JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NUMBER 163 OF 2007

BETWEEN:

THE STATE
-AND-

THE MINISTER OF FINANCE……..……1ST RESPONDENT

GOVERNOR OF THE RESERVE

BANK OF MALAWI...…….2ND RESPONDENT

EX – PARTE: GOLDEN FOREX BUREAU LTD……1ST APPLICANT
- AND -

LEE FOREX BUREAU LIMITED……...……..2ND APPLICANT
- AND -

MONEY FOREX BUREAU LIMITED……..3RD APPLICANT
- AND -

STAR FOREX BUREAU LIMITED……...4TH APPLICANT
- AND -

KALIA FOREX BUREAU LIMITED ……...…5TH APPLICANT
- AND -
CAMBIO FOREX BUREAU LIMITED……6TH APPLICANT

MISCELLANEOUS CIVIL CAUSE NUMBER 164 OF 2007

BETWEEN:

THE STATE
- AND -
MINISTER OF FINANCE……...…1ST RESPONDENT
GOVERNOR OF THE RESERVE
BANK OF MALAWI…….……...2ND RESPONDENT

EX – PARTE: DINI FOREX BUREAU LTD……..APPLICANT

MISCELLANEOUS CIVIL CAUSE NUMBER 165 OF 2007

BETWEEN:

THE STATE
- AND -
THE MINISTER OF FINANCE…….…….1ST RESPONDENT

THE GOVERNOR OF THE RESERVE
BANK OF MALAWI……2ND RESPONDENT

EX – PARTE: CLC FOREX BUREAU LTD…….1ST APPLICANT
- AND -

CASH POINT FOREX BUREAU LIMITED……..…..2ND APPLICANT

- AND -

MALONJE FOREX BUREAU LIMITED…….3RD APPLICANT

MISCELLANEOUS CIVIL CAUSE NUMBER 165 OF 2007

BETWEEN:

THE STATE

- AND -

THE MINISTER OF FINANCE……..1ST RESPONDENT

THE GOVERNOR OF THE RESERVE

BANK OF MALAWI ……...……...2ND RESPONDET

EX-PARTE: SAFARI FOREX BUREAU LTD……...APPLICANT

MISCELLANEOUS CIVIL CAUSE NUMBER 166 OF 2007

BETWEEN:

THE STATE

- AND -

THE MINISTER OF FINANCE……..1ST RESPONDENT

THE GOVERNOR OF THE RESERVE

BANK OF MALAWI……...…….2ND RESPONDENT

EX – PARTE: VICTORIA FOREX BUREAU LTD....1ST

APPLICANT
- AND -

TRAVELLERS BUREAU DE CHANGE LTD…….2ND APPLICANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Messrs Kasambara/Ngwira/J M Chirwa/…...}
T Kalua/Chayekha/Chilenga/……..……...} for the applicants
Mrs Otoba……...}
Messrs Nyamirandu, Chief State……}
Advocate and Chalamanda for the ……..…} 1st respondent
Messrs Mvalo and Masumbu for the ……..2nd respondent
Mr Mdala – Recording Officer

R U L I N G

Manyungwa, J

INTRODUCTION:

This is the respondents' summons filed by the Minister of Finance and the Governor of the Reserve Bank of Malawi to whom I shall refer to as the 1st and 2nd respondent respectively, for the discharge of Orders of leave to move for judicial review, interlocutory injunction and stay in respect of decisions made by the 1st respondent requiring all Forex Bureaux to only operate under a strategic alliance Authorised Dealer Banks and that of the 2nd respondent through gazetted ***Exchange Control [Foreign Exchange Bureaux] Regulations 2007*** requiring that an applicant for a licence for a Forex Bureau be either an Authorised Dealer Bank or a Financial Institution. Following the above decisions by the 1st and 2nd respondents, the ex – parte applicants as appearing above on 26th April, 2007 and other subsequent dates obtained orders for leave to move for judicial review, interlocutory injunction restraining the 1st and 2nd respondents from implementing their decisions and an order of stay, staying those decisions. The application is made pursuant to Orders 53 and 29 of the Rules of the Supreme Court and is

supported by affidavits sworn by Dr Wilson Toninga Banda, General Manager, Economic Services of Reserve Bank of Malawi, Mr Neil Nyirongo, Mr David Nyamirandu, Chief State Advocate, and Mr Samuel Maliton, a legal Practitioner in the employ of the 1st respondent. The applicants vehemently oppose the respondents summons and placed reliance on the affidavits sworn in support of their respective applications for leave for judicial review and other incidental orders.

It should also be mentioned at the outset that initially these matters thus miscellaneous causes number 163, 164, 165, 166 and 167 were filed and treated as separate matters but were with consent of all parties consolidated into one. This ruling therefore shall apply to them as if they were one and the same proceeding.

THE EVIDENCE:

In his affidavit in support of the summons Dr Wilson Toninga Banda depones that the Foreign Exchange (Forex) Bureau Scheme was introduced in 1994 following the liberalization of the Current Account in order to bring about diversity in the foreign exchange market, and that the Forex Bureau sub – sector was also intended to channel funds from the unofficial to the official thereby lessening activities of the black market. That scheme which initially started with four bureaux in Central and Southern Regions has grown significantly in terms and in numbers. Dr Banda states in his affidavit that the Forex Bureau Scheme encountered a number of problems both during and after its evolution ***inter alia*** poor compliance with Exchange Control Regulations and operating guidelines by Forex Bureaux i.e. failure to report exchange rates on daily basis and failure to submit reconciliations of foreign exchange purchases. He also cites the problem of inadequate equipment and facilities for effective dealing in foreign exchange like some forex bureaux lacking telephones, counterfeit detectors, computers etc. Other problems included inadequate management capacity and increasing instances where forex bureaux were implicated in cases of money laundering and other forms of financial crime. The deponent gives the examples of Horizon and Fara Forex Bureaux whose licences were revoked in July 1999 when it came to the attention of the authorities that the two were not issuing accurate official purchases and sales receipts in their transactions. Further, in July 2000, the deponent states, that the licence of Fazaya Forex Bureau was revoked for a similar offence, and in November 2002 the licence of easy Money Forex Bureau was revoked when it was

discovered that the bureau was involved in fraudulent credit card transactions. In September 2003 Alliance Forex Bureau was suspended for two months when it was discovered that the bureau was faking foreign exchange sales transactions by using fictitious customer names and forging signatures of bona fide customers. Through this malpractice the bureau was fraudulently accumulating foreign exchange that was possibly being externalised through illegal means. Incidentally the said Alliance Forex Bureau was voluntarily wound up in December 2006. The deponent further states that in May 2006 a branch of Money Bureau was implicated in a case in which Sheikh Abdul Azizi, a non resident was convicted for attempting to illegally externalise foreign currency amounting to US$17,876.00. The deponent further avers that when investigations were conducted by the Anti – Corruption Bureau they revealed that a certain Mrs Shafeena Latif acting as Branch Manager for the said Money Bureau played a role by fraudulently issuing fake transaction receipts. The said Bureau however parried the misdeed on the branch manager who was subsequently reported to have been dismissed, and the bureau was warned for the malpractice. Further, it is stated that in August 2006 Money Bureau Limited was again warned for being connected to an allegation of illegal acquisition of Travellers Cheques by a Nigerian official. The deponent states further that the Bureau was found guilty of violating procedures in the way it sold a series of Travellers Cheques that formed part of the alleged scam when the said bureau admitted that it did not take responsibility to ensure that the said Travellers Cheques were signed at the point of sale in its presence. In another instance, customers who were implicated and reported to have purchased Travellers Cheques from the Bureau denied any dealings with the bureau over the period in question. It is further stated by Dr Banda, that Forex Bureaux do not respect Exchange Controls of other countries despite notification from the 2nd respondent. He gives an example that in March, 2007 Golden Forex Bureau sold ZAR25, 500.00 to a certain Mrs Patricia Jiya who was travelling to South Africa. This was despite the advice by the 2nd respondent of the ZAR5, 000.00 limit as was contained in the 2nd respondents communication to all authorised dealers in foreign exchange and confirmation from the Reserve Bank of Malawi. The deponent exhibited exhibit “WTD A” which is a letter from the 2nd respondent dated 24th March 2004 addressed to all Authorised Dealer Banks and Foreign Exchange Bureaux. The said letter is in the following terms:

Reserve Bank of Malawi

P.O. Box 30063
Capital City
LILONGWE 3
MALAWI

24TH March, 2004

TO: Authorised Dealer banks
Foreign Exchange Bureaux

Re: RESTRICTION OF IMPORTATION OF SOUTH AFRICAN RANDS BY VISITORS TO THE REPUBLIC OF SOUTH AFRICA

The Reserve Bank of South Africa has complained about the importation of excess South Africa bank notes by individuals visiting the Republic of South Africa from Malawi. In terms of
South African Exchange Control Regulations, visitors into RSA are allowed to import up to a maximum of Rand5,000 per person. Any excess amount in South Africa bank notes is liable to confiscation by the South African Government.

You are therefore required to advise individuals seeking to procure South African Rands from your bank/forex bureaux in order to travel to RSA about this restriction. This will help to avoid unnecessary trouble in South Africa.

Yours faithfully
Signed
GENERAL MANAGER, ECONOMIC SERVICES

The deponent further states that over the years the 2nd respondent has instituted a number of changes on operations but that problems have been aggravated by the fact that forex bureaux do not have a strong institutional and prudential dealing in the foreign exchange market and that in order to arrest these problems, the 2nd respondent has therefore resolved to strengthening monitoring of foreign exchange transactions, hence the

issuance of the new Exchange Control [Foreign Exchange Bureaux] Regulations, 2007. Dr Banda contends that the new scheme which would be run by Authorised Dealer Banks (ADB's) or financial institutions registered under the Banking Act is aimed at improving the monitoring and supervision of forex bureaux whilst ensuring compliance with regulations as the banks would ensure that all reporting procedures by forex bureaux are adhered to. The deponent further states that it was due to the strong institutional capacity that banks have, coupled with the availability of transparent monitoring, and supervisory mechanisms over banks, that it was decided that Malawi should have one regime of regulation over all forex dealers. Dr Banda contends in his affidavit that the intention is to ensure that all forex bureaux shall have increased capacity in terms of facilities, finances and technological advances since Authorised Dealer banks are well developed and are endowed with resources.

The deponent then outlines the operational licences for the various applicants and states that forex bureaux licences in Malawi are issued and renewable annually, and that licences for all forex bureaux in Malawi expired on 31st December, 2006. It is further stated that Bureaux licences in 2007 were issued to forex bureaux whose applicants were Authorised Dealer Banks or financial institutions i.e. Malawi Savings Bank Forex Bureau and CDH Forex Bureau Limited, and that the rest of the forex bureaux were operating on the strength of the blanket extension that was given to all forex bureaux by the 2nd respondent and that the last date for the said extension was 30th April, 2007 as is evidenced by exhibit "WTB 1", which is a copy of the Press Release which, ***inter alia*** contained the following statement:

PRESS RELEASE

CLOSURE OF FOREIGH EXCHANGE BUREAUX

> "The Reserve Bank of Malawi wishes to inform the general public that foreign exchange bureaux will with effect from 2nd May 2007 operate as an extension of foreign exchange operations of an Authorised Dealer Bank (ADB) or as a subsidiary of an ADB and other financial institution registered under the Banking Act, 1989. This is in line with the ***Exchange Control [Foreign Exchange Bureax] Regulations 2007*** gazetted by the Malawi Government on 13th April, 2007. As such all independent foreign exchange bureaux currently

operating in Malawi will no longer be authorised to buy and sell foreign currency or deal in any foreign exchange transactions by 30th April 2007. The following are the names and locations of the foreign exchange bureaux that will cease to operate on the new date (unless they meet new conditions)
[Here were listed the affected forex bureaux)

Signed

Victor Mbewe

GOVERNOR OF RESERVE BANK

Dr Wilson Toninga Banda contends therefore in his affidavit that the applicants' application(s) for leave for judicial review did not disclose that the ex – parte applicants' licences expired on 31st December, 2006 and that the same were merely extended temporarily by the 2nd respondent to 30th April, 2007 and that therefore the issue in contention is not revocation of licences. Further, the deponent states that a number of Forex Bureaux have been warned about serious violations relating to foreign exchange transactions. The deponent exhibited exhibits "WTB 2" which are copies of letters from the 2nd respondent of warnings for issuing fake receipts and operational irregularity addressed to The Managing Director of the Money Bureaux and The Managing Director of Victoria Forex Bureau respectively. The said exhibits are in the following terms.

Reserve Bank of Malawi

P.O. Box 30063
Capital City
LILONGWE 3
Malawi
07 November, 2005

The Managing Director
The Money Bureau
P.O. Box 30432
LILONGWE 3
Attention: Nazir Nathvani

Dear Sir,

Re: WARNING FOR ISSUING FAKE RECEIPT

We have learnt with dismay about Money Bureau's

involvement in a financial crime where one Sheikh Abdul Aziz was convicted in May 2005 for attempting to illegally externalise foreign currency amounting to US$17, 876.00. According to an investigation report by the Anti – Corruption Bureau Mrs Shafeena Yunus Latif, acting in her capacity as Manageress for Money Bureau – Crossroads Branch fraudulently issued false transaction receipt to Sheikh Abdul Aziz to purport that the foreign currency was lawfully exchanged at the Bureau. The fact that Abdul Aziz pleaded guilty to the offence before a court of law is enough evidence against Shafeen Latif and Money Bureau as an accomplice in the crime.

Issuance of inaccurate forex bureau official receipts for purposes other than to cover purchase and sale of foreign currency is an offence under the Exchange Control (Forex Bureau and Foreign Exchange Fixing Sessions) Regulations, which can result into immediate revocation of your operating licence. The Reserve Bank of Malawi, hereby seriously warns Money Bureau to desist from this malpractice or face the consequence. Further we are concerned about the continued employment of Mrs Latif in view of her role in the transaction. We strongly believe that her position need to be reviewed.

Yours faithfully

Signed
Dr Wilson t Banda
GENERAL MANAGER, ECONOMIC SERVICES

The other letter in part is as follows:

The Reserve Bank of Malawi

P.O. Box 30063
Capital City
LILONGWE 3
MALAWI

24th March 2004

The Managing director
Victoria Forex Bureau
P.O. Box 35829
LIMBE

Attention: Zubair Osman

Dear Sir

WARNING ON OPERATIONAL IRREGULARITY

We refer to recent inspection of your forex bureau in Blantyre on 19th February, 2004 which was conducted to investigate on a transaction receipt Number 163904 issued by your bureau for sale of ZAR15, 000.00 travel allowances to a Mr Yusuf A R Majid following an enquiry from South Africam Reserve Bank for our confirmation.

We wish to point out that during the inspection we did not get plausible explanation for the discrepancies between the customer's receipt that was tendered in South Africa and the other copies of the same receipt. Specifically, you did not give sensible explanation on why carbon copies of the receipt show a different date and inconsistent details relating to the currency that was told. While you seemed to downplay the anomalies by assuming that they were merely caused by human error, it was evident that you were not telling the truth. Consequently we needed to contact the customer himself to find out what exactly happened. Mr Majid disclosed that no receipt was issued to him when he procured the ZAR15, 000.00 from the bureau. We learnt that the receipt which is being queried by the South African Reserve Bank (Central Bank) was faxed to Majid some days later when ZAR10, 000.00 was confiscated from him in South Africa.

We also found in your records the remarks IOU Yousuf in relation to the sale of ZAR15, 000.00 to Mr Majid and this gave us the impression that the Bureau deals in some kind of credit transactions with its customers. This is totally unacceptable because it defies the whole essence of business of a forex bureau in Malawi, which is to transact in foreign exchange on the spot.

To say the least, this conduct is very unbecoming of Victoria Forex Bureau as one of the leading forex bureaux in the country. We therefore warn you to desist from this malpractice

and always ensure that accurate official receipts are issued on the spot in all your transaction with the public.

Yours faithfully

Signed
Efford Goneka

DIRECTOR, INTERNATIONAL OPERATIONS

Further Dr Wilson Toninga Banda states that before coming up with subsidiary legislation pertaining to the reforms that were planned to be introduced in the foreign exchange business, there was dialogue and discussions held between the 2nd respondent on the one hand and the applicants on the other. He cites the example that on 3rd November, 2006 a meeting was held between the Governor of the 2nd respondent and the Foreign Exchange Bureau Associations as is evident from exhibit "WTB 3" which are minutes of the said meeting. At that meeting the Governor of the 2nd Respondent informed the gathering that following the recent debt cancellation Malawi's credit rating had increased, thereby the country was becoming an attractive investment destination going by the numerous enquiries, and calls to liberalise the economy especially the capital account. Owing to these developments, the Governor informed the meeting that the World Bank was to send a technical committee of financial experts to review Malawi's financial markets and institutions and that this had forced the 2nd respondent and Malawi Government to review Malawi's financial markets and institutions. It was the view of the Governor at the meeting that there is some lack of discipline in the financial market due to the almost lack of regulation on forex bureaux operations, thereby resulting in differences in exchange rate margins offered by forex bureaux and Authorised Dealer Banks. Lack of internal auditing and supervision were also cited as some of the contributing factors. The Governor therefore informed the meeting that in an effort to regulate the market, there was a new directive that all forex bureaux should form an alliance with Authorised Dealer Banks (ADB's) of their choice, banks being better regulated, and that they would therefore be able to assist forex bureaux in the way they transact. At the same meeting the President of the Association of Forex Bureaux in Malawi – a Mr Nazir Nathvani asked for more time as it was generally felt that the deadline of 31st December, 2006 was not realistic, but the Governor counter – argued that the period given was adequate, and that all bureaux who might not have

formed alliances after the 31st December, 2006 deadline risked having their licences revoked. However, a lot of contributors representing Forex Bureau Association lamented on the lack of guidelines from the 2nd respondent on how the alliance would be formed, and also the fact that the bureaux risked being disadvantaged. It was also felt at the meeting that there was need for sensitization meetings with bureaux to explain the new directive, and some bureaux promised to approach some banks and report back on progress made.

It is further stated that following these developments the 2nd respondent on 8th December, 2006 wrote all forex bureau operators about the new arrangements in the forex bureau operation as is evidenced from exhibit "WTB4", which is a copy of the Exchange Control circular No. 2/2006 issued by the 2nd respondent. The said circular ***inter alia*** provided.

RESERVE BANK OF MALAWI
EXCHANGE CONTROL CIRCULAR NO. 2/2006
STRATEGIC ALLIANCE BETWEEN AUTHORISED
DEALER BANKSS AND FOREIGN EXCHANGE BUREAUX

> "The Reserve bank of Malawi wishes to advise that effective 1st January, 2007, all foreign exchange bureaus in Malawi will only be allowed to operate under strategic alliance with Authorised Dealer Banks (ADBs).
>
> The Nature and scope of the relationships between the foreign exchange bureaus and ADBs will have to be worked out by the banks involved
>
> …
>
> Please note that foreign exchange bureaus are required to strike strategic partnerships or alliances with ADB's by 31st December, 2006. Those foreign exchange bureaus that shall fail to obtain a partner shall be given a period of two months from 1st January, 2007 in order to wind up their business and cease to operate by 28th February, 2007. It is important therefore, for foreign exchange bureaus and ADBs to immediately engage in active negotiations towards these

relationships and report to the Reserve Bank before the effective date.

Signed

Victor Mbewe

GOVERNOR

8th December, 2007

It is further stated that on 18th December 2006 the 2nd respondent issued a further communiqué in which it requested for the ex – parte applicants' feedback and or comments. The said communiqué is contained in exhibit "WTB 5", as follows:

The Reserve Bank of Malawi

P.O. Box 30063
Capital City
LILONGWE 3
MALAWI

18TH December, 2006

TO: ALL OPERATORS OF FOREIGN EXCHANGE BUREAUS AND AUTHORISED DEALER BANKS (ADB'S)

The Reserve Bank of Malawi recently communicated to representatives of foreign exchange bureaus and Chief Executives of Authorised Dealer Banks (ADB's) about new policy on operations of foregn exchange bureaus whereby the bureaus will with effect from 1st January, 2007 only be allowed to operate under strategic alliances with Authorised Dealer Banks.

Further to the initial notification on the new policy, we enclose herewith Exchange Control Circular No. 2/2006 which explains more on the required alliances between forex bureaux and ADB's including available alliance options for the two parties. We should be grateful for your comments on the guidelines to be provided to us by 22nd December, 2006.

Yours faithfully

Signed
Meg Kajiyanike

DIRECTOR, EXCHANGE CONTROL & DEBT MANAGEMENT

On 2nd December, 2006, the Forex Bureau Association of Malawi gave its feedback on the matter which is contained in exhibit "WTB" in which the President of the Association Mr Nazir Nathvani informed the second respondent that although the Association's members were willing to co-operate with the second respondent, and had already contacted some of the Authorised Dealer Banks, (ADBs), the said ADBs were not clear as to the purpose and motivation of the second respondent's directive. Mr Nathvani further informed the second respondent that the ADBs gave impression that the street front spot market did not fit into their strategies and could in fact detract them. Therefore the Forex Association of Malawi had approached the Bankers Association to exchange views. The second respondent was further informed that everyone was of the view that it was not possible to come to decisions and implement them before 1st January 2007, or even by 28th February 2007. The Association therefore asked the second respondent to reconsider the deadlines set in their letter and allow that the matter be explored further with the Bankers Association. Further it was also indicated in the same feedback that the members of the Association were confused with the timing of the directive, as there was no single member of the Association at the time who had any firm prospect of setting up an alliance considering the short period remaining before the end of the year 2006, and expressed the hope that it was not the second respondent's intention to effect a wholesale closure of the bureaux considering the serious implications this would have on the individual institutions, their employees and the dramatic impact on business confidence and the national economy, not least on the value of the Malawi Kwacha, the spot trade on which it was likely to revert to black-market at street level.

It was further contended by Dr Wilson Banda that the country intends to remove the remaining exchange control restrictions on the current account and liberalize the capital account, and that owing to many forex malpractices cited in his affidavit, forex bureaux were not in a position to competently handle forex transactions under the liberalized forex regime, as liberalization of the capital account would lead to introduction of new financial technique,

and instruments, new sources of funds and new participants in the financial markets which increase competitive pressure that can lead to efficiency gains but also introduce highly complex risks for the financial system requiring an improved system of prudential regulation. The deponent contrasted the examples of Zambia, whose currency depreciated due to foreign exchange liberalization, and Botswana which unlike Zambia, never underwent a similar experience because she had accumulated massive reserves to support the removal of exchange controls. It is further stated that a country's approach to liberalization depends on the nature of the economy, and that Malawi unlike Zambia and Botswana which have stronger economies needed to be cautious. It is therefore contended by the respondents that the introduction of the Exchange Control [Foreign Exchange Bureaux] Regulations 2007 is part and parcel of the process of enhancing the regulatory environment in preparation for the liberalization of capital account, which if not properly handled may negatively impact on the economy, such results as capital flight, enhance money laundering activities which if left unchecked may lead to the country losing its foreign reserves as well as its credibility for failure to honour its external obligations. This would in turn drive away investors and development partners.

Dr Wilson Banda therefore contends that the ***Exchange Control [Foreign Exchange Bureaux] Regulations 2007*** would strengthen the regulatory environment by ensuring that only institutions with the highest calibre of operational controls should deal in foreign exchange and that in Malawi such institutions are Authorised Dealer Bank (ADB's) and other Financial institutions licensed under the Banking Act. The deponet further contends that first respondent is indeed empowered by section 3 of the Exchange Control Act to make regulations as he did and that these regulations are not meant to abolish the applicants business but are an attempt to properly regulate and monitor forex in the country and that therefore the same can not be arbitrary and ***ultra vires*** the exercise of the respondent's power.

And in his affidavit in support of the application Mr Samuel Malitoni depones that all Bureaux's licences expired on 31st December 2006, and were not renewed and the said licences are exhibited an exhibit "SM1". He further states that the applicants were allowed by a circular issued by the second respondent to continue operating until February 28, 2007 and that this was meant to afford opportunity to the bureaux to strike alliances as is evidenced by exhibit "SM2". Mr Militoni further stated that there was a

further extension, which allowed the applicants to operate until April 30th, 2007 in order to allow them to arrange for the said strategic partnership in readiness for compliance with the new regulations. The deponent further contends that CLC Forex Bureau was issued with a licence valid until 31st December, 2007 but that the same was subject to CLC Forex Bureau finalising a partnership agreement with New Building Society Bank by 28th February, 2007, which agreement did not materialise. It is therefore contended that CLC Forex Bureau failed to disclose this fact, as is clearly borne out by exhibit "SM3". It is further deponed that after the failure by the applicants to form the said strategic alliances, the new regulations were drafted and sent to each of the ex – parte applicants such that the ex – parte applicants can not be surprised of the new regulations coming into effect on May 1, 2007. Consequently the applicants licences were not valid at the time of commencement of these proceedings as the regulations had already come into effect.

There is also an affidavit of Mr Neil Nyirongo which is not materially different from that of Dr Wilson Toninga Banda.

The ex – parte applicants vehemently oppose the summons and are arguing that each one of them were issued with a forex bureaux licence to operate forex bureaux after satisfying the Exchange Control [Forex Bureaux and Foreign Exchange Fixing Session] Regulations, 1994, as is evident in Document 1 by complying with the minimum requirements under Part III in regulations 8, 9 and 10 on being issued with the forex bureaux licence. The said licences which were issued in or around March, 2006 to the applicants were effective 1st January 2006, valid for a period of one year ending 31st December, 2006 and were accordingly endorsed that they were renewable annually. It was also endorsed on the said licences that they were issued under the Exchange Control [Forex Bureaux and Foreign Exchange Fixing Session] Regulations 1994. However by letter dated 16th April, 2007, signed by the 2nd respondent's Governor, the 2nd respondent advised the applicants to wind up their operations by 30th April, 2007 if they did not meet the requirements that they should be run by Authorised Dealer Banks (ADB's) or other Financial Institutions registered under the Banking Act. The said letter is in the following terms,] and a similar letter was sent to all other Bureaux]:

The Reserve Bank of Malawi

P.O. Box 30063
Capital City
LILONGWE 3
MALAWI

16th April, 2007

The Managing Director
Dini Forex Bureau
P.O. Box 1107
LILONGWE

Dear Sir

Re: CLOSURE OF DINI BUREAUX

Following the announcement by Government in Parliament to extend operations of Foreign Exchange Bureaux from 28th February to 28th March, 2007 there have been extensive consultations between the bank and various stakeholders regarding new requirements for Foreign Exchange Bureaux in Malawi. Following these consultations, Government has decided that Forex Exchange Bureaux will now be run by Authorised Dealer Banks (ADB's) or other financial institutions registered under the Banking Act 1989. Exchange Control [Foreign Exchange Bureau] Regulations are enclosed for your information. Unless you meet the new requirements, please be advised to wind up your operations as a foreign exchange bureau by 30th April, 2007. Reserve Bank of Malawi inspectors will visit your foreign exchange bureau on 3rd May, 2007 for a final inspection and audit of your operations as a closure requirement.

Yours faithfully

Signed
Victor Mbewe

GOVERNOR

A similar letter is exhibited as exhibit "SM 4" in the affidavit of Mr Samuel

Maliton. Further the ex – parte applicants state that enclosed in the letter of 16th April, 2007 were the Exchange Control [Foreign Exchange Bureaux] Regulations 2007 which regulations were to come into effect on 1st May, 2007. The applicants therefore contend that the said Exchange Control [Foreign Exchange Bureaux] Regulations, 2007 made by the 1st respondent were not laid before Parliament. By the aforesaid 2007 Regulations, the 1st respondent will only approve an application for licence if the applicant(s) ***inter alia*** operates as an extension of an Authorised Dealer Banks (ADB's), a subsidiary of an Authorised Dealer Bank or other financial institution registered under the Banking Act.

The ex – parte applicants therefore argued at the hearing of leave to move for judicial review that the duty of the applicant is to ensure, respect, promote and protect the applicants' Constitutional rights to economic activity and freedom of association enshrined in Sections 29 and 32 of the Constitution respectively. Further that the respondents have a duty not to promulgate legislation that would substantially and significantly affect the fundamental rights and freedoms recognised by the Constitution as provided for in Section 58(2) of the Constitution. The applicants further contended that the respondents have a duty to lay before Parliament any delegated legislation in accordance with Section 58(1) of the Constitution, and also a duty not to invoke legislation that is ***ultra vires*** and so the respondents had a duty to consult the applicants before promulgating regulations that will in effect close down the applicants' business or indeed render them illegal organisation. The applicants therefore pray that the leave to move for judicial review and the orders of injunction and stay of the decision be maintained.

ISSUES FOR DETERMINATION:

The main issues for determination in these proceedings is whether the order for leave to move for judicial review and the order of injunction and the stay order that were granted to the ex – parte applicants by this court on 26th April, 2007 be discharged and or vacated as was argued by the respondents and their legal practitioners or should be maintained as submitted by the applicants and their practitioners. Before I delve into my reasoning I wish to express the court's gratitude to both Counsel for the ex – parte applicants as well as Counsel for the respondents for their research and industry. It may not however be possible to recite all of Counsels' submissions in the

course of this ruling. This will not be out of disrespect to Counsel, but that I shall always bear the said submissions in the ruling, and where necessary I shall have recourse to them.

THE LAW:

The law is that it is always open to a respondent, like here, where leave to move for judicial review was granted ex –parte to apply to this court for the grant of leave to be set aside. ***Order 53 of the Rules of Supreme Court***[1] has stated that such applications however are discouraged and should only be made where the respondent can show that the substantive application will clearly fail. Further, ***Order 32*** rule 6 of the Rules of the Supreme Court provides:-

> "The court may set aside an order made ex – parte"

Michael Fordham in his ***Judicial Review Handbook***[2] has said:-

> "The court has power to set aside leave previously granted but will do so only in a very clear cut case."

See also the case of ***R V DPP Ex – p Camelot plc***[3]. Thus the jurisdiction to set aside leave is generally regarded as having its origin in ***Order 32*** above – cited. According to the learned authors De Smith, Woof and Jowell in their book, ***Judicial Review of Administrative Action***[4] they have stated at page 667:

> "Where leave has been granted, a respondent may apply to set aside the grant of leave on the grounds that the application discloses absolutely no arguable case or that there had not been frank disclosure by the applicant of all material matters of both fact and law. However, except in very clear cases such applications are not looked on with favour by the courts."

An application to set aside leave must be made promptly after the person concerned has discovered the grant of leave. See ***R V Eurotunnel***

[1] Order 53/1 – 14/2 of Supreme Court Practice

[2] ***Judicial Review handbook,*** 2nd Edition 1997 par 21.6 page 245

[3] [1997] 10 Admi L Rep 93

[4] De Smith, woof and Jowell. ***Judicial Review of Administrative Action*** 5th Edition, Sweet and Maxwell, 1995

Developments Ex – p Stephens[1]**.** The power of this court to set aside leave, already given, is covered by several English authorities. See ***R V Secretary of State for Home Department ex – p Begum***[2], ***R V Secretary of State for Home Department ex – p Khalid Al - Nafeesi***[3], ***R V Secretary of State for home Departement ex – p Chinoy***[4]**.**

Thus where given, the other party may apply to the court to have the leave set aside because the application discloses absolutely no arguable case or because the applicant has not frankly disclosed material aspects of the law. In ***R V Lloyds of London Ex- p Briggs***[5] Mann L J said concerning the duty to explain the precise basis of an application to set aside:

> "Where it is sought to set aside leave to move for judicial review which has been granted then as a matter of practice the grounds upon which it is sought to set aside leave must be specified with particularity. The jurisdiction to set aside is one which is sparingly exercised and the reasons for invoking that jurisdiction in a particular case must be specified."

Further in ***R V Secretaty of State for the Home Department Ex – p Begum*** (supra) Mc Gowan J had this to say at p 115

> "I agree with (Counsel) that this is a jurisdiction that should be very sparingly exercised."

See also ***R V Secretary of State for the Home Department Ex – p Sholola***[6] endorsed in ***R V Crown Prosecution Service Ex – p Hogg***[7]. And further in ***R V Customs & Exercise Commissioners ex – p Eurotunnel*** [8]it was stated that:

> "[I]t is obvious that the whole purpose of the leave stage would be vitiated if the grant of leave were to be regularly followed by an application to set aside."

[1] [1995] 73 P & CR. 1
[2] [[1989] l Admin LR 110, 112F
[3] [1990] COD 110
[4] [1991] COD 381
[5] [1992] l Imm. 135
[6] [1992] 1 Imm. 135
[7] [1994] 6 Admin LR 778
[8] [1995]CLC 392

And in ***Brendan V Brighton Borough Council***[1] it was stated that the legal profession should pause long and hard before making such applications. Where the court however finds there is no arguable case fit for further consideration, then the court should not grant leave. In ***R V Secretary of state for the Home Department Ex – p Ruck Shanda Begum***[2] it was stated that:

> "It is provided, in effect that where the court is convinced that there is no arguable case fit for further consideration it should not grant the application for leave for judicial review."

See also: ***The State V Secretary to the Treasury, Interteck Testing Services Ex – p J Mponda and 51 Others***[3] on page 4 of the judgement, the learned Mkandawire J had this to say:

> "The court has inherent jurisdiction to set aside orders including orders granting permission to apply for judicial review which have been made without notice being given to the defendant as was the case herein. The authority in point is ***R V DPP ex – p Camelot plc 1997 10 Admin L Rep 93…"***

Thus the requirement for leave in judicial review cases is, in my view, justifiable on the nature of the remedy and the subject matter of the application namely, Public Administration, or legally speaking public law. As was stated by Lord Donaldson MR in ***R V Secretary of State for the Home Department***[4] ***ex – p Chebalak:***

> "The requirement that leave be obtained before a substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases which are unarguable. Accordingly, an application for leave is normally dealt with on the basis of summary submissions. If an arguable point emerges, leave is granted and extended argument ensures upon the hearing of the substantive application."

In ***The State V Minister of Finance ex – p SGS Malawi Limited***[5] my

[1] The Times 24th July, 1996

[2] [1990]COD 107

[3] Miscellaneous Civil Cause Number 172 of 2006

[4] [1991] lWLR 890

[5] Miscellaneous Civil Application Number 40 of 2003

learned brother Mwaungulu J at page 9 of his ruling had this to say:

> "Leave ensures screening for deserving cases to avoid inundation and allowing public administration to continue at least expeditiously, where matters are unfit for judicial review. Moreover, the leave requirement ensures that at an early stage, the appropriate method merited by the law and a factual complexion accompanies the proceedings. Where leave is granted, the judge will have considered pertinent matters including of course, the two general considerations…"

The learned judge went on to say:

> "This, in my judgement means no more than that for every such case where leave initially given is to be set aside, the judge must consider the matter deliberatively. The standard of circumspection is no less for obvious cases than it is for deserving cases. It is circumspection, in my judgement that winnows the grain from the Chaff. In clear cases either way, namely where leave should be clearly granted or refused, little or no difficulty arises. In unclear cases the court must in my judgement, incline towards sustaining the leave given unless, of course, there are compelling reasons for acting contrawise."

Thus, in my considered opinion, the purpose of the requirement for leave is essentially twofold. As was stated by the learned judge Potani J in ***The State V The Governor of the Reserve Bank and Minister of Finance Ex – p Finance Bank of Malawi***[1] at page 2:

> [T]he purpose of the leave requirement is essentially twofold. Firstly, to eliminate at an early stage any frivolous, vexatious or hopeless applications for judicial review without the need for a substantive inter – parties judicial review hearing. Secondly, to ensure that an application is only allowed proceeding to substantive hearing if the court is satisfied that there is a case fit for further investigation and consideration."

It was also put succinctly by Lord Diplock in ***R V Inland Revenue Commissioners, Ex – parte National Federation of Self – Employed and***

[1] Miscellaneous Civil Cause Number 127 of 2005

Small Business Limited[1] that the requirement of leave is there to:

> "[P]revent the time of court being wasted by busy bodies with misguided and trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

There is also an edifying exposition of the rationale for leave in judicial review proceedings in the book by de Smith, Woolf and Jowell's ***Principles of Judicial Review***[2] quoted with approval by Potani J

> "The permission stage in Order 53 proceedings serves a number of purposes. First, it may safeguard public authorities deterring or eliminating clearly ill – founded claims without the need for them to become party to litigation. The requirement may also prevent administrative action being paralysed by pending but possibly spurious legal challenge. Secondly, for the High Court, the permission procedure provides a mechanism for the management of the growing judicial review caseload. A large proportion of applications can be disposed of at the permission stage with the minimum use of the court's – limited resources. Thirdly for the applicant, the permission stage far from being an impediment to access to justice, may actually be advantageous since it enables the litigant expeditiously and cheaply obtain the views of the High court Judge on the merits of his application."

At this juncture it is worthwhile to mention that the court is alive to the danger of being dragged into the determination of matters that are meant, if at all, to be determined at the substantive judicial review proceedings. However having sounded that warning, the court has to consider whether or not in the light of the issues raised by the respondents in their application, the case for the ex – parte applicants does indeed deserve to go for judicial review proceedings. As it has been stated in the leading case of ***Chief Constable of North Wales Police V Evance***[3] that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect

[1] [1982] AC 617 at 642

[2] DeSmith, Woolf and Jowell's ***Principles of Judicial Review,*** London, Sweet and Maxwell 1999.

[3] [1982]lWLR 1155 p 1160

of which the application for judicial review is made but the decision – making process itself. Lord Hailsham in that case at 1160 said:

> "It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the merits in question."

Clearly, the court in judicial review proceedings does not act as a court of appeal but will interfere with the decision of the public authority if it was made in excess of jurisdiction or power conferred by the enabling law. Judicial review will generally lie in these four broad categories (1) where there is want or excess of jurisdiction (2) where there is an error of law on the face of the record (3) where there is failure to comply with rules of natural justice and (4) where the public body's decision or action is unreasonable in the ***Wednesbury*** sense.

It was argued by Mr Noel Chalamanda, Counsel who appeared alongside Mr Nyamirandu, the learned Chief State Advocate representing the 1st respondent, that the three orders that the ex – parte applicants obtained namely order for leave to move for judicial review, order of injunction, and order for stay should be discharged and or vacated by this court mainly on three grounds namely (a) Suppression of material facts (b) that there was misrepresentation of material facts and (c) That the ex parte applicants case is unarguable. Mr Chalamanda submitted that the ex – parte applicants, in their application for leave omitted or misrepresented facts on the status of the operating licences when they failed to bring to the attention of the court the fact that at the time their licences had expired. He referred to the affidavit of Mr Samuel Malitoni which indeed depose to the fact that by 31st December, 2006 a number, if not all the ex – parte applicant's licences had expired. Counsel submitted that the ex – parte applicants were only allowed to operate beyond 31st December, 2006 because it was during the same period that the respondents had engaged the applicants in order for the applicants to align themselves with the new regulations, and that therefore the fact that the ex – parte applicants were not able to align themselves with the requirements pertaining to the new regulations should not be a ground for obtaining the orders they got from this court. Mr Chalamanda further

submitted that the legal position is that one can only operate a forex bureau if one is properly licenced, and that the existence of a licence and its validity is at the heart of operations of any forex bureaux. Further, Mr Chalamanda submitted that the ex – parte applicants also failed to disclose the fact that prior to the gazetting of the regulations, there were a series of meetings, discussions and consultations between the respondents on the one hand and the ex – parte applicants on the other. Counsel referred the court on this point to the case of ***R V Attorney General of Belize Action No. 152 of 2002,*** Where it is stated that even an bortive meeting must be disclosed. Counsel further argued that in the case of CLC Forex Bureau, although it was granted a new licence the said CLC Forex Bureau in its application failed to disclose that the licence was granted subject to the condition that its partnership or alliance with the New Building society had to come to fruition. Finally, Mr Chalamanda submitted as a 3rd ground that the orders for leave, injunction and stay should be discharged and or vacated because there is no arguable case, or lack of arguability.

Mr Ralph Kasambara who was lead Counsel representing the applicants, in replying to Mr Chalamanda's submission, submitted on the ground that there was non – disclosure of material facts, that the answer is to be found in the cases of ***The State V Minister of Finance Ex – p SGS Malawi Limited*** (supra), and ***Mpinganjira and Others V The Speaker of the National Assembly and the Attoreny General***[1] which are for the proposition that it is for the court that is going to decide what are the material facts in a particular case and that even where the material facts are not disclosed the court can, in an appropriate case, decide whether it should continue to hear the matter and or maintain the injunction. As regards the issue of consultation, Mr Kasambara submitted that it is a question of fact as to whether there was consultation or not in a particular case and referred the court to the case of ***Paikaru V Nau.***[2] Counsel therefore contended that if there was consultation, then this is a question of fact which can not be decided at this stage of the proceedings in the presence of two conflicting affidavits.

Where there is non – disclosure of material facts, the position at law is indeed that an ex – parte applicant for leave is under an important duty to disclose to the court of all material facts and matters including matters

[1] Miscellaneous Civil Cause Number 3140 of 2001

[2] ***Paikara V Nau*** [1971] PGSC 35

pointing against the granting of leave or relief. In ***R V Leeds City Council Ex – p Hendry***[1] it was stated that it is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the applicant. Latham J in that case said:

> "[T]his is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure: failure to do this will, in appropriate cases in the discretion of the court being exercised against an applicant in relation to the grant of relief."

In ***R V Lloyds of London ex – p Briggs***[2], the court applying the requirements summarised by Gibson L J in ***Brinks Mat Ltd V Elcombe***[3]**,** it was stated essentially that:

1. "The duty of the applicant is to make a full and fair disclosure of all material facts.
2. The material facts are those which it is material for the judge to know in dealing with the application as made; and materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.
3. The applicant must make proper enquiries before making the application…The duty of disclosure therefore 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.
4. The extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case.
5. If material non – disclosure is established the court will be astitute to ensure [deprivation of an ex – parte injunction obtained thereby].
6. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues and that non – disclosure was innocent is an important consideration but not decisive.
7. It is not for every omission that the injunction will be automatically discharged…The court has discretion."

[1] [1994]6 Admin LR 439

[2] [1993] 5 Admin LR 698

[3] [1988] lWLR 1350

The reasons for requiring the applicant to make a full and frank disclosure are not difficult to see. In ***Fitxegerald V Williams***[1] Sir Thomas Brigham MR talking about the importance of disclosure said:-

> "In seeking ex – parte relief an applicant must disclose to the judge any fact known to him which might affect the judge's decision whether to grant the relief or what relief to grant. It is no answer for an applicant who falls down on his duty to show that the relief would have been granted even had he complied with his duty. The courts have traditionally insisted on strict compliance with this rule as affording essential protection to an absent defendant and as applications for ex – parte relief have multiplied so the importance of complying with duty grown…the judge has then to exercise his own judgement whether in all the circumstances, the interests of justice are best served by discharging, or maintaining or varying the order. In making this judgement he will have regard to the importance of securing compliance with the fundamental principle but he must have regard also to the significance in the context of the particular case of the facts which had not been disclosed when they should have been.

Similarly in ***R V Kensington Income Tax Commissioners Ex – p Princes Edmond de Polignac***[2] Warnington L J made an illuminating statement on this point when he said at page 506:

> "It is perfectly well settled that a person who makes an ex – parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest and possible disclosure of all material facts within his knowledge and that if he does not make that fullest possible disclosure then he can not obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus been wrongly obtained by him."

See also The case of ***R V Attorney General of Belize; Republic of Peru V Preyfus Brothers and Company***[3]***, Mpinganjira and Others V Attorney***

[1] [1996]2WLR 447 at 454 F - H

[2] [1917] lKB 486,506

[3] (55) L T 802 at 803

General[1] and further in ***Bees V Woodhouse***[2] it was stated:

> "The party making an ex – parte application for an injunction should show ***utmost good faith*** and that the doctrine of ***uberrimae fidei*** in effect applies to such cases."

This duty on the applicant to make full disclosure extends to disclosure of facts and documents and even to legal principles and authorities and as such counsel should not expect even experienced judges to be seized of all relevant legal principles and authorities and should cite cases relied upon and adverse to the application as per Lotham J in ***R V Secretary of State for Home Department ex – p Li Bin Shi*** [3], ***R V Secretary of State for Home Office ex – p Shahina Begum***[4],

In the instant case the respondents arguments on the point of non – disclosure of material facts by the ex - parte applicants are that the ex – parte applicants did not state at the time of obtaining leave that the licences to operate forex bureaux had expired, and further that the applicants did not candidly disclose to the court that there had been a series of meetings between the parties prior to the coming into effect of the regulations. The ex – parte applicants contend on the other hand that there was no material non – disclosure and argue that in any case the question as to whether there was material non – disclosure or not is a question to be determined by the court and Mr Kasambara referred the court to the case of ***Mpinganjira and Others V The Speaker of the National Assembly and the Attorney General***[5]. Further, Mr Kasambara also argued that the ex – parte applicants could not be accused of having not disclosed the fact that their licences had expired, when in fact it is clear from the affidavit of Dr Wilson Toninga Banda, in paragraph 13 of his affidavit in support of the summons that all forex bureaux were in fact granted a blanket extension as is evidenced by exhibit "WTB 1", which extension was valid up to 30th April, 2007.

In my judgement, it is clear that by this blanket extension, all forex bureaux licences were valid up to the date of the said 30th April 2007. This is clear from the affidavit of Dr Wilson Toninga Banda, when he states that all forex

[1] Miscellaneous Civil Cause No. 40/2001
[2] 1907 LWL 531
[3] [1995] COD 135
[4] [1995] COD 176
[5] Miscellaneous Civil Cause Number 3140 of 2001

bureaux were operating under a blanket extension, of all the forex bureaux licences by the 2nd respondent. By this extension it meant all forex bureaux licences were validated up to last day of the extension. This explains why the forex bureaux were in operation up to 30th April, 2007. The affidavit of Mr Samuel Maliton on this point is therefore misleading when it states that the said licences had expired by 31st December, 2006 because in paragraph 3 and 4 of his affidavit in contradiction he refers to a circular that was issued by the 2nd respondents which circular extended at first, all forex bureaux licences to 28th February, 2007 as is clearly borne out by exhibit "SM 2" in Mr Malitoni's affidavit. Mr Malitoni also depones in paragraph 4 of the same affidavit that subsequent to the extension of the forex bureaux licences to 28th February, 2007 there was a further extension granted to the ex – parte applicants which allowed them to operate till 30th April, 2007. It is my finding therefore that by these extensions the ex – parte applicants, were legally allowed to operate as it is the granting authority namely the 2nd respondent that allowed them to do so. Consequently the applicants can not be faulted for non – disclosure of this fact, and that even if this were to be held otherwise the same is not, in my view, material, considering that the extension was granted by the 2nd respondent.

Pausing here, I also wish to deal with the issue of CLC Forex Bureau that was raised by Mr Chalamanda. Mr Chalamanda argued that CLC Forex Bureau had not disclosed, or at least suppressed the fact that the licence that the said ex – parte applicant was granted by the 2nd respondent was subject to the condition that its partnership or alliance with the New Building Society had to come to fruition by 28th February, 2007. With due respect to Counsel, I beg to differ. In the grounds for seeking for judicial review at paragraph 6.3 in respect of CLC Forex Bureau it is clearly stated that the applicant's licence (CLC Forex Bureau) was renewed for the whole of 2007 after the said ex – parte applicant had taken substantial steps towards complying with the 2nd respondents' directive to form an alliance with an Authorised Dealer Bank (ADB). There is exhibited document 7 and 8 in the said grounds that show the progress that CLC had made with New Building Society Bank. This point is also deponed to in paragraph 7 of Mr

Chanthunya's affidavit, who is the Managing Director of CLC Forex Bureau, when he states that CLF Forex Bureau made substantial progress towards getting into an alliance with New Building Society Bank, and that it was on that basis that its licence was renewed subject to finalization of the alliance with the said Bank, but that this was not done because the respondents came up with a new directive. To this extent therefore CLC Forex Bureau can not, in considered opnion, be faulted on non – disclosure.

On the question as to whether the ex – parte applicants failed to disclose that there were consultations, it would appear from the affidavit of Dr W T Banda, that mostly the applicants were merely being informed of directives from the 2nd respondents. For there to be consultation, the same must be real, genuine and effective communication between the parties. See the cases of ***Paikara V Nau***[1], ***Attorney General V J N Perry Construction Pty Ltd***[2] and ***Port Louis Corporation V Attorney General***[3]. In any case this is a question to be decided on the facts of the case which is not the duty of this court at this stage.

On the issue that the orders should be dismissed for lack of arguability, the law is indeed that where leave is granted ex – parte, the other party may apply to have the leave set aside because the applicant's case discloses absolutely no arguable case. See ***R V Secretary of State for Home Department ex – parte Khalid Al – Nafeeesi*** (supra). Thus leave will be refused unless the applicant demonstrates an arguable point. As was stated by my brother Judge Mwaungulu in ***The State V Ministry of Finance Ex – p SGS*** (supra) and quoted with approval in the case of ***The Director of Public Prosecutiions and the Lilongwe Magistrate Court Ex – p Dr Cassim Chilumpha***[4]

> "Where [leave] is given, the other party may apply to have the leave set aside because the application discloses absolutely no arguable case or because The applicant has not frankly disclosed material facts or material aspects of the law. A statement made for non – disclosure on an interlocutory injunction by Gibson L J in ***Brinks Mat Limited V Elcombe and others*** (supra) and cited with approval by Kapanda J in ***Mpinganjira and Others V the***

[1] ***Paikara V Nau*** [1971] PGSC 35

[2] [1951] AC 204

[3] [1954] AC 254

[4] Miscellaneous Civil Cause Number 315 of 2005

Speaker of the National Assembly and the Attorney General(supra) is apposite to non – disclosure for leave for judicial review.

> 'Finally, it is not every omission that the injunction will automatically be discharged. A ***locus poenitetiac*** may sometimes be afforded as per Lord Denning M R in ***Bank Meliat V Nikpour***[1]. The court has discretion notwithstanding proof of material non – disclosure which justifies or requires immediate discharge of the ex – parte order, nevertheless continue the order or to make a new order on terms.
>
> > 'When the whole of the facts including that of the original non – disclosure are before the court, it may well grant…a second injunction if the original non – disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.

From the principles laid down in ***R V Jockey Club Licensing Committee*** ex parte Wright (supra), the applicant must bring all matters of law materials to the granting of leave. In Judicial review, courts exercise supervisory jurisdiction on acts or omissions by public bodies in the area of public law. As Sir, John Donaldson M R said in ***R V Panel on Takeovers and Mergers ex – parte Datafin***[2] judicial review avails against public bodies namely bodies exercising power or performing a duty involving a public element. Judicial review also arises when an issue of public law arises…Consequently there would be no arguable case on a judicial review where clearly the body against which Judicial review is sought is not a public body properly understood. Equally, there would be no arguable case on judicial review where no issue of public law arises. Moreover there will be no arguable case on judicial review where the mechanism is sought to enforce an otherwise private right against a public authority. These considerations must attend to a judge when refusing or granting leave under judicial review."

See also ***R V Secretary of State for Home Departement Ex – p Chabank*****, (supra)** ***R V Secretary of State for Home Department Ex – p Rukshanda Begum*** (supra). Thus the judge must be satisfied that there is an issue as

[1] [1985] FSR 87, 90

[2] [1987]QB 815 at 834 E

per ***R V Social Security Commissioners Ex – p Pattni***[1] wherein it was stated that the ex – parte applicant must satisfy the leave judge that there is a basis for seeking judicial review. In ***R V Panel on Takeovers and Mergars Ex – p Datafin*** (supra) at page 844 E – G Sir John Donaldson M R said:-

> "I should like to make it clear that, but for the issue as to jurisdiction, this is not the case in which leave to apply should ever have been given…whether this was a matter calling for reconsideration was plainly for the panel…and the fact that the panel's conclusion might at first have appeared surprising to someone who was not in the day to day contact with the financial markets and who had heard none of the evidence would not have begun to justify the grant of leave."

And in ***R V Local government Commission for England Ex – p North Yorkshire Country Council***[2], Laws J, stated that the judge's task is essentially the same whether the papers are few or voluminous, whether the putative issues are simple or complex, there should be no greater tendency to grant leave in the latter class than the former, that task being to determine whether the case is one whose merits can conclusively decided against the applicant without a full hearing.

Further, in ***R V Inland Revenue Commissioners Ex – p National Federation of Self – Employed and Small Business Limited***[3] Lord Diplock said at page 644 this on the need for arguability on the ex – parte leave stage:

> "If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to an applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief."

However in ***R V Legal Aid Board Ex – p Hughes***[4] Lord Donaldson M R at page 628, commented that things had moved on since Lord Diplock's

[1] (1993) 4 Admin LR 219
[2] The Times 1994 (unreported)
[3] [1982] A C 617
[4] [1993] 5 Admin L R 623

comments and adopted this analysis, 'this was an ex – parte application and that in such a case leave is or should only be granted if ***prima facie*** there is already an arguable case or what has been called "sensible prospect of success." See also ***R V The Number 8 Area Committee of Legal Aid Board Ex – p Mergarry***[1], ***R V Secretary of State for the Home Department ex – p Mohammed Akram***[2]

The ex – parte applicants in the instant case contend that they have an arguable case, while the respondents counter – argue that there is none. As a matter of fact, Mr Nyamirandu deponed in his supplementary affidavit in support of the summons for the discharge of leave and the order of injunction and stay that the regulations, namely, ***The Exchange Control [Foreign Exchange Bureaux] Regulations 2007*** were properly laid before Parliament. He submitted that there is a presumption that subsidiary legislation is ***intra – vires*** and that its only in exceptional cases that an interim injunction can be obtained to restrain the operation of subsidiary legislation. That the law of the land must be upheld in the public interest if there is going to be any stability in our society and that if the applicants are to displace this presumption, then they will have to show a strong case, that the instrument, namely the Regulations herein are ***ultra – vires***. Mr Nyamirandu heavily relied on case from the Court of Justice of the European Communities namely: ***Factortame Ltd and Others V Secretary of State for Transport (No. 2)***[3]. This argument was further extended by Mr Masumbu, counsel for the 2nd respondent, who appeared alongside Mr Mvalo, who submitted that as a matter of fact the application for leave were premised on the assumption that Section 58 of the Constitution was not complied with. Mr Masumbu submitted that the power of the Minister of Finance to make regulations under both Sections 56 of the Reserve Bank of Malawi Act, Chapter 44:02 and 3 Exchange control Act 45:01 can not be challenged, and so the applicant's argument that the making of the 2007 regulations by the Minister is ***ultra – vires*** does not according to him, hold. Counsel further referred the court to Section 17(1)(2) of the General Interpretation Act, Chapter 1:01 and submitted that under that provision subsidiary legislation comes into operation once it has been gazetted and that the said Regulations were gazetted on 13th April, 2007. Mr Masumbu submitted that Section 58 of the Constitution does require that subsidiary

[1] 1st July 1994 (unreported)

[2] [1994] Imm AR 8 at p 10

[3] Court of Justice of European Communities, Case C 213/89 70

legislation must be referred to Parliament and that the affidavit of Mr Nyamirandu confirms that position that the Minister referred the said ***Exchange Control [Foreign Exchange Bureaux] Regulations 2007*** to Parliament. There is a letter that is exhibited as exhibit "DN 1" at paragraph 4 of Mr Nyamirandu's affidavit. That letter is in the following terms:

Ministry of Finance

P.O. Box 30049
LILONGWE 3
MALAWI

4TH May, 2007

The Clerk of Parliament
National Assembly
Private bag B362
LILONGWE 3

EXCHANGE CONTROL (FOREIGN EXCHANGE BUREAUX) REGULATIONS 2007

Pursuant to the Provisions of Section 58(1) of the Constitution of the Republic of Malawi and Standing Order Number 161(b) of the Parliament Standing orders, I send herewith a copy of the Exchange Control [Forex Exchange Bureaux] Regulations 2007. These Regulations were published in the Malawi Gazette Supplement, dated 13th April, 2007.

Signed
Goodwall Gondwe
MINISTER OF FINANCE

Mr Masumbu therefore submitted that going by the provisions of Section 17 of the General Interpretation Act, which provides that subsidiary legislation becomes law once the regulations are gazetted, the laying of the same in Parliament is not an issue. Counsel however conceded that Section 58(2) of the Constitution prohibits Parliament from delegating any legislative powers which would substantially and significantly affect the fundamental rights and freedoms recognised by this Constitution. Surprisingly, Counsel submitted that the issues of Freedom of Association and right to economic

activity and does not arise because in his view all that the Minister has done is to regulate the operations of the Bureaux and that the Regulations are merely intended to regulate the Foreign Bureaux industry and are not targeted at any individual or single company, and referred the court to the case of ***Stanton V City Council of Blantyre***[1] to support his argument that the Exchange Control Regulations 2007 are merely intended to ensure sound, economic, prudent policy.

In reply to these submissions Mr Kasambara first raised the issue about Section 58(1) and (2) of the Constitution and brought to the fore the case of ***Hon. Respicious Dzanjalimodzi V Attorney General***[2], a decision of the High court by my colleague Kamanga, J in which Counsel Mvalo who appeared for the applicant in that case contended that the Road Traffic offences (Prescribed Offences and Penalties) Regulations, 2003 lacked the force of law because the said regulations were not laid before Parliament. This case was however not brought to the attention of the court when Counsel Mvalo argued his case on behalf of the 2nd respondents. Let me here and now agree with Mr Kasambara, that indeed when Counsel appears in court he or she has a duty as an officer of the court to bring to the attention of the court all relevant authorities, including those against his or her clients case. Further, the argument, as I understand it, is not that the Minister of Finance has no power to make regulations under the Exchange Control Act or the Reserve Bank of Malawi Act, but whether he so exercised those powers in accordance with the law.

The first point of call on this aspect as to whether the regulations were required to be laid before Parliament is of course the 1995 Republican Constitution itself. Section 58 of the Constitution deals with Subsidiary legislation. The said section is in the following terms:-

> S58 (1) "Parliament may, with respect to any particular Act of Parliament delegate to the Executive or to the judiciary the power to make subsidiary legislation within the specification and for purposes laid out in the Act and any subsidiary legislation so made shall be laid before Parliament in accordance with its Standing Orders.
>
> (2) Notwithstanding Subsection (1) Parliament shall not have the power to

[1] [1996] MLR 217

[2] Miscellaneous Civil Cause Number 29 of 2006

delegate any legislative powers which would substantially and significantly affect the fundamental rights and freedoms recognised by this Constitution.

The respondents' argument, in my view, on the issue whether or not the ***Exchange Control [Forex Bureaux] Regulations 2007*** were laid or indeed that they are not required to be laid before Parliament can be faulted at least on two fronts. First, paragraph 4 of Mr Nyamirandu's affidavit clearly shows that the Minister of Finance, only purported to lay the said Regulations before Parliament by his letter of 4th May, 2007. Even if the court were to accept that by Honourable Minister of Finance's letter of 4th May, 2007, the regulations were laid before Parliament, which view is not accepted by the court, then it would in effect mean that as of 30th April, 2007, the date when the applicants were told to wind – up their Bureaux business, for failure to comply with the requirements of the regulations, the said regulations were not before Parliament, and as such they had not attained the force of law. Now the respondents submit that the said regulations attained the force of law on 13th April, 2007 when they were gazetted in accordance with Section 17 of the General Interpretation Act. This argument, I am afraid, can not be sustained. It must be appreciated that the General Interpretations Act, came into effect on 29th August 1966 some four decades before the new Constitutional order that was ushered in by the 1994 Republican Constitution which by Section 58(1) require "any" subsidiary legislation so made to be laid before Parliament. The word "any" means all subsidiary legislation that is made by the Minister has to be laid before Parliament in accordance with its Standing Orders. In the case of ***Dzanjalimodzi V Attorney General***[1] , Kamanga J held at page 4 of the judgement:

> "Under Section 58(1) of the Constitution, Parliament delegates to the Minister the Power to make subsidiary legislation. In the matter at hand, the Minister exercised his delegated authority accordingly in promulgating the requisite and necessary subsidiary legislation in the form of offences and penalties. However before the issue to which the Minister has been given authority to prescribe can have the force and effect of law, the party to whom the power has been delegated has to account to the principal authority who delegated such powers, and the principal law – making authority has to have knowledge about that issue before it

[1] Miscellaneous Civil Cause Number 29 of 2006 at p 4

> can gain the force of law. This knowledge by the law – making authority is gained when the delegated authority lays the issue before the principal law – making power. If the same was not done as contended by the applicant in the matter at hand, the process has not been completed as the requirements of Section 58(1) of the Constitution have not been satisfied. Hence, there is need for the aforesaid subsidiary legislation to be laid before Parliament in accordance with Section 58(1) of the Constitution and Parliamentary Standing Orders. Until that is done, it would be premature for the Minister to effect the provision of the aforesaid subsidiary legislation with regard to the Road Traffic (Prescribed Offences and Penalties) Regulations 2003. Hence if the same are being effected, they do not have the force of law and should not be enforced until they are laid before Parliament."

That decision in ***Dzanjalimodzi V Attorney General*** though not binding on me, being a decision by a fellow High Court judge is netherless, highly persuasive and, in my considered opinion, represents the current legal position in our Constitution. In my view Section 58 is meant to ensure transparency and accountability by those conferred the power to make subsidiary legislation, to Parliament which is the law – making authority Properly understood therefore, it would mean that that Section 17 of the General Interpretations Act is in conflict with the clear provisions of Section 58 of the Constitution, the position now being that subsidiary legislation would only become enforceable once it is laid before Parliament, and not by mere publication in the Gazette. See ***Hon Respicious Dzanjalimodzi V Attorney General*** (supra). Now the words laying before Parliament are not defined in the Constitution nor are they defined in the Parliament Standing Orders. Standing Order number 161(b) has provided as follows:-

> 161 "The functions of the Legal Affairs Committee shall include
>
> …
>
> (b) Scrutinising reviewing and reporting on all subsidiary legislation and statutory instruments promulgated under an Act of Parliament and all matters relating thereto shall be severally deemed permanently provide copies to the committee as soon as such documents are published in the Gazette."

An insight into what constitutes 'laying before Parliament', can be had from

the situation obtaining in England. The learned authors, De Smith, Woolf and Jowell in their book ***Judicial Review of Administrative Action*** (supra) at paragraph 5 – 073 at page 274 have said:-

> "Where any statutory instrument is required to be laid before Parliament after being made a copy must be laid before both houses [House of Lords and House of Commons]."

This is in accordance with Section 4(1) of the Statutory Instruments Act of 1946 of England, which provides:-

> Section (1) "Where by this Act or any Act passed after the commencement of this Act any statutory instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each house of Parliament and subject hereafter as provided, shall be so laid before the instrument comes into operation."

Thus, the learned authors de Smith, Woolf and Jowell have argued:

> "If however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. It is true that the laying requirements have generally been regarded as directory by both the courts and learned commentators, ***but the wording of the 1946 Act is strong ("a copy of the instrument shall be so laid before the instrument comes into operation')*** and there is a dictum to the effect that these words are to be read in their literal sense."[1] [emphasis mine]

See the cases of ***R V Immigration Appeal Tribunal ex - Joyles***[2] and ***R V Sheer Matacraft***[3]

The second front upon which the respondents argument is defeated is Section 58(2) of the Constitution. Subsection 2 to Section 58 clearly removes the power or prohibits Parliament from delegating any legislative powers to any authority including a Minister, if such delegation would

[1] de Smith, Woolf and Jowell, ***Judicial Review of Administrative Action*** (ibid) pp215

[2] [1972]3AllER

[3] [1954]lQB 586 at 590

substantially and significantly affect the fundamental rights and freedoms recognised by this Constitution. The contention of the ex – parte applicants is that since the regulations so made ***prima facie*** violate their rights to economic activity and freedom to associate under Sections 29 and 32 of the Constitution respectively, then the same are unconstitutional, as they were promulgated by way of delegated or subsidiary legislation, which delegation is prohibited, in a case, as here where fundamental rights and freedoms would be substantially significantly affected. Section 29 of the Constitution provides:

> S29 "Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi."

And Section 32 of the Constitution provides:

> S32(1) "Every person shall have the right to freedom of association which shall include the freedom to form associations.
>
> (2) No person may be compelled to belong to an association."

Now these rights are contained in Chapter 4 of the Constitution, which contains the Bill of Rights. Section 15 of the Constitution provides for the protection of human rights and freedom.

Section 15 of the Constitution provides:

> "The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and where applicable to them, by all natural and legal person in Malawi and shall be enforceable in the manner prescribed in this Chapter."

Further, Section 5 of the Constitution provides for the Supremany of the Constitution:

> "Any Act of Government or any law that is inconsistent with the provisions of this Constitution shall to the extent of such inconsistency be invalid."

The argument therefore that was advanced by Mr Masumbu that the Minister

merely made the regulations for sound, economic, prudent policy can not, in my most considered opinion, be accepted. As a matter of fact the case of ***Stanton V City Council of Blantyre*** (supra) that was cited by Counsel, quite different from what Counsel advanced held that that although the defendant had powers to make the bye – laws under Local Government (Urban Areas) Act, bye –laws 6(3) that the defendant had made was not compatible with the spirit of the Constitutional Order, as it indirectly violated the plaintiff's Constitutional right to freely engage in economic activity. The plaintiff in that case commenced the action by originating summons seeking determination by the court of five issues all relating to statutory construction. The plaintiff slaughtered livestock at his farm and supplied meat or meat products to his customers within the City of Blantyre. The plaintiff received a restriction order from the defendant preventing him supplying meat to his customers because all livestock had to be slaughtered at an approved slaughter – house. The defendant justified its action by alleging that the situation was created and governed by – laws. The by – law was intended to protect the health of residents of city and not to stifle economic activity. The issue for the court to decide was whether by – law 6(3) of the City of Blantyre (Food) By – laws 1975 was ***ultra – vires*** the Local Government (Urban Areas) Act, whether the provisions violated the plaintiff's right to economic activity and consequently whether the provisions were null and void. The by – law provided among other things, that meat had to be slaughtered at an approved abattoir, but, where meat was imported, it only had to be certified fit for human consumption by a competent authority. In declaring by – law 6(3) null and void it was held (1) That by – law 6(3) was made by the defendant pursuant to the powers granted to it in terms of Section 87 of the Local Government (Urban Areas) Act, and that on the face of it there was no conflict between the by – law and Section 87. Further, the court held that the provisions of by – law 6(3) were not compatible with the spirit of the Constitutional order. It indirectly violated the plaintiff's constitutional right to freely engage in economic activity. It was therefore held that the defendant could not impose restrictions which visibly restrained the plaintiff's right to economic activity and at the same time be seen as unfairly favouring a grant of business monopoly to a trade competitor. In delivering his judgement, Chimasula – Phiri J said:

> "The third issue for determination is whether the provisions of the said by – law 6(3) do not violate the plaintiff's Constitutional right to freely engage in economic activity…

> The Constitution contains an express provision that any provision which is contrary or inconsistent with the Constitution shall be null and void to that extent…The provisions of by – law 6(3) are not compatible with the spirit of the current Constitutional order. I hold the view that by – law 6(3) indirectly the plaintiff's right to freely engage in economic activity."

Similarly, the ***Exchange Control [Forex Exchange Bureaux Regulations 2007*** would in my view be unconstitutional in the light of Section 58(2) of the Constitution which prohibits or removes the power from parliament of delegating any legislative powers to any persons whose effect would be to substantially and significantly affect fundamental rights and freedoms recognised in this Constitutions; much as the Minister has powers to make regulations under the relevant Acts of Parliament but Section 58(2) expressly takes away that power from the Minister, when fundamental rights are affected. I so find.

The respondents, argued that these rights are derogable rights regard being had to Section 44(1) of the Constitution. However, Section 44(2) provides that a restriction or limitation may be placed on the exercise of any rights and freedoms provided for in this Constitution if the same are reasonable, recognised by international human rights standards and are necessary in an open and democratic society. Even if the view that the limitation or restriction, is reasonable or however justifiable under Section 44(1) as argued by the respondents, the duty to show this is on the respondents. Secondly, in my view Section 58 (2) of the Constitution takes the power away from Parliament itself to delegate to the Minister the power to make subsidiary legislation where the effect would be to substantially and significantly affect the fundamental rights and freedoms. If the view is accepted that the 2007 regulations so promulgated by the 1st Respondent significantly and substantially affected the fundamental rights and freedoms under the Constitution then it means the said regulations are unconstitution. In ***F Hoffman – La – Roche & Attorney General V Secretary of State for Trade and Industry***[1] where in Lord Diplock

> "Under our legal system, however the courts as the judicial arm of government do not act on their initiative. Their jurisdiction to determine that a statutory instrument is ***ultra – vires*** does not arise until its validity is challenged in

[1] [1974] ZALLER 1128 at 1153 - 54

> proceedings inter – parties…Unless there is such a challenge and if there is until it has been upheld a judgement of the court, the validity of the statutory instrument and the legality of the acts done pursuant to the law are presumed."

In this regard, the ***Factortame*** case which is not binding on this court that Mr Nyamirandu heavily relied on, is not helpful, having found as I have that where the subsidiary legislation affects the fundamental rights under the Constitution, then the Minister shall have no power to make the same.

However as can be seen from the dictum of Lord Diplock at page 1155, this presumption can be rebutted, where the applicant like here shows a strong ***prima facie*** case, that the statutory instrument is ***ultra vires***. In my considered opinion, the ex – parte applicants have an arguable case worthy to proceed to a full hearing. In other words, I do find that the ex – parte applicants have shown that there is a triable issue here.

Let me also quickly dispose of the argument by the respondents that they took the action they did because some of the ex-parte applicants were not complying with the 2004 regulations or indeed that they were implicated in money laundering and other forms of financial crime.The simple answer is that the respondents should have taken the bureaux concerned to task.

Turning to the injunction and the order for stay, the law is that an interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive Judicial Review application. The approach taken is similar to that taken under **Order 29 of the Rules of Supreme Court**. See ***R V Kensingston and Chelsea royal London Borough Council ex – p Hamell***[1]**.** In ***M V Home Office***[2] it was held that injunctions including interlocutory injunctions can be granted against Ministers and Crown Servants. Clearly, therefore the court has jurisdictions to grant an injunction against the respondents, and the argument by Mr Nyamirandu that the court has no jurisdiction is accordingly dismissed.

Further, as I have already held, it is clear that there are traible issues here, the applicants having shown that they have an arguable case. It is now well settled that the principles governing the grant or refusal of an interlocutory injunction are trite law and are those that were enunciated in

[1] [1989]QB 518

[2] [1993]3WLR 433

the celebrated case on interlocutory injunctions namely – ***The American Cynamide V Ethicon Limited***[1]. The first principle is that the plaintiff must show that he has a good argument claim to the right that he seeks to protect. Secondly, the court must not, at the interlocutory stage, attempt to decide the disputed issues of facts. It is enough if the plaintiff shows that there is a serious question to be tried. Thirdly if the plaintiff satisfies these tests then the grant or refusal of the injunction is for the exercise of the court's discretion on a balance of convenience. See also the case of ***Amina Daudi t/a Amis Enterprises V sucoma***[2] .Moreover in ***Mpinganjira V the Speaker of the National Assembly and Attorney General*** Kapanda, J said:

> "If the effective remedy which is found necessary and appropriate is an injunction order then surely this court will so order notwithstanding the provisions of Section 10 of the Civil Procedure (Suits by and Against Government or Public Officers Act."

Having found that there is are triable issues, I must consider whether damages would be adequate. In my view I think not. This is because, as we shall see a question was paused in the case of ***Evans V Marshall and Company***[3] as to the adequacy of damages. There seems to be a modern view regarding adequacy of damages, which was expressed by Sachs L J

> "The standard question in relation to the grant of an injunction, are damages an adequate remedy? might perhaps in the light of the authorities of recent years be re – written . Is it just in all the circumstances of the case, that the plaintiff should be confined to his remedy in damages."

Furthermore, damages here would be difficult to compute. In the instant case, the violations concerned are on human rights that guaranteed in the Constitution, as such, damages would not be a sufficient remedy. The balance of convenience therefore in my most considered judgement tilts in favour of the applicants, in maintaining the ***status quo.***

On the basis of the foregoing therefore, it is my considered opinion that, justice would be achieved if the ***status quo*** is maintained, until the full judicial review hearing, for this is what justice in the circumstances would demand.

[1] [1975[AC 393

[2] Civil Cause Number 3191 of 2003 (unreported)

[3] [1973] IWRL 349, 379

In the case of ***Francome V Mirro Group Newspapers***[1] sir Donaldson in Criticising the expression, the balance of convenience, state the principles regard balance of convenience as follows:

> "Our business is justice not convenience. We can and we must disregard fanciful claims by either party. Subject to that we must contemplate the possibility that a party may succeed and must do our best to ensure that nothing occurs pending trial, which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult but we have to do our best. In doing so we are seeking a balance of justice not convenience."

In these circumstances and by reasons of the foregoing the respondents' summons for the discharge of the order for leave and order for interlocutory injunction as well as stay is accordingly dismissed with costs.

Pronounced in Chambers at Principal Registry this 2nd July, 2007.

Joselph S Manyungwa
JUDGE

[1] [1984]lWLR 892