover, we do not think there is in proceedings brought under Order 53 any true lis between the Crown, in whose name the proceedings are brought (and we venture a reservation about whether or not issue estoppel could operate against the Crown), and the respondent. Further, we doubt whether a decision in such proceedings, in the sense necessary for issue estoppel to operate, is a final decision; the nature of the relief in many cases, leaves open reconsideration by the statutory authority or other tribunal of the matter in dispute."

May, L.J., approved this passage from Professor Wade's treatise on Administrative Law, 5th ed. (1982), p. 246:

"In these procedures the court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not.' They are a special class of remedies designed to

maintain due order in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be a abuse of legal process; and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds."

I also approve a statement of Professor de Smith in Judicial Review of Administrative Action, 4th ed. (1980). This is what he says about res judicata p 108:

"It is difficult not to conclude that the concept of res judicata in administrative law is so nebulous as to occlude rather than clarify practical issues, and that it should be used as little as possible. "

Res judicata never applies to judicial review proceedings. Moreover, one action was withdrawn.

A withdrawal or discontinuance of an action has never been a defence to a subsequent action. The former Order 21, rule 4 of the Rules of the Supreme Court Rules provided:

"Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action."

Part 38, rule 7 of the Civil Procedure Rules, with some modification, replaces Order 21, rule 4 of the Rules of the Supreme Court:

"A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if -

(a) he discontinued the claim after the defendant filed a defence; and

(b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

The Civil Procedure Rules, therefore, with slight modification, preclude res judicata where the plaintiff withdraws or discontinues the action.

The final point Messrs. Jumbe and Chalamanda raise for the plaintiff's action being frivolous and vexatious is that the plaintiffs should have commenced the proceedings by judicial review not by ordinary proceedings. The proceedings not so began, they contend, this Court should dismiss the plaintiff's action. This contention must be based on O' Reilly v Mackman, [1983] 2 AC 237 where the House of Lords reiterated that where one wants to establish that a body's or authority's decision offends rights that have to be protected by public law, she should, generally, proceed by way of judicial review. Lord Diplock said at page 285:

"Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person

seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions or Order 53 for the protection of such authorities."

The Lord justice Diplock, however, said at page 285:

"My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis - a process that your Lordships will be continuing in the next case in which judgment is to be delivered today."

The learned authors of Civil Procedure, 2001, p. 1053 say:

"The precise scope of the rule in O'Reilly v Mackman is still a matter of debate. Two main approaches have been canvassed in the case law. One approach is that the rule does not apply to claims which are brought to vindicate private law rights even though they involve a challenge to a public law decision or action and may involve determining questions of public law. If this approach is adopted, then the aggrieved person will only be forced to proceed by way of a claim for judicial review where private law rights are not at stake, that is in a case which only raises issues of public law. The alternative approach is that the rule in O'Reilly v Mackman applies to all cases where the claim involves a challenge to a public law decision or action or involves determining questions of public law (subject to certain limited exceptions) whether or not the ultimate aim of the proceedings is to vindicate a private law right. In Roy v Kensington and Chelsea and Westminister Family Practitioner Committee 1992 1 AC 624, the House of Lords left open the question of which of these approaches should be adopted but indicated a preference for the first approach."

In Mercury v Telecommunications Director [1996] 1 WLR 48 the House of Lords suggests more flexibility. Slyn, L.J., recognised that Lord Diplock realised there were exceptions to the general in O'Reilly v Mackman and commented as follows:

"The recognition by Lord Diplock that exceptions exist to the general rule may introduce some uncertainty but it is a small price to pay to avoid the over-rigid demarcation between procedures reminiscent of earlier disputes as to the form of action and disputes as to the competence of jurisdictions apparently encountered in civil law countries where a distinction between 'public law' and what is called 'private law' are by no means worked out. The experience of other countries seems to show that the working out of this distinction is not always an easy matter. In the absence of a single procedure allowing all remedies - quashing, injunctive and declaratory relief, damages - some flexibility as to the use of the different procedures is necessary. It has to be borne in mind that over riding question is whether the proceedings constitute an abuse of the process of the court."

Moreover, Messrs. Jumbe's and Chalamanda's contention that the plaintiff should have commenced these proceedings by way of judicial review under Part 54 of the Civil Procedure Rules, replacing Order 53 of the Rules of the Supreme Court, depends on how one reads Part 54, rule 2 (d) of the Civil Procedure Rules replacing Order 53, rule 1 of the Rules of the Supreme Court:

"The judicial review procedure must be used in a claim for judicial review where the claimant is seeking ... an injunction under section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act)"

Section 30 of the Supreme Court Act 1981 replaced the 1938 Judicature Act providing the High Court with power to order injunctions in circumstances where at common law or under the previous statutes an information by way of quo warranto was appropriate. Part 54(2)(d) can be read in two ways. First it the provision can be read to provide that, irrespective of the source of the power to grant the orders in section 30 proceedings of the like of an information by way of quo warranto, the claimant must commence by way of judicial review. Secondly, the rule can be read to mean that only to the extent that injunctions can be granted under that section should judicial review proceedings be commenced in the circumstances where information by way of quo warranto would have applied at common law. I prefer the earlier view. If information by way of quo warranto is a common law right, under Part 54 rule 2(d), the plaintiff must commence proceedings by way of judicial review.

Even with this conclusion, however, Messrs. Jumbe and Chalamanda's and Mrs. Jumbe's contention can only be based on O'Reilly v Mackman. Lord Diplock however recognise that there are cases where it is permissible to litigate public law issues and private law proceedings where, for instance, the invalidity of the decision of the public authority arises only as a collateral issue in a claim for infringement of a right of a plaintiff arising under private law or where none of the parties objects to the proceedings to continued by ordinary action. Lord Diplock thought that the question of exceptions should be on a case to case basis.

Here, if I understand the plaintiff correctly, he contends that under the private law, the Malawi Congress Party Constitution, the Malawi Congress Party's leadership and consequently the leadership of the Opposition in the House favours his right to lead the Malawi Congress Party inside and outside Parliament. He contends that if the leadership issue is uncertain then the collateral issue about leadership of the House is unresolved. His situation, in my judgment falls in the first exception. The plaintiff's case is akin to Davy v Spelthorne Borough Council [1984] AC 262, where the House of Lords approved a Court of Appeals decision to retain an action under ordinary proceedings because, though public rights issues arose, the plaintiff's action was for private law rights. The House of Lords rejected the defendant's claim that such proceedings were an abuse of the process of the court. In England and Wales the authors of Civil Procedure 2nd. ed. Sweet & Maxwell 2001 comment as follows at pg 1009:

"The precise scope of the rule in O'Reilly v Mackman is still a matter of debate. There

are two main approaches which have been canvassed in the case law. One approach is that the rule does not apply to claims which are brought to vindicate private law rights even though they involve a challenge to a public law decision or action and may involve determining questions of public law. If this approach is adopted, then the aggrieved person will only be forced to proceed by way of claim for judicial review where private law rights are not at stake that is in a case which only raises issues of public law. The alternative approach is that the rule in O'Reilly v Mackman applies to all cases where the claim involves a challenge to a public law decision or action or involves determining questions of public law (subject to certain limited exceptions) whether or not the ultimate aim of the proceedings is to vindicate a private law right. In Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 AC 624, the House of Lords left open the question which these approaches should be adopted but indicated a preference for the first approach."

In Mercury v Telecommunications Director [1996] 1 WLR 48 the House of Lords suggests more flexibility. Slyn, L.J., recognised that Lord Diplock realised there were exceptions to the general in O'Reilly v Mackman and commented as follows:

"The recognition by Lord Diplock that exceptions exist to the general rule may introduce some uncertainty but it is a small price to pay to avoid the over-rigid demarcation between procedures reminiscent of earlier disputes as to the form of action and disputes as to the competence of jurisdictions apparently encountered in civil law countries where a distinction between 'public law' and what is called 'private law' are by no means worked out. The experience of other countries seems to show that the working out of this distinction is not always an easy matter. In the absence of a single procedure allowing all remedies - quashing, injunctive and declaratory relief, damages - some flexibility as to the use of the different procedures is necessary. It has to be borne in mind that over riding question is whether the proceedings constitute an abuse of the process of the court."

In my judgment this flexibility is important. It is important to protect public authorities whose decisions and actions infringe on rights by proceeding by way of judicial review. It was not intended, however, to stifle citizens' rights by so rigid a rule when other options of redress, though inconvenient to public authorities, are available to vindicate citizens' rights and ensure justice and fairness to public authorities and citizens. The plaintiff, pursuing his rights under the private law of the party and the practice clearly documented in the uncontroverted evidence from both sides, should be allowed to vindicate his rights by a simple process adopted here notwithstanding the office of the leader of the opposition in the National Assembly is a public office to which probably judicial review is appropriate.

On the brief facts accepted in this court there is enough evidence to establish entitlement to a right. This evidence can only be controverted through trial. On the face of it therefore there is a triable issue. The Speaker recognised the plaintiff leader of the opposition in the National Assembly because the plaintiff was a leader of the Malawi Congress Party, the main opposition party in parliaments. The Speaker and the National Assembly recognised Mr. Tembo to be Leader of the Opposition, during the plaintiff's suspension, because Mr. Tembo was Vice President of the Malawi Congress Party. The practice of the Malawi

Congress Party and the National Assembly confirm the position. More importantly, recognition of the leadership at the beginning of the National Assembly's life must be final. In the United Kingdom there is a statute to that effect. There is no such statute in the country. The parliamentary practice makes the rule credible. It is unclear that the Malawi Congress Party Constitution provides a mode. The practice of the party approved by the House prima facie entitles the plaintiff to claims he makes. The parliamentary party's decision to elect the leader of the opposition is the novelty. Trial will solve the problem There is therefore a triable issue with some prospect of success.

No Interference with the National Assembly

This action, as I understand it, is not about the jurisdiction, powers and internal procedures of the National Assembly. This Court has very limited business in that regard. The Constitution, the National Assembly and the democratic ideal recognise, acknowledge and respect the power, freedom and abilities of political parties to set up the procedures, strategies and practices to fulfil the political mandate in the political and constitutional offices in the executive and legislative branches of government the Constitution creates. The process by the President to fill positions in the executive branch of government and of the majority party to determine its chief whip, if this be constitutional, is a prerogative of the political party under its internal procedures. Just as the Speaker cannot settle a political dispute within the majority party, if the governing party, about its choice of a leader in the House, the Speaker cannot, in the guise of internal procedures, interfere with the political process and practice in which political parties determine within themselves the people who will perform the constitutional powers the electorate, through the expressed will of an election, give to political parties. Constitutional institutions, namely, the Court, the President, the National Assembly and the Speaker, must allow political parties the freedom and flexibility to determine and exhaust the process of deciding who and how to further the political agenda of those who elected them. Once the political parties make the choice, the Speaker's recognition must be final. Certainly neither the Speaker nor the National Assembly under the Constitution or the legis can make the choice of the leader of a political party in the House.

Political Party disputes are juridical

Where, within the political parties, there are disputes as to their internal procedures, that is not a matter of the internal procedure of the House. It is a matter of the political parties and their internal rights within their constitutional and legal framework. Only Courts, under the Constitution, can settle these disputes. The Speaker and the National Assembly cannot, under the guise of internal procedures of the House settle, these otherwise juridical questions. When Courts settle disputes between private individuals, they perform their benign and condign constitutional role, a role the framers excluded, properly so, from other branches of government, the legislature and the executive branches. In performing that role, the courts are scarcely, if at all, dealing with the internal affairs or arrangements of the National Assembly.

No immunity when members question constitutional issues of their political party

When a political party, a legal entity, has questions about how officers under its

Constitution exercise powers under the Constitution to which the officers are members, those are matters of interpretation of their Constitution on which Courts, not the National Assembly, has jurisdiction. The National Assembly cannot claim for any member of that political party the immunities and privileges which only enure to that member for performing constitutional legislative functions. The privileges and immunities are prescribed and circumscribed for condign legislative functions and not political disputes in a political party. When members of a political party, who are members of the National Assembly, cross the borders of the House to settle private rights in the nation's courts, Courts have jurisdiction and the immunities and privileges of the members in the National Assembly pale to insignificance.

Parliament exercises restraint on its immunities

More importantly, the Court does no as a matter of course, invoke the privileges and immunities of the House. The House or its members have to raise the immunities and privileges. The parties here, and properly so, have not raised their immunities. Most important, however, is that civilized and democratic parliaments, where there are chances of collision with courts, have agreed as a matter of law and practice of the House, not to raise the immunities and privileges when courts are performing their legitimate functions. It cannot be assumed that the immunities are just asserted. They are proved and circumscribed within the general constitutional framework which puts no institution above the law and above the courts. Immunities must be claimed and have not, properly so, in this matter. The Court in declaring the rights of the parties under their political party constitutional arrangements scarcely interfere with the operations, procedures of the House.

Will the Court grant a permanent injunction?

The second question to consider is whether in the circumstances of this case the court would grant a permanent injunction at the end of the trial. First, the nature of an information in the nature of quo warranto necessitates granting the interim relief. The defendant might or might not have a legal basis for his authority. More importantly, the exercise of power in an office in which one is not entitled, even if it is for a emoluments, cannot be appeased by payment of money.

Are damages an adequate remedy for the plaintiff and defendant?

A person challenging exercise of the power's of the office seldom wants damages as a remedy. In this particular case, it is a singular honor and privilege to lead the opposition in the National Assembly and influence government policy and the legislative mandate. Damages, in my judgement are an inadequate remedy for the plaintiff if the court proves him right at the end of a trial. It becomes unnecessary therefore to answer the question whether the defendant can compensate the plaintiff. The Court must consider these two aspects in relation to the defendant. If at the trial Mr. Tembo is proved right are damages an adequate remedy? Will Mr. Chakuamba, from his undertaking, compensate the defendant? What was said for Mr. Chakuamba applies to Mr. Tembo. Again it is unnecessary to consider whether Mr. Chakuamba can compensate Mr.Tembo.

The balance of justice

The court, where damages are an inadequate remedy, grants the injunction on the balance of justice. The court considers where the incidence of injustice would be heavier if one course of action is taken. If granting the injunction will cause more injustice to the defendant should he be right, the court may refuse the injunction. Conversely, the court may grant the injunction if the plaintiff's losses are heavier should she be proved right if the court refuses the injunction. If damages are an inadequate remedy for the plaintiff and the defendant the court chooses a course of action which minimises injustice by considering the parties' losses ensuing from adopting a particular course of action. In this action, the losses are severer for the plaintiff.

The leadership issue should, according to the Malawi Congress Party, be addressed at a Malawi Congers Party convention for that purpose. The plaintiff, the elected leader of the Malawi Congress Party, does not have to call such an election before the time is due. The plaintiff, as seen, has already been put in the inconvenience of calling a convention for the purpose. The National Assembly and the Speaker at the beginning of this Parliaments life recognised him a leader of the opposition in the National Assembly. The plaintiff has more to lose from such a premature leadership contest. The defendant has all to gain, even if he loses the leadership contest, if this Court does not restrain his actions. According to the Malawi Congress Party's Constitution, the private law governing the plaintiff's and defendant's relative positions in the party nationwide and the National Assembly, the plaintiff should exercise such powers. The Supreme Court confirmed the plaintiff's legal position inside and outside the National Assembly. The defendant's insistence that he leads the Malawi Congress Party inside and outside the National Assembly undermines the plaintiff's position in the constitutional and parliamentary set up in the National Assembly. The respondent has little to lose. He was there only for the plaintiff's absence. The plaintiff's absence was brief and ended. The defendant's position was only at the pleasure and sufferance of the leader of the opposition in Parliament and the leader of the Malawi Congress Party. To the extent that the plaintiff's losses are greater, the balance of justice favours granting the injunction.

On the other hand, if damages are an inadequate remedy for the parties and the relative losses to the parties are unascertainable a court has to maintain the status quo. In other words the parties have to be put to the position they were before the action complained of. Usually on a negative injunction, this position favors the plaintiff, unless, of course the plaintiff is not guilty of delay, per Lord Diplock in Garden cottage Foods Limited v Milk Marketing Board [1984] AC 130. In this respect the plaintiff is faultless. He has been hither and tither to vindicate his rights. He has been to the House, to this Court and the Supreme Court. Much delay, if there has been delay, has been caused by the defendant and the system. There would be no injustice or prejudice to the defendant if this Court decided, as it certainly will, to maintain the status quo. There will be prejudice to the plaintiff if this Court does not want to maintain the status quo.

Political ramifications of granting the injunction

Under the principles in American Cynamid Co. v Ethicon Ltd. a court, when deciding whether to grant an interim injunction, may consider the social, economic and political ramifications of a refusal or permission of an interim injunction. In American Cynamid Co. v Ethicon Ltd., when granting the injunction, the Court considered that "no factory would be closed and no workpeople would be thrown out of work." In Beaverbrook Newspapers v Keys, [1978] ICR 582 the Court took into account the public interest where the injunction will bear some political or public significance.

On the latter aspect, the Court has to conduct itself in a way that recognises the privileges and immunities of the House and individual members of the House. The National Assembly needs little, if any, assistance from Courts to enforce its authority, candour and procedures. The House however is virtually powerless when its members, indeed any citizen, resort, as they should, to the courts to resolve deputes. In that respect there is some duty on the Courts to ensure the candour and respect of the House in resolving disputes that may have ramifications on the house. These ramifications can only be legal, not political. In this regard the Court must ensure that the impartiality of the House in all aspects of its operations, including the processes in which, particularly the chief whip and the leader of the opposition, are chosen is achieved. The injunctive relief must be such that it enables the appropriate process to occur in the context of the independence, punctility and competence of the House. As I understand it, the chief whip and the leader of the opposition are matters within the party's competence. The process of ascertaining that leader is a matter of the parties. For some time the Conservative Party in Britain left that question to the parliamentary party. That has changed to a nationwide vote by people other than the parliamentary party. This injunction, therefore facilitates, if that be necessary, the initiative in the Malawi Congress Party to set the process of resolving the matter. That, in the judgement of this Court is achieved by resorting to the status quo ante so that an appropriate leadership challenge, rather than one arising from a suspension which, in the opinion of this Court, was unconstitutional.

Courts' decisions must be respected

More significant however is the ramification of failing to grant the injunction on the relationship of this and the legislative branches of government. As we see shortly, one reason for granting the injunction is the relative strength of the parties' case. Paramount to that consideration is that there is a decision of this Court and the Supreme Court to the effect that the plaintiff is the leader of the Malawi Congress Party. Failing to abide by these decisions sets the superior Courts of the land in a collision course with the House. Restraining the defendant therefore brings relief to the two institutions of Government which have not to collide with each other on the extent and implications of the immunities of the legislative branch against this Court's plenipotentiary powers to review action of any organ of State and Government for conformity with the Constitution and fundamental rights that the Constitution introduces. Failing to grant the injunction against

the defendant in view of the immunity the Speaker claimed and this Court confirmed can only confirm the impotence, which there should not be, of the two branches of government expected to work harmoniously. There are no three governments. There is one government and three branches of government which should be working harmoniously and complementarily for the dignity, respect and equal concern of the people of Malawi. Decisions of this Court and the Supreme Court should be respected. In R v Speyer, R v Cassel, Lord Reading, C.J., said

"This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown."

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

The plaintiff's case is stronger

More crucial, however has been the consideration of the relative strengths of the parties' cases. The Court considering whether to grant interim relief should be very slow to delve at this stage into a process that leaves the impression that the matters are being concluded at that preliminary and interlocutory stage. The gravity of the matter and, as I said earlier, the plaintiff's insistence the defendant has no defence to the action on the one

hand and the defendant's insistence that the plaintiff's action is frivolous vexatious and unlikely to sicced require an evaluation of the relative strengths of the parties' cases.

The relative strength of the plaintiff's action justifies this Court's decision to grant the plaintiff the interim relief he seeks. First, the plaintiff has the backing of a Supreme Court decision that virtually makes the plaintiff the leader of the Malawi Congress Party and, on the practice under the private law of the Malawi Congress Party, the leader of the opposition in the House. That practice bases on that the Speaker recognised the plaintiff as the leader of the opposition in the National Assembly at the beginning of this Parliament's life because the plaintiff is a leader of the opposition Malawi Congress Party. The defendant was the deputy leader of the House because he was second in command in the Malawi Congress Party. More importantly, the defendant assumed the function as leader of the house for the time the plaintiff was suspended because the defendant was the Vice President of the Malawi Congress Party. The Speaker in the final decision when suspending the plaintiff stated that the leadership of the opposition in the house would be the defendant's until the plaintiff, the recognised leader of the opposition in the House, resumed duties.

Given that leadership of the house of the Opposition is not an elective position and the Speaker cannot determine the matter, the party structure whether in Parliament or not must determine the leader of the opposition. There is no agreed procedure. The Malawi Congress Party Constitution provides that an and expansive categories of members of which parliamentarians are but a very small number determine the leadership of the party. The Constitution does not empower the parliamentary party to determine leadership of the Malawi Congress Party. Consequently, the decision of the parliamentary party falls to

be questioned by the plaintiff as the President of Malawi Congress Party and any member of the Malawi Congress Party.

Conclusion

On the principles stated justice dictates that an interim injunction be granted. There is a triable issue which is not frivolous and vexatious and one with prospect of success. Damages are not an adequate remedy for both parties should they proved right at the trial. Nevertheless, the parties do not want damages. They want to influence public policy and people's welfare through this very important position in the House. The balance of justice favours granting the injunction. The plaintiff has more to lose if the defendant is not restrained. The plaintiff has little to lose and more to gain if the injunction is refused. The injunction is necessary to maintain the status quo and ensure the harmony between the two branches of government. The injunction is justified on that the plaintiff's case is stronger than the defendant's. There are no immunities and privileges to members. If there are they have not been raised in this Court. I grant the interim injunction. The defendant will abide by this Order until this Court determines the matter.

Made in Court this day the 22nd of October 2001.

D.F.MWAUNGULU

JUDGE