JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CAUSE NO. 71 OF 2025
(Before Hon. Justice Kenyatta Nyirenda)

BETWEEN:

THE STATE (ON THE APPLICATION OF MAJOR BLESSINGS KAKHUTA BANDA & 2 OTHERS) …….. CLAIMANTS

-AND-

THE CHIEF SECRETARY TO THE PRESIDENT AND CABINET ……..…… DEFENDANT

CORAM: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mr. Chinula SC, Counsel for the Claimants
Mr. Chisiza (Chief State Advocate), Counsel for the Defendant
Mrs. Alinafe Mtenje, Court Clerk

RULING

Kenyatta Nyirenda, J.

1. This is this Court's Ruling on an application by the Defendant for an order discharging leave to commence judicial review proceedings and an ancillary order of injunction (Application to Discharge Leave). The Application to Discharge Leave is brought under Order 10, rules 1 and 3, and Order 16, rule 6, of the Courts (High Court)(Civil Procedure) Rules, 2017 [Hereinafter referred to as "CPR"].

2. The Claimant is opposed to the Application to Discharge Leave.

3. The brief background to the Application to Discharge Leave is as follows. On 20th November 2025, the Claimants filed with Court a without notice application for permission to commence judicial review of the Defendant's decisions seconding the Claimants to various State-Owned Enterprises (challenged decisions). The challenged decisions were communicated separately to the Claimants and hand delivered to them on 18th November, 2025.

4. The Claimants seek the following reliefs:

(a) a declaration or order that the challenged decisions are unconstitutional, illegal and unreasonable;

(b) a like order to certiorari quashing the challenged decisions;

(c) a like order of prohibition restraining the Defendant from implementing or in any way influencing the implementation of the challenged decisions;

(d) any other declaration or order that the Court may deem fit and just to make in the circumstances of the case; and

(e) an order for costs.

5. The facts of the matter, as set out in the Grounds on Which Relief is Sought, are as follows:

"1.1 All the Applicants are serving Senior Military Officers in the Malawi Defence Force, namely:

a) Major General Francis Blessings Kakhuta Banda;

b) Major General Swithun Kondwani Mchungula;

c) Major General Chikunkha Harrison Elija Soko;

d) Major General Saiford Mandiza Kalisha; and

e) Brigadier General Harold Benedictus Dzoole.

1.2 On 18th November, 2025 in the morning, all the Applicants were separately summoned to the office of the Commander of the Malawi Defence Force where they were each handed a letter dated 31st October, 2025 seconding them to various State-Owned Enterprises as follows:

a) Major General Francis Blessings Kakhuta Banda to the National Food Reserve Agency (NFRA);

b) Major General Swithun Kondwani Mchungula to the Electricity Supply Corporation of Malawi (ESCOM);

c) Major General Chikunkha Harrison Elija Soko to the Agricultural Development and Marketing Corporation (ADMARC);

d) Major General Saiford Mandiza Kalisha to Blantyre Water Board although NOCMA is also mentioned in his letter; and

e) Brigadier General Harold Benedictus Dzoole to the Northern Region Water Board although EGENCO is also mentioned in his letter.

1.3 The said letters all mention that the secondment is for 3 years and may be cancelled any time before the expiry of the secondment period. The letters further stated that the secondment shall be governed by the provisions of the Malawi Public Service Regulations (MPSR) relating to secondment of public servants to Statutory Corporations and other organisations.

1.4 As highlighted, all the Applicants are Senior Officers serving in the Malawi Defence Force on permanent and pensionable terms.

1.5 The Malawi Defence is established under Chapter XVI of the Constitution and the Defence Force Act and the regulations thereunder provide various aspects of members of the Malawi Defence Force including the appointment, deployment and removal of its members.

1.6 Under the Constitution and the Defence Force Act, as senior officers in the Malawi Defence Force the Applicants can only be appointed or removed from office by the Defence Council and the Applicants are aware that the Defence Council did not convene to either deliberate or issue the secondment letters."

6. Having considered the application, including its supporting documents, I granted the Claimants permission to move for judicial review. I also granted the Claimants an interim order staying the challenged decisions until the final determination of the matter. For reasons that will be clear in a moment, it is expedient to quote the exact words of the material part of the Order Granting Permission to Apply for Judicial Review:

> *"**IT IS FURTHER ORDERED** that this order operates as a stay of the said decision of the said Chief Secretary to the President and Cabinet until the final determination of this matter."*

7. The Application to Discharge Leave was filed with the Court on 10th December 2025. The Application to Discharge Leave is supported by a sworn statement by Dr. Justin Adack K. Saidi, the Chief Secretary in the office of the President and Cabinet which states as follows:

> *"2. I am the Chief Secretary in the office of the president and cabinet and as such, matters of fact I depone to herein have come to my knowledge by virtue of the said position and I verily believe them to be true. For the matters of fact that are not within my personal knowledge, I duly disclose the sources thereof and provide the grounds for my belief thereof.*

3. *I make this sworn statement in support of the application to discharge the leave for judicial review and the ancillary order of injunction.*

4. *On 20th November, 2025, the Applicants obtained leave to commence judicial review against the decision to transfer them to diverse State-owned enterprises. They were also granted an ancillary order of stay of the said decision.*

5. *However, I verily believe that the said order for leave and ancillary injunction should be discharged for the reasons appearing hereinbelow.*

This is a Private Matter and therefore, not amenable to Remedy of Judicial Review

6. *The Applicants have running employment contracts with the Malawi Defense Force. I have been advised by counsel and verily believe the same to be true that the existence of a contract is evidence of the private law nature of the matter herein. The said employment contracts are between the individual Applicant and the MDF itself.*

7. *To buttress this point, at paragraph 5 of the Applicants sworn statement in support of the Application for leave to commence judicial review, the deponent clearly avers that the Applicants have contracts with the Malawi Defense Force and that they are on pensionable terms.*

8. *Additionally, the deponent of the said sworn statement, at paragraph number 6, grieves, without showing how, that the transfer may affect the Applicants' pension benefits which is an attendant benefit of the employment relationship subsisting between the Applicants and the Malawi Defense Force.*

9. *I have been advised by counsel and verily believe the same to be true that where there is an apparent mix of private and public law matters the dominant factor prevails. In this case, the dominant factor is the employment contract between the individual Applicants and Malawi Defense Force. Further, I verily believe that the remedy of judicial review is not available in a private law matter.*

The Applicants have an Alternative Remedy

10. *I have been advised by Counsel and verily believe the same to be true that the remedy of judicial review is not available in instances where the Applicant has an alternative remedy. As demonstrated in the preceding paragraphs, the matter herein is a private law matter and as such the Applicants have an alternative remedy being commencement of an ordinary action.*

That the Deponent of the sworn statement in support of the Applicants application did not make an undertaking as to damages

11. *I have gone through the sworn statement in support of the Applicants' application and have observed that the deponent did not make an undertaking as to damages.*

12. Since the only concern by the Applicants is that they may lose pension benefits, I have been advised by counsel and verily believe that damages are adequate remedies.

The Applicants Suppressed Material Facts

13. I have been advised by counsel and verily believe that the deponent of the application in support of the Applicants' application did not disclose the fact that they have an alternative remedy being the commencement of an ordinary action.

14. Further, the deponent did not disclose why the said alternative remedy was not pursued by the Applicants.

15. I understand that this statement shall be used in a proceeding and acknowledge that if I state in it anything I know to be false, I shall be liable to a substantial penalty.

***WHEREFORE** I pray for an Order discharging an order for leave to commence judicial review and the ancillary order of injunction."*

8. The Claimants are opposed to the Application to Discharge Leave and there is, in that regard, three documents, namely, a sworn statement in opposition, Skeleton arguments in opposition and supplementary skeleton arguments.

9. The sworn statement in opposition was made by the 1st Claimant and the relevant part thereof states as follows:

*"3. **THAT** I have read the Sworn Statement of **JUSTIN ADACK K. SAIDI, PHD** the Chief Secretary in the Office of the President and Cabinet in support of the Application to Discharge Leave To Commence Judicial Review Proceedings and An Ancillary Order of Injunction and I wish to respond as hereunder.*

*4. **THAT** paragraphs 1, 2, 3 and 4 of the Sworn Statement are admitted.*

*5. **THAT** I refer to paragraph 5 of the Sworn Statement and state that the Order for leave and ancillary injunction should not be discharged for the reasons appearing hereunder.*

THIS IS A PUBLIC MATTER AND THEREFORE AMENABLE TO JUDICIAL REVIEW

*6. **THAT** I refer to paragraphs 6, 7, and 8 of the Sworn Statement and I have been advised by Counsel that the Defendant wrote the letters of secondment in his capacity as a holder of a public office which brings this matter in the purview of judicial review.*

*7. **THAT** I again refer to paragraphs 6, 7 and 8 of the Sworn Statement and state that*

indeed all of us Applicants have running contracts with the Malawi Defence Force but I hasten to add that the Defendant has nothing to do with our said Contracts with the Malawi Defence Force and accordingly the Defendant had no legal authority to issue Letters od Secondment to us.

8. *THAT I refer to paragraph 9 of the Sworn Statement and state that the Defendant wrote the letters of secondment to us in his capacity as Chief Secretary to the President and Cabinet which, I am advised by Counsel, is a public office under section 92(4) of the Constitution.*

THE APPLICANTS HAVE AN ALTERNATIVE REMEDY

9. ***THAT** I refer to paragraph 10 of the Sworn Statement and state that as Applicants we do not have an alternative remedy in so far as the Defendant's letters of secondment to us are concerned. I wish to repeat the contents of paragraph 6 hereof and state that in issuing the letters of secondment, the Defendant was exercising a public duty.*

UNDERTAKING AS TO DAMAGES

10. ***THAT** I refer to paragraphs 11 and 12 of the Sworn Statement and state that I have been advised by Counsel that in applications for judicial review there is no need to make an undertaking as to damages as the court looks at the decision-making process and not the merits of the decision complained of.*

SUPPRESSION OF MATERIAL FACTS

11. *THAT I refer to paragraphs 13 and 14 of the Sworn Statement and I have been advised by Counsel that the jurisdiction on matters of judicial review is with the High Court and not with courts subordinate to the High Court and I accordingly repeat the contents of paragraph 9 hereof and further state that the application was based on the letters of secondment and not on any other document as such there was no suppression of facts."*

10. In terms of the Application to Discharge Leave, permission to apply for judicial review is sought to be discharged on four grounds, namely, that:

(a) the matter being employment matter, is a private law matter and as such, it is not amenable to judicial review;

(b) the Claimants have an alternative remedy being commencement of an ordinary action;

(c) the 1st Clamant did not make an undertaking as to damages; and

(d) the 1st Claimant suppressed material facts.

Whether or not the present matter is amenable to judicial review (First Issue)?

11. It is the case of the Defendant on the First Issue that the present matter is not amenable to judicial review because it is a private matter and not a public matter. It is expedient that that the relevant part of the Defendant's skeleton arguments be quoted:

> *"**The law***
>
> *3.1 The Court in the case of **Mpinganjira (N) v State & Anor,** (Misc. Civil Cause 63 of 2003) [2003] MWHC 38 (1 June 2003), made the following observations:*
>
> > *"I hold the view that the Applicant does not have an arguable case for judicial review. The dominant factor in this case is that the Applicant wants to enforce private rights under the private law of employment"*
>
> *3.2 The Court did not stop there as it also highlighted the fact that **not** every decision by a public body or officer is amenable to judicial review. The Court share the following illuminating insights:*
>
> > *"It was submitted on behalf of the ex-parte Applicant that since the Respondent is a public company then the public law remedy of Judicial Review should be available to the applicant to remedy a wrong committed against him. I do not agree with this argument. The relationship between the claimant and Respondent is a private one notwithstanding the fact that the Respondent is a public body. If there is a breach of any of the terms of the contract of employment, between the applicant and the respondent, the remedy should be found in a legal suit under private law. This Court has said that it is not every right or freedom that would be enforced horizontally: **Saukila -vs.- The National Insurance Company Ltd.** Civil Cause No. 117 of 1997**, Felix Mtwana Nchawe -vs.- Minister of Education, Science and Technology** Misc. Civil Cause No. 82 of 1997. Further, I wish to put it here that in as much any wrong invariably involves a breach of a fundamental right or freedom it is not correct to say that the process to be taken to remedy the wrong will always be through Judicial Review"*
>
> *3.3 The law is also very clear that where there is an apparent mix between private and public law matters the Court should consider the dominant factor. In the case of **Chisa v. Attorney General Civil Cause Number 85 of 1994** made the following observations:*
>
> > *"Where the applicant is enforcing rights under private law the proper remedy was an action under private law. Where the action was on rights protected under private law the plaintiff could still proceed under remedies*

in private law even if there was a public law issue. What is clear, however, is that judicial review is not available to enforce rights that are protected by private law and the plaintiff must proceed in his remedies under private law."

Analysis and submission

3.4 In this matter, it has been shown in the sworn statement of JUSTIN ADACK K. SAIDI, PHD that each Applicant has a running contract with the MDF. Further, it has also been shown that the Applicants' concern, according to the sworn statement filed in support of the permission for judicial review, is that the transfers would affect their pension. We submit that these issues of transfer of an employee, pension of employees are labour issues.

3.5 Per the decision of ***Mpinganjira (N) v State & Anor*** *(supra) and* ***Chisa v. Attorney General*** *(supra), we submit that the dominant factor is this proceeding is the employment issue. It is therefore, not a public matter but a private matter. We pray that this matter should be dismissed on the ground that, it is a private matter and, therefore, not amenable to judicial review."*

12. The Claimant are of the opposite view. They maintain that the case was properly commenced by way of judicial review process. The submissions by Claimants on the First Issue were also concise and succinct and I cannot do better than quote them in full. They read as follows:

"4.0 ***The relevant law in the instant case***

4.1 Public law vis-à-vis public body

a) The office of the Secretary to the Cabinet vis-à-vis legal obligations

i) The office of the Secretary to the Cabinet (now known as the Chief Secretary to the President and Cabinet) is established under section 92(4) of the Constitution in the following manner –

"There shall be a Secretary to the Cabinet who shall be appointed by the President and whose office shall be public office…" *(emphasis supplied)*

ii) Under section 16 of the Public Service Act, the Secretary to the Cabinet has been established as the head of the ***public service.*** *Though the term "public service" has not been defined under both the Constitution, the Public Service Act or the General Interpretation Act, we opine that as a holder of a public office, the Secretary to the Cabinet invariably render public service.*

Thus inter alia, the Public Service Act provides that the Secretary to Cabinet shall exercise fair and equitable treatment of public officers in the exercise of his powers of administration and management of the public service.[1]

Thus, as earlier noted, judicial review lies against the decisions of public bodies[2]*. Although there is no definition of a "public body" under the Constitution, Public Service Act or General Interpretation Act, for these purposes, the definition under the Access to Information Act would be used. Suffice. Thus, a* ***"public body means the Government, a statutory body or any other body appointed by the Government to carry out public functions."***[3]

iii) Chapter III of the Constitution establishes fundamental principles on which it is founded.

Thus, section 12 (1) (a) of the Constitution provides that the legal and political authority of the State is derived from the people of Malawi and it must therefore be exercised solely in accordance with the Constitution to serve and protect their interest.

Further, section 12(1) (b) of the Constitution provides that all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.

Finally, section 12(1) (f) provides that all institutions and persons shall observe and uphold the Constitution and the rule of law and no institution or person shall stand above the law.

iv. Chapter IV of the Constitution provides for human rights. Section 43 of the Constitution provides for administrative justice and provides as follows –

"Every person shall have the right to –

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

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

[1] Section 17(b)(iii), this flows from section 7 of the Public Service Act
[2] *Supra* paragraph 3.2
[3] Access to Information Act (No. 13 of 2017)

It has been held that the rights established under section 43 embody the rules of natural justice at common law.[4]

b) ***Malawi Defence Force***

Chapter XIV of the Constitution establishes the Malawi Defence Force (hereinafter to as the "MDF") as the sole military force in Malawi.[5]

Although under section 161(1) of the Constitution, the ultimate responsibility of the MDF vests in the President in his capacity as Commander-in-Chief and such powers include -

"…(4)(b) the power to <u>appoint and remove from office senior officers</u> and other members of the Defence Force of Malawi…" *(emphasis supplied)*
the said power shall only be exercisable by the President subject to the recommendation of the Defence Council.

The MDF is regulated by the Defence Force Act[6] *under which, the Defence Council has been established by section 5 and also subject to the Constitution in terms of its powers and functions stipulated under section 6.*

5. ***The law vis-à-vis the facts***

From the factual and legal analysis herein, we argue as follows -

5.1 The relevant provision of the Constitution and the Public Service Act clearly establish that the office of the Secretary to the Cabinet is a public office and therefore its decisions are amenable to judicial review.

5.2 The manner in which the decision by the Chief Secretary to the President and Cabinet was made to second the Applicants in the instant case is illegal as it is ultra vires section 161 as read with section 6 of the Constitution and the Defence Force Act, the same being vested in the President and only exercisable on the recommendation of the Defence Council.

Clearly, the Secretary to the President and Cabinet never had any powers that he purported to exercise in the present case.

5.3 The manner in which the Secretary to the President and Cabinet made the decision to second the Applicants is procedurally improper as it was made in contravention of section 43 of the Constitution and the principles of natural justice.

[4] *<u>The State vs. The Electoral Commission, ex parte Dr. Bakili Muluzi and United Democratic Front,</u>* Constitutional Civil Cause No. 2 of 2009 (Principal Registry)
[5] Section 159
[6] Act No. 24 of 2023

> *It is clear from the application that neither were the Applicants consulted nor reasons offered for the decision made in the instant case."*

13. I have considered the First Issue and the respective submissions thereon by the parties through counsel. It is trite that a body acting under statute is considered as exercising public power and its actions and decisions are thus amenable to judicial review: see **In The Matter of the Ministry of Finance Ex Parte SGS Malawi Limited**, HC/PR Civil Application No. 4 of 2003. Further, Order 19, rule 20(1), of the CPR makes it clear that judicial review covers the review of, among other matters, a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened. To my mind, the challenged decisions fall squarely within the ambit of Order 19, rule 20(1), of the CPR.

14. In view of the foregoing, it is my holding on the First Issue that the present matter is amenable to judicial review.

Whether or not the Claimants have an alternative remedy being commencement of an ordinary action (Second Issue)?

15. It is the case of the Defendant on the Second Issue that the Claimants have an alternative remedy by way of an ordinary action. Paragraph 4 of the Defendant's Skeleton Arguments are relevant and they will be reproduced:

> *"The law*
>
> *4.1 In **R v Epping and Harlow General Commissioners ex parte Goldstraw** [1983] All E.R. 257 it was held that:*
>
> > *"It is a cardinal principle that, save in the most exceptional circumstances [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used".*
>
> *4.2 In **State v The Commissioner General of the Malawi Revenue Authority Ex-Parte Airtel Malawi Limited** Judicial Review cause No. 33 of 2015, PR, (Unreported) the High Court said this on alternative remedies: -*
>
> > *"It is trite law that the remedy of judicial review is not available in cases where other remedies exist and have not been used, such as an appeal to the superior court or statutory appellate tribunal or recourse to another forum: See **R. v Epping and Harlow General Commissioners Ex-parte Goldstraw (1983) 3 ALL ER 257 at 262.** This proposition of the law is*

> *premised on the fact that judicial review is a remedy of last resort. It is, therefore, important that the judicial review process should not be clogged with unnecessary cases, that is, cases which are perfectly capable of being dealt with by other tribunals. In this regard, I wish to deal with the issue of alternative remedies first because if it turns out that the Applicant has alternative remedies which it has not utilized or exhausted, then it would not be necessary in my view to consider the other matters.'*

Analysis and submission

4.3 As already established in the sworn statement of JUSTIN ADACK K. SAIDI, PHD, the Applicants herein are enforcing private law remedies using public law. They have an alternative remedy by way of an ordinary action.

4.4 Per ***State v The Commissioner General of the Malawi Revenue Authority Ex-Parte Airtel Malawi Limited*** *, judicial review is not available where the applicant has an alternative remedy. In this matter, the Applicants have an alternative remedies and we pray that this proceeding be struck off on this basis."*

16. On their part, the Claimants argue that the application to commence judicial review proceedings emanated from the Defendant's letters of secondment to the Claimants. It is thus submitted that they have no alternative remedy in the circumstances other than direct recourse to this Court as the challenged decisions were void ab initio.

17. It will be recalled that the holding of the Court on the First Issue is that the present matter is amenable to judicial review. Clearly, the appropriate and only mode of commencement for the claims herein by the Claimants against the Defendant has to be judicial review and not ordinary action: see Order 19, rule 20(1), of the CPR, **Ousman Kennedy v. Blantyre International School & Another**, HC/PR Civil Cause No. 495 of 2016, **Sheikh Ismail Daudi & Others v. The Registered Trustees of Al-Barakah Charity Trust,** HC/PR Civil Cause No. 180 of 2016, **Koreai v. Designated Board Schools [1995] 2 MLR 649** [Hereinafter referred to as the **"Koreai Case"]** and **O'Reilly v. Mackman [1982] 3 ALL ER 1124**

18. In **Koreai Case,** the Plaintiff commenced an action for a declaratory order and an injunction to restrain the defendants from acting on certain invoices and expelling pupils who had refused to pay the new tariff of tuition fees. On the same day, the Plaintiff was granted an interim injunction order, on an ex-parte summons, restraining the defendants from excluding the Plaintiff's children from school on the grounds of refusal to pay school fees.

19. In the course of its judgment, the Court in **Koreai Case** dealt with the issue of whether or not the plaintiff had rightly commenced the proceedings by way of ordinary action and it remarked as follows, at page 651:

> *"The Defendant has submitted that under Order 53/1-14/15 of the Rules of the Supreme Court there is a provision that where a person seeks to establish that a decision of a private*
>
> *body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise (O'Reilly v Mackeman) [1982] All ER 1124). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process. It would, as a general rule, be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public or authority infringed rights to which he was entitled to protection under public law, to proceed by way of an ordinary action and, by this means, to evade the provisions of Order 53 for the protection of such authorities.*
>
> *The above exposition of the law in the submission of the defendant is correct."* -Emphasis by underlining supplied

20. In view of the foregoing, the answer to the Second Issue is that the Claimants do not have an alternative remedy.

Whether or not the 1st Clamant did not make an undertaking as to damages (Third Issue)?

21. The Defendant submits that the injunction should be discharged on account of the failure by the Claimants to make an undertaking as to damages. It is expedient that the skeleton arguments by the Defendant on the Third Issue be quoted in full:

> *"**The law***
>
> *5.1 Even where it is shown that damages would not be an adequate remedy the courts would not readily grant the order of interlocutory injunction. It would only do so after considering whether the applicant for an interlocutory injunction has undertaken to compensate the Defendant's damages. See **State and Registrar of Financial Institutions v. Parte Prime Insurance Company Limited & Goss Katoki Mwalilino** MSCA Civil Appeal Number 41 of 2016 (Unreported), per Mwaungulu, JA.*
>
> *5.2 An undertaking as to damages has been described as the price that an Applicant pays for him or her to be able to be granted an order of an injunction. The purpose of the undertaking is to indemnify the Defendant should it be discovered that the injunction was wrongly granted. **Lord Reid** in the case of **Hoffman-La Roche v Secretary of State for Trade and Industry (1974) 2 All ER 1128.***

> *"It is not in doubt that in an ordinary litigation the general rule has long been that no interim injunction likely to cause loss to a party will be granted unless the party seeking the injunction undertakes to make good that loss if in the end it appears that the injunction was unwarranted. He cannot be compelled to give an undertaking but if he will not give it he will not get the injunction."*

5.3 ***In Thangalimodzi and 18 others vs Roads Authority and another Civil Cause Number 238 of 2018.*** *Justice Nriva decliclined to grant an injunction to the Claimants therein because the Applicants failed to make an undertaking as to damages.*

5.4 *Mwaungulu J, as he then was, said in* ***Mwambungu v Shalom Company and Others****, Civil Cause Civil Cause Number 553 of 2003, HC, PR (Unreported) that:*

> *"It must be understood that interlocutory injunctions are made on the usual undertaking as to damages. It is on this undertaking that courts do what at common law is almost anathema, preventing a party exercising rights before a court determines those rights."*

5.5 *Mwaungulu JA in* ***Green Communications & Ndovi v. Standard Bank of Malawi****, MSCA Civil Appeal No 29 of 2015 (Unreported) as follows:*

> *"The court, invariably grants an interim injunction on the applicant's usual undertaking to pay damages should the action be unsuccessful. Where, therefore, damages adequately compensate the successful respondent, the court may not grant an interim injunction.*

Analysis and submission

5.6 *In the present matter, it is imperative to note that the Applicants' major concern is that their transfers will adversely affect their pensions. Pension is a pecuniary issue and we submit that damages would adequately compensate them.*

5.7 *Therefore, as per* ***Hoffman-La Roche v Secretary of State for Trade and Industry*** *(supra), the Applicants were under obligation to make undertaking as to their ability to pay damages. Such omissions are fatal and, per* ***Thangalimodzi and 18 others vs Roads Authority and another****, we pray that the order of stay granted herein be dismissed with costs."*

22. The submissions by the Claimants on the Third Issue are to the effect that the Claimants cannot make an undertaking as to damages as it is unclear what damage the Government would suffer as a result of the impugned decision of the Defendant.

23. I have read the submissions by the Defendant and I have difficulties in understanding their relevancy or applicability to this case. The principles and case authorities covered therein relate to injunctions. No order of injunction, interim or otherwise, has been granted in this case. As can be noted from paragraph 6 of this

Ruling, what the Claimants sought was an order of stay of the challenged decisions and this what the Court granted.

24. The case authorities on the differences between an order of injunction and a stay order are endless, and the case authorities express the differences in all sorts of different ways, but it all in the end comes down to the same thing. An order of injunction and a stay order are legal remedies that serve different purposes. An order of injunction is a court order that prohibits a party from engaging in a specific action or behavior. It is typically granted by a court to prevent harm or preserve the status quo until a final decision is made. A stay order, on the other hand, is used to temporarily suspend or delay the enforcement of a decision or a judgment. A stay order is usually used to provide relief to a party who is seeking to challenge or appeal a decision. In a nutshell, while a stay order focuses on temporarily halting the enforcement of a decision, an order of injunction focuses on preventing future harm.

Whether or not the 1st Claimant suppressed material facts (Fourth Issue)?

25. The Defendant has dealt with the Fourth Issue in paragraph 6 of the Defendant's Skeleton Arguments thus:

> "**The law**
>
> *6.1* *In the case of* ***Mchungula Amani v. Stanbic Bank Limited and Another HC (PR) Civil Cause Number 558 of 2007*** *at page 4 Potani J observed:*
>
> > *"It becomes imperative to bear 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 applicant 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".*
>
> *6.2* *Gibson L J,* ***in Brinks Mat Ltd V Elcombe*** ***[1988] I WLR 1350*** *stated that:*
>
> 1. *The duty of the ex – parte 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 assessment of the applicant or his legal advisors.*
> 3. *The applicant ex – parte must make proper enquiries before making the application …The duty of disclosure therefore applies not only to material facts known to the ex – parte 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 astute to ensure [deprivation of an ex – parte injunction obtained thereby].*

6. *Whether the fact not disclosed is of sufficient materiality to justify or to 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 dismissed…the court has discretion".*

6.3 In ***Ndomondo v. The State and Speaker of National Assembly,*** *Misc. Civil Cause No. 57 of 2007, HC, Lilongwe District Registry unreported, Mzikamanda J. discharged leave to move for judicial and attendant order on the basis that the Applicant did not disclose to the Court that he had a previous conviction and in* ***S v Council of University of Malawi, Ex-Parte in Re: Longwe and Another*** *(138 of 2009) [2010] MWHC 1 (21 January 2010), Manyungwa, J. discharged leave to proceed with judicial review proceedings on the basis that the Applicants had not disclosed to the court that they commenced similar proceedings before and that they discontinued the said proceedings.*

Analysis and Submission

6.4. In the Applicants' application for judicial review, they told Court that there is no alternative remedy available to them. However, it has been shown above that the Applicants have alternative remedy.

6.5 We submit that this is a material fact on which the remedy was granted. Failure to disclose material facts is fatal. In ***Ndomondo v. The State and Speaker of National Assembly (supra),*** *the Court discharged leave for failure, on the part of the Applicant, to disclose material facts, also see* ***S v Council of University of Malawi, Ex-Parte in Re: Longwe and Another*** *(supra).*

26. As will be noted from the sworn statement in opposition, the Claimants deny suppressing any material facts. The Fourth Issue is covered in paragraph 7 of the Claimants' Skeleton Arguments as follows:

"The Applicants exhibited the materials that led them to make an application for judicial review and these were the letters dated 3st October, 2025 written by the Defendant and handed over to each of the Applicants on 18th November, 2025. There were no other facts

that the Applicants had to disclose to the Court as they made the application for permission to commence judicial review proceedings."

27. I have considered the Fourth Issue and the respective submissions thereon by the parties through counsel. Given the decisions that this Court has reached on the Second Issue and the Third Issue, the answer to the 4th Issue has to be in the negative, that is, the 1st Claimant is not guilty of suppression of material facts.

Disposition and Way Forward

28. In view of the foregoing and by reason thereof, the Application to Discharge Leave is dismissed with costs.

29. Hearing of the substantive judicial review proceedings herein was scheduled for 18th December 2025 but the same was pended in view of the Application to Discharge. Now that the Application to Discharge Leave has been dismissed, the hearing that was pended is re-scheduled to take place in open court on 16th January 2026 at 9 o'clock in the forenoon.

Pronounced in Chambers this 7th day of January 2026 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE