IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONSTITUTIONAL CAUSE NO. 3 OF 2004

IN THE MATTER OF THE MALAWI GENERAL ELECTIONS; AND IN THE MATTER OF ACCESS TO STATE CONTROLLED MEDIA FOR ELECTORAL COMPETETORS

and

IN THE MATTER OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT; AND IN THE MATTER OF THE ELECTORAL COMMISSION ACT; AND IN THE MATTER OF THE CONSTITUTION OF MALAWI

BETWEEN:

NATIONAL DEMOCRATICE ALLIANCE.....PLAINTIFF

and

THE ELECTORAL COMMISSION.....1ST DEFENDANT

and

THE MALAWI BROADCASTING **CORPORATION.....2ND DEFENDANT**

and

TELEVISION MALAWI LIMITED.....3RD DEFENDANT

CORAM: JUSTICE A.C. CHIPETA
HONOURABLE JUSTICE F.E. KAPANDA
HONOURABLE JUSTICE T.R.M. CHIZUMILA (MRS)
Kasambala and Mwakhwawa, of Counsel for the Plaintiff
Chokotho, of Counsel for the 1st Defendant
Ngutwa, of Counsel for the 2nd Defendant
C. Kalua, of Counsel for the 3rd Defendant
Balakasi and Rhodani, Recorders and Court Clerks

Date of hearing : 6th May 2004
Date of Judgment : 14th May 2004

JUDGMENT

Introduction

The Plaintiff is a political party in this country. It is known by the name National Democratic Alliance. In this case it is represented by M/s Kasambala and Mwakhwawa, of Counsel.

Procedural Matters

There are in all three Defendants in this matter. The first is the Electoral Commission, which is represented by Mr Chokotho, of Counsel. The second Defendant is the Malawi Broadcasting Corporation, which is represented by Mr Ngutwa, of Counsel. The third Defendant is Television Malawi Limited, which is represented by Mr Kalua, of Counsel. The Plaintiff commenced these proceedings, which are by way of Originating Summons, on 20th April 2004. In terms of Order 12 rule 9 as read with rule 5 of the same Order under the Rules of the Supreme Court, the time allowed for acknowledgement of Service of Originating

Summons, where service is to be effected within the jurisdiction, is 14 days from

the date of service. For some reason, unknown and unexplained to us, the Plaintiff chose to neglect this rule. It asked the Defendants to this action to acknowledge service of the Originating Summons herein within 10 days only instead of within the time prescribed by the Rules.

The action having thus begun, the next day i.e. 21st April 2004, the Plaintiff presented and argued an ex-parte application before the Deputy Registrar of the Court. In consequence of that step it obtained an order abridging the time within which the Originating Summons had to be heard. The matter thus ended up being set down for hearing on 29th April 2004. This was only eight days away from the date of abridgment of time. By then, it is to be noted, not a single one of the Defendants in the case had yet been served with the Originating Summons. Consequently, none of them was legally aware of the existence of the action in this Court against them.

As matters stood, therefore, this case was fixed for hearing just a little more than a week away from issue of the Originating Summons. Indeed, it was so set down for hearing before the Defendants were aware of it and even before their time for acknowledging service, be it the 14 days according to the rules, or be it the 10 days according to the time the Plaintiff unilaterally and without legal sanction imposed, had begun to run. The record will show that the Defendants were only served with the Originating Summons on 22nd April 2004. As such, at the time they were being so served a hearing date was already in place. The matter was coming for hearing well before the time the Defendants were entitled to or were given for purposes of acknowledging service was due to expire.

We were wondering, when the case was called for hearing, whether the multiple abridgements of time we have just shown would in any way bother the Defendants. We however saw no sign that they were at all concerned with them. None of them complained against any of these shortcuts in procedure.

Now, although the matter started with the three Defendants registering some preliminary objections with the Court, none of those touched on the points just mentioned above. The objections equally did not touch on some of the more grave concerns we had, as a Court, on the state of the Court file at the time and the fact that it did not seem ready for a hearing to take place on the occasion. We thus felt compelled in the end to ourselves raise with learned Counsel for all the parties herein what we felt rendered it difficult for us to plunge into a hearing of the case there and then. The matter appeared to us to be far from ripe for such exercise, the anxiety of the parties to start it notwithstanding. We did this so as to benefit from the explanations of Counsel before we could take a position on the observations we had made. Further, we made these observations realizing that the matter before us was of paramount importance as it touched on constitutional provisions.

The following day, 30th April 2004, we ruled on all the preliminary issues that had featured in the case. We also took the opportunity in the ruling to give to the parties directions as regards the rectification of the defects we had spotted so that the case could be made ready before we could commence its hearing. The parties assured us of speedy compliance with these directions and they indicated to us that we could safely give them a date six days hence. Accordingly, we adjourned the matter to 6th May 2004 for hearing.

Earlier Ruling

It is not necessary here to repeat what we said in our ruling on the preliminary issues. However we think it is

significant, in a nutshell, to capture the salient features of that ruling. We do so because our earlier ruling has a bearing on the outcome of this case. It is worth recalling to mind that due to breaches of procedural rules, including Order 41 rule 5

of the Rules of Supreme Court, the Plaintiff's case did not remain as intact as originally filed at the end of the day. In its affidavit filed in support of the Originating Summons, four out of five exhibits, being exhibits "SM1," "SM3," "SM4a," and "SM4b" were rejected as hearsay evidence. In addition what had been filed as the Plaintiff's supplementary affidavit in the case, the deponents of which had no link with the case and no authority to swear an affidavit in it, was also rejected. Thus in support of its case the Plaintiff only remained with its original affidavit in support with one acceptable exhibit.

The Originating Summons

In its Originating Summons the Plaintiff has posed seven questions for the determination of this Court. For lack of brevity in expression we will set out the questions in full. These are:

> " 1. Whether the 1st Defendant has a duty in law to ensure that the electoral process is free and fair or not;
>
> 2. Whether equal coverage of the electoral activities and propaganda of all the competitors in the electoral process is an integral part of the holding of free and fair democratic elections;
>
> 3. Whether equal access to the media for all competitors in the electoral process is an integral part of the holding of free and fair democratic elections or not;
>
> 4. Whether the first Defendant has failed to ensure for all competitors equal and fair access to the state media or not;
>
> 5. Whether the 2nd and 3rd Defendant is under an obligation to accord equal and or free and fair access to its facilities

to all competitors in the electoral process or not;

6. Whether the 2nd and 3rd Defendants has accorded preferential treatment and access to its facilities to the United Democratic Front and its presidential and other candidates or not;

7. Whether the 2nd and 3rd Defendant has in violation of its legal obligations to the nation and all the competitors in the electoral process fail to accord such competitors equal and fair access to its broadcast facilities or not?"

Following the determination of the questions the Plaintiff prays that the Court gives the following orders, declarations, and directions against the Defendants:

"1. That the 1st Defendant be ordered to take steps to ensure that free and fair elections are held in the country as required by law.

2. That the 1st Defendant be directed to take concrete steps to ensure that all competitors in the electoral process have equal and or fair access to all state controlled media and in particular the Malawi Broadcasting Corporation and Television Malawi Limited.

3. That the 1st Defendant be directed to take concrete steps to ensure that all state controlled media and in particular the Malawi Broadcasting Corporation and Television Malawi Limited take concrete steps to accord equal and or fair access to their facilities to all the competitors in the electoral process political compliance by all state organs and the Malawi Broadcasting Corporation and Television Malawi Limited in particular with the provisions of the Presidential Parliamentary Elections Act, the Electoral Commission Act and the Constitution of Malawi internationally recognized

practice in democracies and in regard to the process of managing the electoral process.

4. That the 2nd and 3rd Defendants be directed to comply with the Parliamentary and Presidential Elections Act, the Electoral Commission Act and the Constitution of Malawi and internationally recognized practice in democracies and to accord equal and or fair access to its facilities to all competitors in Malawi electoral process for the 2004 General Elections."

Observations on the questions and the relief sought in the Originating Summons

There is a local case authority that has featured highly in these proceedings right from the stage of preliminary objections. This is the case of Dr Charles Kafumba, Luka Banda, Laurent Kamulete vs The Electoral Commission and The Malawi Broadcasting Corporation.[1] It was decided by the Hon. Justice Mkandawire on 10th June 1999, just a few days before the 1999 General Elections in Malawi.

On examination and comparison we observe that the present case is virtually just a reincarnation of the Kafumba case above-referred. In that case too seven questions were put before the Court for determination and almost word for word they were couched in exactly the same terms as the questions posed in this matter. Further, when it came to the prayers the Plaintiffs wanted from the Court, four prayers were listed. They too, almost word for word, were exactly like the prayers tabled before this Court. The only differences we have been able to note between these two cases are:

(i) that the Plaintiff has changed,

(ii) that Television Malawi Limited has now joined the team of Defendants, and

[1] Misc. Civil Cause No. 35 of 1999 High Court (unreported)

(iii) that the elections the action relates to are the forthcoming 2004 ones as opposed to the 1999 ones that featured in that case.

This aside, we have also noted, that in large measure the arguments that were advanced in the Kafumba case are the very ones that have been repeated before us in this case. Basically, therefore, this case in terms of the way it has been framed is just a recycled Kafumba case.

On point of our acknowledgement of this striking similarity between these two cases, let us hasten to mention, that we still stand by the ruling we issued on 30th April 2004 in this case that this matter does not lie *res judicata*. As we clearly held then on the authorities of Ngunda vs Mthawanji[2] and Inspector of Taxes vs Sacranie[3] and even on reference to the 4th edition of Stroud's Judicial Dictionary, *res judicata* will only apply on issues that have been previously raised and decided between the same parties, which is not the case here.

At the same time we wish to reiterate our disagreement in our April 30th ruling with the procedure the Court adopted in the initial filing of the Kafumba case, of making the lodging of a written complaint with the Electoral Commission a pre-condition for commencing an action in the High Court. We took the view and still stand by it that, empowered as this Court is, under clear constitutional provisions which do not restrict its original jurisdiction in hearing and determining, inter alia, any civil proceedings under any law, we will not allow litigants, on matters concerning the violation of fundamental rights, to be blocked from accessing justice in this manner.[4]

Acknowledgement of Service and Defendant's

[2] [1987-89]12 MLR 183

[3] [1923-61]1 ALR Mal. 615

[4] See Section 41(2) and (3) as read with 108(1) of the Republic of Malawi Constitution

Affidavits

Leaving the Kafumba case aside for the moment, having already disclosed the processes the Plaintiff filed in the matter, we should record the fact that, despite the limited time available to them, all the Defendants managed to file acknowledgements of service of the Original Summons herein. They also managed to file affidavits in opposition to it. In the case of the 1st Defendant, the Electoral Commission, it initially filed an affidavit sworn by its Chief Elections Officer, Mr Roosevelt Gondwe. This affidavit carries with it three exhibits

respectively marked as "RG1" to "RG3". Next the Electoral Commission filed a supplementary affidavit in opposition sworn by Mr Fergus Lipenga, its Head of Media and Public Relations. As regards the 2nd Defendant, Malawi Broadcasting Corporation, its Director General, Mr Owen Maunde, swore an affidavit in opposition carrying one exhibit marked "OS1". The 3rd Defendant also only filed a single affidavit in opposition. The deponent thereof was Mr Wellington Kuntaja, who is the 3rd Defendant's Chief Editor/Head of News and Current Affairs. This affidavit carried with it five exhibits, respectively marked "WK1" to WK5."

Hearing of the Originating Summons

On 6th May 2004, when the case was next called for hearing, we noted that the parties had, in the limited time they had secured for themselves to remedy the shortfalls pointed out, tried their best to do so. To a substantial extent they had complied with the directions which we had issued in our ruling of 30th April 2004. We thus heard all the parties argue their sides of the case.

Court Bundle

With specific reference to the Court bundle we had so much emphasized on, although the one we got was rather loose and incomplete, with last minute production of copies of authorities to be relied upon on the part of learned Counsel for the 2nd Defendant during the hearing of the matter, we ended up with nearly as complete a Court bundle as we could hope for in the rushed circumstances of this case.

Analysis of the Evidence

Before we can revisit the arguments the parties presented at the hearing we carried out, we believe it would be timely now to adequately survey and assess the processes the parties filed in Court in preparation for the case. As earlier on mentioned, in support of the Originating Summons, the Plaintiff filed an affidavit in support. The deponent thereof is the Plaintiff's Director of Publicity Affairs, Mr Salule Masangwi. By and large, from the way his affidavit has been framed, the facts he has sworn to have come to him in the course of his duties in the Plaintiff party and he is therefore mainly relying on information which he has indicated that he verily believes.

It is to be observed at this point that the rules regarding use of affidavits in actions do not allow this type of affidavit in a matter like the present where we are not dealing with interlocutory matters, but with a final determination of parties' rights. Order 41 rule 5(1) of the Rules of Supreme Court, as clearly explained in practice note number 41/5/1 demands that such affidavit contain only facts the deponent can speak of from his own knowledge. In other words, an affidavit in support of the kind of matter before us is supposed to contain the equivalent of what would be the deponent's oral evidence, if he were called upon to testify in open Court. Indeed sub-rule(2) of the same Order 41 rule 5 shows that affidavits containing statements of information or

belief are only suitable for use in interlocutory proceedings.

Determination Defects in affidavit in support

As will be seen, therefore, we have before us an Originating Summons through which the rights of the parties to the action are to be determined. The affidavit filed in its support, according to the rules, unfortunately happens to be one suitable for an interlocutory application, as it is largely based on statements of information and belief. In fact, as will be further noted, even in the situations where such affidavit is suitable, apart from deposing to the effect that one has information which he believes, the deponent is required to disclose the sources of such information and the grounds thereof. Upon going through the affidavit in question we note, not only that it falls short of the expected standard because it is mainly based on information and belief, but it also so fails because, to a substantial extent, it does not disclose sources and grounds of the said information.

Live and unfair coverage

Be this as it may, among other things, the affidavit of Mr Masangwi has asserted that the information he has received and believed, and of which he then says he is aware, is to the effect that the 2nd and 3rd Defendants have given and continue to give unfair coverage of activities and unfair news coverage of the ruling United Democratic Front as against the Plaintiff and other political parties. Further, the Plaintiff complains that he has also been informed and verily believes to be true that the 2nd Defendant unfairly gave live coverage and rebroadcast the United Democratic Front's launches of its campaign and manifesto in Blantyre and Lilongwe and that the same were also broadcast by the 3rd Defendant on several occasions. Moreover, it is the complaint of the Plaintiff that like unfair coverage and broadcasting has been undertaken by the 2nd and 3rd Defendants in respect of whistle stop tours of the United

Democratic Front in Mangochi and Phalombe promoting Bingu Wa Mutharika.

Alleged attack of Plaintiff party

Furthermore, Mr Masangwi has alleged, in the same affidavit, that in the live coverage and broadcasts of the United Democratic Front's campaign activities his party has come under direct attack, but that the 2nd and 3rd Defendants have not given it any right of reply on the allegations made against it and its leaders. The deponent then goes back to information he has received and believed, of which he then claims he is aware, to the effect that complaints have been made to the 1st Defendant about the conduct of the 2nd and 3rd Defendants, but that the said 1st Defendant has done nothing to ensure equal coverage of the activities of all parties participating in the Presidential and Parliamentary elections to be held on 18th May 2004. In this regard the deponent exhibited a letter marked "SM2" written by the Secretary General of his party,

Mr Wilfred Dambuleni, to the Chief Elections Officer of the 1st Defendant on 23rd March 2004 under the title "Biased Coverage by Television Malawi Limited and Malawi Broadcasting Corporation (MBC)." Mr Masangwi has wound up his affidavit by claiming that the 1st Defendant has failed and/or neglected to level the playing field and to ensure equal coverage of the news and activities of the parties contesting the elections.

We believe that all parties to this case do duly appreciate the fact that Malawi follows the common law system of justice. This system, at heart, is adversarial and not inquisitorial. The burden, in this system, lies on the party that asserts, that seeks to be believed by the Court, to

furnish to the Court ample and credible evidence for it in turn to be satisfied about that party's case. It is no business of the Court in the system that applies in this country to go out and hunt for evidence on behalf of the parties. Courts are enjoined to base their decisions solely on the evidence procedurally presented before them in the cases filed before them and on nothing else.

Now in this case most of the contents of the affidavit in support so far gone through are what are known as assertions or allegations. Before an allegation is accepted to be true it is trite that there must normally follow evidence to prove it. In civil cases the standard of proof is, of course, not so high. A preponderance of probabilities suffices.[5]

An examination of the affidavit herein will show that most of the assertions made in it have not been beefed up with what can be called evidence in support. One would have expected for example that the assertion "unfair coverage of activities and unfair news coverage of the ruling United Democratic Front as against the Plaintiff..." would be accompanied by legally acceptable evidence which could enable the Court to make an objective assessment of the coverages in question and to eventually come to an independent conclusion on the assertion made. The same would be true for complaints relating to live coverage and rebroadcasts of the launches of compaign and manifestos of the United Democratic Front and of the Plaintiff Party by providing evidence regarding the comperative quantity, quality, content, and duration of the competing coverages and broadcasts.

So also, over and above the allegation that the Plaintiff has come under direct attack from the United Democratic Front in these broadcasts, one would have expected evidence to be furnished, may be even in the form of visual or audio tapes, for the Court to directly appreciate the

[5] See *Miller vs Minister of Pensions* [1947]2 All ER 372

evidence behind the complaints in issue. We should emphasize that in our system of justice it is always incumbent on the parties to bring material and convincing evidence before the Court. It is no part of the rules of evidence that the Court will scout for itself in search of evidence that will satisfy it on any party's complaint or allegation. The Plaintiff has however merely been contented with making bare assertions and leaving it at that as if the assertions in themselves are evidence.

It will be recalled, we believe, that exhausted and perplexed with what were clear gaps in the Plaintiff's supply of evidence in support of its case to the Court we, at some point during the hearing, even asked learned Counsel for the Plaintiff why the evidence being alluded to as existing was not really being presented to the Court for it to assess it itself. The response we got was that as a Court we could indeed order that some tapes about the coverages and broadcasts complained of be brought to the Court by the 2nd and 3rd Defendants so that we can sample them. Certainly we could not do that as doing so would be fishing for evidence for the benefit of a party or of the parties to the case. It was the job of the Plaintiff, to ensure that the affidavit in support of its Original Summons carries enough evidence within it.

As can be further seen even on the allegation the Plaintiff makes in its affidavit to the effect that it has come under direct attack from the United Democratic Front, the deponent has fallen short of particularizing the attacks so made, or to otherwise table before the Court the said attacks in legally acceptable evidence for the Court's consumption. Further, despite the complaint that the 2nd and 3rd Defendants have not accorded the Plaintiff the opportunity to reply, since Code 5(2) in the 3rd Schedule to the Communications Act 1996 requires that the person so

attacked specifically request for such opportunity, no indication or evidence has been furnished in this affidavit to show that any such request for a reply was ever made and refused.

In the absence of a clear and unequivocal admission of liability in a civil case there is no escape from the onus to supply adequate evidence by a party that asserts wrongdoing against another. Indeed the very cases learned Counsel for the Plaintiff have cited and furnished us with clearly demonstrate this. For example in Attorney General and Others vs Kabourou,[6] a Tanzanian case in which the Respondent was challenging the results of a by-election that came out in favour of a Chama Cha Mapinduzi candidate, and where part of the allegations were that Radio Tanzania, Dar-es-Salaam, had given more airtime to the campaign of the party of this winner candidate, and that it had been biased in his favour, to prove the case to the Court the parties placed reliance on extensive live testimony. In our reading of that case there were no less than fifteen witnesses from the Plaintiff's side and no less than eight defence witnesses when the case was heard at first instance. The range of witnesses included people who worked in the media as well as ordinary citizens who had attended the various campaign rallies. They could even recite the attacks that were made and identify the

officials that made them including His Excellency Alli Hassan Mwinyi.

Another good example would be the case of Tamasese Efi vs the Attorney General of Samoa[7] in which the Leader of the Opposition in Samoa was complaining of a ban allegedly imposed on him from accessing television, radio, and newspapers by the Prime Minister who was also the Minister of Broadcasting in the regime that was current at the time of

[6] [1975]2 LRC 757

[7] WSSC 22 of 2000 (unreported)

suing and his predecessor in the regime preceeding it. Although in large measure too in that case reliance was placed on affidavit evidence, each and every deponent was searchingly cross-examined on his/her affidavit, and the Court was clearly given ample evidential material on which to base its decision in the case. Again in that case there were no less than 10 witnesses on the side of the complaining leader of the opposition and no less than four witnesses on the side of the sued Attorney General.

In our case, in contract, the Plaintiff has put in one affidavit in support, the supplementary one having been disqualified and rejected on procedural grounds. As earlier pointed out, this affidavit has been sworn as if it was in support of an interlocutory application, and not for the type of action we have at hand, by being based on information and belief. Indeed, the affidavit does not divulge the sources and grounds of the information it deposes to. Besides, as also shown, in the main the affidavit contains bare assertions or allegations, without the requisite supporting proof. The Court, as also disclosed, has not been provided with any material on which it can test and either confirm or disprove the deponent's assertions on the various allegations he has made in his affidavit. In the presentation of the case it was mentioned several times that there is overwhelming evidence in support of the Plaintiff's allegations. Without making it available, as

demonstrated by our above analysis of the affidavit in support, we find ourselves at a loss when we search the file before us, which should be our only repository of evidence for the determination of this case, where this overwhelming evidence really is.

At this point the developments that took place at preliminary objection stage readily come to mind. Commenced and fixed for hearing in a great rush, it will be recalled that on the very first day this case was called for hearing, the Plaintiff was found at fault of getting hold of

mail between the Public Affairs Committee and the Electoral Commission and then exhibiting it as its evidence, in a bid to prove some of its allegations in the matter. The Plaintiff was also faulted for picking reports published by a Media Monitoring Unit that is not part of it and exhibiting them as its evidence. The rules of evidence, as captured in Order 41 rule 5, clearly forbid this. On this account we disqualified those exhibits as not being evidence the Plaintiff could exhibit. For a party that had filed an affidavit in support of its case to lose in it four out of the five exhibits it was going to rely on would most certainly have been quite a set back in its preparation of the case.

One therefore would ordinarily have expected that the party so affected by this blow from the evidential rules would require a bit of time to reflect on the effect of that impact on its case before forging on. It is not to be forgotten that at the same time as the Plaintiff lost these four exhibits from its arsenal of weapons meant for the advancement of its case, it also lost a supplementary affidavit. We would have thought that in the circumstances the need for the Plaintiff to at that time take stock of its case was very eminent. As happened, however, the Plaintiff openly demonstrated that it did not in the least care about how that exclusion of what it had filed as part of its evidence really affected its case. Thus the Plaintiff immediately went ahead to ask the Court for a date only six days away to argue its case as if nothing significant had happened to it in the ruling on preliminary objections.

We found that a bit strange, but it is no business of ours to dampen the faith parties hold in the strength of their cases. As we have, however, now just shown in our commentary on the balance of the evidence the Plaintiff was finally left with, it did not measure to the mark the law would expect in a case of this weight. It mainly came from information and belief when the law required it to be from direct personal knowledge. It also mainly comprised of assertions whose substantiation was not incorporated within the affidavit, and the Court was given no alternative

opportunity to view or otherwise listen to the coverages or broadcasts complained about by the Plaintiff. The Court was thus not given a chance to judicially assess whether or not to agree with the deponent's assessment as made in the affidavit in support.

It therefore came as no surprise to us when in arguing the Plaintiff's case, learned Counsel for the Plaintiff tended to frequent the affidavit of Mr Roosevelt Gondwe and its exhibits as a supplement to the contents of the affidavit the Plaintiff had filed. We merely took this as an oblique recognition and acknowledgement that the affidavit of Mr Masangwi alone, and as couched, was falling short of amply substantiating the Plaintiff's action. Thus in order to give it a boost in the action, parts of Mr Gondwe's affidavit in opposition and/or its exhibits had to be picked on and exploited to the advantage of the Plaintiff.

No facts to argument the law

While on the subject of the facts, or the evidence the Plaintiff needed to have loaded its affidavit with in support of the Originating Summons so as to convince the Court of the violations and the biases it has alleged against the Defendants herein, we would like to make an observation. It is that as we studied the parties' processes, skeleton arguments, and the authorities, and also as we heard the presentations in this

case, on the part of the Plaintiff, we gained a distinct impression that more weight and time was devoted to argument on the law as compared to argument on the facts that necessitated the case. While we were fully addressed on what the law on media coverage and broadcasts is in Malawi, in other countries, and at regional and international levels, the facts behind this case, i.e. those that triggered its commencement, were not given as thorough attention as the law was.

Now when a Court is dealing with a case it is as much interested in the facts giving rise to it as it is interested in the law applicable. To merely make pronouncements on the law without an adequate factual base may sit well in a symposium situation or in an academic one, but certainly not in a judgment. We take the opportunity to sincerely commend the learned Counsel for the Plaintiff for their thorough and effective digging up and exposing of the law on the subject at hand. Actually the skeleton arguments they filed on behalf of the Plaintiff bear clear testimony of this. Pages 3 to 18 tackle all important Sections of the Constitution between Sections 4 and 76, all material provisions of the Electoral Commission Act 1998, all material provisions of the Presidential and Parliamentary Elections Act, (Cap 2:01), and all relevant provisions of the Communications Act, 1998.

They also tackle relevant provisions of the United Nations Declaration of Human Rights, the International Covenant on Civil and Political Rights, apart from spilling over to regional instruments including the African Charter on Human and People's Rights, and the European and the American Conventions in respect of Human Rights. As regards case authorities we have been taken on a tour of a chain of Ghanaian authorities, Tanzanian case authorities, authorities decided by the Privy Council from various parts of the Commonwealth and even authorities from the House of Lords, among others.

We have also been exposed to a lot of guidelines covering Media Regulatory bodies, equitable access for political parties, Obligation of Pluralism, Guidelines for Election Broadcasting in Transitional Democracies from Article 19, as well as General comments of the Human Rights Commission of the United Nations, among others. Our dedicated reading of all this law from legal provisions, precedents, legal texts, and local and international practices or guidelines has throughout, however, been accompanied by the question,

whether evidentially or factually the Plaintiff has laid a proper foundation for its case.

We find, on assessment, that the Plaintiff has given us an overdose of the law and a complete underdose on the facts in support of its case. Having made the mistake of attaching four pieces of hearsay evidence to its main affidavit and having lost the same on the way, and having also lost use of its supplementary affidavit, the Plaintiff took no steps to recover from this loss of balance in its case. The Plaintiff placed too much faith in an affidavit that depended on information and belief and which was therefore limping from the word “go”. Worse still the affidavit in question hardly carried the details or the evidence to substantiate the allegations it contained.

The law, it appears, was recited to such extensive and extreme levels as to cloud the situation or to cover up for this shortfall in the evidence the Plaintiff was required to furnish to the Court. Our holding in the circumstances is that extremely good though the Plaintiff was in presenting the law, that per se did not compensate for the clear deficiency in the evidence it furnished in support of its case. We were not, in this Court, given an adequate base upon which to objectively assess whether the allegations contained in the affidavit supporting the Originating Summons are or are not true. In so rushing this case through the Court, the Plaintiff omitted to care for one vital element in it - i.e. the evidence to prove it to the requisite standard.

Mode of commencement of proceedings

The matter herein having been commenced by Originating Summons we also find it opportune to at this stage just look back to Order 5 rule 4(2)(a) and (b) of the Rules of the Supreme Court and to briefly reflect on it. Matters to be brought under Originating Summons procedure

generally ought to be those where either the sole or principal question to be resolved is the construction of a piece of law or an instrument under such or matters "in which there is unlikely to be any substantial dispute of fact" (our emphasis).

Without necessarily questioning the wisdom of the Plaintiff for choosing this mode of commencing its case, we note that the assertions made by the Plaintiff through the affidavit of Mr Masangwi have been met with four affidavits in opposition from the three Defendants herein. Thus even discounting the shortfalls that we have pointed out in the affidavit of the Plaintiff, the question becomes whether honestly this was a case on which a Court could properly be expected to adjudicate on affidavit evidence only.

Conclusion

How, even if all the affidavits on the file were of facts from personal knowledge, were we to gauge demeanour and credibility of the deponents, merely by looking at the mute contents of the affidavits they have submitted? Further, how were we to judge the coverages and broadcasts complained about herein without being given the opportunity to examine their recordings or without being given other enlightening evidence so as to come up with our own opinions on them. Was just looking at the affidavits, opposed as they are, going to help us at all? How were we to choose which affidavit to believe as containing the truth and which one to disbelieve as containing lies just by looking at the opposing documents?

The Plaintiff having displayed such heavy weaknesses in regard to the evidence it has tried to put at the disposal of the Court through its affidavit in support, it now seems pointless to survey and assess the defences the three Defendants put up through their affidavits in opposition. Such would only have been necessary if the Plaintiff had managed to capture some evidence and to procedurally

place it before the Court. As already demonstrated above the Plaintiff has not done so. We take the view therefore that the Plaintiff opted for a fatal path when it chose not to pay much attention to the grounding of its case in evidence, well apart from grounding it in the law. We accordingly discuss the Originating Summons herein with costs.

Pronounced in open Court this day 14th day of May 2004 at Blantyre.

Signed……
A.C. Chipeta J

Signed……
F.E. Kapanda J

Signed……
T.R.M. Chizumila (Mrs) J