



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 50 OF 2018**

**BETWEEN**

**COXLEY KAMANGE ..... CLAIMANT**

**AND**

**THE REGISTERED TRUSTEES OF MINIBUS**

**OWNERS ASSOCIATION OF MALAWI ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Chimowa, of Counsel, for the Claimant

Mr. Mwala, of Counsel, for the Defendant

Mrs. Jessie Chilimapunga, Court Clerk

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**RULING**

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*Kenyatta Nyirenda, J.*

This is my ruling on an application brought by the Claimant under Order 10, rules 1 and 10, of the Courts (High Court) (Civil Procedure) Rules [hereinafter referred to as “CPR”]. The Claimant seeks an interim order of injunction:

*“barring or restraining the Defendants by themselves, their servants or agents or howsoever otherwise from suspending the Claimant from his duties as the Secretary General for the National Executive Committee or as the Regional Secretary for the Minibus Owners Association of Malawi, Southern Region Committee and from suspending all the allowances which the Claimant is entitled to in his capacity as Secretary General for the National Executive Committee and Regional Secretary for the Southern Region Committee of MOAM and from being blocked to perform the duties of the positions that the Claimant holds at the Defendant’s offices and to deliberate the issue of the Claimant’s suspension at the forthcoming AGM of the Defendants until trial of the action or until further order of the court”.*

The application is supported by a sworn statement by the Claimant [Hereinafter referred to as the “Claimant’s Sworn Statement”] which is couched as follows:

- “3. *THAT I am elected to the position of the Secretary General for Minibus Owners Association of Malawi (MOAM) and the next elections, all factors being equal, will be held in March 2018.*
4. *THAT I am also elected to the position of Secretary for the Southern Region Committee for Minibus Owners Association of Malawi.*
5. *THAT on 30<sup>th</sup> January 2018, I received a phone call from Mr. Christopher Chisesele, the National Chairman of MOAM ho told me that I should withdraw a criminal case, **The Republic v Isaac Osman and Stone Mwamadi Criminal Case No. 487 of 2017** which is being heard at Limbe Magistrate’s Court Dalton Road, or else he order that payment of my allowance be suspended.*
6. *THAT the National Chairman’s phone call made me to wonder why he would make such a threat when he was very much aware that the accused persons had physically assaulted me and caused great damage to my office. I hereto attach a copy of a Photostat of my hand which was stabbed by one of the suspect Mr. Stone Mwamadi.*
7. *THAT for clarity sake, in **R v Isaac Osman and Stone Mwamadi**, I complained to the Police that I had been physically attacked by some employees of MOAM who wanted MOAM to pay them their salary arrears which I did.*
8. *THAT after I had paid them their arrears the employees stated demanding that I pay them their bonuses too on the spot, a suggestion which I complied with and the employees were duly paid.*
9. *THAT I was surprised that despite my complying with all their demands the said employees still resorted to physically assaulting me and broke office furniture including my office door.*
10. *THAT after receiving the call as mentioned above in paragraph 4, on the same day the 30<sup>th</sup> of January 2018, I decided to write the National Chairman asking him to put his request in writing for record purposes. I hereto attach a copy of the said letter marked and exhibited as “CK1”.*
10. *THAT however, the next day, 31<sup>st</sup> January 2018, I was surprised that instead of receiving a reply to my letter, I received a letter suspending my allowances. I hereto attach a copy of the said letter marked and exhibited as “CK2”.*
11. *THAT stated below are some of the allowances which were arbitrarily suspended even though at the material time I was still executing the duties for which I am supposed to earn the said allowances;*
  - a) *K5,000.00 as daily allowance*
  - b) *K30,000 as fuel allowance per week*

- c) *K25,000 as phone allowance per month*
  - d) *K10,000 as entertainment allowance per week*
12. *THAT it is imperative to mention that Article 30 of MOAM's constitution provides that as a Regional Secretary I am one of the members of the Executive Committee who are entitled to receive allowances e.g. phone allowances. I hereto attach a copy of the Constitution of MOAM marked and exhibited as "CK3".*
  13. *THAT the said letter, as in 10 above, was co-signed by the Regional Treasurer and Vice Regional Secretary, both of whom I noted do not have legal mandate to issue such correspondences as per Article 16 of the Constitution of MOAM.*
  14. *THAT On 1<sup>st</sup> February 2018, I wrote the National Chairman querying why he had chosen to ignore the rules of natural justice before suspending my allowances without giving me an opportunity to be heard. I hereto attach a copy of the said letter marked and exhibited as "CK4".*
  15. *THAT as if that was not enough, on 10<sup>th</sup> February 2018, I received a letter from the Chairperson of the Southern Region Committee Mr. Christopher Chisesele which was co-signed by a Secretary ( but I **am** the Secretary of the Southern Region Committee of MOAM).*
  16. *THAT the letter as referred to in 13 above was to the effect that I was being suspended as Secretary of the Southern Region Committee of MOAM. I hereto attach a copy of the said letter marked and exhibited as "CK5".*
  17. *THAT it is perplexing that when the decision to suspend my allowances was made I was not accorded an opportunity to be heard and the same happened when a decision was being made to suspend me from working as Secretary for the Southern Region Committee of MOAM.*
  18. *THAT a close scrutiny of "CK5" shows that a decision has been made that a final verdict in the matter will be made by the National Executive Committee of MOAM at the AGM which is scheduled to be held in March 2018. I also attach a Photostat of **The Nation** of 13<sup>th</sup> February 2018 marked and exhibited as "CK6" where at para. 2 Mr. Chisesele, the National Chairman of MOAM, is quoted as stating that I have to remain out of office until new office bearers are elected at the AGM.*
  19. *THAT if the Defendant are allowed to deliberate the issue of my suspension at the AGM, definitely my chances of being elected, to any position I may aspire to, will be slim since the electorate will have already been made to lose confidence in me.*
  20. *THAT I should also mention that the signatories of the letter suspending my allowances, as in "CK2", were the Regional Treasurer Mr Peter Maliyana and the Vice Regional Secretary Mrs Fanny Kamanga who both also happen to be members of the National Executive Committee of MOAM.*

21. *THAT further, the letter suspending me from my duties a Regional Secretary was signed by the Regional Chairman Mr. Christopher Chisesele who coincidentally also happens to be the National Chairman in the National Executive Committee of MOAM.*
22. *THAT it therefore follows that my prospects of getting a fair hearing, in a hearing whose quorum comprise the very people who made the decisions which I am complaining against is tantamount to zero since the makers of the negative decision will also become judges in a decision which they themselves made*
23. *THAT I repeat paragraph 14 above and state that I was not accorded a hearing before the decision to suspend my allowances was made and later to suspend me from my duties as Secretary of the Southern Region Committee of MOAM, the same I feel was unfair and undermined my right to fair labour practices and as such the same is tantamount to punishment before being heard which is contrary to the rules of natural justice.*
24. *THAT be as it may, Article 10 of the Constitution of MOAM provides for a Disciplinary Committee with power to hear and to decide upon any disciplinary complaint by or against any member.*
25. *THAT the Constitution of MOAM does not give any powers to hear disciplinary matters and let alone are those powers accorded to any member who is not a member of the Disciplinary Committee*
26. *THAT if the National Executive Committee of MOAM is not restrained from making a decision on the matter, not only will a grave substantive and procedural miscarriage of justice w be the result but also the decision will be unconstitutional as the AGM will be exercising duties which the Constitution accords power to a different forum ie the Disciplinary Committee.*
27. *THAT for avoidance of doubt, Article 10A 1 of the Constitution simply provides for the election of members of the Disciplinary Committee at the AGM but not necessarily that the AGM should hear disciplinary matters.*
28. *THAT therefore, it is an undeniable fact that the Defendants are breaching my right to fair labour practices and have failed to follow rules of natural justice and that there are actions are also not in tandem with the Constitution of MOAM as such it is only with the intervention of this honourably court that sanity will be restored;*
29. *THAT I therefore believe that this is a proper case where an urgent interim relief should be granted.*
30. *THAT the Claimant undertakes to compensate the Defendants should it later transpire that the interim relief was erroneously granted.*
31. *THAT The above application is of extreme urgency as the Defendants as shown in "CK5" have already expressed their intention to deliberate at the AGM the issues*

*which led them to unilaterally suspend me from my duties as Secretary of the Southern Region Committee.*

*WHEREFORE it is my prayer that an interim relief be granted directing the Defendants that until the hearing of an inter-partes application for an injunction or until a further order, the defendants must either by themselves, their agents, servants or otherwise howsoever, be restrained from inviting me to a disciplinary inquiry or suspending me from my elected position as Secretary of the Southern Region Committee of MOAM and/or from withholding any allowances which I am entitled to receive in the course of executing my duties.*” – Emphasis by underlining supplied

I momentarily pause to observe that there is a fundamental mismatch between the application and the prayer in the Claimant’s Sworn Statement. The latter is limited to restraining the Defendant from (a) inviting the Claimant to a disciplinary inquiry, (b) suspending the Claimant from the position of Secretary of the Southern Region Committee of Minibus Owners Association of Malawi (MOAM) and (c) withholding any allowances. Needless to say, the prayer in the Claimant’s Sworn Statement does not seem to make sense and cannot sustain the grant of an interlocutory injunction. However, in the Court’s quest to deal with the proceedings justly and fairly, I will still proceed to consider the application as a whole.

The Defendant is opposed to the application and it, accordingly, filed a sworn statement in opposition through Peter Maliyana, a member of the Defendant’s National Executive Committee. For purposes of parity of treatment, I will also set out in full the material part of the said Sworn Statement. It reads:

- “3. *That I refer to paragraph 3 and 4 of the Claimant’s sworn statement and admit the same.*
4. *That the Claimant herein was among other duties responsible for the day to day administration of the Secretariat of the Defendants’ Regional offices in the Southern Region.*
5. *That in the course of his duties as Regional secretary the Defendant is alleged to have mismanaged the secretariat to an extent that there was discontent in the Defendant’s offices on the following allegations:*
  - (a) *Misconduct with female employees*
  - (b) *Bringing the Association into disrepute*
  - (c) *Engaging in conduct likely to cause industrial strike at the secretariat*
  - (d) *Bringing politics in the Defendant’s offices*
6. *That as a consequence of the situation that obtained at the Secretariat the Regional Office of the Association suspended the Claimant and referred the*

*matter to the national executive committee which has the mandate on issues of discipline and also suspended the payment of his allowances which are meant to facilitate his work. I Exhibit hereto copies of the said letters as “PM1” and “PM2”*

6. *That the suspension of the Claimant was therefore an investigative process aimed at bringing the situation at the office under control and to facilitate the disciplinary process.*
7. *That the National Executive committee summoned the Claimant to a disciplinary hearing in Lilongwe and provided him with transport expenses. I exhibit hereto copy of the letter as “PM3”.*
8. *That the Claimant decided not to attend the disciplinary hearing.*
9. *That the National Executive decided to dismiss the claimant for bringing the Association into disrepute*
10. *That in the premises therefore the Claimant was given an opportunity to be heard but he decided not to take it.*
11. *That balance of convenience in this matter lies in favour of dismissing the application as considering the volatile situation at the Defendant’s office, with allegation of sexual harassment of female employees, it will not be proper for the Claimant should return before the determination of the matter herein.”*

The Claimant filed a supplementary sworn statement dated 27<sup>th</sup> February 2018 wherein he complains of the Defendant’s decision made on 26<sup>th</sup> February 2018 suspending him as the Secretary General of MOAM.

I have deliberately set out all the sworn statements *in extenso* as the same are of particular relevance to the question whether or not damages would not provide an adequate remedy.

Counsel Chimowa submitted that damages would not be an appropriate remedy because, to quote Counsel Chimowa’s own words, “*very soon, there will be elections and the Claimant has a legitimate expectation to be elected as Chairman or Secretary General*”. It was thus argued that unless the injunction is granted, the Claimant would be debarred from vying for the said elective positions.

On his part, Counsel Mwala contended that the issue of debarment from elections is not relevant in the present case by reason of Article 20.2 of the Constitution of MOAM which provides that “*A member of executive committee shall not hold the office of a trustee*”. Counsel Mwala argued that as the Claimant is a trustee of MOAM, he is not eligible to hold any position on the executive committee of MOAM, including those of Chairman or Secretary General. It was thus submitted

that damages would be an adequate remedy.

I fully agree with Counsel Mwala that debarment from elections does not arise in the present case. I have read and re-read the Constitution of MOAM but searched in vain for a provision to the effect that a member on suspension cannot stand for elections. On a related note, it will be recalled that, at regional level, the Claimant was only suspended from exercising the duties of the office of Secretary of the Southern Region Committee of MOAM: the Claimant still remains a member of this Committee. In the premises, I am satisfied that damages would be adequate remedy for the loss that may be sustained between the application and the trial, that is, “*all the allowances which the Claimant is entitled to in his capacity as Secretary General for the National Executive Committee and Regional Secretary for the Southern Region Committee of MOAM*”.

Having found and determined that damages would provide adequate remedy, the application has to be dismissed in *limine*. It has to be borne in mind that the question whether or not damages constitute an adequate remedy is, just like the related question whether or not there is a serious question to be tried, a threshold requirement: only an affirmative answer to the question would lead to a consideration of the issue pertaining to balance of justice.

That said, there another important ground why the present application was doomed to fail, that is, suppression of material facts.

A perusal of the Claimant’s Sworn Statement show that it begins by stipulating the positions that he holds in MOAM, that is, Secretary General for Minibus Owners Association of Malawi and Secretary for the Southern Region Committee of MOAM: see paragraphs 3 and 4 of the Claimant’s Sworn Statement. Surprisingly, the Claimant does not state that he is also a trustee of MOAM.

The Claimant offered no explanation for non-disclosure of this fact. It is not difficult to fathom why the Claimant does not want the Court to know that he also holds the position of a trustee of MOAM. In terms of Article 20.2 of the Constitution of MOAM, a member of executive committee is not allowed to hold the office of a trustee.

It is trite that in an application for an interlocutory injunction, all material facts must be laid before the Court and nothing may be suppressed. The court requires *uberrima fides* on the part of the applicant: see the judgment of Lord Cozens-Hardy, M.R. in **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac [1917] 1 KB 486**.

The *ratio decidendi* of **R v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac**, supra, is that if an *ex parte* injunction has been granted upon an affidavit which was not candid and did not fairly state the facts, but state them in such a way as to mislead and deceive the court, there is power inherent in the court, in order to protect itself and prevent an abuse of process, to discharge the injunction and even to refuse to proceed further with the examination of the merits: see also **Vitsitsi v. Vitsitsi [2002-2003] MLR 419 (SCA)** the Supreme Court of Appeal stated, at p.422, that:

*“it is a perfectly and long settled principle of law that a person who makes an ex-parte application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not do so he will not be allowed any advantage gained by means of an order which will have been so obtained”*

It has to be borne in mind that material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. Therefore, for the conclusion to be reached that the claimant suppressed or misrepresented facts, the alleged suppressed facts must be facts which if it were laid before the court the ex-parte injunction could not have been granted: see **Gloria Mchungula Amani v. Stanbic Bank Limited and Another, HC/PR Civil Cause No. 558 of 2007(unreported)**. I have carefully analysed the Claimant’s Sworn Statements and I am satisfied that the Claimant suppressed material facts.

Before resting, I wish to observe that the principle requiring parties to disclose all material documents, whether supportive or against a party’s case, is now fully ingrained in CPR: see Order 15, r.1, of CPR which requires a party to disclose a document where the party seeks to rely on the document or the party is aware of the document, and the document to a material extent adversely affects the party’s case or supports another party’s case.

All in all, the application has to be dismissed with costs.

Pronounced in Chambers this 3<sup>rd</sup> day of April 2018 at Blantyre in the Republic of Malawi.



**Kenyatta Nyirenda**  
**JUDGE**