**JUDICIARY**
**IN THE HIGH COURT OF MALAWI**
**LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)**
**JUDICIAL REVIEW CAUSE NO. 66 OF 2021**

**BETWEEN**

**THE STATE (On application of:**

**MUNDANGO NYIRENDA ..... 1ST APPLICANT**

**CENTRE FOR DEMOCRACY AND ECONOMIC DEVELOPMENT INITIATIVES (CDEDI) ..... 2ND APPLICANT)**

**AND**

**MINISTRY OF THE MALAWI GOVERNMENT RESPONSIBLE FOR HEALTH ..... 1ST DEFENDANT**

**SPEAKER OF PARLIAMENT OF MALAWI ..... 2ND DEFENDANT**

**THE ATTORNEY GENERAL ..... 3RD DEFENDANT**

**UNKNOWN OTHERS ..... 4TH DEFENDANT**

**CORAM:** **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mr. Taulo, Counsel for the Applicants
Mr. Nyirenda, the Attorney General, Counsel for the Defendants
Mr. Henry Kachingwe, Court Clerk

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**RULING**

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*Kenyatta Nyirenda, J.*

Introduction

1. This is my Ruling on two applications made by the Applicants, namely, an application for permission to proceed with judicial review and an application for an

order of interlocutory injunction. The applications are brought under Order 19, rules 20, 21 and 22 of the Courts (High Court) (Civil Procedure) Rules [hereinafter referred to as the "CPR"].

Challenged Decisions

2. The decisions of the Defendants which the Applicants seek to be judicially reviewed [hereinafter referred to as the "challenged decisions"] are stated as follows:

> *"(a) the decision of the 1st Defendant to introduce mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector, including journalist which amount to a violation of fundamental rights guaranteed by the Constitution of Republic of Malawi* (Challenged Decision No. 1);
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> *(b) the decision by the 1st Defendant to administer Mandatory vaccination without citizens free and informed consent which amount to interference with human right of bodily integrity, which is part of the right to private life enshrined in the Universal Declaration of Human Rights and is contrary to principles within international law* (Challenged Decision No. 2);
>
> *(c) the decision by the 2nd Defendant to deny the 1st Claimant entry into Parliament building on 23rd December, 2021 due to failure to produce vaccination certificate that amount to derogation of fundamental human rights enshrined in the Constitution of the Republic of Malawi and enshrined in the Universal Declaration of Human Rights as well as contrary to principles within international law* (Challenged Decision No. 3);
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> *(d) the Decision by the 4th Defendant to deny its employees entry into work premises due to failure to produce vaccination certificate amount to derogation of fundamental human rights enshrined in the Constitution of Republic of Malawi and enshrined in the Universal Declaration of Human Rights as well as contrary to principles within international law* (Challenged Decision No. 4)".

Reliefs Sought

3. The following reliefs are sought by the Applicants:

(a) a declaration that the decision by the 1st Defendant to introduce mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector including journalist (sic) which amount to a violation of fundamental rights guaranteed by the Constitution of (sic) Republic of Malawi is arbitrary, unreasonable in the wednesbury sense, ultra vires and unconstitutional (Relief No. 1);

(b) a declaration that the decision by the 1st Defendant to administer mandatory vaccination without citizens free and informed consent which amount to interference with human right of bodily integrity, which is a part of the right to private life enshrined in the Universal Declaration of Human Rights and is contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional (Relief No. 2);

(c) a declaration that the decision by the 2nd Defendant to deny the 1st Applicant entry into Parliament building on 23rd December, 2021 due to failure to produce vaccination certificate (sic) that amount to derogation of fundamental human rights enshrined in the Constitution of Republic of Malawi and enshrined in the Universal Declaration of Human Rights as well as contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional (Relief No. 3);

(d) a declaration that the decision by the 4th Defendant to deny entry into work premises due to failure to produce vaccination certificate that amount to derogation of fundamental human rights enshrined in the Constitution of Republic of Malawi and enshrined in the Universal Declaration of Human Rights as well as contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional (Relief No. 4);

(e) An order of quashing order (certiorari) quashing the impugned decisions of the Defendants (Relief No. 5); and

(f) interim orders of injunction against the Defendants preventing them from implementing the challenged decisions (Relief No. 6).

Grounds on which Reliefs are being Sought

4. The grounds on which reliefs are being sought have been stated as follows:

*"1.3 The Decision by the 1st Defendant to introduce Mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector, including Journalist which amount to a violation of fundamental rights guaranteed by the Constitution of Republic of Malawi is arbitrary, unreasonable in the wednesbury sense, ultra vires, unlawful and unconstitutional.*

*1.4 The Decision by the 1st Defendant to administer Mandatory vaccination without citizens free and informed consent which amount to interference with human right*

*of bodily integrity, which is a part of the right to private life enshrined in the Universal Declaration of Human rights and is contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional.*

*1.5 The Decision by the 2nd Defendant to deny the 1st Applicant entry into parliament building on 23rd December, 2021 due to failure to produce vaccination certificate that amount to derogation of fundamental human rights enshrined in the Constitution of Republic of Malawi and enshrined in the Universal Declaration of Human rights as well as contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional.*

*1.6 The Decision by the 4th Defendant to deny its employees entry into work premises due to failure to produce vaccination certificate that amount to derogation of fundamental human rights enshrined in the Constitution of Republic of Malawi and enshrined in the Universal Declaration of Human rights as well as contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional."*

Sworn Statement in Support of the Applications

5. The applications were at the ex-parte stage, supported by two statements, sworn by the 1st Applicant and Mr. Sylvester Namiwa respectively.

6. The sworn statement by the 1st Applicant reads as follows:

*"2. THAT I am journalist who publish online articles.*

*3. THAT I can confirm that indeed on 23rd December, 2021 the 2nd Defendant denied the me entry in the said parliament premises on the ground that he failed to produce Vaccination Certificate.*

*4. THAT my right was violated as journalist as I failed to access information and parliamentary proceedings which ultimately denied the general public to access information from parliament through online news known as Atlas Malawi.*

*5. THAT I therefore pray that the conduct of the Defendants and decision be discouraged."*

7. The sworn statement by Mr. Namiwa will also be quoted in full:

*"1. THAT I am the Executive Director of the 2nd Applicant in the present application and as such duly authorized to make this statement.*

*2. THAT the 2nd Applicant is an organization established in order to promote human rights, democratic values, economic development and good governance. I attach*

*hereto copy of the Certificate of incorporation, Certificate of membership to CONGOMA and organization profile Marked* ***Exhibit "SN 1 A, B and C.***

3. *THAT the 1st Defendant is the Government institution responsible for Health.*

4. *THAT the 3rd Defendant is a Legal Practitioner for Malawi Government.*

5. *THAT the 4th Defendant is public or private institutions in Malawi that are denying entry of their employees from its working premises due to failure to produce vaccination certificate.*

***Background Information***

6. *THAT the 1st Defendant on 16th December, 2021 announced that it will from January, 2022 start imposing mandatory vaccination to some categories of citizens or public officers. I attach hereto a copy of the Ministerial statement and marked* ***"Exhibit SN2."***

7. *THAT that following the Ministerial statement to impose mandatory vaccination on its citizens the 2nd Defendant and 4th Defendant has already started to effectively implementing no vaccination certificate no entry policy on its employees and general public.*

8. *THAT on 20th December, 2021 the 2nd Defendant through Clerk of Parliament issued a memo to its members that members of staff that have not submitted their vaccination details regarding their vaccination status will not be granted access to the precincts and will deemed that they are on absence without leave and their allowances will be forfeited. I attach hereto a copy of the memo and marked* ***"Exhibit SN3."***

9. *THAT on 23rd December, 2021 the 2nd Defendant denied the 1st Applicant entry in the said parliament premises on the ground that he failed to produce Vaccination Certificate. I attach hereto a copy of his Sworn statement verifying this facts and marked exhibit* ***"Exhibit SN4."***

10. *THAT further in reaction to the statement by Honourable Minister responsible for Health, 4th Defendant has now started to deny entrance to its work premises any of its employees who have not been vaccinated yet.*

11. *THAT the Decision by the 1st Defendant to introduce Mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector, including Journalist which in my humble view amount to a violation of fundamental rights guaranteed by the Constitution of Republic of Malawi since it inconsistent with section 19 (3) and (5) of the Constitution of Republic of Malawi.*

12. *THAT the Decision by the 1st Defendant to administer Mandatory vaccination without citizens free and informed consent amount to interference with human right*

*of bodily integrity, which is a part of the right to private life enshrined in the Universal Declaration of Human rights and is contrary to principles within international law it is therefore in my humble view arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional.*

13. *THAT the Decision by the 2nd Defendant to deny the 1st Applicant entry into parliament building on 23rd December, 2021 due to his failure to produce vaccination certificate in my humble view this also amount to derogation of fundamental human rights enshrined in the Constitution of Republic of Malawi and enshrined in the Universal Declaration of Human rights as well as contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional.*

14. *THAT the Decision by the 4th Defendant to deny its employees entry into work premises due to failure to produce vaccination certificate in my humble view also amount to derogation of fundamental human rights enshrined in the Constitution of the Republic of Malawi and enshrined in the Universal Declaration of Human rights as well as contrary to principles within international law is arbitrary, unreasonable in the wednesbury sense, unlawful and unconstitutional*

15. *THAT to confirm that the Mandatory vaccination is violation of human rights, this explains why the 2nd Claimant and the Malawi Human Rights Commission by their respective statements dated 21st December, 2021 also condemned the decision by the 1st Defendant to impose Mandatory vaccination but the same has been ignored by the Defendants. I attach hereto a copy of the Public condemnation by the Human Rights Commission and marked* ***"Exhibit SN5 A & B."***

16. *THAT further I have also observed that in countries with highest vaccination rates, such as Israel, the United Kingdom (UK) and the whole Europe, are reporting increased cases of the Covid -19 than Malawi, therefore it is illogical and unreasonable to impose mandatory vaccination to Malawi when the evidence is clearly in highly vaccinated areas that vaccine is not helping to reduce Covid- 19 cases.*

17. *THAT there is no guarantee that the Vaccines is safe not only to Malawians put globally, this explains why the International Criminal Court after hearing submission of well experienced and advanced doctor has issued Order stopping the rollout of Covid 19 Vaccination, introduction of unlawful vaccination passports. I attach hereto extract of Judgment from online and marked Exhibit* ***"Exhibit SN5."***

18. *THAT it is clearly that the Defendants' conduct is unlawful, ultra vires, arbitrary and unconstitutional as well as abuse of power and ought to be stopped by this Honourable Court before the life of the general public is endangered."* – Emphasis by underlining supplied

8. I momentarily pause to observe that the manner in which paragraph 6 of the sworn statement by Mr. Namiwa is crafted gives the distinct impression that Exhibit SN2 is a copy of the Ministerial statement by which the 1st Defendant on 16th

December, 2021 announced that it will from January, 2022 start imposing mandatory vaccination to *"to all public servants, frontline workers and those working in the social sector, including Journalists". We will revert to this point in due course."*

Inter-parte Hearing

9. The applications came ex-parte on 25th December 2021. Ordinarily, applications of this sort, that is, applications for permission to proceed with judicial review and applications for interim reliefs, are dealt with in a summary fashion, that is, the judge determines the applications without a hearing and the judge need not sit in open court for that purpose: see O. 19, rule 20 (3), of the CPR and the case of **State and others; Ex parte Ziliro Qabaniso Chibambo [2007] MLR 372.** However, having looked at the nature of the applications, I perceived that the best way to deal with them was by way of an inter-partes hearing. I, accordingly, decided to exercise the powers given to the Court under Order 19, rule 20 (4), of the CPR by directing that the applications should come by way of an inter-partes hearing on 3rd January 2022.

10. On the set hearing day, the Applicants, through Counsel Taulo, addressed me at lengthy in support of the applications and the Attorney General, on behalf of the Defendants, responded by arguing at some lengthy too in opposition to the granting of the applications.

Sworn Statement in Opposition

11. The Defendants are opposed to the applications and they rely on a statement sworn by the Attorney General. The sworn statement provides as follows:

> *"5. I refer to the Applicants' application for permission to apply for Judicial Review and the Applicants' application for an order of interlocutory injunction and state that there is nothing that the 3rd Defendant has done pertaining to the COVID-19 vaccine that is subject of the Applicants' applications. Additionally, the Applicants' supporting sworn statements have failed to demonstrate that the 3rd Defendants made any decision affecting their rights or legitimate expectations. I verily believe that failure to acknowledge that the 3rd Defendant has not made any decision in respect of the COVID-19 vaccine constitutes suppression of material facts. As regards, the 4th Defendant who has been described as 'Uknown Others' I verily believe that the 'Unknown Others' cannot be subject of Judicial Review application.*
>
> *6. Further, at paragraph 4 of Mr. Mundango Nyirenda's supporting sworn statement, it is averred that on 23rd December, 2021 Mr. Mundango Nyirenda was prevented from accessing parliamentary proceedings having been denied entry into Parliament on ground that he failed to produce a COVID-19 Vaccination Certificate. So far as I can ascertain and from information that I obtained from the*

*2nd Defendant, Parliament was not in session on 23rd December, 2021. Therefore, it cannot be correct that Mr. Mundango Nyirenda was prevented from accessing parliamentary proceedings on account of his failure to produce a COVID-19 vaccination certificate. To that end, I verily believe that the Applicants have suppressed material facts. Moreover, the Applicants have suppressed material facts to the effect that the 2nd Defendant never made any pronouncement regarding the COVID-19 vaccine and, therefore, she is an improper party to these proceedings.*

7. *As regards, the 1st Defendant, I am informed by Honourable Khumbize Kandodo Chiponda, and I verily believe the same to be true that contrary to the Applicants' assertion that the 1st Defendant has introduced mandatory vaccination to specified groups of people, the 1st Defendant has not yet promulgated laws on mandatory vaccination. The truth is that there are only plans to introduce mandatory vaccination in the near future targeting specified groups of people. I verily believe that the matter herein is not yet ripe for judicial proceedings as no mandatory vaccination regulations or laws have yet been put in place.*

8. *At paragraph 17 of Mr. Silvester Namiwa's supporting sworn statement it has been averred that the International Criminal Court has issued a stop order stopping the rollout of COVID-19 vaccination and the introduction of vaccination passports. I have examined Exhibit **'SN5'** purporting to be a judgment of the International Criminal Court to support the assertion that the International Criminal Court has issued a stop order against the COVID-19 vaccination and the introduction of vaccination passports. **'SN5'** is but a complaint before the International Criminal Court against among others, the Prime Minister of the United Kingdom, Boris Johnson, Chief Medical Officer for England and Chief Medical Adviser to the UK Government, Christopher Whitty, Co-Chair of the Bill and Melinda Gates Foundation, William Gates III and Co-Chair of the Bill and Melinda Gates Foundation, Melinda Gates, Director General of the World Health Organisation, Tredos Adnanhom Ghebreyesus, etc. Therefore, the Applicants have suppressed the facts that the International Criminal Court has issued a 'stop order' against the Covid-19 vaccination and the vaccination passports.*

9. *Mr. Silvester Namiwa's supporting sworn statement has also exhibited a communique from Parliament titled 'Measures to enhance the prevention of infection and the spread of coronavirus at Parliament of Malawi' in which the Clerk of Parliament informs the members of staff to either produce vaccination certificates or COVID-19 negative test results before being granted entry into Parliament premises. There is nothing in the said communique that seeks to require members of the public to either produce COVID-19 vaccination certificates or COVID-19 negative test results. Accordingly, the Applicants have suppressed material facts when they state that the communique by the Clerk of Parliament seeks to exclude members of the public including the 1st Applicant from accessing Parliament if they are not vaccinated against COVID-19. I verily believe that **'SN3'** applies specifically and exclusively to parliamentary staff.*

10. *Further, I verily believe that the affected parliamentary staff would have the right to pursue remedies before the Industrial Relations Court in respect of the internal*

*memorandum of the production of COVID-19 vaccination certificate and/or the production of COVID-19 negative test result before gaining entry into the National Assembly premises.*

11. *Furthermore, I verily believe that the 1st, 2nd and 4th Defendants have no legal capacity to be sued or to sue.*

12. *I verily believe that the 2nd Applicant lacks locus standi to bring the present application since it has not brought any individual affected by the Defendants' decision. The Applicants seek to rely on the announcement by the Clerk of Parliament that members of staff would not be granted entry into Parliament's premises if they failed to produce either a COVID-19 vaccination certificate or COVID-19 negative test result. The communique targets employees of the National Assembly and no other. The Applicants are not members of staff for the National Assembly and cannot claim to have been affected by the communication by the Clerk of Parliament.*

13. *Further, I verily believe that the Applicant's application has no basis since it has failed to connect the impugned decision to the Defendants herein.*

14. *Furthermore, I verily believe that the Applicants have failed to bring an arguable case against the Defendants since they have failed to exhaust all the available remedies and since they have failed to explain the harm the decision by the Defendants has caused on the Applicants.*

15. ***ACCORDINGLY,*** *I do pray before this court that the Applicants' application for permission to apply for Judicial Review and for an order of interlocutory injunction should be dismissed with costs."*

Sworn statement in Reply

12. Mr. Namiwa filed with the Court a sworn statement in reply and paragraphs 3 to 11 thereof are relevant:

"3. ***THAT*** *I have read the sworn statement in opposition sworn by Honourable Attorney General* ***THABO CHAKAKA NYIRENDA*** *and I would like to make my humble reply as follows:*

4. ***THAT*** *the 1st Applicant is a Malawian citizen who was refused entry into Parliament building by the 3rd Defendant and is also directly affected by the Decision by the 1st Defendant to impose mandatory vaccination therefore have Locus Standi to challenge decision to impose Covid -19 mandatory vaccination.*

5. ***THAT*** *I refer to paragraph 5 of Sworn Statement of the Honourable Attorney General and state that the Attorney General is sued in capacity as Legal Practitioner representing the 1st and 2nd Defendant and therefore Decision made by the 1st and 2nd Defendants as far as litigation is concerned binds the 3rd Defendant pursuant to section 3 and 4 of Civil Procedure (Suits by or against the Government or Public Officers) Act the facts which even Honourable Attorney*

*General himself is well aware and there is no any suppression of material facts that would deprive the Honourable Judge to adjudicate the matter in dispute in just and fair manner irrespective of the outcome.*

6. ***THAT** I refer to paragraph 6 of Sworn Statement of the Honourable Attorney General and aver that:*

   6.1 *I can confirm that it is true that on 23rd December, 2021 the parliament was not in session but committees of parliament sessions were still taking place which are still parliamentary process or proceedings that are also open to the general public and media practitioners or journalists, therefore there is no any suppression of material facts as the Honourable Attorney General want to make this Honourable Court to believe.*

   6.2 *THAT the 2nd Defendant as the leader in the Parliament of Malawi expresses her decision through the Clerk of the parliament and in that capacity she issued the Internal Memorandum referred as **Exhibit SN3** which expressly made pronouncement regarding the Covid-19 vaccine, in particular at paragraph 2 of the administrative measures of the Internal Memorandum therefore the 2nd Defendant is a proper party to the present proceedings.*

   6.3 *THAT the measures referred in paragraph 6.2 above also affects members of the general public, that explains why the 1st Applicant was denied entry on account that he failed to produce Covid-19 Vaccination Certificate or passport at the entrance of parliament building.*

7. *THAT I refer to paragraph 7 of Sworn statement of the Honourable Attorney General and aver that:*

   7.1 *The Honourable Attorney General has clearly duly acknowledged that the Honourable Minister responsible for Health, Khumbize Kandodo has introduced Mandatory Covid-19 Vaccination for specific group, and what is yet to be done is to promulgate the Covid-19 Mandatory vaccination Regulations or Rules.*

   7.2 *It is crystal clear from the paragraph 7 of Sworn Statement of the Honourable Attorney General that the 1st Defendant through his Minister has already made decision to introduce the Mandatory Covid -19 vaccination what is remaining is to translate the Decision into written Rules and thereafter to enforce the same. This can also be ascertained by the statement by Honourable Minister herself in her conclusion of her Ministerial statement referred hereto as **Exhibit SN2** where she states that the covid-19 vaccination will be made mandatory and further she does not even point out the law that gives her power to make such kind of declaration.*

   7.3 ***THAT** what the Applicants are challenging herein is not a law or Rules but the decision of introducing that Mandatory Covid-19 Vaccination either by way of promulgating Covid-19 Vaccination Rules or otherwise.*

*7.4 THAT it is even in interest of justice that the Court should not wait until the Honourable Minister promulgates the Rules that are clearly on face of it are in contravention of the provisions of the Constitution as doing so will lead to wasting of tax payer's money or other government resources in promulgating the Rules that could be put to other meaningful use such as purchasing Medicines in various hospitals or paying salaries to various public servants.*

*8. THAT I refer to paragraph 8 of Sworn statement of the Honourable Attorney General and aver that:*

*8.1 THAT agree with Honourable Attorney General that the Documents referred as Judgment is in fact a formal complaint, it was an oversite on my part and bona fide mistake that I perceived such document as Judgment but in all honesty, the Honourable Attorney General may agree with me that the fact that the official complaint filed against the Covid-19 vaccination as subject matter of complaint in the so called developed nation should not be trivialised as doing so would be putting lives of its Citizens in danger.*

*8.2 Further, the fact that is now well known that the Government has tendency of signing non- liability clause that states the vaccine manufacturers and doctors administering it shall not be held liable should there be adverse side effects of the said vaccines, this clearly shows that the vaccines is not completely safe, otherwise such clause would have been unnecessary.*

*9. THAT I refer to paragraph 9 of the Sworn statement of the Honourable Attorney General aver the measures referred in paragraph 6.2 above also affects the general public, that explains why the 1st Applicant was denied entry on account that he failed to produce Covid-19 Vaccination Certificate or passport.*

*10 THAT I refer to paragraph 10 of the Sworn statement of the Honourable Attorney General and aver that 1st Applicant having been denied entrance to the parliament on account of his failure to produce the Covid-19 Certificate has locus standing to bring the present application.*

*11. THAT I refer to paragraph 11 of the Sworn statement of the Honourable Attorney General and aver that since Court has wide powers under a Judicial review forum to quash any Decision of any office of the Government or public officer who deliberately ignore provisions of the Constitution such us the 1st , 2nd and 4th Defendant, therefore it is only proper that the 1st , 2nd and 4th Defendant be included in the present proceedings and be sued along aside the Attorney General as their Legal Practitioner.*

*12. THAT I refer to paragraph 12 of the Sworn statement of the Honourable Attorney General and aver that the 2nd Applicant has locus stand; having properly brought the 1st Applicant who was denied by the 2nd Defendant to enter into parliament building and further being a journalist, is among the targeted group that is likely to be forced to take the Covid-19 vaccination this can be confirmed by the public*

*communication by the Malawi Human Rights Commission referred as* ***Exhibit SN5B.*** *Therefore, the 2nd Applicant as human rights watch dog against any violations has locus stand to bring the present proceedings.*

13. *THAT I refer to paragraph 13 of the Sworn statement of the Honourable Attorney General and aver that the foregoing clearly demonstrate that the impugned decisions are by the Defendants.*

14. *THAT I refer to paragraph 14 of the Sworn statement of the Honourable Attorney General aver that the above clearly shows that there is arguable case fit for Judicial review and there is no alternative remedy to against the Defendant's ultra vires and unconstitutional decisions.*

15. *THAT I refer to paragraph 15 of Sworn statement of the Honourable Attorney General and aver that:*

    15.1 *It is only just and fair that leave for Judicial review application and interim Order of an Injunction be granted pending determination for Judicial review application.*

    15.2 *That in event, the Court find in favour of the Defendants, I humbly pray that the Court should not condemn the Applicants in costs since this is public interest litigation and the Applicants are financially struggling.*

16. ***THAT*** *the foregoing clearly shows that there is a serious question to be tried, the balance of convenience lies in favour of the Defendants and damages would not be an adequate remedy as this involves not only violation of individual right but life of the entire nation that is at stake."*

Analysis and determination

13. For reasons that will become apparent in a moment, I have not found it necessary to recite in any detail the legal arguments advanced by both Counsel. Instead, I have opted as a matter of prudence to address what in my view constitutes the threshold questions, namely, whether or not:

(a) the entities named as Defendants are proper parties to the present proceedings?

(b) the Applicants have sufficient interest in the matter to which the application relates? and

(c) the Applicants suppressed material facts?

*Whether or not the entities named as Defendants are proper parties to the present proceedings?*

14. It is the case of the Applicants that these judicial review proceedings were competently brought against the Defendants. Counsel Taulo submitted that judicial review cases can be brought against Government or a public officer and this explains why the 1st and 2nd Defendants were named as Defendants. He further submitted that the office of the 2nd Defendant is an entity known to law as it is a creature of section 53(1) of the Constitution. Counsel Taulo also argued that although the Internal Memorandum on Measures to Enhance the Prevention of Infection and the Spread of Corona Virus at Parliament (Internal Memorandum) was issued by the Clerk of Parliament, the Clerk of Parliament was doing so on behalf of the 2nd Defendant. Regarding the 3rd Defendant, Counsel Taulo submitted that he had been made a party not as a decision maker but by virtue of the Civil Procedures (Suits by or against the Government or Public Officers) Act.

15. In his submissions, the Attorney General contended that the Applicants have demonstrated a lack of understanding about the difference between an ordinary suit and a judicial review application. He argued that it is only ordinary suits that would have the Attorney General joined as a defendant. He cited the cases of **Mpinganjira (N) v. State and Malawi Development Corporation (Miscellaneous Civil Cause No. 63 of 2003 ) [2003] MWHC 38 (2 June 2003), Buliyani v. Malawi Book Service [1994] MLR 24** and **The State v. The President of the Republic of Malawi and the Director of Public Prosecutions ex-parte Matilda Katopola Misc. Civil Case No. 79 of 2012, HC, LL District Registry (Unreported)** for the proposition that the correct defendant in a judicial review application is the public officer or body that made the decision being complained of. The Attorney General concluded his submissions on this point by praying that the 1st Defendant, the 2nd Defendant and the 3rd Defendant be struck out from the proceedings on the ground that they are improper parties since none of them made the decision being complained of.

16. Order 19, rule 23, of the CPR spells out the persons who can be named as defendants in an application for judicial review. The relevant part of rule 23 provides as follows:

> *"(1) An application for judicial review shall set out the grounds for making the application and shall be supported by a sworn statement.*
>
> *(2) An application under sub rule (1) shall name as defendant-*

(a) *for a declaration in relation to an Act or subsidiary legislation, the Attorney General;*

(b) *for an order that a person shall do or shall not do something, the person in question; and*

(c) *for an order about a decision, the person who made or should have made the decision."* – Emphasis by underlining supplied

17. The 1st Defendant has been named as *"Ministry of the Malawi Government Responsible for Health"*. Clearly, *"Ministry of the Malawi Government Responsible for Health"* is not person within the context of rules 23(2). Further, none of the challenged decisions was made by the *"Ministry of the Malawi Government Responsible for Health"*. In the circumstances, it is my considered view that the Attorney General is right in submitting that the 1st Defendant was improperly added as a party. I am fortified in my view by the case of **Dr. Bakili Muluzi and The United Democratic Front vs The Malawi Electoral Commission Constitutional Case No. 1 of 2009**, in which the Court opined as follows:

> *"... we wish also to observe that in any type of proceedings that come before the Courts, issues concerning Mode of Commencement are fundamental. The Law, as all its Practitioners ought to appreciate, clearly makes the effort to classify proceedings that may be brought before Courts of Law either by the Cause of Action that gives rise to them, or by the subject-matter they relate to. It then duly assigns to each category or class of action, or proceedings, the particular mode or particular modes by which proceedings can be tabled in a Court of Law... The substantive Law governing a given state of affairs, as read with the available procedural law, in the ordinary course of things, is ever in place to guide a litigant as to the best applicable mode of commencing his/her action or proceedings in a Court of Law.. Commencing proceedings in a correct manner, therefore, is like boarding the right bus or train when traveling, because it is capable of getting you to the destination you want. In like manner, commencing an action or proceedings in a wrong manner, is like boarding the wrong bus or train, because it does not have prospects of getting you to the destination you desire, unless you disembark and restart the journey on the correct bus or train."* - Emphasis by underlining supplied

18. I, accordingly, order that the 1st Defendant be struck out as a party to these proceedings.

19. The 2nd Defendant has been made a party to these proceedings because the Internal Memorandum is said to have been issued by the 2nd Defendant through the Clerk of Parliament: see paragraph 8 of the sworn statement by Mr. Namiwa. It is

expedient that the Internal Memorandum be reproduced in full. It reads as follows:

*"Ref. No. NA/COP/2* *20th December, 2021*

*FROM : THE CLERK OF PARLIAMENT*

*TO : ALL MEMBERS OF STAFF*

***MEASURES TO ENHANCE THE PREVENTION OF INFECTION AND THE SPREAD OF CORONAVIRUS AT PARLIAMENT OF MALAWI***

*With reference to the communication made in the House on Thursday, 2nd December, 2021 regarding the resolution on preventive measures against COVID-19 made by the Business Committee, I would like to advise you that the measures will be implemented with immediate effect. The administration of the measures will include the following.*

1. *A list of Staff that have submitted the vaccination details will be made available at all access gates to the Parliament precincts;*

2. *Members of Staff that have not submitted details regarding their vaccination status will not be granted access to the precincts. Where one is not vaccinated, then access to the Precincts will be granted after presenting negative result of a COVID-19 test from the Community Health Surveillance Unit (CHSU) at own cost.*

   *The validity of the test result will be 48 hours for a rapid antigen test and 72 hours for the PCR test. At expiry of the period, and if one has to access the precincts, then a new test result will have to be presented;*

3. *Members of Staff that have not submitted vaccination details will be assumed that they are on absence without leave, and therefore, will forfeit the payment of allowances for performing official duties;*

4. *In due course and as and when required, Parliament will check with the Ministry of Health on authenticity of vaccination details or test results; and,*

5. *These measures will equally apply to Members of Staff, contractors and other stakeholders and necessary communication will be made in this regard through key responsible officers and contract managers.*

*Finally, let me urge you all to continue taking personal responsibility in safeguarding your lives, and of those around you. Please consistently follow the hygiene measures within the Precincts of Parliament. Prevention is better than cure, and this begins with you.*

*Thank you all.*

***Fiona Kalemba (Mrs)"***

20. The Internal Memorandum speaks for itself. It expressly states that it is from "THE CLERK OF PARLIAMENT" and it signed by the Clerk of Parliament, Mrs. Fiona Kalemba. Nowhere does she state that she is signing on behalf of the 2nd Defendant (Those familiar with how official Government communication is written know what I am talking about). I thus have difficulties in understanding how the Applicants expect to convince the Court that the Internal Memorandum was issued by the 2nd Defendant. In the circumstances, I endorse the submission by the Attorney General that the 2rd Defendant was improperly added as a party. In light of the foregoing, the 2nd Defendant has to be struck out as a party to these proceedings. It is so ordered.

21. Regarding the 3rd Defendant, it is noteworthy that the Applicants are not seeking declarations in relation to an Act or subsidiary legislation. Rule 23(2)(a) is, therefore, not applicable. Further, a perusal of the reliefs being sought by the Applicants shows that they are not seeking any order to make the Attorney General to do or not to do anything. In the circumstances, rule 23(2)(b) is not applicable to the 3rd Defendant. Furthermore, the Applicants are not seeking an order about a decision that was made by the 3rd Defendant or that should have been made by the 3rd Defendant. In the premises, I fully agree with the submission by the Attorney General that the 3rd Defendant was improperly added as a party. In view of the foregoing, I have no option but to struck out the 3rd Defendant as a party to these proceedings. It is so ordered.

22. The net result of having struck out the 1st Defendant, 2nd Defendant and the 3rd Defendant is that there is only one remaining Defendant, that is, the "Unknown Others". Clearly, this is fatal to the case of the Claimants. By its very nature, judicial review proceedings cannot proceed against "unknown people".

23. In view of the foregoing and by reason thereof, these proceedings have to be dismissed in their entirety.

*Whether or not the Applicants have sufficient interest in the matter to which the application relates?*

24. Order 19, rule 20(2), of the CPR states that a person making an application for judicial review must have sufficient interest in the matter to which the application relates (locus standi). As such, courts must in judicial review proceedings first decide

whether an applicant has locus standi in the matter under consideration: see **State and another ex parte CLC Forex Bureau and nine others [2009] MLR 449** and **State and Others ex parte Ziliro Qabaniso Chibambo [2007] MLR 372.**

25. It is significant that none of the documents initially filed by the Applicants touched upon the issue of locus standi. The issue was first raised by the Attorney General: see paragraph 12 of the sworn statement by the Attorney General.

26. It is the case of the Defendants that the Applicants do not have locus standi in the present case: they are, to use the phrase employed by the Attorney General "*merely busy bodies, timewasters, mercenaries and trouble makers*". The issue of locus standi is covered in paragraph 2 of the Defendant's Skeleton Arguments in Response:

> "2. ***WHETHER THE MATTER IS HYPOTHETICAL, MOOT OR ACADEMIC AND WHETHER THE APPLICANTS HAS LOCUS STANDI IN THE MATTER***
>
> *The Law*
>
> 2.1 *Section 15(2) of the Constitution states that:*
>
> > *"Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights".*
>
> 2.2 *In Malawi the courts do not allow cases where no dispute has arisen. So in* ***Maziko Charles Sauti-Phiri v. Privatisation Commission Const. Cause No 13 of 2005****, the Court held, in the manner quoted below, that it would not give gratuitous legal opinions:*
>
> > ***"...secondly it is not in courts to give gratuitous legal opinions. This, we think is for practitioners to do. Practitioners must not and should not therefore be encouraged to come to court to seek opinions which they will then pass on to their clients. Thirdly, and following on the foregoing we think we must also emphasise the point that courts should be allowed to decided real disputes/issues."***
>
> 2.3 *The above principle was cited with approval in the case of* ***James Phiri v Muluzi and Another (Constitution Case No. 1 of 2008) [2008] MWHC 4 (25 July 2008).***
>
> 2.4 ***In*** *R v Monopolies and Mergers Commission, ex parte Argyll Group Ltd 1986 1 WLR 763 Lord Donaldson MR* ***stated that:***

*'The first stage test which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody.'*

2.5 ***Sedley J's view in*** *R v Somerset County Council and ARC Southern Limited ex p Dixon 75 P & CR 175, [1997] JPL 1030* ***was that this test contained the following elements:***

***(a) The threshold at the point of the application for leave is set only at the height necessary to prevent abuse.***

***(b) To have "no interest whatsoever" is not the same as having no pecuniary or special personal interest. It is to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody.***

2.6 *Schiemann J in* ***R v Secretary of State for the Environment, ex parte Rose Theatre Trust*** *1 Q.B. 504 at 520, stated that "not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision . . ."*

***Analysis and submission***

2.7 *It is submitted that the Court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. The applicant needed to have a person who alleges to have been affected by the mandatory vaccination for them to have locus standi. It is submitted that per the advice of Tribe, the Courts should not "out-step the constitutional authority by issuing advisory opinions. The 1st Applicant is not an employee of the National Assembly. He cannot be said to be affected by the decision of the Clerk of Parliament on COVID-19 vaccination, more so a decision that was tailored for the members of staff of the National Assembly given that he is not one. The statement of Mr. Namiwa that the 1st Applicant wanted to cover business committee meetings on 23rd December, 2021 is, at best, hearsay. Above all, the statement has not been substantiated by, for example, a timetable of the said meetings, a request to enter into parliamentary premises, or an invitation to the said meetings.*

2.8 *The Applicants could have locus standi only if there was victim of the alleged decision by the Defendants. For a legal dispute to occur requiring the court to make a determination there should be a real person alleging that their rights have been violated by the conduct of the state. The said right should be identifiable in relation to a subject matter. Since there is no victim of the alleged conduct of the Defendants the Applicants do not have locus standi in the present case. The Applicants have presented, before this Honourable Court, abstract hypothetical questions. There is no concrete legal dispute in the present case requiring the determination of the legal rights of the parties upon the facts alleged and so the application for judicial review should be dismissed.*

2.9 *The Applicants are merely busy bodies, timewasters, mercenaries and trouble makers. They do not have sufficient interest in the matter. Permission for judicial review should not be granted to mere busy bodies, timewasters, mercenaries and trouble makers.*

2.10 *Further or in the alternative, the 2nd Applicant's memorandum and Articles of Association do not show that the Applicants are concerned with the promotion and protection of human rights. They do not have expertise and experience in human rights either. They also do not have any experience and expertise in medical rights or in modern science, micro-biology and medicine. Lord Hope in* ***Walton v Scottish Ministers*** *2012 UKSC 44 said of these:*

> *"Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity."*

*The above decision applies Mutatis Mutandis to the present case.*

2.11 *The Applicants have not demonstrated their knowledge in the protection of human rights, or in modern science, micro-biology and/or medicine.*

2.12 *Objective 2.7 in the 2nd Applicant's Memarts, namely, 'to provide advocacy and civic [sic] education on people's rights and economic responsibility in economic independence and contribution towards national development' has nothing to do with the protection and promotion of human rights within the meaning of section 15(2) of the Republic of Malawi Constitution. In other words, the 2nd Applicant does not have 'sufficient interest in the promotion, protection and enforcement of rights under' Chapter IV of the Republic of Malawi Constitution. There is nothing in the 2nd Applicant's Memarts that suggest that the 2nd Applicant's objective concerns the 'the promotion, protection and enforcement of rights under' Chapter IV of the Republic of Malawi Constitution.*

2.13 *It has also been argued that the fact that Mr. Sylvester Namiwa is a member of the board of the 2nd Applicant constituted board resolution within the meaning of* ***Chaponda and another, ex parte Kajoloweka and others,*** *(MSCA Civil Appeal No. 5 of 2017) [2019] MWSC 1 (13 February 2019). My lord, the 2nd Applicant has the following five directors: Cosmas Msendema, Teresa Temweka Chirwa, Sylvester Shadreick Namiwa, Brian Chifuniro Chamgombo and Hartley Kaluwa per the 2nd Applicant's Memarts that have been produced before court. The 2nd Applicant is not a one-man shareholder (single shareholder) of the company. The 2nd Applicant's Memarts clearly state that a decision of the directors shall either be a majority per Clause 7 of the Memarts or Unanimous in terms of Clause 8 of the*

*Memarts. Therefore, the decision by Mr. Syvester Namiwa to commence these proceedings cannot be said to be a board resolution to commence proceedings challenging the COVID-19 mandatory vaccination within the ambit of* ***Chaponda and another, ex parte Kajoloweka and others****."*

27. The Applicants insist that they have locus standi in the present case. It may not be out of place to set forth in full the relevant part of the Applicants' Supplementary Skeletal Arguments in Support of Application for Leave for Judicial Review and an Application for Order of Injunction:

*"**4.0 LAW APPLICABLE***

***LOCUS STAND (SUFFICIENT INTEREST) AND LEAVE FOR JUDICIAL REVIEW***

***Legitimate Expectation or Interest***

*THE CONSTITUTION*
***Section 43** – Every person shall have the right to-*

*(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms,* ***legitimate expectations or interests are affected or threatened****; and*

*(b)* ***be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known****.*

*Section 11 –(2) (c ) In interpreting the provisions of this Constitution a Court of law shall where applicable , have regard to current norms of public international law and comparable foreign case law.*

*11(3) Where a Court of law declares an act of exercise or a law to be invalid , that Court may apply such interpretation of act or law as is consistent with this Constituton.*

*CASE LAW*

*It is now settled practice that Civil Societies in Malawi has locus to litigate in public interest cases. This can be exemplified by the case of R (oao Human Rights Defenders Coalition & Ors.) v President of the Republic of Malawi & Anor. (Judicial Review 33 of 2020) [2020] MWHC 130 (20 November 2020); and State obo HRDC & Ors. v President of Malawi & Ors. (Judicial Review 33 of 2020) [2020] MWHC 26 (27 August 2020);*

***Articles 9 UN Declaration on Human Rights Defenders that was adopted by the General Assembly in 1998 enjoins Civil Societies to make complaints about official policies and acts relating to human rights and to have such complaints reviewed and also attend public hearings, proceedings and trials in order to access their compliance with national and international human rights obligations.***

***Administrative rights and remedies***

***Section 12.***—*(1) This Constitution is founded upon the following underlying principles—*

*(a) all legal and political authority of the State derives from the people of Malaŵi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;*

*(b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malaŵi;*

*(c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malaŵi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;*

*(d) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;*

*(e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and*

*(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.*

***Section 41*** *(1) Every person shall have a right to recognition as a person before the law.*

*(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.*

*(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law*

*Section (12) This Constitution is founded upon the following underlying principles—*

*(e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and*

*(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.*

***COURTS (HIGH COURT) (CIVIL PROCEDURE) RULES, 2017***

*Order 19 PART III*
*Rules:*

*20. (1) Judicial review shall cover the review of__*

*(a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or*

*(b) a decision, action or failure to act in relation to the exercise of a public function in order to determine__*

*(i) its lawfulness;*

*(ii) its procedural fairness;*

*(iii) its justification of the reasons provided, if any; or*

*(iv) bad faith, if any,*

*where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.*

*(2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.*

*(3) Subject to sub-rule (3), an application for judicial review shall be commenced ex-parte with the permission of the Court.*

*(4) The Court may upon hearing an ex parte hearing direct an inter-partes hearing.*

*CASE LAW*

*Traditionally leave for judicial review was denied where there has been delay in applying to the Court or where the Claimant does not have sufficient interest in the matter to which claim relates.*[1]

*It has been held , however , that these issues of delay*[2] *and standing*[3] *should ordinarily be left to be dealt with at the full hearing, in practice, only in the clearest cases will permission be refused on either of these grounds alone*[4].

***Interest and Judicial Review***

*Legal Definition of "Interest"*

*According to The Longman Dictionary (2011)*[5] *define the word "interest" as concern in the outcome of an event. See also the case of Guinnes Mahon Ltd v Kensington and Chelsea RLBC[1998] 3 WLR 829.*

*It has to be noted that what matters is concern of its outcome not necessarily the process involved for one to have an interest. Thus in the case of R(on the application of Edwards ) v Environment Agency(2004)*[6] *, Keith J had this to say :*

> *"You do not have to be active in a campaign yourself to have an interest in its outcome. If the consultation exercise ends with a decision which affects your interest, you are no less no less affected by that decision simply because you took no part in the exercise but left it to others to do so... it has been said that it is easier to identify a sufficient interest in the decision to issue the permit even if he is temporally homeless, because as an inhabitant of Rugby, he will be affected by any adverse impact on the environment which the trials on the use of tyres chips may have."*

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[1] Page 840Lesueur W.J, De Smith's Judicial Review, 6th Edition, Sweet & Maxwell Publisher, London (2007)

[2] Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2A.C. 738; Cf R v Secretary of State for Trade and Industry Exp. Green Peace Ltd [1998] Env. LR. 415.

[3] Inland Revenue Commissioner v National Federation of Self -Employed and Small Businesses [1982] A.C 617; R.v. Somerset County Council Exp.Dixon (1998) 75P. & C.R.175

[4] Le suer and Sunkin [1992] P.L.102.

[5] Richard and Curson, The Longman Dictionary of Law, 8th Edition ,Pearson Publisher,London(2011)

[6]

28. A have considered the respective submission by Counsel. It is not uninteresting to note that the Applicants have placed reliance on cases decided by the High Court, namely, **R (oao Human Rights Defenders Coalition & Ors.) v. President of the Republic of Malawi & Anor. (Judicial Review 33 of 2020) [2020] MWHC 130 (20 November 2020)** and **State obo HRDC & Ors. v. President of Malawi & Ors. (Judicial Review 33 of 2020) [2020] MWHC 26** and foreign case, to wit, **Caswell v. Dairy Produce Quota Tribunal for England and Wales [1990] 2 A.C. 738, R v. Secretary of State for Trade and Industry Exp. Green Peace Ltd [1998] Env. LR. 415. Inland Revenue Commissioner v. National Federation of Self -Employed and Small Businesses [1982] A.C 617; R.v. Somerset County Council ex-parte. Dixon (1998) 75P. & C.R.175 and Le suer and Sunkin [1992] P.L.102.** I would have expected the Applicants to cite at least one or two cases decided by the Supreme Court of Appeal on the subject of locus standi. Anyhow, a party is entitled to present his or her case using material that he or she believes best advances his or her case.

29. The issue of locus standi in judicial review cases has been the subject of decisions of the Supreme Court of Appeal in a number of cases and my research shows that the most recent decision by the Supreme Court of Appeal on the matter is to be found in the case of **Hon. Dr. George Chaponda & Another v. The State ex-parte Mr. Charles Kajoloweka, MSCA Civil Appeal No. 05 0f 2017** [hereinafter referred to an the "**Kajoloweka Case**"]. This judgement was delivered on 13th February 2019 and the Supreme Court of Appeal reaffirmed that the binding precedent on locus standi is its decision in **Civil Liberties Committee v. Minister of Justice & Another [2004] MLR 55** [hereinafter referred to an the "**CLC Case**"].

30. In the **CLC Case**, the Supreme Court of Appeal held that for an applicant for judicial review to show that he or she has sufficient interest in the matter, he or she has to show that it is his or her right or freedom that has been violated as a basis for taking up the action. The point was put thus:

> *"Clearly the two cases establish that, in the field of public law, a private plaintiff can establish standing to bring an action if he can show that the conduct or decision of the defendant adversely affects his legal right or interest. A strong belief or conviction that the law generally or a particular law should be observed, or that conduct of a particular kind should be prevented is not sufficient to ground standing. They also establish that an ordinary member of the public who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. The two cases further express the view that a strong desire to enforce public law as a matter of principle or as part of an effort to achieve the objects of a particular organization and to uphold the values which it*

*was formed to promote is not sufficient to establish **locus standi** to commence an action. Finally the two cases from the countries of the Commonwealth, support the view that, in public law, **locus standi** is jurisdictional issue."* – [Emphasis by underlining supplied]

31. Needless to say, the decision in the **CLC Case** represents the current position on locus standi in Malawi and it will remain so until the Supreme Court of Appeal departs from the same or legislation is enacted providing otherwise. It would appear the Applicants were oblivious of this fact otherwise they would have fully understood that it was not necessary to *"take us on a journey of international human rights law standards on locus standi"*.

32, The burden rests on the Applicants to show that they have locus standi. Have they demonstrated that they have locus standi to the standard set out in the **CLC Case**?

33. Let us start by looking at the case of the 1st Applicant, shall we. According to the standard propounded by the Supreme Court of Appeal in the **CLC Case**, for a person (human or corporate) to have locus standi in a matter he or she must possess a legal or substantial right which is over and above that which the general public may possess in the matter. This means that one must prove that he or she has been directly affected by the action or conduct complained of before he or she can be allowed to commence an action to protect or enforce the rights in issue.

34. According to the sworn statement by the 1st Applicant at paragraph 6 of this Ruling, he is a journalist who publishes online articles and on 23rd December, 2021 the 2nd Defendant denied him entry in the parliament premises on the ground that he failed to produce vaccination certificate. He case is that his right was violated as journalist as he failed to access information and parliamentary proceedings and this ultimately denied the general public to access information from parliament through online news known as Atlas Malawi.

35. Firstly, that the 1st Applicant expected to obtain court orders with far reaching legal, financial, social, etc, implications on the basis of such a *"bare"* sworn statement is beyond me. The 1st Applicant neither identifies the person(s) who stopped him from entering the precinct of the National Assembly nor states the capacity in which they did so. As was expected, the Defendants, through the sworn statement by the Attorney General, attacked the sworn statement of the 1st Applicant for lack of particulars. Instead of giving the said particulars, the 1st Applicant chose not to file any supplementary sworn statement. That it was necessary to do so is borne out by the attempt by Mr. Namiwa to give the particulars in his supplementary

sworn statement. Unfortunately, as was rightly observed by the Attorney General, the narration by Mr. Namiwa as what is alleged to have happened to the 1st Applicant at Parliament building is, at best, hearsay.

36. Secondly, it will be recalled that the 1st Applicant states that he was denied access to Parliament premises based on the Internal Memorandum. As already discussed at paragraph 20 of this Ruling, the Internal Memorandum was issued by the Clerk of Parliament and it is exclusively directed at employees of the National Assembly. There is nothing in the Internal Memorandum that seeks to require members of the general public to either produce COVID-19 vaccination certificates or COVID-19 negative test results.

37. In the premises, if at all the 1st Applicant was denied access, I do not think that it had anything to do with the Internal Memorandum. In short, the 1st Applicant has failed to establish that he possesses a legal or substantial right which is over and above that which the general public may possess with regard to the Internal Memorandum.

38. Time to turn to the 2nd Applicant. A perusal of paragraph 12 of the sworn statement in reply by Mr. Namiwa shows that the 2nd Applicant seeks to clothe itself with locus standi through the 1st Applicant. The attempt by the 2nd Applicant to ride on the 1st Applicant's back is doomed to fail because the back of the 1st Applicant has already been broken: the Court has already decided that the 1st Applicant does not have locus standi in the present case.

39. The 2nd Applicant also claims to have locus standi in this matter by virtue of being a human rights body: see paragraph 12 of the sworn statement in reply by Mr. Namiwa. I strongly believe that if the Applicants had bothered to read the **CLC Case**, they would not have put forward such a claim. Such a claim flies in the face of the decision in **CLC Case**. The mere fact that an entity dabbles in human rights issues is not enough to accord it locus standi in each and every case concerning human rights. For example, protection of human rights (ban on the publication, printing and distribution of newspaper) was an issue in the **CLC Case**, but the Civil Liberties Committee was held not have sufficient interest.

40. There is another legal hurdle that the 2nd Applicant has failed to surmount. The 2nd Applicant contends that by the mere fact that Mr. Namiwa is the Executive Director of the 2nd Applicant, Mr. Namiwa has the mandate to bring the present application on behalf of the 2nd Applicant. Counsel Taulo submitted that by virtue of being the 2nd Defendant's Executive Director, Mr. Namiwa has full authority to commence legal proceedings on behalf of the 2nd Defendant. It was thus argued that

there is no need for him to show that the 2nd Applicant gave him mandate to commence the present proceedings. With due respect to the Applicants, such a claim flies in the face of the decision in **Kajoloweka Case** wherein the Supreme Court of Appeal questioned the basis of Mr. Kajoloweka's mandate as there was no general or special resolution of the Board of Trustees to take out the proceedings. The following passage in the **Kajoloweka Case** is instructive:

> *"It is this Court's view that the mandate of Mr. Charles Kajoloweka is found lacking and worrying ... We note nevertheless that in his founding affidavit he is speaking as if he is a trustee and yet the case is in the name of the Registered Trustees of the Registered Trustees of Youth and Society. We should have expected the mandate of the various trusts to bring up the matter. This should have come as a resolution of board or specific mandate of the Trsutees in this issue. We do not have anything of that nature. Our concerns are raised further on reading the affidavit of Mr. Charles Kajoloweka which is more of "I". But, this Court does not know if the board of trustees mandated him to raise the concern of fellow trustees."*

41. It is commonplace that 2nd Applicant has five directors, namely, Mr. Cosmas Msendema, Ms. Teresa Temweka Chirwa, Mr. Sylvester Shadreick Namiwa, Mr. Brian Chifuniro Chamgombo and Mr. Hartley Kaluwa: see also paragraph 2.13 of the Defendant's Skeleton Arguments in Response

42. The observations by the Supreme Court of Appeal in the **Kajoloweka Case** apply to this case with equal force. This Court was expecting that the sworn statement(s) by Mr. Namiwa would show that the 2nd Applicant had given him mandate to commence the present proceedings on behalf of the 2nd Defendant. This could have been in the form of minutes, resolution or specific mandate of the directors on the matter under consideration, There is nothing of that sort.

43. As the matter stands, it is the finding of this Court that the present proceedings were not competently commenced on behalf of the 2nd Applicant. Mr. Namiwa is not the 2nd Applicant and the corollary is also true: the 2nd Applicant is not Mr. Namiwa.

44. It is settled law that locus standi is a jurisdictional issue: see the **CLC Case**. As the Applicants have failed to establish locus standi in this case, the case has to be dismissed. It is so ordered.

45. We are done with the issue of locus standi but a word or two on an instrument that the Claimant sought to rely on might not be out of place. The instrument in question is article 9 of the UN Declaration on Human Rights Defenders: see paragraph 27 of this Ruling. In his oral submissions, Counsel Taulo passionately argued that Article 9 clothes the 2nd Defendant with locus standi because the Article

enjoins civil societies to make complaints about official policies and acts relating to human rights and to have such complaints reviewed, etc. He placed reliance on section 11(2)(c) of the Constitution which states:

> *"11. (2) In interpretating the provisions of this Constitution a court of law shall-*
>
> *(c) where applicable, have regard to current norms of public international law and comparable foreign case law."* Emphasis by underling supplied

46. Understanding how international law is implemented by states at national level necessities understanding the relationship between international legal system and the national legal system. In this regard, the basic theories of "monism" and "dualism" have long been used to explain the relationship of international law to domestic law.

47. This relationship has long been discussed by many excellent works: see, for example, 7 United Kingdom National Committee of Comparative Law, The Effect of Treaties in Domestic Law, Sweet and Maxwell, London, UK, 1987. (edited by Jacobs, Francis and Shelley, Roberts.) However, it is impossible for Court for reasons of time and space to examine exhaustively all the aspects involved in the relationship between international law and municipal law. It will suffice that we go directly to the provision in the Constitution that addresses this issue.

48. Section 211 of the Constitution deals specifically with the relationship between international law and municipal law. The section states:

> *"(1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying agreement.*
>
> *(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapse.*
>
> *(3) Customary international law, unless inconsistent with this Constitution or on Act of Parliament, shall have continued application."*

49. It is clear from a reading of section 211 of the Constitution that the said section is now the fons et origo (the source and origin) for enforceability of international law in Malawi. Section 211 of the Constitution provides that international

agreements will, after the appointed time, only form part of the law of Malawi if they have been ratified by an Act of Parliament and if so provided for in the Act. The provision also clarifies that any international agreement that was signed or ratified by Malawi prior to the appointed time and which is binding on Malawi forms part of the law of Malawi.

50. It is also clear that all kinds of customary international law, whether it be universal, general, regional, local or particular, shall continue to apply under the Constitution.

51. It is, however, important to note that section 211 of the Constitution entrenches the supremacy of the Constitution and the sovereignty of Parliament over both existing international agreements and customary international law. Consequently, if there is a conflict between a provision of the Constitution or an Act of Parliament and a provision of a treaty or a norm of customary international law, the provision in the Constitution or the Act will prevail.

52. It is obvious that in the context of our national legal system there is a difference in the legal status of an international agreement that forms part of the law of the Malawi and the legal status of an international agreement that is not part of the law of the Malawi. For starters, while a Malawian court is bound to apply the laws of Malawi, it is not compelled to apply an international agreement that does not form part of the law of the Malawi. The court may only have regard to such an agreement, where applicable.

53. Article 9, being an international agreement, would fall under section 211(1) of the Constitution. Unfortunately, the Applicants have not adduced any evidence to show that Article 9 meets the requirements of section 211(a) of the Constitution.

*Whether or not the Applicants suppressed material facts?*

54. Judicial review process presupposes an existence of a decision by a public body. The presupposition is grounded on, among other matters, the fact that if an application for judicial review is successful, the usual result is that the decision is "quashed" or nullified. It thus becomes imperative for the Court to know at the very outset the person who made the decision being challenged and the medium used to communicate the said decision.

55. In paragraph 6 of his sworn statement, Mr. Namiwa has attached a ministerial statement (Exhibit SN2). It is important that we recall the challenged decision, the reliefs sought and the grounds on which reliefs are being sought in relation to Exhibit SN2 and these are as follows:

(a) Challenged Decision No. 1, that is, the decision of the 1st Defendant to introduce mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector, including journalists which amount to a violation of fundamental rights guaranteed by the Constitution of Republic of Malawi : see paragraph 2 of this Ruling;

(b) Relief No. 1, that is, a declaration that the decision by the 1st Defendant to introduce mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector including journalist (sic) which amount to a violation of fundamental rights guaranteed by the Constitution of (sic) Republic of Malawi is arbitrary, unreasonable in the wednesbury sense, ultra vires and unconstitutional: see paragraph 3 of this Ruling; and

(c) the first ground on which reliefs are being sought, namely, the Decision by the 1st Defendant to introduce Mandatory vaccination by January, 2022 to all public servants, frontline workers and those working in the social sector, including Journalist which amount to a violation of fundamental rights guaranteed by the Constitution of Republic of Malawi is arbitrary, unreasonable in the wednesbury sense, ultra vires, unlawful and unconstitutional: see paragraph 4 of this Ruling

56. A summary of the allegations by the Applicants in connection with Exhibit SN2 is that it contains statements to the effect that mandatory COVID-19 vaccination would be introduced by January, 2022 to all public servants, frontline workers and those working in the social sector, including journalist. Our first task is to find out if these allegations are true.

57. Exhibit SN2 is relatively lengthy but it is necessary that it be quoted in full:

*"SPEECH BY THE MINISTER OF HEALTH, HON. KHUMBIZE KANDODO CHIPONDA, MP DURING A PRESS CONFERENCE ON LEVEL 2 OF THE COVID-19 RESPONSE DELIVERED AT MOH CONFERENCE ROOM ON 16TH DECEMBER 2021*

- *The Co-Chair of the Presidential Taskforce on Coronavirus, Dr. Chalamira Nkhoma*
- *Honourable Members of the Presidential Taskforce on Coronavirus*
- *The Secretary for Health, Dr. Charles Mwansambo*
- *Chief of Health Services, Dr. Queen Dube*
- *Directors and other senior staff of the Ministry of Health*
- *Members of the Media*
- *Ladies and Gentlemen*

***Good morning,*** *I have called for this press conference to give updates of the resolutions that the Presidential Task Force on Coronavirus made during its meeting yesterday. As you are aware the Presidential Task Force on Coronavirus was instituted by our State President, His Excellency Dr. Lazarus Mc Carthy Chakwera to oversee the COVID-19 pandemic preparedness and response in the country. The PTF is also responsible to review the disease trend and effect appropriate measures to ensure that we limit the further spread of the disease and reduce the effects on the human health and the economy.*

*Distinguished Members of the Press, Ladies and Gentlemen, We continue to observe an increase in the number of new confirmed cases and this is worrisome as it is coming at this time as we approach the festive season and the presence of the new variant (Omicron) in our country. The cases have been rapidly and and we need to act differently. To reduce the further spread in our communities. As we approach the festive season which is characterized by lots of mass gatherings and travel, to ensure that the risk of COVID-19 transmission is minimized during this festive month. I would like to request every one of us to include COVID-19 preventive measures as we plan our celebrations of the season. As pointed out that the cases are rising, our statistics indicates that Cumulatively, Malawi has recorded 62,933 cases including 2,310 deaths (Case Fatality Rate is at 3.67%). Of these cases, 2,742 are imported infections and 60,191 are locally transmitted.*

*Cumulatively, 59,000 cases have now recovered (recovery rate of 93,75%) and 232 were lost to follow-up. This brings the total number of active cases up from 235 on Tuesday. This is worrisome and we need to seriously need to strictly adhere to the COVID-19 preventive and containment measures. On COVID-19 vaccination let me point it out that more and more people are getting the vaccine on daily basis but we still have a lot of people to be vaccinated. So far, a total of 1,587,487 vaccine doses have been administered in the country. Cumulatively 946,691 and 356,955 people have received the first dose and second dose of Astra Zeneca vaccine respectively whilst 283,841 have received Johnson and Johnson. We have adequate stocks of the vaccine in the country and let me encourage everyone eligible to get the vaccine. The best time to get vaccinated is now.*

***Distinguished Members of the Press, Ladies and Gentlemen,*** *the Presidential Task Force on Coronavirus, in collaboration with the Emergency Operation Centre on COVID-19 (EOC), continues to closely monitor the trend of the pandemic in our country. On Wednesday 15th December, the Taskforce met to review the situation of the pandemic in the country, and the public health and other measures that are in place to contain the epidemic. It noted that there has been a progressive increase on the number of new confirmed COVID-19 cases, those admitted to treatment units and positivity rates over the past two weeks.*

*As communicated last time, our experts have come up with five alert levels and thresholds for the pandemic so as to provide guidance on the measures to be instituted at each level. Alert level 1 represents the lowest magnitude of cases, admissions and deaths, while level 5 represents the highest magnitude of cases, admissions and deaths. Bases on this characterization and recent data, I would like to inform the nation that we are now in Level 2 of the pandemic. On this basis, the following measures will take effect from Monday, the 20th December 2021 to ensure that we continue to suppress further spread of the disease in our communities:*

*1: PUBLIC GATHERINGS*

*In addition to general preventive measures including use of face masks in open places, observance of social distance, frequent washing of hands and use of sanitizers:*

*a) all religious, recreational and wedding gatherings should not exceed 100 people indoors, and 250 people outdoors subject to the social distancing requirements of at least one meter between persons*
*b) for sporting activities, the figures prescribed under paragraph (a) above should include players, officiating personnel, officials of participating teams and spectators;*
*c) all bars and entertainment centres should close by 10 pm*
*d) night vigils for funerals are not permitted, and indoor attendance should not exceed tern persons at a time*
*d) political party meetings are allowed subject to the limitations specified in (a) above [maximum of 100 persons in doors and 250 persons outdoors]*
*e) mobile markets should be held once a week.*

*Where necessary, an enforcement officer may order a gathering to disperse and may use reasonable force to cause the gathering to disperse.*

*2. WORKPLACES*

*In addition to general preventive measures including use of face masks in open places, observance of social distance, frequent washing of hands and use of sanitizers:*

*a) all offices should practice weekly disinfection of surfaces with emphasis on high-touch surfaces:*
*b. staff should work in shifts of no more that 50% capacity of an office at a time:*
*b) all contacts of confirmed COVID-19 cases should be traced, tested and self-quarantined for 14 days:*
*c) office may be re-opened 24 hours after disinfection is completed; and*
*d) in offices interacting with the public, where possible, appointments or bookings should be encouraged, and each office should have a contact tracing system in place.*

*2. HOSPITALITY AND RECREATION BUSINESS*

*In addition to general preventive measures including use of face masks in open places, observance of social distance, frequent washing of hands and use of sanitizers:*

*a) there should be disinfection of surfaces, with emphasis on high-touch surfaces, done at least once a week.*
*b) measures to decongest business premises should be implemented.*
*c) take away or delivery services should be encouraged for restaurants and other food serving facilities: and*
*d) Supermarkets and other shops should ensure disinfection of trolleys and baskets between two clients*

### *3. TRAVEL AND TRANSPORT*

*In addition to general preventive measures including use of face masks in open places, observance of social distance, frequent washing of hands and use of sanitizers:*

*1. **Travel and transportation within Malawi***

*a) travel to, and from, affected areas should be restricted, unless necessary, for essential services*

*b) Conveyances by public vehicles such as buses, mini buses and taxis should not exceed 60% of available seating capacity of the vehicles; and*

*c) Compliance committees should be established to ensure that preventive measures are adhered to by all operators.*

*1. **International travel and transportation from Malawi***

*a) travel to countries or territories, categorized as high-risk destinations by Government, is not allowed:*

*b) Only travel for essential purposes, as defined by Government, to high risk designated countries or regions will be allowed.*

*III) **International travel to Malawi***

*a) there is no restriction to entry into Malawi for travellers from all countries, except those from countries that may be classified as High Risk Countries. However, all travellers should produce a valid negative PCR based test certificate which was obtained from an accredited or designated laboratory in the country of origin within 72 hours of arrival in Malawi. In Addition, travellers should show evidence of full COVID-19 vaccination at the point of entry. Those without proof of vaccination will be vaccinated at the point of entry.*

### *4. EDUCATION INSTITUTIONS*

*There is no change to measures for education institutions which have remained open throughout the latest wave*

### *5. CLOSING REMARKS*

*As I end this press briefing, allow me to remind fellow Malawians that the Taskforce continues to monitor the situation of the pandemic and may make adjustments to the guidelines and measures from time to time.*

*Let me also remind fellow Malawians that COVID-19 Vaccines are available in all our government and CHAM health facilities and all those aged 18 and above should go to get vaccinated for free. No one should pay for these vaccines.*

*Uptake of these vaccines has not been high enough towards reaching our goal of vaccinating at least 60% of eligible Malawians by the end of next year. The vaccine remains our best preventive tool and reaching 60% of Malawians remains our target. Accumulating data is continuing to indicate that the majority of those being admitted to our emergency treatment units or losing their*

*lives to COVID-19 have not been vaccinated. I therefore urge all Malawians to come forward and get vaccinated. Further, let me point our that the COVID-19 vaccines will be made mandatory for certain categories of people and the specific categories will be announced in due course.*

*I also urge all Directors of Health and Social Services, all Council managers, and traditional, religious and influential opinion leaders to continue collaborating as we continue to implement vaccination drives that take the vaccines to the people where they live, especially those far to reach areas and the elderly.*

*I count on all Malawians of good will to bring this pandemic under control. No one is safe until all of us are safe.*

*I thank you for your attention and I wish you a safe festive season.*"

A storm in a teacup

58. Few matters stand out like sore thumbs in Exhibit SN2. In the first place, the press conference was called to give an update on the resolutions that were made during the meeting of the Presidential Task Force that was held on 15th December 2021. Secondly, the resolutions relate to measures to take effect from "Monday, the 20th December 2021" and these measures are grouped under five headings, namely, "PUBLIC GATHERINGS", "WORKPLACES", "HOSPITALITY AND RECREATION BUSINESS", "TRAVEL AND TRANSPORT" and "EDUCATION INSTITUTIONS". Thirdly, the issue concerning Covid-19 vaccines was not a resolution: it was covered under "CLOSING REMARKS". Fourthly, the categories of people in respect of which the Covid-19 vaccines is planned to be made mandatory is not stated in Exhibit SN2. Fifthly, according to Exhibit SN2, 'the specific categories will be will be made in due course". Sixthly, Exhibit SN 2 does not contain any date as to when COVID-19 vaccines will be made mandatory. Seventhly, conspicuous by its absence in Exhibit SN2 is statement or statements to the effect that *"mandatory COVID-19 vaccination would be introduced by January, 2022 to all public servants, frontline workers and those working in the social sector, including journalist".*

59. Needless to say, these findings are damning to the case of the Applicants. For example, the fact that the categories of people in respect of which the Covid-19 vaccines is planned to be made mandatory is not stated means that the Applicants cannot establish that they fall within the categories of people to be affected. In short, they would not be able to establish locus standi. This coupled with the fact that no date has been given as to when "Covid-19 vaccines will be made mandatory" simply confirms that the present proceedings have been prematurely brought and the questions being raised for determination are, to a great extent, both abstract and hypothetical. It is not the business

of courts to give advice on a hypothetical matters except where it is expressly allowed to do so.

60. The Applicants also rely on Exhibit SN5B: see paragraph 17 of the sworn statement by Mr. Namiwa. This exhibit is a statement on mandatory Covid-19 vaccinations issued on 21st December 2021 by the Malawi Human Rights Commission. The first paragraph of the statement is pertinent and it reads as follows:

> *"The Malawi Human Rights Commission (the Commission) has noted with concern Government's announcement, through the Minister of Heath, who is also Co-Chair of the Presidential Task Force on Covid-19, to introduce mandatory vaccination by January, 2022. According to the statement, this will affect all public servants, frontline workers, and those working in the social sector, including journalist."*

61. Exhibit SN5B has no attachment. It is thus not clear to this Court whether or not the announcement being talked about in Exhibit SN5A refers to the speech by the Minister of Health contained in Exhibit SN2. If the announcement is not the one in Exhibit SN2, it means the document or documents embodying the decision that the Applicants seek to challenge as regards the alleged introduction of mandatory Covid-19 vaccination is not before this Court in this case.

62. In the event that the proposition in paragraph 61 of this Ruling is true, then there can be no question that the probative value of Exhibits SN2 and SN5A is much less than the probative value to be attached to the document (statement) containing the decision that the Applicants seek to challenge. I thus find it very remarkable and worrisome that whilst the Applicants were resourceful enough to source and adduce to this Court Exhibits SN2 and SN5A, they made no effort at all (the facts speak for themselves) to bring before this Court the material document (statement). How the Applicants expect the Court to quash a decision contained in a document that is not before the Court for its examination is beyond me.

63. It might not be out of order to state that the absence of this crucial document (statement) would perhaps have been looked at from a favourable light had it been that the Applicants had been honest enough to point out to the Court that they had not presented the document (statement) in question to the Court and give an account of attempts, if any, made to secure the same and challenges, if any, faced in that quest. Unfortunately, the Applicants did not have the courtesy to do this.

64. Matters have not been helped by the fact that the Applicants have misrepresented several other material facts. Firstly, there is the issue to do with Exhibit SN2. As already observed herein at paragraphs 55 and 56 of this Ruling, Mr. Namiwa presented Exhibit SN2 as being a copy of the Ministerial statement by which the 1st Defendant announced that "*mandatory COVID-19 vaccination would*

*be introduced by January, 2022 to all public servants, frontline workers and those working in the social sector, including journalist".* Nothing could be further from the truth.

65. Secondly, there is misrepresentation regarding Exhibit SN5B: see paragraph 17 of the sworn statement by Mr. Namiwa. Exhibit SN5 is 46 pages long but for present purposes only a few pages have to be quoted. Exhibit SN5b reads:

> *"December 6, 2021*
>
> *International Criminal Court*
> *Office of the Prosecutor*
> *Communications*
> *Post Office Box 19519*
> *B2500 CM The Hague*
> *The Netherlands*
> ***Email: otp.informationdesk@icc-cpi,int***
>
> .....
>
> *Mr. Prosecutor*
>
> *1 This communication and complaint is provided to the office of the Prosecutor pursuant to ...*
>
> *2. We have tried to raise this case through the local English police and the English Court system without success ...*
>
> *49. It is our further intention to present to you and detail how, in the United Kingdom this year, the Government of the United Kingdom, with its Ministers and senior officials have violated the Rome Statute of the International Criminal Court ...*
>
> ***128 It is of the outmost urgency that ICC take immediate action, taking all of this into account, to stop the rollout ....***
>
> ***D. REQUEST FOR THE OPENING OF AN ENQUIRY***
>
> *129*
>
> *151 The request for investigation meets the criteria of the Statute...*
>
> *153. **WE WANT TO REPEAT: it is of outmost urgency that ICC take immediate action ... by way of an IMMEDIATE court injunction***
>
> *APPENDICES*
>
> ....."

66. In paragraph 17 of his sworn statement, Mr. Naniwa presented Exhibit SN 5B as being an extract of a judgement of the International Criminal Court (ICC) stopping two things, namely, the rollout of Covid 19 Vaccination and the introduction of unlawful vaccination passports. He further stated that the said judgement was delivered after the Court heard *"submissions of well experienced and advanced doctor"*. This was a total lie. As was correctly observed by the Attorney General, Exhibit 'SN5B' is not a judgment of the ICC but a complaint before the ICC.

67. In paragraph 8 of his sworn statement in reply, Mr. Namiwa claims that he did not intentionally mean to misrepresent the complaint before the ICC as a judgement of the ICC. He claims that what happened was a result of an oversight on his part and *"and bona fide mistake"*. With due respect to Mr. Namiwa, bare claims will not do. Mr. Namiwa should have led evidence in support of his claim that the misrepresentation was innocently made. The High Court was faced with a similar claim in the case of **Malawi Congress Party v. The President of the Republic of Malawi, Judicial Review 34 of 2020** and paragraph 102 of the said judgement is relevant:

> *"Firstly, there has to be evidence adduced before the Court on the basis of which the Court can reach the conclusion that the complained act was innocently done or not. For example, in **Evans v. Bartlam**, the court made a finding of fact regarding the defendant's knowledge of his right to apply to set aside the judgement."* – Emphasis by underlining supplied.

68. In the present case, no evidence whatsoever has been led by Mr. Namiwa, or the Applicants for that matter, to explain how Mr. Namiwa ended up mispresenting a complaint before the ICC as a judgement of the ICC stopping the rollout of Covid 19 Vaccination and the introduction of unlawful vaccination passports.

69. The Court has deliberately set out the relevant part of Exhibit SN5B and I am baffled as to how Mr. Namiwa could have understood the complaint before the ICC as a judgement of the ICC. The Court is inclined to the view that Mr. Namiwa, for reasons best known to himself, chose not to be truthful on this issue. In light of the foregoing, I am not persuaded by the claim by Mr. Namiwa that what happened was a result of a mere oversight on his part.

70. It has been held, in the case of **Brink's Mat Ltd v. Elcombe and Others[ 1988] 1 WLR 1350 at 1356F**, that the duty of an applicant in a judicial review case to make a full and frank disclosure of material facts entails, among other things, the following:

1. material facts are those which it is material for the judge to know in dealing with the application as made

2. materiality is to be decided by the court and not by assessment of the applicant or his legal advisors

3. the applicant must make proper inquiries before making the application

4. the duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries

5. the extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case

6. if material non-disclosure is established the court will be astute to ensure deprivation of an ex-parte injunction or any relief obtained thereby

7. whether the fact complained of is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to the issues and that non-disclosure was innocent is an important consideration but not decisive.

71. Further, whether or not a fact complained of is of sufficient materiality depends on, on among other matters, the importance of the fact to the issues in the case: see **Brink's Mat Ltd v. Elcombe and Others [1988] 1 WLR 1350, at 1356F**. To my mind, there can be no doubt that the suppressed facts in the present case are material in that they go to the root of the challenged decisions. It is thus my finding and holding that the Applicants suppressed material facts.

Conclusion

72. In summary, for the various reasons given herein, this Court is of the clear view that the Applicants have failed to show a fit case for further investigation in the proposed judicial review. What we have here is the proverbial "*a storm in a tea cup*" or "*making a mountain out of a molehill*". The application for permission to commence judicial review is, accordingly, dismissed.

73. Finally, for the avoidance of doubt and in the interest of clarity, the application for interim reliefs has been dealt a fatal blow by the fact that the application for permission for judicial review has failed.

Costs

74. The position of the Applicants on the question of costs is that each party should bear own costs. Counsel Taulo informed the Court that he is acting on behalf of the Applicants on pro-bono basis. He explained that he decided to do so in solidarity with the Applicants who *"want to see that there is no violation of human rights and have shown great courage"*.

75. The Attorney General submitted that Counsel Taulo had cited no authority for his prayer for a no-cost order. The Attorney General further contended that the State is expending tax payers money to defend frivolous applications brought by mere busy bodies. He prayed that the Applicants be met with an order of costs against them.

76. Costs are in the discretion of the Court: see section 30 of the Courts Act. It is also commonplace that costs follow the event. An instructive authority is Order 31(3)(2) of the CPR which provides that where the Court decides to make an order about costs, the unsuccessful party should be ordered to pay the costs of the successful party.

77. Looking at the circumstances of this case, it would be very difficult for the Court to find a justification for going against the norm that costs follow the event. Firstly, it is noteworthy that the Applicants have sued wrong parties. Secondly, the Applicants have failed to establish that they have locus standi in this case. Thirdly, the Court has found that they suppressed material facts. Fourthly, what comes out from an examination of the documents filed with the Court by the Applicants is that the Applicants were too casual. They forgot that, as one eminent Judge keeps reminding us, "litigation is serious business and it has to be handled as such". In short, there was shameful laxity on the part of the Applicants and their Counsel in a case whose stakes are very high.

78. In view of the foregoing and the fact that the Defendants have succeeded in resisting the application, I have no hesitation in awarding costs to the Defendant. It is so ordered.

Pronounced in Court this 13th day of January 2022 at Lilongwe in the Republic of Malawi.

**Kenyatta Nyirenda**

**JUDGE**