IN THE HIGH OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1841 OF 2001

IN THE MATTER OF ARTICLE 42 OF THE MALAWI CONGRESS PARTY CONSTITUTION

AND

IN THE MATTER OF A PETITION BY 37 DISTRICT COMMITTEES OF THE PARTY PRESIDENT TO COINVENE AN

EXTRAORDINARY ANNUAL CONVENTION OF THE PARTY

MR D.T. KAMPANJE BANDA ……………………………PLAINTIFF

Suing on his own behalf and on behalf of all members

of District committees of the Malawi Congress Party

that petitioned the Party President to call for an

Extraordinary Annual Convention

- AND –

HON. GWANDA CHAKUAMBA ………………………DEFENDANT

CORAM: MKANDAWIRE, J

Kaphale of Counsel for the Plaintiff

Mhango of Counsel for the Defendant

Fatch Recording Officer

JUDGMENT

In his amended notice of motion for committal the defendant seeks that D.T. Kampanje Banda, Hon. J.Z.U. Tembo, Hon. Kate Kainja and Potiphar Chidaya be committed to prison for contempt of court. I will set out the amended notice of motion for committal and it reads:

1. That D.T. Kampanje Banda be committed to

prison for his contempt of court in disobeying an Order dated 17th June 2002 restraining him and all persons alleged to be District Chairpersons by himself, his servants or agents or otherwise any member of the Malawi Congress Party, howsoever from holding the MCP Convention planned for 22nd June 2002 in Lilongwe or any other date or place until the various committees constituted under the Malawi Congress Party structures, the Constituency, District and Regional Committees having renewed their respective mandates and/or until the determination of the Originating Summons herein or until further Order.

2. That Hon. John Z.U. Tembo, Hon. Kate Kainja

and Potiphar Chidaya be committed to prison for their contempt of court in disobeying and/or aiding and abetting the defying and flouting of Orders of this court in that being members of MCP who had first hand knowledge of the contents of the injunction restraining members of the Malawi Congress Party from holding a MCP Convention called for 22nd June 2002 in Lilongwe or any other date or place until the various committees constituted under the Malawi Congress Party organizational structures at Constituency, District and Regional Committee levels had renewed their respective mandates and/or until the determination of the Originating Summons herein or until further order and with such knowledge, encouraged and assisted the plaintiffs and some members of the Malawi Congress Party in holding a MCP Convention on 22nd to 23rd June 2002 at National Resources College in Lilongwe and participated thereof.

3. Of declaration that the said Mr D.T. Kampanje

Banda, Hon. John Z.U. Tembo, Hon. Kate Kainja and Potiphar Chidaya with tacit knowledge assisted the holding of a MCP Convention, which was an outrageous conduct of defying the Court orders, thereby undermining the authority of the High Court Of Malawi, trivializing the Rule of Law and compromising the due course of justice.

4. Consequential direction that, the MCP Convention purportedly held at the National Resources College in Lilongwe on 22nd and 23rd be and is hereby declared void ab inition, illegal and a nullity.

5. That the said Hon. John Z.U. Tembo, Hon. Kate Kainja, D.T. Kampanje Banda and Potiphar Chidaya be committed to prison for their contempt of court and do also pay to the Defendant his costs of and incidental to this application and the orders to be made thereon.

A brief history of the matter is as follows. Sometime in September 2001, Mr Kampanje Banda, the plaintiff herein commenced an action by way of petition in the Lilongwe District Registry under Civil Cause No. 645 of 2001 seeking a court order that a national convention of the Malawi Congress Party be convened and held. That action was dismissed as being grossly irregular, frivolous, vexatious and a waste of time and attempt to draw the court into to a club wrangle.

The plaintiff then came to the Principal Registry in Blantyre. On 6th June 2002 he took out an Originating summons seeking:

> "An order mandating the defendant immediately or within such time as the court may deem fit, convene an extraordinary annual convention of the Malawi Congress Party."

In the meantime before the originating summons was heard, the defendant got information that a Convention of the Malawi Congress Party had been called to be held in Lilongwe on 22nd June, 2002. According to the defendant, in terms of the Constitution of the Malawi Congress Party only the Party President can call a convention. He as the party President had not called for the convention to be held in Lilongwe on 22nd June 2002. It was his view that the convention to be held in Lilongwe was unconstitutional as the people who had convened it were not mandated to do so.

The defendant then took out an exparte summons for injunction to restrain the plaintiff by himself, his servants or agents, or otherwise any member of the Malawi Congress Party whomsoever from holding the Malawi Congress Party convention scheduled for 22nd June 2002 in Lilongwe. The exparte summons was held on 17th June 2002. An injunction was granted in the following terms:

"IT IS ORDERED that an injunction is hereby granted restraining the Plaintiff by himself, his servants, or agents, or otherwise any member of the Malawi Congress Party howsoever from holding the Malawi Congress Party Convention scheduled for 22nd June

2002 in Lilongwe or any other date and place until the various committees constituted under the Malawi Congress Party structures the Constituency, District and Regional Committees have renewed their respective mandates and/or further until determination of these proceedings or until further order."

The order carried a penal notice in the following terms:

"If you disobey this order you may be found guilty of contempt of Court and may be sent to prison or fined or your assets may be seized."

When the plaintiff was served with the order, he applied that it should be discharged. This was an inter parties application and it came before me on the 19th June 2002. After hearing learned counsel on both sides, I dismissed the application. The application to discharge the order having been dismissed, it meant that the order of injunction still stood with full force and the plaintiff was aware of that.

As I have said earlier on, this is a notice of motion for contempt of court. The defendant is alleging that despite the order of injunction being in force the plaintiff went ahead and held the convention in Lilongwe on 22nd June 2002. If the plaintiff did hold the convention as is being alleged then indeed he was in contempt of court as he had disobeyed the court order. The plaintiff may not have been satisfied with the dismissal of the application to discharge the injunction. However there were only two options open to him. The first was to obey the order of injunction. The second option was to appeal against the dismissal. The plaintiff did not have a third option. I am making this observation because the law is very clear on court orders. The law is that a court order as long as it stands, must be obeyed. This was clearly stated in the case of Hadkinson vs Hadkinson (1952) 285. At page 288 Romer L J had this to say:

"It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it … A party who knows of an order, whether null and void regular or irregular, cannot be permitted to disobey it .. .. It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null and void. ……

As long as it existed it must be obeyed."

This case was cited with approval by Hon, Chief Justice Banda in the case of Dr Peter

Chiwona vs Hon Gwanda Chakuamba MSCA Civil Appeal No. 40 of 2000. A person who disobeys a court order takes the law in his own hands and this cannot be tolerated. In the instant case the defendant alleges that the plaintiff disobeyed the court and want him to be committed for contempt. In addition to the plaintiff there is Hon. J Z U Tembo, as well as Hon. Kate Kainja and Potiphar Chidaya. However in their affidavits in opposition, they say that they are not parties to the action.

I think that before I go any further I must consider who may be liable to be held in contempt of court. Clearly the person or persons against whom the order is made may be held liable if they are in breach. In this case, the plaintiff would be liable if it is found that he had disobeyed the order. The order of injunction, however was not just directed to the plaintiff but to any member of the Malawi Congress Party. So that any member of the Malawi Congress Party who had notice of the order may be found liable if they did what the order forbade. But the law goes further than that. In the case of Seaward vs Peterson (1897) 1 ch 545 it was said that a person who knowingly assists another who is restrained by an injunction in doing acts in breach of the injunction shall himself be liable to committal for contempt although he was not a party. At page 551 North J said as follows:

"In the present case Murray was not a party to the action and upon that ground his counsel argued that he could not be committed for contempt. That does not follow. An injunction to restrain a man, his servants and agents, from doing an act is a common recognized form, and the injunction can be enforced against servants and agents although they are not parties in the action. Murray's counsel failed to explain why servants and agents should be liable to be committed, though they are not parties to the action; while other persons who had done exactly the same things could not be committed because they were not parties to the action. In my opinion that is not the law; any one who deliberately assists another in committing a breach of an injunction can be punished for his contempt of Court in so doing equally with a servant or agent of the person enjoined. I think the words "servants and agents" are inserted by way of warning to such persons, not as describing a particular class of persons, but generally as describing assistants of the person who is restrained from committing the particular act. There is no magic in those words."

In the instant case, it follows that Hon. J.Z.U. Tembo, Hon. Kate Kainja and Potiphar Chidaya can be held liable for contempt if they knowingly assisted or aided the plaintiff in holding the convention although they were not parties to the action. But besides assisting and aiding they can also be held liable as members of M.C.P. since the injunction was directed at all members of the party

The next question to consider is whether they were served with the order. Service is one

of the essential pre requisites to a finding of contempt. It was submitted that service must be proved beyond reasonable doubt. In the case of Bramblevale Ltd (1969) 3 All ER 1062 it was said that

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase it must be proved beyond reasonable doubt."

In their affidavits in opposition Mr. D.T. Kampanje Banda, Hon. J.Z.U. Tembo, Hon Kate Kainja and Potiphar Chidaya deny having been served with the court order. Against these denials, there are affidavits of Yotamu John and Jimmy Yesaya. In his affidavit Yotamu John says that he effected service on Mr Chidaya who refused to accept service. He then left the court order in Mr Chidaya's office. Turning to the affidavit of Jimmy Yesaya, he said he was instructed by Hon. Gwanda Chakuamba to deliver a letter to the Secretary General Hon. Kate Kainja. He handed over the letter to her and saw Hon. Kate Kainja opening it. Attached to the letter was the order of injunction. After reading it, the Secretary General passed the letter and the attachment to Hon. John Tembo who also read the documents. These affidavits are denied. But after carefully considering the facts of the case and the circumstances thereof I accept these affidavits. I therefore find it as a fact that Mr Potiphar Chidaya, Hon. John Tembo and Hon. Kate Kainja were served with the court order. Indeed I am satisfied beyond reasonable doubt that service was done.

But even if there was no service, a person may still be held liable in the event of breach if he had notice of the court order. It is recognized that it is quite possible to evade personal service although one has full notice of the court order. In the case of United Telephone Company v Dale (1884) 25 ch D 778 Pearson J had this to say at 786:

"I do not believe the rule to be, and I shall not act upon the rule as it has been stated to me, that in no case will a court enforce obedience to its injunction by means of a committal to prison, simply upon the grounds that, the injunction has not been served, when it appears beyond all doubts or disputes that, the defendant is aware that the injunction has been granted, and that it is the intention of the plaintiff to enforce it."

The learned Judge went on at page 787.

"..The court would be to a great extent incapable of doing its duty to itself, as well as to Her Majesty's subjects, if it were to say that, with perfectly accurate knowledge of the order of the court, a defendant is at liberty to defy the court's authority, and then come to

the court and say, 'You cannot visit me for that breach of your order, because the order has not been served on me.' What is the necessity of serving an order upon a defendant, if he knows perfectly well without that service, what it is, which he is bound to obey?"

Again in the case of Re Parte Langley (1879) CA 110 Thesiger L.J. had this to say:

"The question in each case and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of court, that you can infer from the facts that, he had notice in fact of the order which has been made? . . . those who assert that there was such a notice, ought to prove it beyond reasonable doubt."

What then are the circumstances of this case. In this case after the injunction was granted, an application was made to discharge it. Common knowledge dictates that a person cannot apply to discharge an order of which he has no notice. The plaintiff instructed counsel to make such an application after he became aware of the order. At paragraph 4 of his affidavit D.T. Kampanje Banda says as follows:

" I received the letter from my lawyers advising me that the court had refused to vacate the injunction on 1st July 2002 as the same had been sent to me by ordinary post."

Who in his same mind can believe this. Perhaps let me briefly set out the chain of events. I granted the injunction on 17th June 2002. On 19th June 2002 an application to vacate the order was made. The application was heard on 20th June 2002. I dismissed the application on 21st June 2002. The convention was to be held the following day 22nd June 2002. The whole thing was extremely urgent. Now Mr Kampanje Banda says in his affidavit that he received communication from his lawyers on 21st July 2002. Perhaps the plaintiff may well be advised that this is not a kindergarten. I have no doubt in my mind that he was informed the same day, that is 21st June 2002.

Let me turn to the application to vacate the injunction. That application was supported by an affidavit sworn by learned counsel. At paragraph 3 it says:

"The statements of fact that I depone to, have been communicated to me by Mr Kampanje Banda, Honourable John Tembo, Honourable Kate Kainja and Mr Potiphar Chidaya, all of whom have first hand knowledge of the matters in issue herein and I

verily believe the same to be true."

This can only mean that all the four persons mentioned in learned counsel's affidavit had full notice and knowledge of the injunction. It cannot be anything else. Having given instructions to counsel to vacate the order they are estopped from claiming that they had no knowledge of the injunction. In the case of Re Tuck Murch v Loosemore (1906) ch 692 Collins MR observed at page 694 that:

"knowledge is higher than service . . . . service is unnecessary where there is knowledge."

In the circumstances I am satisfied beyond reasonable doubt that Mr Kampanje Banda, Hon. John Tembo, Hon. Kate Kainja and Mr Potiphar Chidaya had notice of the injunction granted on 17th June 2002. They also had notice that the application to vacate the injunction was dismissed.

I finally come to the question of breach. Did the plaintiff disobey the injunction and held the convention in Lilongwe on 22nd June 2002. In answer to this question, there are two affidavits. The first deponed to by the defendant Hon. Gwanda Chakuamba and the second was deponed to by Willy Chapawamba Chisemphere. At paragraph 6 Hon. Gwanda Chakuamba says that it had come to his notice that in breach and in obedience of the injunction an M.C.P. Convention was held in Lilongwe on 22nd June 2002 and 23rd June 2002. In his affidavit Mr Chisemphere said that he did attend the M.C.P. convention held at the Natural Resources College in Lilongwe on 22nd June 2002. The master of ceremony was Mr Kampanje Banda. At the opening of the convention, the plaintiff as Master of ceremony announced that he and others had gone to a court to compel president Gwanda Chakuamba to call a convention but instead the court had prevented them from holding the convention. He went on at paragraph 4 that since the party does not belong to the courts but belongs to the supporters the courts would be ignored and the convention would proceed. Further Mr Kampanje Banda invited the delegates to feel free to vote Hon. John Tembo as Party President. Hon. Tembo had signified his desire and willingness to serve the Party as president. And indeed delegates voted Hon. John Tembo as Party President.

The plaintiff raised objections to the affidavits of Hon. Chakuamba and Mr Chisemphere. It was submitted that the affidavit of Hon. Chakuamba does not comply with Order 41 rule 5/2 of the Rules of the Supreme Court in that the source of information and grounds for believe have not been disclosed. It is true that the source of information is not disclosed. But the opening sentence of Order 41 rule 5/3 of the Rules of the Supreme Court 1997 edition reads as follows:

"Although in practice the grounds of the witness's information or belief are frequently not stated a deponent should never state that he believes something unless he has applied his mind to the matter and concluded that there are good grounds for his belief."

That is the general rule. Further down the rule it is said that a party against whom an affidavit of information or belief which omits the relevant grounds is made is entitled to make an objection. Such an objection has been raised in the instant case. However I do not view the objection as one of substance. In the circumstances I accept Hon. Chakuamba's affidavit. Turning to the affidavit of Mr Chisemphere it was submitted at length that it is a fabrication and should not be believed. Hon. Kate Kainja attacked the affidavit on the basis that there is nothing known as Lilongwe Sub Region and there is no post of Sub-Regional Organising Secretary. She further stated that Mr Chisemphere could not have attended the convention, as he was not on the list of delegates. It has however been submitted on behalf of the defendant that there is nothing wrong with Mr Chisemphere's affidavit as he was present at the convention. I must confess that this affidavit has caused me some anxiety. However after carefully considering counsels submissions I have come to the conclusion that the affidavit tells the truth and I accept it. If Mr Chisemphere attended the convention as I have no doubt he did, rejecting the affidavit will only mean shutting out facts that would assist the court. If corroboration is necessary, then I find the same in Hon. Chakuamba's affidavit who deponed to the fact that a convention was indeed held. To answer my earlier question, I find it as a fact and I am satisfied to the requisite standard that the injunction granted on 17th June 2002 was indeed disobeyed as the convention which was stopped did take place.

Having found that the injunction was disobeyed I will now consider if Mr Kampanje Banda, Hon. John Tembo, Hon. Kate Kainja and Mr Potiphar Chidayas can be held liable for the breach. Clearly Mr Kampanje Banda is guilty of contempt. He is the plaintiff in this action and the injunction was directed at him and of course all members of the Malawi Congress Party. The injunction was restraining him from holding the convention. Not only was the convention held, but that he was also a master of ceremony. I now turn to Hon. John Tembo. He is leader of this faction of the Malawi Congress Party. He must have sanctioned the convention. A meeting of this magnitude cannot take place without his approval. I have found that he had the notice of the injunction. It was within his powers to stop the convention so as to comply with the court order. He did not. Instead he had signified his willingness and desire to be elected President at the convention and he was indeed elected President. I am aware that he was not a party to the action and I have already dealt with that aspect of the matter. To allow himself to be elected President, it means that the he had encouraged that the convention be held so that he could be elevated to that post. In the result I find him guilty of contempt of court. Next, I come to Hon. Kate Kainja. She is Secretary General of the party. The injunction was directed at all members of the party including herself. She participated at the convention. Mr Kampanje Banda called upon Mr Majoni to chair the convention through her. Before the convention was held, she had written a letter inviting Hon. Chakuamba to the convention. This means that Hon. Kainja not only participated at

the convention but she had also taken part in organizing the same. Indeed the post of Secretary General is crucial to the holding of a convention. I also find her guilty of contempt. Finally I come to Mr Potiphar Chidaya. He was an administrator in the M.C.P. Apart from having notice of injunction, it is not clear what role he played in holding the convention. He is not even mentioned in Mr Chisemphere's affidavit that he attended the convention. In any case as an administrator he could only act on instructions from politicians. I do not find him guilty.

The defendant has asked this court to declare the convention held at the Natural Resources College in Lilongwe on 22nd and 23rd June 2002 void abinitio, illegal and a nullity. It is submitted by the plaintiff that such a declaration is unnecessary as it will pre-empt the action before the court. I have no problem with granting what the defendant is calling for. The declaration will not pre-empt the action. If anything it is the plaintiff who has pre-empted the action by holding the convention. Let me refer to the case of Macfoy vs United Africa Co Ltd (1961) 3 All ER 169 where Lord Denning made this observation at page 1172:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and except it to stay there. It will collapse."

It follows that the declaration I am called upon to make is only for convenience, otherwise whatever was deliberated at that convention automatically collapsed. The convention was not only unconstitutional, but it was held in defiance of a clear and un ambiguous court order. In law it is as if there was no convention. I therefore declare it void abinitio, illegal and a nullity.

Before I come to sentence, I wish to make a few observations. This is history repeating itself. I entirely agree with the defendant that this is a disgraceful and outrageous defiance of a court order. It is time the MCP started respecting court orders. It is time the MCP returned to constitutionality. Indeed it is time the MCP started to learn from their past mistakes. In the case of Dr Peter Chiwona vs Hon. Gwanda MSCA Civil Appeal No. 2 of 2000 the Supreme Court warned the MCP. At page 9, Hon. Chief Justice Banda said:

"It appears to us that the Lilongwe convention was convened in violation of these principles. We also hold the view, considering the total facts, that the Lilongwe convention must, have been aware of the court order stopping it from taking place and that it was deliberately decided to disobey the court order. This was most reprehensible conduct and courts cannot condone it. As we have seen, had the proper procedure been followed by the respondent, some people at the Lilongwe convention would have been

committed to prison for contempt, for disobeying the court order."

That warning from the Supreme Court was not enough. It is perfectly true that the MCP does not belong to the courts. Perhaps the role of courts is not appreciated. The role of courts is simply to see to it that constitutionality and the rule of law are maintained. In this case, the plaintiff commenced an action to compel the defendant, who is President of the MCP to convene a convention. Before that case is heard, a convention was unconstitutionally and in violation of a court order held in Lilongwe. This is indeed undermining the authority of the court.

In the case of Chupa vs The Mayor of Blantyre City Assembly and others Civil Case No. 133 of 2001 a sentence of 14 days imprisonment was passed. The sentence was suspended for 18 months on condition that the accused did not commit a similar offence. The court observed that the accused were first offenders. In the instant case the contemnors are also first offenders but there was a flagrant and deliberate defiance of court order. I have considered whether to impose a custodial sentence. In view of the fact that they are first offenders I have decided against such a sentence. I think that a fine would be a better alternative. However when it comes to a fine I am in some difficulty as there is no precedent to go by. As I said this is a serious matter and the fine must reflect that seriousness. I order that each of them should pay a fine of K200,000.00 and in default thereof 12 months imprisonment.

I now come to costs. This is in the discretion of the court. Although I have found Mr Chidaya not guilty, this will not affect costs. If anything his role was very insignificant. The plaintiff will pay costs of this motion.

Pronounced in open Court this 11th day of October 2002 at Blantyre.

M.P. MKANDAWIRE

JUDGE