REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL REFERRAL NO. 3 OF 2021
(BEING CIVIL CAUSE NO. 230 OF 2021)

BETWEEN

THE DEMOCRATIC PROGRESSIVE PARTY ……CLAIMANT

AND

THE ATTORNEY GENERAL (on behalf of the Office of the President of the Republic of Malawi) ……..……DEFENDANT

***CORAM*: HON. JUSTICE S.A KALEMBERA**
HON. JUSTICE R. MBVUNDULA
HON. JUSTICE D. nyaKAUNDA KAMANGA
HON. JUSTICE A. MTALIMANJA
HON. JUSTICE T. R. LIGOWE

Mr. Samuel Tembenu SC, Counsel for the Claimant
Mr. Charles Mhango, Counsel for the Claimant
Mr. Frank Mbeta, Counsel for the Claimant
Mr. Madalitso Mmeta, Counsel for the Claimant
Mr. Thabo Chakaka Nyirenda, Attorney General, for the Defendant
Mr. Reyneck Matemba, Solicitor General, for the Defendant
Mr. Neverson Chisiza, Principal State Advocate, for the Defendant
Mr. Charles Mutinti, Court Reporter
Ms. Harriet Chiusiwa, Court Reporter
Mr. Felix Mathanda, Official Interpreter
Ms. Faith Ngoma, Official Interpreter
Mrs. Charity Chawinga, Official Interpreter
Mr. Michael Mbekeani, Official Interpreter
Ms. Emily Chimang'anga, Official Interpreter

RULING ON PRELIMINARY ISSUES

1. This is a unanimous decision of this Court.

Background

2. On 7th June, 2020, the former President of this Republic of Malawi, Professor Arthur Peter Mutharika (Professor Mutharika) appointed the Sixth Cohort of the Electoral Commission (hereinafter referred to as "the Commission"). The appointees were Justice Dr. Chifundo Kachale as Chairperson and Mr. Arthur Nanthuru, Dr. Jean Mathanga, Ms. Linda Kunje, Mr. Steve Duwa, Ms. Olivia Liwewe and Dr. Anthony Mukumbwa as members. On 16th June, 2020 the Malawi Congress Party and Dr. Lazarus McCarthy Chakwera (Dr Chakwera) commenced judicial review proceedings, styled Judicial Review Cause No. 34 of 2020, *Malawi Congress Party and Dr Lazarus McCarthy Chakwera v The President of the Republic of Malawi* at the High Court Lilongwe District Registry, challenging, in the main, the appointment of two of the Commissioners.

3. On 23rd June, 2020, the Sixth Cohort of the Commission, as appointed on 7th June, 2020, presided over and managed the Fresh Presidential Elections (hereinafter referred to as "FPE 2020"), which returned Dr. Chakwera as President and Dr. Saulos Klaus Chilima as Vice President. This Cohort also presided over and managed divers by-elections for Members of the National Assembly and Local Government Councils.

4. On or about 7th April 2021, the President rescinded the appointments of Dr. Jean Mathanga and Ms. Linda Kunje as Commissioners of the Sixth cohort of the Commission. The rescission was withdrawn by the President through his letter dated 28th May, 2021, pursuant to the decision of the High Court, Principal Registry in Civil Cause No. 45 of 2021, *Dr. Jean Mathanga and Linda Kunje v Electoral Commission and Attorney General*.

5. On or about 24th June, 2020, the Malawi Congress Party and Dr. Chakwera withdrew and discontinued the judicial review proceedings. On 19th March,

2021, the Malawi Congress Party and Dr. Chakwera applied for and were granted permission to revive the said proceedings. Subsequently, Dr. Chakwera applied for and was granted an order removing himself as a party to the judicial review proceedings and the remaining parties were *Malawi Congress Party v The President of the Republic of Malawi.* Dr. Jean Mathanga, Ms. Linda Kunje, Mr. Steve Duwa and Mr. Arthur Nanthuru joined the proceedings as Interested Parties.

6. The judicial review proceedings culminated in a judgment of 2nd June, 2021 in which the Court held that four out of the six Commissioners were not duly appointed as members of the Sixth Cohort of the Commission, as their nomination and appointment were done in breach of section 4 of the Electoral Commission (Amendment) Act, 2017. The Court further held, on the premise of section 42 of the General Interpretation Act, (Cap 1:01), of the Laws of Malawi, and on the authority of the cases of *Chilima and another v Mutharika and another*, Constitutional Reference No. 1 of 2019, (unreported) and *Mutharika and another v Chilima and another*, Constitutional Appeal No. 1 of 2020 (unreported), that the actions and decisions of the Sixth Cohort of the Commission were not affected by the defect in the appointment of four of its members. The Court also held that the fact that the case made reference to section 75 of the Constitution did not make it, or certain parts thereof, fit for determination by the High Court sitting as a Constitutional Court.

7. We must at this stage highlight, as will be shown below, that in the course of these proceedings Counsel for the Claimant informed the Court that their reference to the Seventh Cohort of the Commission was erroneous and that the correct reference is the Sixth Cohort and amended their pleadings accordingly.

8. On 8th June, 2021, the Claimant herein commenced proceedings at the High Court, Principal Registry, (hereinafter referred to as the "original Court") in Civil Cause No. 230 of 2021 seeking reliefs which we reproduce below:

    a. "*A declaration that the rescission of the appointment of the two Commissioners of the Seventh Cohort of the Electoral Commission*

rendered the Seventh Cohort of the Electoral Commission inquorate and unconstitutional under Section 75 (1) of the Constitution of the Republic of Malawi as from the date of appointment of the Seventh Cohort of the Electoral Commission on or about the 7th June 2020.

b. *A declaration that the decision of the High Court of Malawi in Malawi Congress Party v. The President of Malawi and Four Others, Judicial Review Cause No. 34 of 2020 which declared that four Commissioners of the Seventh Cohort of the Commission were not validly appointed, reduced the Seventh Cohort of the Electoral Commission to only two validly appointed Commissioners and a Chairperson as from the date of the appointment of the Seventh Cohort of the Electoral Commission on 7th June 2020 and therefore the Seventh Cohort of the Electoral Commission was inquorate and unconstitutional from the day of its appointment.*

c. *A declaration that under Section 75 (1) of the Constitution of the Republic of Malawi, any vacancy in the composition of the Electoral Commission appointed with the minimum number of Six Commissioners, renders the Commission inquorate and unconstitutional; and thereby incapable of exercising any powers and functions in relation to elections in Malawi as provided for in Section 76 of the Constitution including presiding over, managing and conducting any elections including the purported Fresh Presidential Elections held on 23rd June 2020 in Malawi and all the By-elections conducted by the said inquorate Electoral Commission.*

d. *A declaration that under Section 75 of the Constitution of the Republic of Malawi, an unconstitutional and inquorate Electoral Commission does not have the Constitutional powers or mandate to preside over, manage and or conduct any elections in the Republic of Malawi.*

e. *A Declaration that Section 42 of the General Interpretation Act (CAP. 1:01) of the Laws of Malawi is inconsistent with the Section 75 (1) of the Constitution, and therefore invalid to the extent of such*

inconsistency under Section 5 of the Constitution of the Republic of Malawi.

f. *A declaration that section 10 of the Electoral Commission Act, CAP. 2:03) of the Laws of Malawi in inconsistent with the Section 75 (1) of the Constitution, and therefore invalid to the extent of such inconsistency under Section 5 of the Constitution of the Republic of Malawi.*

g. *A declaration that the Seventh Cohort of the Electoral Commission having been rendered unconstitutional and inquorate, the Fresh Presidential Elections presided over, managed and conducted by the unconstitutional and inquorate Seventh Cohort of the Electoral Commission on 23rd June 2020 and all subsequent Parliamentary and Local Government By-Elections, are thereby null and void ab initio.*

h. *A declaration that the purported election of the President and Vice President on 23rd June 2020 and the subsequently purported swearing into the offices of President and Vice President of the Republic of Malawi are null and void ab initio.*

i. *A declaration that the Members of the National Assembly and Local Government Councils purportedly elected in elections presided over, managed and conducted by the unconstitutional and inquorate Seventh Cohort of the Electoral Commission and subsequently sworn into their respective offices as Members of the National Assembly and Local Government Councils in the Republic of Malawi, are thereby null and void ab initio.*

j. *Consequential orders and directions that the status of the Presidency of the Republic of Malawi revert to the position it was prior to the appointment of the unconstitutional and inquorate Seventh Cohort of the Electoral Commission.*

k. *Consequential orders and directions that the offices of Members of the National Assembly and Local Government Councils purportedly elected in By-Elections presided over, managed and conducted by the unconstitutional and inquorate Seventh Cohort of the Electoral Commission and subsequently sworn into their respective offices of Members of the National Assembly and Local Government Councils in the Republic of Malawi revert to the positions they were in prior to the holding of such purported By-Elections.*

l. *Consequential orders and directions for the Fresh Appointment of the Seventh Cohort of the Electoral Commission.*

m. *Consequential orders and directions for the holding of Fresh Presidential Elections as directed by the Constitutional Court and the Malawi Supreme Court of Appeal on 3rd February 2020 and 8th May 2020 respectively.*

n. *Consequential orders and directions for the holding of Fresh Parliamentary and Local Government By-Elections in all the Constituencies and Local Government Councils where By-Elections were purportedly held, managed and presided over by the unconstitutional and inquorate Seventh Cohort of the Electoral Commission.*

o. *Any other consequential orders and directions as this Honourable Court shall deem fit and constitutional in the circumstances.*

p. *Costs of this action.*" [*sic*]

9. On 15th July, 2021, the original Court, being of the opinion that a matter on the interpretation or application of the Constitution had arisen, referred the

proceedings to the Chief Justice for certification as a constitutional matter. The Referral is reproduced below:

"*The original Court being of the opinion that a matter on the interpretation or application of the Constitution has arisen in the above proceeding in respect of the following questions, and subject to preliminary issues to be raised by the Defendant:*

(a) whether the President's rescission of the appointment of two Commissioners of the Seventh Cohort of the Electoral Commission rendered the Seventh Cohort of the Electoral Commission inquorate and unconstitutional under Section 75 (1) of the Constitution of the Republic of Malawi as from the date of appointment of the Seventh Cohort of the Electoral Commission on or about the 7th June 2020;

(b) whether the decision of the High Court of Malawi in Malawi Congress Party v. The President of Malawi and Four Others, Judicial Review Cause No. 34 of 2020 which declared that four Commissioners of the Seventh Cohort of the Commission were not validly appointed rendered the Seventh Cohort of the Electoral Commission inquorate and unconstitutional under Section 75 (1) of the Constitution of the Republic of Malawi as from the date of appointment of the Seventh Cohort of the Electoral Commission on or about the 7th June 2020;

(c) whether under Section 75 (1) of the Constitution of the Republic of Malawi, any vacancy in the composition of the Electoral Commission appointed with the minimum number of Six Commissioners, renders the Commission inquorate and unconstitutional; and thereby incapable of exercising any powers and functions in relation to elections in Malawi as provided for in Section 76 of the Constitution;

(d) whether an inquorate Electoral Commission under Section 75 of the Constitution of the Republic of Malawi has the Constitutional powers or mandate to preside over, manage and or conduct any elections in the Republic of Malawi;

(e) whether section 42 of the General Interpretation Act (CAP. 1:01) of the Laws of Malawi is inconsistent with Section 75 (1) of the Constitution, and therefore invalid to the extent of such inconsistency under Section 5 of the Constitution of the Republic of Malawi;

(f) whether section 10 of the Electoral Commission Act (CAP. 2:03) of the Laws of Malawi is inconsistent with Section 75 (1) of the Constitution of the Republic of Malawi and invalid under Section 5 of the Constitution of the Republic of Malawi, where the effect of any vacancy in the Electoral Commission reduces the number of Commissioners below the Constitutional minimum number of Six Commissioners;

(g) if the Seventh Cohort of the Electoral Commission was rendered inquorate and unconstitutional, whether the Seventh Cohort of the Electoral Commission had the constitutional powers and mandate to preside over, manage and conduct the Fresh Presidential Elections on 23rd June 2020 and all the subsequent Parliamentary and Local Government By-Elections; and

(h) whether in the event that questions (a) to (g) are answered in the affirmative, the Fresh Presidential Elections of 23rd June 2020 and all the subsequent Parliamentary and Local Government By-Elections presided over, managed and conducted by the inquorate and unconstitutional Seventh Cohort of the Electoral Commission, are null and void ***ab initio****,*

submits this Referral for certification of the Honourable Chief Justice under Section 9 (3) of the Courts Act." [*sic*]

10. On 20th August, 2021, the Chief Justice certified that the proceedings had complied with section 9 (3) of the Courts Act, (Cap 3:02), of the Laws of Malawi, and this present Panel was subsequently duly empaneled to sit as a Constitutional Court to deal with the said proceedings.

The Pleadings

11. Both parties filed amended pleadings, which although quite lengthy, but for reasons which will become clear in the course of this Ruling, will be reproduced in full as follows:

"*CLAIMANT'S AMENDED STATEMENT OF CASE*

1. *The Claimant is and was at all material times a registered political party in the Republic of Malawi and duly represented in the National Assembly.*

2. *The Claimant avers and will contend during trial that the Claimant has rights and duties enshrined in the Constitution of the Republic of Malawi, including but not limited to the right to participate in peaceful political activities intended to influence the composition and policies of the government, the right to participate in elections, the right to campaign for a political cause, as provided for under the Constitution of the Republic of Malawi, the Political Parties Registration Act and all other Laws of Malawi.*

3. *The Defendant is the Legal Representative for the office of the President of the Republic of Malawi and is sued in that capacity.*

4. *The Claimant avers and will contend during trial that under and by virtue of Section 4 of the Electoral Commission Act the Claimant being a political party with the requisite significant representation in the National Assembly in Malawi is entitled to be consulted on the appointment of Commissioners of the Electoral Commission in Malawi.*

5. *In pursuance of the right to be consulted under Section 4 of the Electoral Commission Act on or about the 4th of June 2020 the Claimant was duly consulted by the President of the Republic of Malawi on the appointment of the Sixth Cohort of the Electoral Commission and the Claimant duly submitted and recommended to the President, names of persons, including the names of Dr Jean Chifundo Mathanga, Ms. Angelina Linda Kunje, Mr. Steve Duwa and Mr. Arthur Nanthuru, as persons proposed by the Claimant*

for the appointment of Commissioners of the Sixth Cohort of the Electoral Commission.

6. *The Claimant avers and will contend during trial that under Section 75 (1) of the Constitution of the Republic of Malawi the minimum number of Commissioners of the Electoral Commission, is Six excluding the Chairman of the Commission.*

7. *The Claimant avers and will contend during trial that subsequently on 7th June 2020 the President appointed Six Members of the Sixth Cohort of the Electoral Commission including Dr. Jean Chifundo Mathanga, Ms. Angelina Linda Kunje, Mr. Steve Duwa and Mr. Arthur Nanthuru as Members of the Sixth Cohort of the Electoral Commission.*

8. *The Claimant avers and will contend during trial that on or about 16th June 2020 and subsequent to the appointment of the Sixth Cohort of the Electoral Commission, the Malawi Congress Party and Dr Lazarus MacCarthy Chakwera, challenged the appointment of the Sixth Cohort of the Electoral Commission by way of Judicial Review in Judicial Review Case Number 34 of 2020 on the grounds, inter alia, that the appointment of two of the Commissioners of the Commission, was illegal and invalid.*

9. *The Claimant avers and will contend during trial that subsequent to the appointment of the Sixth Cohort of the Electoral Commission, the Commission presided over, managed and conducted the Fresh Presidential Elections on 23rd June 2020 and other By-elections for Members of the National Assembly and Local Government Councils in Malawi.*

10. *The Claimant avers and will contend during trial that the Fresh Presidential Elections returned the names of Dr. Lazarus MacCarthy Chakwera and Dr. Saulos Klaus Chilima as President and Vice President Elect and the two subsequently took the oath of office of President and Vice President respectively.*

11. *The Claimant further avers and will contend during trial that the By-Elections for Members of the National Assembly and Local Government Councils also returned various persons as Members of the National Assembly and Local Government Councils in Malawi.*

12. *The Claimant avers and will contend during trial that Dr. Lazarus MacCarthy Chakwera and Dr. Saulos Klaus Chilima having won and sworn in as President and Vice President of the Republic of Malawi; on or about 24th June 2020 or 28th July 2020 the Malawi Congress Party and Dr. Lazarus MacCarthy Chakwera withdrew and discontinued the proceedings in Judicial Review Case Number 34 of 2020 aforesaid.*

13. *The Claimant avers and will contend during trial that on or about 19th March 2021 the Malawi Congress Party and Dr. Lazarus MacCarthy Chakwera applied for and were granted permission to revive the proceedings in Judicial Review Case Number 34 of 2020 aforesaid.*

14. *The Claimant avers and will contend during trial that on or about 19th April 2021 the Malawi Congress Party and Dr. Lazarus MacCarthy Chakwera applied for and were granted an order to remove Dr. Lazarus MacCarthy Chakwera as a party to the proceedings in Judicial Review Case Number 34 of 2020 aforesaid.*

15. *The Claimant avers and will contend during trial that on or about 7th April 2021 the President of the Republic of Malawi rescinded the appointments of the said Dr Jean Chifundo Mathanga and Ms. Angelina Linda Kunje as Commissioners of the Sixth Cohort of the Electoral Commission.*

16. *The Claimant repeats paragraphs 6, 7 and 15 hereof and avers and will contend during trial that the rescission of the appointment of Dr. Jean Chifundo Mathanga and Ms. Angelina Linda Kunje as Commissioners of the Sixth Cohort of the Electoral Commission rendered the Sixth Cohort of the Electoral Commission to fall below the Constitutional minimum of Six for Members of the Electoral Commission in Malawi.*

17. *The Claimant repeats paragraphs 6, 7, 15 and 16 hereof and avers and will contend during trial that the Sixth Cohort of the Electoral Commission was thereby inquorate and unconstitutional from the date of its appointment and thereby incapable of exercising any powers and functions in relation to elections in Malawi as provided for in Section 76 of the Constitution including presiding over, managing and conducting any elections including the Fresh Presidential Elections held on 23rd June 2020 in Malawi and all the By-Elections conducted by the said inquorate Electoral Commission.*

18. *The Claimant repeats paragraphs 8, 12, 13 and 14 above and avers and will contend during trial that by its Judgment on 2nd June 2021 in Malawi Congress Party v. The President of Malawi and Four Others, Judicial Review Cause No. 34 of 2020 the High Court of Malawi also declared that four Commissioners of the Sixth Cohort of the Commission, namely Dr. Jean Chifundo Mathanga, Ms. Angelina Linda Kunje, Mr. Steve Duwa and Mr. Arthur Nanthuru were not validly appointed as Commissioners of the Sixth Cohort of the Electoral Commission.*

19. *The Claimant avers and will contend during trial that by reason of the High Court Judgment aforesaid the Sixth Cohort of the Electoral Commission had only two validly appointed Commissioners and a Chairperson as from the date of the appointment of the Sixth Cohort of the Electoral Commission on 7th June 2020, and therefore the Sixth Cohort of the Electoral Commission was below the constitutional minimum number of Six for Commissioners of the Electoral Commission and thereby inquorate and unconstitutional from the day of its appointment.*

20. *The Claimant repeats paragraph 19 hereof and further avers and will contend during trial that the Sixth Cohort of the Electoral Commission, being inquorate and unconstitutional, was incapable of exercising any powers and functions in relation to elections in Malawi as provided for in Section 76 of the Constitution including presiding over, managing and conducting any elections including the Fresh Presidential Elections held on*

23rd June 2020 in Malawi and all the By-Elections conducted by the said inquorate Sixth Cohort of the Electoral Commission.

21. *The Claimant repeats paragraphs 8, 9, 10, 12, 13, 14 and 18 above and avers and will contend that Dr Lazarus MacCarthy Chakwera, now the President of the Republic of Malawi, at all material times knew and was aware that the Sixth Cohort of the Electoral Commission was tainted with illegality, but nevertheless participated as Presidential Candidate for the Malawi Congress Party in the Fresh Presidential Election of 23rd June 2020 presided over, managed and conducted by the Electoral Commission tainted with such illegality.*

22. *The Claimant avers and will contend during trial that Section 42 of the General Interpretation Act (CAP. 1:01) of the Laws of Malawi is inconsistent with Section 75 (1) of the Constitution, and therefore invalid to the extent of such inconsistency under Section 5 of the Constitution of the Republic of Malawi.*

23. *The Claimant avers and will contend during trial that in so far as Section 75 (1) of the Constitution is couched in mandatory terms as to the minimum number of Commissioners of the Electoral Commission, Section 10 of the Electoral Commission Act (CAP. 2:03) of the Laws of Malawi is inconsistent with Section 75 (1) of the Constitution where the number of Commissioners falls below the Constitutional minimum number of Six Commissioners and therefore Section 10 of the Electoral Commission Act is invalid to the extent of such inconsistency under Section 5 of the Constitution of the Republic of Malawi.*

24. *By reason of the matters aforesaid the Claimant claims for the following declaratory orders and consequential reliefs:-*

    24.1 *A declaration that the rescission of the appointment of the two Commissioners of the Sixth Cohort of the Electoral Commission rendered the Sixth Cohort of the Electoral Commission inquorate and unconstitutional under Section 75 (1) of the Constitution of the Republic*

of Malawi as from the date of appointment of the Sixth Cohort of the Electoral Commission on or about the 7th June 2020.

24.2 A declaration that the decision of the High Court of Malawi in Malawi Congress Party v. the President of Malawi and Four Others, Judicial Review Cause No. 34 of 2020 which declared that four Commissioners of the Sixth Cohort of the Commission were not validly appointed, reduced the Sixth Cohort of the Electoral Commission to only two validly appointed Commissioners and a Chairperson as from the date of the appointment of the Sixth Cohort of the Electoral Commission on 7th June 2020 and therefore the Sixth Cohort of the Electoral Commission was inquorate and unconstitutional from the day of its appointment.

24.3 A declaration that under Section 75 (1) of the Constitution of the Republic of Malawi, any vacancy in the composition of the Electoral Commission appointed with the minimum number of Six Commissioners, renders the Commission inquorate and unconstitutional; and thereby incapable of exercising any powers and functions in relation to elections in Malawi as provided for in Section 76 of the Constitution.

24.4 A declaration that under Section 75 of the Constitution of the Republic of Malawi, an inquorate and unconstitutional Electoral Commission does not have the Constitutional powers or mandate to preside over, manage and or conduct any elections in the Republic of Malawi.

24.5 A Declaration that Section 42 of the General Interpretation Act (CAP. 1:01) of the Laws of Malawi is inconsistent with the Section 75 (1) of the Constitution, and therefore invalid to the extent of such inconsistency under Section 5 of the Constitution of the Republic of Malawi.

24.6 A Declaration that in so far as Section 75 (1) of the Constitution is couched in mandatory terms as to the minimum number of Commissioners of the Electoral Commission, Section 10 of the Electoral Commission Act (CAP. 2:03) of the Laws of Malawi is inconsistent with Section 75 (1) of the Constitution where the number of Commissioners

falls below the Constitutional minimum number of Six Commissioners; and therefore Section 10 of the Electoral Commission Act is invalid to the extent of such inconsistency under Section 5 of the Constitution of the Republic of Malawi.

24.7A declaration that the Sixth Cohort of the Electoral Commission having been rendered inquorate and unconstitutional, the Fresh Presidential Elections presided over, managed and conducted by the inquorate and unconstitutional Sixth Cohort of the Electoral Commission on 23rd June 2020 and all subsequent Parliamentary and Local Government By-Elections, are thereby null and void ab initio.

24.8 A declaration that the election of the President and Vice President on 23rd June 2020 and the swearing into the offices of President and Vice President of the Republic of Malawi are null and void ab initio.

24.9A declaration that the Members of the National Assembly and Local Government Councils elected in By-Elections presided over, managed and conducted by the inquorate and unconstitutional Sixth Cohort of the Electoral Commission and subsequently sworn into their respective offices as Members of the National Assembly and Local Government Councils in the Republic of Malawi, are thereby null and void ab initio.

24.10 Consequential orders and directions that the status of the Presidency of the Republic of Malawi revert to the position it was in prior to the appointment of the inquorate and unconstitutional Sixth Cohort of the Electoral Commission.

24.11 Consequential orders and directions that the offices of Members of the National Assembly and Local Government Councils elected in By-Elections presided over, managed and conducted by the inquorate and unconstitutional Cohort of the Electoral Commission and subsequently sworn into their respective offices of Members of the National Assembly and Local Government Councils in the Republic of Malawi revert to the positions they were in prior to the holding of such By-Elections.

24.12 Consequential orders and directions for the Fresh Appointment of the Sixth Cohort of the Electoral Commission.

24.13 Consequential orders and directions for the holding of Fresh Presidential Elections as directed by the Constitutional Court and the Malawi Supreme Court of Appeal on 3rd February 2020 and 8th May 2020 respectively.

24.14 Consequential orders and directions for the holding of Fresh Parliamentary and Local Government By-Elections in all the Constituencies and Local Government Councils where By-Elections were held, managed and presided over by the inquorate and unconstitutional Sixth Cohort of the Electoral Commission.

24.15 Any other consequential orders and directions as this Honourable Court shall deem fit and constitutional in the circumstances.

24.16 *Costs of this action….*" [*sic*]

"*RE-AMENDED DEFENCE*

1.0 Except as set out below, and except where it contains admissions, the Defendant requires the Claimant to prove the matters set out in the statement of case.

2.0 The Defendants refers to the statement of the case and pleads that the Claimant's claim emanates from a decision of the High Court in Judicial Review Cause No. 34 of 2020, Lilongwe District Registry between the Malawi Congress Party v. The President of the Republic of Malawi in which the High Court having nullified the appointment into the Electoral Commission of Persons nominated by the Claimants held that the past decisions of the Electoral Commission were unaffected by the court's nullification of the said appointment.

The Defendant, therefore, pleads that the High Court lacks jurisdiction to review or overturn its own decision or the decision of another High Court judge.

3.0 Further, the Defendant pleads that the High Court judgment set out at paragraph 2.0 above cannot constitute a cause of action

4.0 Without prejudice to the foregoing statement, the Defendant contends that the Claimant's action is premature and invalid as the Claimant did not comply with the mandatory 3 months' notice as per section 4 of the Civil Procedure (Suits By or Against the Government or Public Officers) Act (the 'Act).

5.0 In the alternative and without further prejudice to paragraphs 2.0, 3.0 and 4.0 above, since, in the main, the substance of the action and the remedy being sought is the nullification of the Fresh Presidential Election held on 23rd June, 2020, the Defendant contends that the Claimant does not have the requisite locus standi in this matter as it was not a candidate in the said election. The action, therefore, ought to be dismissed or struck out for lack of locus standi on the part of the Claimant.

6.0 In addition, the Defendant is not a proper party to this action as there is nothing from the judgment of the High Court in Judicial Review Cause No. 34 of 2020, Lilongwe District Registry nor from the conduct of the June, 2020 Fresh Elections that can be imputed on the Defendant.

7.0 In the further alternative, since, in the main, the substance of the action and the remedy being sought is the nullification of the Fresh Presidential Election held on 23rd June, 2020, this matter is an electoral matter and therefore, it is wrongly commenced. It ought to have been commenced as an Electoral Petition under section 100 of the Parliamentary and Presidential Elections Act, Cap. 2:01 of the

Laws of Malawi. The action therefore ought to be dismissed or struck out on this basis.

8.0 The Defendant repeats the immediate foregoing and further contends that being an electoral matter, the same is statute barred for being filed out of time and not within the requisite 7 days from the date of the declaration of the results of elections. The action therefore ought to be struck out or dismissed for being statute barred.

9.0 In the further alternative and without prejudice to the foregoing statements of defence, the Defendant contends that this action ought to be struck out or dismissed for raising in paragraphs 4, 5, 6 and 7 of the Statement of Case matters which are res judicata by reason of the determination of the High Court in its judgment dated 2nd June, 2021 in Judicial Review Cause No. 34 of 2020, Lilongwe District Registry between the Malawi Congress Party v. The President of the Republic of Malawi.

10.0 Similarly, the Defendant contends that the Claimant cannot raise the issue of validity of the June 23 Fresh Presidential Elections as contended in paragraphs 12, 13, 15, 16, 17 and 18 of its Statement of Case as the said issue was already determined by the High Court in its judgment dated 2nd June, 2021 between the Malawi Congress Party and the President of the Republic of Malawi (supra), to wit, among others, that the actions of the disputed Sixth Cohort of Commissioners were saved by section 42 of the General Interpretations Act.

11.0 In the further alternative, if the Claimant had legal competence, which is denied, the action still ought to have been struck out or dismissed for being frivolous, vexatious and an abuse of court process as matters raised in paragraph 11 of the Claimant's Statement of Case were the subject of Judicial Review proceeding commenced by the Claimant before the Lilongwe District Registry of the High Court in a Judicial Review Cause No. 17 of 2021 between

The State (on the application of the Democratic Progressive Party) v. The President of the Republic of Malawi, The Secretary to the President and Cabinet which the Claimant withdrew subsequent to the affected commissioners commencing a similar matter before the Principal Registry of the High Court. Further, the issues raised by the Claimant with regard to the purported rescission of the appointment of Ms. Linda Kunje and Mrs. Jean Namathanga into the Electoral Commission ought to have been dealt with by way of Judicial Review and not by way of ordinary action.

12.0 The Defendant refers to paragraph 5 of the Claimant's Statement of Case and admits the contents therein. However, the Defendant will contend at trial that the Court found that the Claimant's nomination of the names to be appointed commissioners was unlawful as it violated section 4 of the Election Commissions Act.

13.0 The Defendant repeats the foregoing and states that the Claimant is estopped from commencing an action founded on its own illegality and wrongdoing.

Particulars of the Claimant's illegality/wrongdoing

(a) The Claimant submitted five nominations as follows:
- *(a) David Kanyenda*
- *(b) Steve Duwa*
- *(c) Arthur Nanthuru*
- *(d) Dr Jean Mathanga*
- *(e) Linda Kunje*

(b) Yet, the law requires that the eligible party should submit three nominations only.

(c) Out of the five submitted nominations, the then President, appointed four nominations to be Commissioners, namely:
- *(a) Steve Duwa*

(b) Arthur Nanthuru
(c) Dr Jean Mathanga
(d) Linda Kunje

(d) Yet, as things stood then, the then President was supposed to appoint 3 Commissioners on the part of the Claimant.

14.0 The Defendant refers to paragraphs 15, 16 and 17 of the Claimant's Statement of Case and contends that the letter dated 7th April, 2021 was withdrawn by the President of the Republic of Malawi through his letter dated 28th May, 2021, pursuant to the decision of the court in Civil Cause Number 45 of 2021 between Dr Jean Mathanga and Linda Kunje v. Electoral Commission and Attorney General which court faulted and rendered ineffective the letter dated 7th April, 2021. The Defendant contends that, having been faulted by the court and subsequently revoked by the President of the Republic of Malawi, the letter dated 7th April, 2021 cannot form the basis of a cause of action. The action ought to be struck out or dismissed with costs.

15.0 The Defendant refers to paragraphs 8,12,13, 14 and 21 of the Statement of Case and puts the Claimant to strict proof thereof.

16.0 Without prejudice to paragraphs the foregoing preliminary statements of Defence, the Defendant refers to paragraphs 1, 2, 3 and 4 of the Claimant's Statement of Case and admits the contents therein.

17.0 The Defendant refers to paragraphs 6, 7, 8, 9, 10, 11 and 14 and admits the contents therein.

18.0 The Defendant refers to paragraphs 15 and 16 of the Claimant's Statement of Case and denies the strange interpretation therein. At trial, the Defendant will contend that the finding of undue appointment by the court cannot affect the validity of the elections as rightly held by the court.

19.0 The Defendant refers to paragraphs 17 and 18 of the Claimant's Statement of Case and denies that section 42 of the General Interpretations Act and section 10 of the Electoral Commission Act are inconsistent with section 75 (1) of the Constitution and at trial, the Claimant will be put to strict proof thereof.

20.0 The Defendant repeats the foregoing statement and contends that the Claimant's interpretation of the aforesaid provisions is misleading.

21.0 The Defendant refers to paragraph 19 of the Claimant's Statement of Case and strongly objects to the grant of the said declaratory orders on the basis that the same are unfounded and based on an interpretation that is not known to the law.

22.0 Even if the Court is moved by the said interpretation, which is highly unlikely, the Defendant will argue that the Court should not grant the said declaratory orders on the basis of public policy. It will not be in the best interest of the people of Malawi to grant the said declaratory orders.

23.0 The Defendant will further argue that the Claimant herein is not challenging the number of votes polled but rather the constitution of the Commission and will prevail on Court to distinguish the two.

24.0 *Except where expressly admitted, the Defendant denies each and every allegation of fact set out in the Claimant's Statement of Case as if the same were traversed seriatim. ...*" [sic]

"*CLAIMANT'S REPLY TO THE DEFENDANT'S AMENDED DEFENCE*

1. *The Claimant refers to the Defendant's Amended Statement of Defence and joins issue with the Defendant's Statement of Defence.*

2. *The Claimant refers to paragraph 1.0 of the Defendant's Amended Defence and denies the allegation that the Summons herein is premature as the Summons is not a suit envisaged by the said Section 4 of the Civil Procedure (Suits By or Against the Government or Public Officers) Act as alleged as the Summons was taken out to seek the Court's interpretation and application of the Constitution and not to claim monetary compensation or any such remedies against the Government that require the giving of such notice before suit.*

3. *The Claimant refers to paragraphs 2.0 to 4.0 of the Defendant's Amended Defence and denies that the substance of the Claimant's action against the Defendant is the nullification of the Fresh Presidential Election held on 23rd June 2020 as the main claim is to seek the Court's interpretation and application of the Constitution as regards the legal status of the Seventh Cohort of the Electoral Commission under Section 75(1) of the Constitution and in relation to the powers and functions of the Electoral Commission under Section 76 of the Constitution.*

4. *The Claimant states that the prayer for the nullification of the Fresh Presidential Election and the subsequent bye-elections conducted by the impugned Seventh Cohort of the Electoral Commission, is a consequence of the impugned status of the Seventh Cohort of the Electoral Commission.*

5. *The Claimant refers to paragraphs 5.0 and 6.0 of the Defendant's Amended Defence and denies that the matters raised in paragraphs 4, 5, 6, and 7 of the Claimant's Statement of Case are res judicata as the issue of the effect of the nullification of some Commissioners of the Seventh Cohort of the Electoral Commission are matters of the application and interpretation of the*

Constitution of the Republic of Malawi and such issue cannot be adjudicated upon by a single Judge of the High Court.

6. *The Claimant refers to paragraph 7.0 of the Defendant's Amended Defence and states that paragraph 11 of the Claimant's Statement of Case merely states the fact that on 7th April 2021 the President of the Republic of Malawi rescinded the appointment of two Commissioners of the Seventh Cohort of the Electoral Commission and as a matter of fact the Defendant has admitted this statement of fact in paragraph 11 of the Defendant's Amended Defence.*

7. *The Claimant repeats paragraph 6 above and states that in the said Judicial Review Case Number 17 of 2021 the Claimant had moved the High Court to review the decision to rescind the appointment of the two Commissioners and the Claimant did not move the High Court to challenge the effect of the rescission on the status of the Electoral Commission as in the present matter.*

8. *The Claimant refers to paragraphs 8.0, 9.0 and 16.0 of the Defendant's Amended Defence and denies the defence of illegality on the part of the Claimant in the nomination of names to be appointed Commissioners of the Electoral Commission and the defence of public policy, as such defences cannot override the clear provision of the Constitution requiring a minimum number of six for a valid Electoral Commissioners.*

9. *The Claimant refers to paragraphs 12.0, 13.0, 14.0, 15.0 and 16.0 of the Defendant's Amended Defence and repeats paragraphs 5 and 8 hereof and shall contend during trial that the Constitution of Malawi is the supreme law of Malawi and all organs of State and the offices created by the Constitution should be defined and constituted in accordance with the Constitution of Malawi and not otherwise.*

10. *The Claimant refers to paragraphs 4.0, 5.0, 6.0, 9.0 and 17.0 of the Defendant's Amended Defence and repeats paragraphs 3 and 9 hereof and states that the defence of number of votes polled in a particular election cannot override the challenge against the constitutional status of the Electoral Commission, or the lack of constitutional powers by the Electoral Commission and the illegality of the constitution of the Electoral Commission. ...*" [*sic*]

Issues for the Court's determination

12. On 9th July, 2021, the Defendant filed preliminary issues, as reproduced below, to be resolved by this Court prior to determining the substantive action:

(a) Whether the High Court has jurisdiction to overturn its own decision or to review its own decision and whether a High Court judgment can constitute a cause of action;

(b) Whether the present proceeding is aimed at reviewing or appealing against the decision of the High Court on similar issues;

(c) Whether non-compliance with section 4 of the Civil Procedure (Suits by or against Government or Public Officers) Act is fatal to the proceedings commenced against the Attorney General and whether the present proceedings can be dismissed for failing to comply with section 4 of the Civil Procedure (Suits by or against Government or Public Officers) Act;

(d) Whether a political party has *locus standi* to challenge the results of an election and whether the Claimant and the Defendant are proper parties to the present proceeding;

(e) Whether the Claimant having deliberately contravened the law in recommending the appointment into the Electoral Commission of more than three nominees, should be allowed to benefit from its own

illegality and whether it should be estopped from challenging the decisions of the members of the Electoral Commission who were appointed into the Electoral Commission in contravention of section 4 of the Electoral Commission Act;

(f) Alternatively, whether the present proceeding seeks to benefit the Claimant from its own unlawful and illegal act;

(g) Whether the present proceedings should have been commenced by way of petition and whether the present proceedings have been wrongly commenced;

(h) Whether or not the present proceedings are statute barred under section 100 of the Parliamentary and Presidential Elections Act, having been commenced more than seven days from the declaration of the result of the election;

(i) Whether or not, the present proceedings are frivolous, vexatious and an abuse of court process and a waste of the Court's time.

13. Both parties filed elaborate skeleton arguments and submissions, to which we have had recourse in the course of determining the preliminary issues and for brevity's sake we will focus only on the essence of the same. We gratefully acknowledge the industry of Counsel on both sides. We now proceed to consider and determine the preliminary issues, but not necessarily in the order they have been presented.

***Issue 1*: Whether the Attorney General must take an oath of office in order to have standing in court.**

14. In the course of hearing the preliminary issues, Counsel for the Claimant raised an oral preliminary objection to the Attorney General appearing before us on the ground that he had not taken an oath of office. Counsel submitted that notwithstanding that there is no legal provision requiring the Attorney General to take an oath of office, the office of the Attorney General being both

a constitutional and a public office and accountable to the people of Malawi, the person so appointed must take an oath as a public promise to the people of Malawi that s/he will preserve and defend the Constitution and discharge the duties of the office in good faith.

15. Counsel further submitted that the issue raised under this head, though not raised as a substantive matter, this Court may be pleased to make a pronouncement and recommendation for the amendment of the necessary provisions of section 98 of the Constitution to provide for the requirement of the Attorney General taking an oath of office before assuming the office, as a promise to the people of Malawi that in the discharge of the duties of Attorney General, the person appointed will preserve and defend the Constitution and discharge the duties of the office in good faith.

16. In response, the Attorney General submitted that there is no provision under any law that requires the Attorney General to take an oath before assuming office. He further submitted that the office of the Attorney General is a creature of section 98 of the Constitution whereunder there is no requirement to take an oath of office. He also submitted that Parliament never intended for the Attorney General to take an oath of office before assuming duties. He referred to the case of *Nseula v Attorney General and another* [1999] MLR 313 for the position that the duty of the court is to ascertain Parliament's intention and not to make value judgments.

17. We observe that both parties admit, and rightly so, that there is no legal provision requiring the Attorney General to take an oath of office upon assuming office. Section 98 of the Constitution which creates the office of the Attorney General, does not require the Attorney General to take an oath of office. No other law does. This Court cannot read into the law that which it does not provide for.

18. Counsel Mhango, former Attorney General, told this Court that, upon assuming that office, he signed a document in his office which he believes was an oath of office. We observe that he did not disclose the contents of the document. In his presentation he did not state before whom he took the

purported oath and under what law he did so. We are therefore unable to discern whether that document was indeed an oath of office or a document of a different character. Counsel also alleged a practice whereby previous holders of that office took such an oath but did not substantiate the same. In our view even if such a practice had existed, it would not create a legal obligation in the absence of a statutory requirement for the Attorney General to take an oath of office.

19. We have addressed our minds to the Claimant's prayer that this Court should make a pronouncement and recommendation for the amendment of section 98 of the Constitution to provide for the requirement of the Attorney General taking an oath of office before assuming office. However, an examination of the Constitution shows that the framers of the same did not intend the Attorney General to take an oath. This is because, where the framers intended for an oath of office to be taken, the Constitution expressly provides for the same. For instance, under section 52, Members of Parliament are required to take an oath of allegiance. Under section 81, the President and his Vice are required to take an oath of office. Under section 95, Ministers and Deputy Ministers are required to take an oath of office or solemn affirmation before assuming duties. Under section 115, Judges and Magistrates are also required to take an oath of office. We repeat that there is no statutory provision requiring the Attorney General to do likewise.

20. Where the framers of the Constitution did not intend an oath of office to be taken, no requirement is provided therefor. For instance, the Director of Public Prosecutions and the Ombudsman, whose offices are established under sections 99 and 120 of the Constitution, respectively, are not required to take an oath of office before assuming their duties. So, for the Attorney General.

21. It is a well settled principle of statutory interpretation, that *expressio unius est exclusio alterius* (to express one thing is impliedly to exclude another). That which was excluded was not intended to be included. Francis Bennion in *Statutory Interpretation*, second edition, at page 873 puts it thus:

"*Known for short as the expressio unius principle, it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples, or ex abundanti cautela, or for some other sufficient reason, the rest are taken to be excluded from the proposition*."

22. The principle was applied by the Supreme Court of Appeal in *Nseula v Attorney General* (supra) when it stated at page 328 that:

"*Indeed it is an elementary principle of interpretation which is encapsulated in the maxim expressio unius est exclusio alterius – the expression of one thing implies exclusion of other things or person. The loss of seat on appointment as minister or deputy minister is excluded from the expressed intention in section 63 of the Constitution. Something which is excluded cannot be implied into an express provision.*"

23. Clearly, therefore, in the case at hand the framers of the Constitution did not intend for the Attorney General to take an oath of office. We therefore decline to pronounce ourselves in the manner prayed for by the Claimant. We find that the Attorney General is properly before us.

***Issue 2*: Whether the High Court has jurisdiction to overturn or review its own decision, whether a High Court judgment can constitute a cause of action, and whether the present proceedings are aimed at reviewing or appealing against a decision of the High Court on similar issues.**

24. We understand the preliminary issues under paragraph 12 (a) and (b) above to be raising similar issues, we shall therefore deal with the same together. Under this issue we will discuss the following:

a. effect of certification;
b. whether this matter is an appeal;
c. whether it is *res judicata*;
d. whether this Court is functus officio; and

e. whether the judgment in *Malawi Congress Party v The President of the Republic of Malawi* constitutes a cause of action.

a. Effect of certification

25. The Claimant submitted that the issues for determination in the present case are delineated by the contents and terms of the certification and that the said issues were not placed before the Court in *Malawi Congress Party v The President of the Republic of Malawi.*

26. In response to this the Defendant submitted that during the certification, albeit an administrative function, the Chief Justice was not considering the interface between the constitutional questions as raised by the Claimant and the judgment in *Malawi Congress Party v The President of the Republic of Malawi* on similar issues. The Defendant argued that the certification in this matter did not do anything beyond placing the constitutional questions before this Court. The Defendant further argued that the certification did not resolve any conflicts between what the Claimant is seeking before this Court and the issues already determined in *Malawi Congress Party v The President of the Republic of Malawi*. The Defendant submitted that this is the proper time for this Court to determine the congruency of the constitutional questions and the findings/determination in *Malawi Congress Party v The President of the Republic of Malawi* at this preliminary stage.

27. We note that in the original Court the Claimant, in the main, was asking that Court to determine whether section 42 of the General Interpretation Act and section 10 of the Electoral Commission Act are inconsistent with section 75 (1) of the Constitution and took the position that the same were invalid to the extent of such inconsistency with section 5 of the Constitution. The Claimant was seeking consequential orders and directions to the effect that the actions and decisions of the Sixth Cohort of the Commission were null and void *ab initio*.

28. Contrary to the Claimant's submissions, the Court in *Human Rights Commission v Attorney General* [2011] MLR 85 (HC) specifically held that a

constitutional panel is competent to handle and dispose of preliminary objections. Coming to the present matter, we observe that the Referral to the Chief Justice by the original Court in Civil Cause No. 230 of 2021 for certification was made "subject to preliminary issues to be raised by the Defendant." The Chief Justice certified the matter in accordance with the terms of the Referral. We therefore find ourselves expressly bound by the certification herein to consider and dispose of the preliminary issues before the substantive hearing.

29. In addition, Order 16 rule 6 (1) of the Courts (High Court) (Civil Procedure) Rules, (hereinafter referred to as "CPR"), allows the court to hear arguments by the parties in a proceeding on preliminary issues of fact or law between the parties, where it appears likely that if the issues are resolved, the proceeding or part thereof will be resolved without a trial, or the costs of the proceeding or the issues in dispute are likely to be substantially reduced. Order 16 rule 6 (1) of the CPR is in tandem with the overriding objective of the Rules, as provided for in Order 1, rule 5. Constitutional matters are not an exception as the act of certification does not override Orders 1, rule 5 and 16 rule 6 (1) of the CPR.

30. We observe that the Claimant is blowing hot and cold in protesting against the Defendant raising preliminary issues as they have done, whilst at the same time raising a preliminary issue themselves regarding whether or not the Attorney General had taken an oath of office and, consequently, whether he has a right of audience before this Court.

31. We observe that the Claimant did not disclose to the original Court that it was the finding of the Court in *Malawi Congress Party v The President of the Republic of Malawi*, that on the premise of section 42 of the General Interpretation Act, and on the authority of the cases of *Chilima and another v Mutharika and another*, Constitutional Reference No.1 of 2019 and *Mutharika and another v Chilima and Another*, Constitutional Appeal No. 1 of 2020, the actions and decisions of the Sixth Cohort of the Commission were not affected by the defect in the appointment of four of its members. The Claimant did not also disclose that the Court further held that the reference to

section 75 of the Constitution did not make the said case, or certain parts thereof, fit for determination by the High Court sitting as a Constitutional Court.

32. In our considered view, these are material facts the Claimant should have disclosed before the original Court. Regrettably, whether by design, neglect or other reason, the Claimant did not place these facts before the original Court, contrary to the party's duty to candidly place all material facts before the court from which they seek relief or remedy. We are of the firm view that if the Claimant had not suppressed these material facts the decision of the original Court might have been different in terms of the Referral. Be that as it may, the point remains that the matter was certified subject to disposal of the preliminary issues. We conclude that this Court is within its legal mandate in entertaining the preliminary issues herein and they are rightly before us.

b. Whether this matter is an appeal

33. It was submitted by the Defendant that the present action is founded on the decision of the High Court in Judicial Review Cause No. 34 of 2020, *Malawi Congress Party v The President of the Republic of Malawi* and the rescission of the appointment of Ms. Linda Kunje and Dr. Jean Mathanga as communicated in the letter dated 7th April, 2021. According to the Defendant, by the present action, the Claimant is effectively asking this Court to overturn or review the decision in *Malawi Congress Party v. The President of the Republic of Malawi*, in which the Court, relying on the case of *Mutharika and another v Chilima and another*, Constitutional Appeal No. 1 of 2020 as well as section 42 of the General Interpretation Act, held that past decisions of the irregularly constituted Commission were valid.

34. The Defendant also submitted that the High Court sitting as a constitutional panel does not have any jurisdiction to review or overturn its own decision. This, according to the Defendant, is because in terms of section 108 of the Constitution and in terms of the case of *Reserve Bank of Malawi v Finance Bank Malawi Limited (in Voluntary Liquidation) and Attorney General*,

Commercial Cause No. 202 of 2008, Principal Registry (unreported), a constitutional panel of the High Court is not superior to the High Court and that only the Supreme Court of Appeal is superior to the High Court. The Defendant also submitted that section 11 of the Courts Act which governs additional jurisdiction of the High Court can also not give this Court the powers to review the decision of the Court in the case of *Malawi Congress Party v The President of the Republic of Malawi*. The Defendant contended that the proper course of action was to appeal to the Supreme Court of Appeal against the decision of the High Court. Once a High Court delivers its final judgment on the merits only three options remain, namely, enforcement of the judgment by the successful party, amending the judgment under the slip rule or filing of an appeal to the Supreme Court by an unsuccessful party, so went the argument.

35. The Defendant argued that if the Claimant was aggrieved by the decision of the High Court in *Malawi Congress Party v The President of the Republic of Malawi*, the proper approach was for it to join as an intervener or as an interested party and appeal against the decision. The Defendant invited the Court to consider the case of *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; in which the former President of South Africa Mr. Thabo Mbeki and the Government of the Republic of South Africa sought leave to intervene in the appeal on the ground that they had interest in the appeal since many findings of the lower court impinged on them negatively and they wished to have the record set straight.

36. The Defendant submitted that what is clear from the judgment is that a person who was not a party to the case but has been aggrieved by the order can join the case on appeal. The Defendant further submitted that therefore the Claimant could have joined the case of *Malawi Congress Party v The President of the Republic of Malawi* during the trial or on appeal; and because it did not, it cannot be allowed to commence fresh proceedings to challenge the reasoning and conclusion therein. We have considered that case and we

note that the principle is based on the rules of court in South Africa, but there is no corresponding provision in our rules. Therefore, it is inapplicable.

37. The Defendant also submitted, on the authority of the case of *Mpinganjira v Lemani and another* [2000–2001] MLR 295 (HC), that a court cannot arrogate to itself powers beyond what is given to it by statute. This, according to the Defendant, is because the High Court sitting as a constitutional panel does not have jurisdiction to review a decision of a judge of the High Court sitting as a single judge. According to the Defendant, a review of the decision in *Malawi Congress Party v The President of the Republic of Malawi* would be null and void for lack of jurisdiction. The Defendant cited the cases of *Bhima v Bhima* [1973-74] 7 MLR 163 and *Hetherwick Mbale v Hissan Maganga*, MSCA Civil Appeal No. 21 of 2013, (unreported) in support of this argument. The present action that seeks to review or overturn the decision of the High Court Judge should, therefore, be dismissed with costs, so went the argument.

38. In response, the Claimant submitted that the assertion by the Defendant that the present matter is an appeal or a review of the decision in *Malawi Congress Party v The President of the Republic of Malawi* is borne out of a misconception or misapprehension of the real nature of the present case. The Claimant further submitted that this Court is fully entitled to hear this matter and that it is not *functus officio* as argued by the Defendant. According to the Claimant, the present case is a constitutional matter where this Court is being called upon to determine constitutional questions which were clearly set out in the Referral by the High Court in Civil Cause No. 230 of 2021, as certified by the Chief Justice. The Claimant argued that none of the matters that were presented before the Court in *Malawi Congress Party v The President of the Republic of Malawi* have been placed before this Constitutional Court. The Claimant contended that the parties to that case were the Malawi Congress Party and the President of the Republic of Malawi and the issues before that Court were as set out in paragraph 29 of the judgment of the Court, namely, whether or not:

    (a) the application for judicial review was barred by the limitation period;

(b) the claimant had *locus standi*;
(c) there was suppression of facts;
(d) the appointment of the interested parties as members of the Commission was irregular and that the claimant had waived and been complicit to that irregularity;
(e) the application for judicial review was an abuse of process aimed at oppressing the interested parties;
(f) there had been violation of the interested parties' constitutional right to fair labour practices;
(g) the interested parties were duly appointed;
(h) the defendant deliberately flouted the law; and,
(i) the claimant was entitled to the reliefs sought.

39. According to the Claimant, far from the assertions of the Defendant, this Court is not being called upon to review the decision of the High Court in *Malawi Congress Party v The President of the Republic of Malawi*. The present case is about the constitutional implications where the composition of the Commission as provided for in section 75 of the Constitution is reduced below the mandatory constitutional minimum of six Commissioners. The Claimant contended that they seek in the main to argue at the substantive hearing, that an inquorate Commission is incapable of discharging its constitutional functions and that any decisions made by it are invalid. The Claimant stated that it is on this basis that they seek to invite the Court to declare section 42 of the General Interpretation Act invalid in so far as it is inconsistent with section 75 of the Constitution. According to the Claimant, these matters were not before the High Court in *Malawi Congress Party v The President of the Republic of Malawi.*

40. The Claimant further contended that after the certification by the Chief Justice in accordance with section 9 (3) of the Courts Act, the issues for determination by this Court are delineated by the contents and terms of the certification. In the Claimant's understanding those issues were not placed before the High Court in *Malawi Congress Party v The President of the Republic of Malawi* as earlier stated. According to the Claimant, it is the act of certification that confers jurisdiction on this Court.

41. In response to the Defendant's submission that the Claimant in the present case should have applied to join the action in *Malawi Congress Party v The President of the Republic of Malawi* and then appeal against the Court's final judgment instead of commencing the present case, the Claimant argued that that argument is preposterous. To begin with, so the argument went, the proceedings in *Malawi Congress Party v The President of the Republic of Malawi* had nothing to do with the present Claimant and there would therefore have been no basis for the Claimant to apply to be joined as a party in that case. The Claimant cited Order 6, rule 7 of the CPR, on joinder of parties as the authority for this proposition. The Claimant submitted that secondly, and more importantly, it is not in any way disputing or disagreeing with the correctness of the decision in *Malawi Congress Party v The President of the Republic of Malawi*.

42. Having considered the arguments and submission of the parties, it is instructive to re-state the position of the law regarding the status of a panel of High Court judges sitting as the present one. Section 9 (2) of the Courts Act provides that every proceeding in the High Court and all business arising expressly and substantively relating to, or concerning the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges. It is evident that the scheme of the law is that ordinary business falling within the jurisdiction of the High Court will be dealt with and disposed of by a single judge. Where the business expressly and substantively relates to or concerns the interpretation or application of constitutional provisions, then a panel of not less than three judges shall hear and dispose of that matter subject to certification by the Chief Justice, as provided for in section 9 (3) of the Courts Act.

43. Clearly, section 9 of the Courts Act does not confer on the High Court jurisdiction, over and above that conferred under section 108 of the Constitution. Therefore, a panel of judges sitting to hear a constitutional matter has concurrent jurisdiction with a judge of the High Court sitting alone. It is not in question that a single judge of the High Court lacks appellate or review jurisdiction over a decision of another High Court judge.

Consequently, a panel of High Court judges also lacks that jurisdiction. Happily, both parties acknowledge this to be the legal position, albeit the Claimant's argument that the present action is not an appeal against the decision in *Malawi Congress Party v The President of the Republic of Malawi*.

44. We have carefully read and analysed the judgment of the Court in *Malawi Congress Party v The President of the Republic of Malawi*. In that case the Claimant sought the following reliefs, as outlined at paragraph 12 of that judgment:

    (a) An order compelling the Defendant to appoint members of the Electoral Commission as duly nominated by qualified political parties within two days of the order of the Court and in accordance with the relevant law;

    (b) A declaration that in the circumstances the Defendant was legally obliged to appoint the third nominee and thus all the three nominees of the Claimant;

    (c) An order compelling the Defendant to appoint the third nominee of the Claimant within two days from the date of the order, in default of which the third nominee should automatically be deemed to have been duly appointed as a member of the Electoral Commission;

    (d) A declaration that the Defendant's appointment of the four interested parties or one of them was *ultra vires* and inconsistent with section 4 (2) and (3) of the Electoral Commission (Amendment) Act, 2017 and therefore illegal;

    (e) An order quashing the appointment of the interested parties or one of them;

    (f) An order for costs of the proceeding.

45. The 1st and 2nd Interested Parties sought, among others, the following reliefs, as outlined at paragraph 27 of the judgment:

    (a) "In the event that the application for judicial review herein is upheld and the appointments of all the interested parties or one of them are found to be ultra vires and are quashed [as] *prayed by the Claimant, the 1st interested party and the*

2nd interested party pray that the Court should make the following consequential declarations and orders:

(i) A declaration that from the time [the] *interested parties were appointed, there was* [no] *electoral commission as the number of commissioners did not meet the threshold provided for by Section 75(1) of the Constitution; and*

(ii) A declaration that all the acts carried out by the electoral commission from the time the interested parties were appointed including the Fresh Presidential Elections held on the 23rd June, 2020 and all subsequent [by-elections] *which were managed by the electoral commission that included the interested parties are invalid as the electoral commission did not meet the threshold provided for in Section 75(1) of the Constitution.*

(b) In the alternative, the 1st interested party and [the] 2nd interested party, pray that the Court should certify the questions for determination by the High Court, sitting as the Constitutional Court in terms of Section 9 of the Courts Act:

(i) Whether the conduct of the Claimant in seeking the quashing of the appointments of the interested parties as Commissioner[s] amounts to a violation of the interested parties' constitutional right to fair labour practices; and

(ii) *Whether, if the application for judicial review herein succeeds, there existed a legally and constitutionally constituted electoral commission from the time the interested parties were appointed as commissioners and whether the acts carried out by the electoral commission from the time the interested parties were appointed as commissioners are invalid in terms of Section 75(1) of the Constitution*." [*sic*]

45. The 3rd and 4th Interested Parties also filed their joint Defence on 6th May 2021 which, among others, stated as follows as outlined at paragraph 28 of the judgment:

    a. *"The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state the claimant has suppressed the material fact that since their appointment, it has worked with them and accepted the results of all elections they have presided over in which the claimant has actually been a majority winner. The claimant has therefore not shown any prejudice which it has suffered by the appointment of the 3rd and 4th Interested Parties as Commissioners.*

    b. *The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state that if they were irregularly appointed as Commissioners (which is denied), such irregularity was waived by the claimant by allowing them to preside over the 2020 re-run of the presidential elections in which the claimant's presidential candidate won as well as 15 by-elections in which the claimant's candidates won 40% of all contested seats and specifically 50% of the contested parliamentary seats.*

    c. *The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state the claimant cannot maintain this action when [Dr. Chakwera] its leader, who was mandated to submit individuals for appointment as Commissioners, actually waived any irregularities, if any to the 3rd and 4th Interested Parties' nomination and appointment by formally appointing them as Commissioners and formally recognizing them as such in the two meetings he had with them after becoming president of the Republic of Malawi.*

    d. *The 3rd and 4th Interested Parties refer to paragraphs 4 to 6 herein and contend that having acquiesced in their appointment as Commissioners, and having actually worked with them for a period of nine months in which their conduct has never been faulted, the present action is not only tainted with laches but is also an abuse*

of the court process merely aimed at oppressing the 3rd and 4th Interested Parties."

46. At paragraph 29 of the judgment, the Court isolated the following issues for its determination, namely, whether or not:
    a. the application for judicial review was barred by the limitation period;
    b. the claimant did not have sufficient interest (*locus standi*) in the matter;
    c. the claimant had suppressed material facts;
    d. if the interested parties' appointment as members of the Commission was irregular, the claimant had waived and had been complicit to such irregularity;
    e. the application for judicial review was an abuse of the court process aimed at oppressing the interested parties;
    f. there had been violation of the interested parties' constitutional right to fair labour practices;
    g. the interested parties were duly appointed;
    h. the defendant deliberately flouted the law; and
    i. the Claimant was entitled to the reliefs sought.

47. In disposing of the matter, the Court stated at paragraphs 100 and 101 of the judgment that:
    "*100. In conclusion on this issue, I have said sufficient, I think, to make it clear that both the nomination process and the appointment process were botched up in very serious ways. Firstly, the Defendant allowed the DPP to submit five names instead of three names. Secondly, the Defendant appointed four members of the Commission from the list that the DPP submitted instead of three members of the Commission. Thirdly, the Defendant appointed only two members of the Commission from the list of nominees by the Claimant instead of three members of the Commission. Fourthly, the Defendant erred in rejecting the third nominee of the Claimant (Mr. Richard Chapweteka) without following the process laid down in section 4(3) of the Act.*

101. In light of the foregoing, I have no hesitation in holding that the Interested Parties were not duly appointed."

48. At paragraph 113 the Court further said:

"*113. It is now time to consider what the Interested Parties have termed consequential pronouncements and orders. The Interested Parties argued that in the event that the appointments of all of them or one of them is quashed for being ultra vires, then the Court should make sure that the matter is taken to its legal logical conclusion and make consequential pronouncements and orders. The argument was worded as follows:*

> *"If the appointments of all the interested parties or one of them are ultra vires, they are invalid from the time the appointments were made. Actually, the effect is no appointments were made. This in turn begs the question whether in terms of Section 75(1) of the Constitution the country has had an electoral commission from the time the ultra vires appointments were made? This is because of the constitutional requirement that the electoral commission must be made up of at least six commissioners plus the chairman was not met from the word go. If we remove the four interested parties herein or one of them it will mean the threshold set by Section 75(1) was not met from the word go. Our contention is that this means the country has had not electoral commission and we pray that the Court should make such a consequential declaration and finding.*
>
> *We further respectfully invite the Court to make a consequential declaration and finding that all the acts that by the electoral commission that included the interested parties herein are invalid, if the appointments of the interested parties or one of them are set aside for being ultra vires, because as we have noted above, there was no electoral commission from the word go. Such acts include the fresh presidential elections that were won by the His Excellency Dr. Lazarus McCarthy Chakwera and Right Honourable Saulos Klaus Chilima as well as the by*

elections that have been managed by the irregularly constituted electoral commission. Effectively, we invite the Court to declare that the country has had not president and vice president among other things.

It may be contended that the situation is saved by section 10 of the Electoral Commission Act which is to the effect that subject to the Constitution and to section 11(3), any vacancy in the membership of the Commission shall not affect its decisions, the performance of its functions or the exercise of its powers under the Constitution, this Act or any other written law. We would disagree. The provision in issue is expressly subject to the Constitution which includes Section 75(1) of the Constitution that provides for the composition of the Electoral Commission to be at least six commissioners plus the Chairman. If section 10 were to be interpreted to mean that the Electoral Commission can operate with less than six commissioners plus the chairman the provision would stand in conflict with Section 75(1) of the Constitution, as a result of which the provision would to the extent of such inconsistency be invalid in terms of Section 5 of the Constitution. Section 75(1) of the Constitution uses the word shall which means it is mandatory that the composition of the electoral commission should be six commissioners plus the chairman." [*sic*]

49. The Court continued at paragraph 114:

"*114. To my mind, section 42 of the General Interpretation Act fully addresses the argument being raised by the Interested Parties. Section 42 of the General Interpretation Act is couched in the following terms:*

"Where, by or under any written law, any board, council, commission, committee or similar body, whether corporate or unincorporate, [i]s established, the[n], unless a contrary intention appears, the powers of such board, ... commission, council, committee or similar body shall not be affected by-

(a) any vacancy in the membership thereof; or

(b) <u>any defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof</u>. – Emphasis by underlining supplied."

50. At paragraphs 115, 116, 117 and 118 the Court concluded this aspect as follows:

"*115. I am fortified in my view by the case of Chilima and Another v Mutharika and Another (Constitutional Reference No. 1 of 2019) [2020] MWHC 2 (03 February 2020). In this case, the High Court sitting as a "Constitutional Court" held that the decisions of the President and the Vice President who were found to have been irregularly elected were unaffected by the Court's nullification of the results of the irregular election. This decision was upheld on appeal to the Supreme Court of Appeal in Mutharika and Another v. Chilima and Another (MSCA Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 (08 May 2020).*

116. The second miscellaneous matter is more or less related to the first miscellaneous matter that we have just discussed. It is worded as follows in the skeleton arguments by the Interested Parties:

> *"In the alternative, if the Court is of the view that the consequential declarations and findings cannot be made within the scope of the present action, we pray that the same be certified for the determination of the High Court, sitting as the Constitutional Court in terms of section 9 of the Courts Act as the issues clearly border on the interpretation of Section 75(1) of the Constitution*."

117. The answer to this issue is short and sweet. The mere fact that there is reference in the present case to section 75 of the Constitution does not make this case, or certain issues herein, fit for determination by the High [Court] sitting as a "Constitutional Court". In terms of section 9 (2) of the Courts Act, it is only those matters that "expressly and substantively relate to, or concern, the interpretation or application of the provisions of the Constitution" that have to be placed

before a "Constitutional Court": see James Phiri v. Dr. Bakili Muluzi and Attorney General, Constitutional Case No. 1 of 2008 and Maziko Charles Sauti-Phiri v. Privatization Commission and the Attorney General, Constitutional Cause No. 13 of 2005. Of course, this can only happen after certification by the Chief Justice to that effect.

118. In the present case, as the foregoing would have shown, the central issue in the present case is whether or not the members of the Commission whose names were announced on 7th June 2020 were nominated and appointed in accordance with the nomination process and appointment process laid down in section 4 of the Act. I have great difficulties in understanding how such an issue can be said to fall under section 9(2) of the Courts Act." [*sic*]

51. We find that the issues that have been brought for determination before this Court are the same as the ones in respect of which the consequential orders in *Malawi Congress Party v The President of the Republic of Malawi* were sought. As can be seen from paragraphs 18 and 19 of their submissions, the Claimant summarised its case before this Court as follows:

"*This proceeding has, therefore, been brought under Section 9 of the Courts Act for the Court to determine whether an Electoral Commission which has been held not to have been properly constituted by reason of illegality as well as failure to qualify for appointment by some of those actually appointed, could properly discharge its constitutional mandate of organizing and conducting elections in Malawi. And by necessary implication, whether the 23rd June 2020 FPE and other by elections for Members of Parliament and Councilors, presided over by an inquorate Electoral Commission can stand in light of the two decisions referred to earlier on.*

Therefore, the case before this Court is about the legal implications of the acts and decisions of an Electoral Commission whose membership was below that mandatorily required by Section 75 of the Constitution of the Republic of Malawi."

52. Whilst the parties, the questions in the Referral and the pleadings in the present case do not mirror those in the case of *Malawi Congress Party v The President of the Republic of Malawi* it is evident that the Court in *Malawi Congress Party v The President of the Republic of Malawi*, as we will demonstrate below, pronounced itself on these very issues that the Claimant now seeks this Court to determine.

53. The first relief sought by the Claimant is a declaration that the rescission of the appointment of Commissioners Dr. Mathanga and Ms. Kunje rendered the Sixth Cohort of the Commission inquorate and unconstitutional under section 75 (1) of the Constitution as from the date of appointment of the Sixth Cohort of the Commission on or about the 7th June 2020. This is also the first question in the Referral. In our considered opinion this is no longer an issue for the following two reasons. The first is that the parties in paragraphs 16 and 17 of their Joint Statement of Agreed Facts are *ad idem* that the letter of rescission dated 7th April 2021 was withdrawn on 28th May 2021. The second, and more important, is that the Court in *Malawi Congress Party v The President of the Republic of Malawi* declared that the actions and decisions of the Sixth Cohort of the Commission were saved by section 42 of the General Interpretation Act.

54. The second relief sought by the Claimant is a declaration that the decision of the High Court of Malawi in *Malawi Congress Party v The President of the Republic of Malawi* which declared that four Commissioners of the Sixth Cohort of the Commission were not validly appointed, reduced the Sixth Cohort of the Commission to only two validly appointed Commissioners and a Chairperson as from the date of the appointment of the Sixth Cohort of the Commission on 7th June 2020 and therefore the Sixth Cohort of the Commission was inquorate and unconstitutional from the day of its appointment. This is the second question in the Referral. As shown above, this was in effect one of the reliefs sought by the 1st and 2nd Interested Parties, Dr. Mathanga and Ms. Kunje, respectively, in *Malawi Congress Party v The President of the Republic of Malawi*. In response to this the Court declared that the actions and decisions of the Sixth Cohort

of the Commission were saved by section 42 of the General Interpretation Act.

55. The third relief sought by the Claimant is a declaration that under section 75 (1) of the Constitution, any vacancy in the composition of the Commission appointed with the minimum number of six Commissioners, renders the Commission inquorate and unconstitutional; and thereby incapable of exercising any powers and functions in relation to elections in Malawi as provided for in section 76 of the Constitution. This is the third question in the Referral. It was also in effect one of the reliefs sought by the 1st and 2nd Interested Parties, Dr. Mathanga and Ms. Kunje, respectively, in *Malawi Congress Party v The President of the Republic of Malawi*. Once again, in response to this the Court declared that the actions and decisions of the Sixth Cohort of the Commission were saved by section 42 of the General Interpretation Act.

56. The fourth relief sought by the Claimant is a declaration that under section 75 of the Constitution, an inquorate and unconstitutional Commission does not have the constitutional powers or mandate to preside over, manage and conduct any elections in the Republic of Malawi. This is the fourth question in the Referral. The Court in *Malawi Congress Party v The President of the Republic of Malawi* declared that the actions and decisions of the Sixth Cohort of the Commission were saved by section 42 of the General Interpretation Act.

57. The fifth relief sought by the Claimant is a declaration that section 42 of the General Interpretation Act is inconsistent with section 75 (1) of the Constitution, and therefore invalid to the extent of such inconsistency under section 5 of the Constitution. This is the fifth question in the Referral. This issue was considered by the Court in *Malawi Congress Party v The President of the Republic of Malawi* in response to the 1st and 2nd Interested Parties' prayer for consequential orders, as shown in paragraphs 113 and 114 of the judgment, which has been reproduced above. This issue is therefore *res judicata* as we will demonstrate below that the Claimant is caught on account of having a privity of interest in the

subject matter as raised by the 1st and 2nd Interested Parties, who were nominees of the Claimant, in the proceedings in *Malawi Congress Party v The President of the Republic of Malawi.* To seek to have section 42 of the General Interpretation Act declared unconstitutional in this Court is an indication of the Claimant's dissatisfaction with the judgment, the only plausible remedy for which is an appeal to the Supreme Court of Appeal.

58. The sixth relief sought by the Claimant is a declaration that in so far as section 75 (1) of the Constitution is couched in mandatory terms as to the minimum number of Commissioners of the Commission, section 10 of the Electoral Commission Act is inconsistent with section 75 (1) of the Constitution where the number of Commissioners falls below the constitutional minimum number of six Commissioners; and therefore section 10 of the Electoral Commission Act is invalid to the extent of such inconsistency under section 5 of the Constitution. This is the sixth question in the Referral. Our response to the fifth relief sought by the Claimant applies here *mutatis mutandis*.

59. The seventh relief sought by the Claimant is a declaration that the Sixth Cohort of the Commission having been rendered inquorate and unconstitutional, the FPE 2020 presided over, managed and conducted by the inquorate and unconstitutional Sixth Cohort of the Commission on 23rd June 2020 and all subsequent Parliamentary and Local Government by-elections, are thereby null and void *ab initio*. This is the seventh question in the Referral. The Court in *Malawi Congress Party v The President of the Republic of Malawi* considered and disposed of this issue when the Judge interpreted section 42 of the General Interpretation Act. We affirm our position that this is a matter for appeal.

60. The eighth relief sought by the Claimant is a declaration that the election of the President and Vice President on 23rd June 2020 and the swearing into the offices of President and Vice President of the Republic of Malawi are null and void *ab initio.* This is the eighth question in the Referral. The relief sought here if granted would be consequential to the seventh relief

sought by the Claimant. What we have said in regard to the seventh relief sought by the Claimant applies here *mutatis mutandis*.

61. The ninth relief sought by the Claimant is a declaration that the members of the National Assembly and Local Government Councils elected during by-elections presided over, managed and conducted by the inquorate and unconstitutional Sixth Cohort of the Commission and subsequently sworn into their respective offices as members of the National Assembly and Local Government Councils are thereby null and void *ab initio*. This is the ninth question in the Referral. The relief sought here if granted would also be consequential to the seventh relief sought by the Claimant. As such, what we have said in regard to the seventh relief sought by the Claimant applies here *mutatis mutandis*.

62. From our analysis above, we observe with dismay that the Claimant has sought, albeit unsuccessfully, to disguise itself and its pleadings in the present case as being different from those in the *Malawi Congress Party v The President of the Republic of Malawi* case. We will come back to the issue of the parties in due course and explain ourselves when we are dealing with the issue of *res judicata*. Coming back to the issue at hand, in the main, it was the finding of the Court in *Malawi Congress Party v The President of the Republic of Malawi* that the defect in the appointment of the Commissioners did not affect their actions and decisions, including their management and conduct of the FPE 2020 as well as the by-elections for Members of Parliament and Councillors. Therefore, the Claimant cannot contend that the issues in the present matter are different from those which were determined by the Court in the case of *Malawi Congress Party v The President of the Republic of Malawi.* As such, the Claimant cannot re-litigate the issues before us. This we cannot allow.

63. As indicated above this Court being a High Court cannot sit as an appellate or review Court of the decision in the case of *Malawi Congress Party v The President of the Republic of Malawi* or indeed any other court of concurrent jurisdiction. We accept the Defendant's submission that this

court "cannot arrogate to itself powers beyond what is given to it by statute".

c. Whether this matter is res judicata

64. The Defendant submitted that this action is *res judicata* and cited the cases of *Nthara v ADMARC* [1995] 1 MLR 177 (HC), *Lockyer v Ferryman* (1877) 2 App. Cas. 519 and *Carl-Zeiss-Stiftung v Rayner and Others* [1966] 2 All ER 536 in this regard. According to the Defendant, the judgment in *Malawi Congress Party v The President of the Republic of Malawi* clearly shows that the Court in paragraphs 114 and 115 of the judgment addressed and determined the questions that this Court is being asked to determine. The Defendant contended that section 75 of the Constitution and section 42 of the General Interpretation Act were before the court in *Malawi Congress Party v The President of the Republic of Malawi*.

65. The Defendant submitted that he does not subscribe to the Claimant's arguments that the certification of the matter by the the Chief Justice means that the issues raised by the Claimant have to be determined on the merits and not based on the preliminary objections because of the importance of the issues as raised by the Claimant in its Summons.

66. The Defendant pointed out that the Claimant being fully aware that the case of *Malawi Congress Party v The President of the Republic of Malawi* was of interest to it, since the subject matter was the Claimant's nomination of four people for the appointment of Commissioner, neither joined the case at first instance nor appealed against the judgment.

67. On the other hand, the Claimant contended that in the present case, apart from the lack of common identity of the parties and common subject matter, the issues that have been certified by the Chief Justice for consideration are not the issues that the Court dealt with in *Malawi Congress Party v The President of the Republic of Malawi*. It is the

Claimant's view that in the present case, the subject matter is different from that which was before the Court in *Malawi Congress Party v The President of the Republic of Malawi*. The Claimant thus submitted that the present action is not caught by the defence of *res judicata*. The Claimant relied on the cases of *Carl-Zeiss-Stiftung v Rayner & Keeler (No. 2)* [1967] 1 AC 853, *Mkandawire v University of Malawi* MSCA Civil Cause No. 24 of 2007, *Finance Bank of Malawi (in Liquidation) v Ishmael Lorgat*, High Court, Commercial Case No. 56 of 2007, *Thrasyvoulou v Secretary of State for the Environment* [1990] AC 273 and *Arnold v National Westminster Bank plc* [1991] 3All ER 41.

68. *Res judicata* is a well settled principle of law. The object of the rule is premised on two grounds, on one hand, public policy, that there should be an end to litigation and on the other hand, hardship on the individual, that no one should be vexed twice for the same cause: *Carl-Zeiss-Stiftung v Rayner* [1966] 2 All ER 536. See also the cases of *Nthara v ADMARC* [1995] 1 MLR 177 and *Violet Tembo (Mother and next friend of Mzanga Dominic Mpango) v The Administrator General and another* [2014] MLR 407.

69. For *res judicata* to apply, the earlier judgment relied on must be a final judgment and there must be identity of the parties and of the subject matter in the former and the present litigation. Any of these three factors can give rise to the defence of *res judicata*. It was stated in *Carl-Zeiss-Stiftung*, at page 550 that:

> "*…there is no doubt that the requirement of identity of the parties is satisfied if there is privity between a party to the former litigation and a party to the present litigation... It has always been said that there must be privity of blood, title or interest: Here it will have to be privity of interest. That can arise in many ways, but it seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject matter…There does, however, seem to be a possible extension of the doctrine of privity as commonly understood. A party against whom a previous decision was pronounced may employ a servant or*

engage a third party to do something which infringes the right established in the earlier litigation, and so may raise the whole matter again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by re-litigating the original question by means of the device of putting forward his servant."

70. As we have established above the questions in the Referral were already resolved in a final judgment in *Malawi Congress Party v The President of the Republic of Malawi.*

71. The Claimant in the present matter was, and remains, in our view, a privy of the Interested Parties in *Malawi Congress Party v The President of the Republic of Malawi.* The Claimant stated in its submissions at paragraphs 153 to 155 and 165(b) that they were a qualifying political party for purposes of nomination of commissioners to the Commission. It is common cause that the Claimant nominated commissioners whose nomination and appointment were declared invalid. The Claimant submitted at paragraph 154 as follows:

"*The finding by the Court in* ***Malawi Congress Party v The President of the Republic of Malawi*** *Judicial Review Cause No 34 of 2020 that the Claimant's nomination was* ***void*** *affects the representation of the Claimant in the Electoral Commission. The* ***void*** *nomination was followed by a further declaration, as it ought to have been, that the appointment of four electoral Commissioners was invalid. The Claimant's interest, in this regard, is a greater interest than that of the general public or indeed the non-qualifying political parties. The Claimant stands in a sufficiently very close relation or proximity to section 75 of the Constitution and more especially the composition thereof and the effects of an inquorate electoral commission*."

72. This clearly fortifies our finding that the Claimant was a privy to the Interested Parties in the proceedings in *Malawi Congress Party v The*

President of the Republic of Malawi. As stated in the case of *Carl-Zeiss-Stiftung* the Claimant is trying to re-litigate through the backdoor by instituting the present proceedings, in common parlance, trying to take a second bite at the cherry. This, we will not condone.

73. We have addressed our minds to the case of *Malawi Communications Regulatory Authority (MACRA) v Joy Radio Limited* [2012] MLR 256 (SCA) as it relates to the present case. What obtained in that case is that the High Court at the Principal Registry in a judicial review matter found that MACRA had acted *ultra vires* and unfairly in revoking a radio licence it had issued to Joy Radio Limited. Joy Radio Limited had not made a claim for damages as part of the judicial review proceedings and the Court made no order in that regard. Subsequently, Joy Radio Limited commenced a claim for damages at the High Court, Mzuzu Registry, which was granted. The Supreme Court of Appeal upheld the finding that the question of breach of Joy Radio Limited's rights and consequential damages had not been placed before the Court during the earlier judicial review proceedings such that the said proceedings were not final on the private law rights between MACRA and Joy Radio Limited, hence *res judicata* could not apply.

74. In our considered view the *Joy Radio Limited* case is distinguishable from the present matter. The relief that was being sought in the earlier proceedings was different from the one that was being sought in the subsequent proceedings, whereas, in the present circumstances the reliefs that were sought in *Malawi Congress Party v The President of the Republic of Malawi* are the self-same ones being sought in the case before us.

75. The Supreme Court of Appeal in the *Joy Radio Limited* case, citing the case of *Republic of India v India Steamship Co. Ltd.* [1993] AC 410 at 415 observed that considerations for *res judicata* are not cast in stone. It noted that:

> "*The Court, in special circumstances, may vary any one of the considerations in the interest of justice since these rules are largely*

founded upon the public interest in finality of litigation rather than achievement of justice between the individual litigants".

76. In our considered view the facts before us do not lend themselves to dispensing with the principle of *res judicata*. As we have established above, there are factors which militate against relaxation of the doctrine of *res judicata* in this matter. The present matter is, effectively, not only an appeal in disguise, but is also a re-litigation clothed in constitutionalism.

77. Whilst the Claimant has repeatedly and emphatically submitted that this matter raises serious constitutional questions that call for the determination or decision of this Court, a close examination of their processes shows that this is a mere façade. We are at this point compelled to re-state that the Court in *Malawi Congress Party v The President of the Republic of Malawi* unequivocally held that the issues herein do not raise constitutional questions and we are not in a position to allow the Claimant to reopen the issue. At the pain of repeating ourselves, on account of the Claimant's privity of interest, the right of appeal has always been available. If the Claimant's prime concern is the issue of constitutionalism we do not doubt that the Supreme Court of Appeal has jurisdiction to attend to the same.

78. It will be recalled that the principle of *res judicata* under the limb of privity involves the existence of a final judgment, identity of parties and the subject matter. So far, we have dealt with final judgment and identity of parties and we are now moving on to identity of subject matter.

79. In regard to identity of subject matter this Court has already demonstrated and made a finding above that the subject matters which the Claimant seeks to litigate in this action are the self-same ones which were already disposed of by the Court in the case of *Malawi Congress Party v The President of the Republic of Malawi*.

80. We conclude therefore that the three elements prerequisite to establishing *res judicata*, namely final judgment, identity of parties and subject matter

have been met. Consequently, we find that these proceedings are caught by the principle of *res judicata.*

d. Whether or not this court is functus officio

81. The Defendant alternatively contended that this Court is *functus officio* in as far as the effect of the decision of the irregularly constituted Commission is concerned. The Defendant asserted that this is a futile exercise and that the proceedings filed by the Claimant are an attempt to move the court, after it became *functus officio*, to review its own decision. The Defendant relied on the cases of *Ethel Kansawa v Administrator General* High Court Principal Registry, Probate Cause No. 185 of 1993 (unreported), *SGVH Mlongoti & another v T/A Chingala & others*, High Court Lilongwe Registry, Civil Cause No. 306 of 2020 (unreported) and the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 S.C.R 848. On the other hand, the Claimant submitted that this Court is fully entitled to hear this matter and that it is not *functus officio* as argued by the Defendant.

82. The principle of *functus officio* applies to the judge who rendered the final judgment. In *Dickins v The Parole Board for England and Wales and the Secretary of State for Justice* [2021] 1 WLR 4126 it was stated, on the authority of *R (Commissioner of Police of the Metropolis) v IPCC* [2015] EWCA Civ. 1248, that the concept of *functus officio* arises when "a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it."

83. We thus find that the concept is inapplicable in the present case for the reason that this Court did not render the judgment in *Malawi Congress Party v The President of the Republic of Malawi*. Nevertheless, this matter remains caught by the principle of *res judicata*.

a. Whether or not the judgment in Malawi Congress Party v The President of the Republic of Malawi constitutes a cause of action

84. The Defendant argued that these proceedings are premised on the judgment in *Malawi Congress Party v The President of the Republic of Malawi* as a cause of action. The Defendant submitted that the Claimant has demonstrated no harm, injury or loss that the said judgment has occasioned on it.

85. The Claimant contended that a court decision can found a cause of action. This according to the Claimant is on the authority of the case of *Kafantayeni and others v Attorney General* [2007] MLR 104, which paved the way for courts to exercise discretion in re-sentencing convicts on whom the then mandatory death penalty had been imposed. The Claimant stated that following that case convicts on death row commenced legal proceedings moving the court to review their death sentences. The Claimant also argued that a person can commence a claim for malicious prosecution following an acquittal, the decision in the criminal case being the cause of action.

86. In response to this the Defendant submitted that the Claimant's reference to the case of *Kafantayeni and others v Attorney General* is misplaced because that case concerned the enforcement of the judgment. The Defendant further submitted that the issue of whether a judgment can form a cause of action never arose and was never subject of the Court's determination in the abovementioned case. The Defendant submitted that there was no re-litigation but re-sentencing. These cannot be regarded as fresh actions by the very definition of an action, so went the argument.

87. With reference to the Claimant's assertion that following the *Kafantayeni* judgment the convicts on death row commenced legal proceedings moving the court to review their death sentences, we must put the record straight that it was the court, as directed in the judgment, which issued notices of sentence rehearing.

88. Back to the present case, the expression 'cause of action' is defined as "the fact or combination of facts which give rise to a right of action'': *Sidhu t/a Sidhu and Company v Malaya Blantyre Limited* [1998] MLR 340 at 341. We have read the case of *David Muwonge Ssalongo v The Attorney General* (Civil Suit No.279 of 2003) [2009] UGHC 156 cited by the Defendant and although it is a Ugandan case we find it persuasive and applicable to the present case. According to that case the three ingredients essential for a cause of action to exist are: that the plaintiff must have enjoyed a right; that right must have been violated; and that the defendant is the violator of the right. The Claimant herein has not demonstrated, firstly, what right it enjoyed *vis a vis* the judgment in *Malawi Congress Party v The President of the Republic of Malawi*. Secondly, the Claimant has not demonstrated any link between the judgment and a violation of any of its right so as to give rise to a cause of action. Thirdly, it has not identified the violator of that right, if any. In our view the onus of establishing these matters lies squarely on the Claimant. As a matter of fact, the Claimant has expressly stated in its submissions that it is not disputing the judgment in *Malawi Congress Party v The President of the Republic of Malawi*.

89. The question we address our minds to is whether the judgment in *Malawi Congress Party v The President of the Republic of Malawi* is a fact or combination of facts to give rise to a cause of action? The response is a resounding no because the judgment is a judicial decision and it does not meet the test outlined in the abovementioned cases. In fact, the Claimant has not demonstrated that the said judgment is a fact or a combination of facts as defined in the case of *David Muwonge Ssalongo v The Attorney General*.

90. In *Manda and others v City of Blantyre* [1992] 15 MLR 228 at 237 it was stated that:

> "*The words "cause of action" have been held to mean "every fact which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court", per Lord Esher MR in*

Read v Brown (1889) 22 QBD 128 at 131. A more recent case is Letang v Cooper [1965] 1 QB 232 where Diplock LJ at 242 defined the words as meaning "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

91. We therefore are persuaded by the Defendant's submission and do hereby find that the said judgment does not constitute a cause of action at all. In any event as we have stated above, these proceedings are an appeal masquerading as fresh proceedings. It is a notorious legal principle that a cause of action does not arise at the stage of appeal but in the tribunal of first instance. What arises at this stage is a right of appeal as opposed to a cause of action.

92. From the foregoing the preliminary issues under paragraph 12 (a) and (b) are sustained and we find that the Claimant is precluded from bringing the present action as it is not only an attempt to appeal via the backdoor but it is also caught by the defence of *res judicata*.

***Issue 3*: Whether the present proceedings should have been commenced by way of petition as opposed to summons.**

93. The Defendant submitted that the Claimant improperly commenced these proceedings by way of summons having noted that it was out of time to institute an electoral petition. The Defendant further argued that similarly, the Claimant craftily designed its processes so as to paint the picture that this is not an election matter with the aim of escaping the limitation period imposed by the law. According to the Defendant, the present proceedings are an election matter and the Claimant was supposed to commence the same by way of petition, within seven days from the date the results of the election were announced, as provided for under section 100 of the Parliamentary and Presidential Elections Act, (Cap. 2:01), of the Laws of Malawi (hereinafter referred to as the 'PPEA'). This is because Order 19 rule 13 of the CPR, provides that an election matter shall commence in the manner specified under the PPEA and the Local Government Elections

Act, (Cap. 22:02), of the Laws of Malawi (hereinafter referred to as the 'LGEA'), so the argument went.

94. The Defendant contended that the reliefs sought by the Claimant in paragraphs 8 to 11 of the amended summons clearly show that the Claimant is challenging the results of the FPE 2020 and the Parliamentary and Local Government by-elections managed by the Sixth Cohort of the Commission. The Defendant also argued that the present matter is an election matter because the Claimant seeks an application of the Constitution to the status of the Sixth Cohort of the Commission in view of the judgment of the court in *Malawi Congress Party v The President of the Republic of Malawi* and the decision of the State President in removing Ms. Linda Kunje and Dr. Jean Mathanga from being Commissioners.

95. In response, the Claimant relying on Order 1, rule 4 of the CPR which defines an election matter as:

> "*a proceeding that requires the application of the Constitution, the Parliamentary and Presidential Elections Act or the Local Government (Elections) Act due to an act or omission during an election*"

submitted that the Defendant's rescission of the appointment of the two Commissioners in April 2021, the 'void' nomination of the Commissioners, the 'invalid' appointment of the Commissioners, the determination of the effective date of the rescission of the appointment of the two Commissioners, the determination of the effective date of the 'invalid' appointment and the constitutional question whether an inquorate Commission is incapable of exercising any powers and functions in relation to elections stated in the summons, are not acts or omissions during an election so as to justify the conclusion that this is an election matter to be disposed by Petition under section 100 of the PPEA. In the Claimant's view the present proceedings are a constitutional matter and were properly commenced by summons as required by Order 19, rule 3(1) of the CPR.

96. Order 1 rule 4 of the CPR defines an election matter as a proceeding that requires the application of the Constitution, the PPEA or the LGEA due to

an act or omission during an election. Section 100 (1) of the PPEA provides that:

> "*A complaint alleging an undue return or an undue election of a person as a member of the National Assembly or to the office of President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within seven days including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person- (a) claiming to have had a right to be elected at that election; or (b) alleging himself to have been a candidate at such election*."

97. The legal position, in our deduction, is that for there to be an election petition three factors must obtain, namely (i) the complaint must arise "due to an act or omission during an election," (ii) the Claimant must have had a right to be elected at an election and (iii) the Claimant must have been a candidate at such election. In the present case these three factors do not obtain as the crux of the Claimant's action is in regard to the composition of the Commission. Accordingly, we reject the Defendant's assertion that this is an election matter. We further reject the Defendant's assertion that it ought to have been commenced by way of petition.

98. Nevertheless, we remain astute in our finding that this action is an appeal in disguise and/or an attempt by the Claimant to have a second bite at the cherry.

***Issue 4*: Whether or not the present proceedings are statute barred under section 100 of the PPEA, having been commenced more than seven days from the declaration of the result of the election.**

99. As discussed under *Issue 3*, the Defendant's view is that the case at hand is an election matter. The Defendant argued that since the effect of the action commenced by the Claimant herein is to invalidate the FPE 2020, the action is statute barred and the Claimant is way out of time to challenge those elections and the by-elections held thereafter, so it should be dismissed with costs.

100. The Claimant contended that the issues in the summons do not give rise to an election matter to be disposed by petition under section 100 of the PPEA.

101. Having found above that this matter is not an election petition the limitation period under section 100 of the PPEA does not apply. The Defendant's argument consequently falls away.

***Issue 5*: Whether a political party has *locus standi* to challenge the results of an election and whether the Defendant is a proper party to the present proceedings.**

a. locus standi of the Claimant

102. The Defendant submitted that in the present matter, the Claimant was not a candidate in the FPE 2020 nor the subsequent Parliamentary and Local Government by-elections managed by the Sixth Cohort of the Commission. According to the Defendant, the Claimant cannot claim to have suffered over and above the candidates in the elections managed by the Sixth Cohort of the Commission. The Defendant has referred to the cases of *President of Malawi and another v Kachere and others* [1995] 2 MLR 616 and *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General and others* [2014] MLR 363 for the proposition that a person must have sufficient interest so as to be able to ask a court of law to give him a declaratory judgment. The cases of *Civil Liberties Committee v Minister of Justice and another* [2004] MLR 55 and *Chaponda and another, ex parte Kajoloweka and others,* MSCA Civil Appeal No. 5 of 2017 were also cited for the proposition that to establish standing, a party must satisfy the court that the conduct of the Defendant adversely affects his or her legal right over and above others. The Defendant contended that the interest of the Claimant in this matter does not meet the test as set out in the cases cited above.

103. The Claimant submitted that the question of *locus standi* has to be considered within the context of the proceedings that it has filed for this Court's consideration. The Claimant submitted that the reading of sections 100 and 114 of the PPEA clearly shows that electoral petitions are about complaints or irregularities in respect of the conduct of an election or the handling of complaints or irregularities in the conduct of an election. It contends that the present case has nothing to do with any complaints about irregularities in the conduct of any election, for the Claimant's action to be interpreted as an election petition.

104. The Claimant further submitted that it is common cause that it is a qualifying political party for purposes of nomination of Commissioners into the Commission. The Claimant asserted that this case is not a mere public interest litigation. The Claimant contended that it has met the requisite threshold to enjoy the right to have its nominees appointed to the Commission. The Claimant further contended that the finding by the Court in *Malawi Congress Party v The President of the Republic of Malawi* that the Claimant's nomination was void affected its representation in the Commission and that therefore in that regard, it has a greater interest than that of the general public or indeed the non-qualifying political parties. The Claimant stands in a sufficiently very close relation or proximity to section 75 of the Constitution and more especially the composition of the Commission and the effects of an inquorate electoral commission, so it was argued.

105. We take cognizance of the fact that the Claimant, as a qualifying nominating party, has an interest in the composition of the Commission. However, it will be recalled that we have established that this present action is an appeal in disguise and/or a re-litigation of the issues. We thus find that the Claimant lacks standing to approach the Court in the manner it has done by commencing fresh proceedings. While the parties have raised plausible arguments on the principle of *locus standi,* our considered view is that these are misplaced. This is on account of our finding that the

present action is an appeal in disguise. We therefore dismiss this preliminary issue on that premise.

b. status of the Defendant as party

106. We observe that the parties in paragraph 3 of their Joint Statement of Agreed Facts agreed that the Defendant is the legal representative for the office of the President of the Republic of Malawi and is sued in that capacity. The Joint Statement of Agreed Facts was filed on 1st October 2021. In his submissions filed on 14th October 2021, the Attorney General reneged from that agreement, and raised as a preliminary issue the question whether the Defendant is a proper party to these proceedings and strongly argued that he is not.

107. The Defendant argued that he is a wrong party to the present proceedings which were commenced against the Attorney General on behalf of the Office of the President of the Republic of Malawi. (emphasis ours). According to the Defendant this style of citation entails that the Claimant sued the Attorney General for actions or omissions of the Office of the President which is a Government institution. It is the Defendant's view that the Commission or the President of Malawi or the former President, who constituted the impugned Sixth Cohort of the Commission, or indeed, the Commissioners themselves should have been the rightful defendant(s).

108. According to the Defendant the Statement of Case and the Reliefs sought show that the Claimant is challenging the constitution of the Sixth Cohort of the Commission and its decisions thereafter, however the Office of the President did not make the decisions or do anything that is the subject of these proceedings. The Defendant submitted that the said office did not appoint or remove the impugned Commissioners, but the Office of the President only communicated some of the disputed decisions herein. The Defendant further submitted that, the Office of the President does not have the mandate to run affairs of elections in Malawi but the Commission

itself. The Defendant prayed that these proceedings should be struck out or dismissed with costs on the basis that he is a wrong party.

109. In response the Claimant submitted that the Defendant admitted that it is the incumbent holder of the office of President of the Republic of Malawi, Dr. Chakwera, and the Malawi Congress Party who applied to the High Court for the nullification of the appointment of four of the Commissioners of the Sixth Cohort of the Commission. The Claimant further submitted that the constitutional implications of the High Court in nullifying the appointment of the four Commissioners of the Sixth Cohort of the Commission, is that the Sixth Cohort of the Commission was rendered inquorate and unconstitutional from the date of its appointment and therefore lacked the constitutional powers and mandate to perform any of the constitutional functions given to the Commission under section 76 of the Constitution.

110. As to why the Attorney General was made a party to these proceedings, the Claimant justified its choice for suing the Office of the President of the Republic of Malawi through the Attorney General by stating that the Claimant's complaint is about the constitutional status of the Sixth Cohort of the Commission since the matters emanated from the impugned appointment of the said Commissioners by an incumbent holder of the Office of the President of the Republic of Malawi. The Claimant argued that the Commission does not appoint itself, nor do the Commissioners, but by an incumbent holder of the Office of the President – which is an office and not an individual, but that the former is occupied by any elected individual. According to the Claimant, the holder of the office of the President of the Republic of Malawi swears an oath to uphold and protect the Constitution while the office of Attorney General, as the principal legal advisor to the Government and the President, is also under a duty to uphold and protect the Constitution. The Claimant concluded that the Defendant, namely, the Attorney General, is a proper party to these proceedings, which are about the interpretation and application of the Constitution.

111. The Claimant commenced these proceedings against the Attorney General 'on behalf of the Office of the President of the Republic of Malawi.' (emphasis ours). However, there exists no juristic person at law known as the 'Office of the President of the Republic of Malawi' in this jurisdiction. Section 92(4) of the Constitution establishes the office of the Secretary to the Cabinet. So, the juristic person is the Secretary to the Cabinet. Section 78 of the Constitution states that 'there shall be a President of the Republic who shall be Head of State and Government…'. According to the case of *The Anti-Corruption Bureau v Chinkhadze and Kantema* [2002–2003] MLR 288 at 291 (SCA) 'it is common knowledge that where the Legislature wants to confer … legal capacity, it expressly so provides.' We have examined the laws in this jurisdiction and found no law that confers juristic personality termed "the Office of the President of the Republic of Malawi".

112. We take cognizance of section 3(1) of Civil Procedure (Suits by or against the Government or Public Officers) Act which provides that:

> "*Save as may otherwise expressly be provided by any Act, suits by or against the Government shall be instituted by or against the Attorney General. Such suits shall be instituted and tried in the same manner as suits to which the Government is not a party.*"

113. It is clear from this provision that the Attorney General can be sued on account of the actions or omissions of the Government or a public officer. The Attorney General is not sued in abstract, he represents either the Government or a public officer.

114. In the present case the citation of the Defendant conveys the impression that the suit is against an act of an office, which office is the 'Office of the President of the Republic of Malawi' an entity not known to the law. The suit is also not against the Government or a public officer as envisaged under section 3(1) of Civil Procedure (Suits by or against the Government or Public Officers) Act. The Attorney General has not been sued in that capacity as representing either the Government or a public officer. He is

rather sued as representing the Office of the President which is neither the Government nor a public officer.

115. We must state that the citation of the Attorney General would have been proper and within the law but for what we state next. By adding the words in brackets, 'on behalf of the Office of the President of the Republic of Malawi', the implication is that the alleged wrongdoer is the Office of the President of the Republic of Malawi. The Office, as already pointed out, is not a juristic person and is at law incapable of taking the decision that is complained of.

116. We are in the realm of the law and nomenclature matters. Public offices and officers should therefore be referred to according to law. This observation reminds us of what was stated in *Tembo and Kainja v The Speaker of The National Assembly* MSCA Civil Appeal No. 1 of 2003 (unreported), that:

> "*A decision regarding which party to sue is an important decision which is made by a party or his Counsel after careful consideration of the facts of the case. The task of which party to sue must be performed by the litigant and not the court. It is no business of the court to assist a litigant in choosing for him the correct party to sue. Where a litigant is represented by Counsel it would not be proper for the court to assist Counsel in making a decision regarding the correct party to sue. To do otherwise would undermine the essence and spirit of our adversarial system of litigation*."

117. In this matter an injunction issued against the Speaker of the National Assembly, whom the court found to have been a wrong party, was vacated *inter alia* on the ground that a wrong party had been sued. Our understanding of that finding is that where a claimant has not sued the correct party the action is futile and no remedy can ensue from the same as no defendant exists from whom such remedy can be recovered.

***Issue 6*: Whether non-compliance with section 4 of the Civil Procedure (Suits by or against the Government or Public Officers) Act is fatal to the proceedings commenced against the Attorney General and whether the present proceedings can be dismissed for failing to comply with section 4 of the said Act.**

118. In considering this issue will refer to the Civil Procedure (Suits by or against the Government or Public Officers) Act (Cap 6:01) of the Laws of Malawi as "the Act".

119. Section 4 of the Act provides that:

"*No suit shall be instituted against the Government, or against any public officer until the expiration of three months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Attorney General, and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims*."

120. The Defendant argued that it is a mandatory requirement of the law that any person desirous of commencing a suit against the Government has to comply with this provision. The Defendant submitted that the rationale is as stipulated in the case of *Kamanga v Attorney General* [1995] 2 MLR 687 and applied in *Rashid Tayub, Transglobe Produce Export Limited v Attorney General (Director of Public Prosecutions) and the Director of the Anti-Corruption Bureau,* High Court Principal Registry, Civil Cause No. 209 of 2018, that the Government as a colossal institution must be given sufficient time to prepare to meet a case that is brought against it. The Defendant also contended that it has not been disputed that the Claimant did not give the required mandatory notice. The Defendant has invited this Court to consider the case of *Dr. Bakili Muluzi v The Director of the Anti-Corruption Bureau,* MSCA Civil Appeal No. 17 of 2005 (unreported) which concerned the interpretation of section 32 of the Corrupt Practices Act, where the proceedings were held to be null and void for failing to comply with the mandatory provisions of section 4 of the Act.

The Defendant submitted that the present proceedings are a suit against the Government commenced under Order 5 of the CPR and therefore required the mandatory notice.

121. The Claimant cited section 2 of the Act, which provides that:

> "*Any claim against the Government which would if such claim had arisen against a subject be the ground of an action in any competent court shall be cognizable by the said court whether such claim shall arise or have arisen out of any contract lawfully entered into on behalf of the Government or out of any wrong committed by any servant of the Government acting in his capacity and within the scope of his authority as such servant*:…"

and contended that the reading of the provision shows that the Act is about claims arising from contract or torts and that these are claims for monetary compensation. The Claimant argued that the present case is neither founded on contract nor tort but on public law and specifically on the alleged breach of a constitutional provision, namely section 75 (1) of the Constitution. The Claimant asserted that the proceedings in *Dr. Bakili Muluzi v The Director of the Anti-Corruption Bureau* were caught by the requirement for notice under section 4 because they had been commenced by originating summons as opposed to the fast track process of judicial review.

122. The Claimant also contended that since the present matter was commenced under Order 19 of the CPR, which provides for commencement of "Matters Under the Constitution" as "Particular Proceedings" as opposed to regular claims such as contracts and torts, such proceedings, including constitutional matters, referrals by courts and by the President, election matters, judicial reviews, *habeas corpus* and declarations, do not require compliance with section 4 of the Act. The Claimant asserted that the foregoing are no longer suits against the Government. The Claimant relied on the case of *Dr. Jean Mathanga and Linda Kunje v The Electoral Commission and the Attorney General*, High Court Principal Registry, Civil Cause No. 45 of 2021 (unreported) where

it was held that the requirement for notice does not augur well with the constitutional provisions, such as the right to an effective remedy, right of access to justice and the Court's power to review acts and decisions of the Government.

123. Section 9(2) of the Courts Act provides that every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges (emphasis supplied). Order 19, rule 1 of the CPR provides that Part 1 thereof shall apply to proceedings on the interpretation or application of the Constitution which are certified by the Chief Justice under rule 2 and shall be dealt with in the manner specified under section 9 (2) of the Courts Act. Order 19, rule 3 (1) provides that subject to sub-rule (2), proceedings under Part 1 (of Order 19) shall be commenced by summons under Order 5.

124. A reading of these provisions shows that the scheme envisaged by the law for matters relating to the interpretation of the Constitution is that such matters will first be commenced as any other ordinary proceedings, and then certified by the Chief Justice as being a constitutional matter, if deemed so. In our considered view, contrary to the Claimant's assertion, the CPR do not permit that a constitutional matter should be commenced under Order 19, even where the Claimant intends ultimately to have it certified as such. It is imperative that it be commenced under Order 5 as any other ordinary civil proceeding.

125. The Claimant commenced this action in the original Court by way of a summons under Order 5 of the CPR and then applied to the said Court to refer it to the Chief Justice for certification under section 9 (3) of the Courts Act. The original Court proceeded to refer it to the Chief Justice for certification under Order 19 rule 7 of the CPR. Indeed, this was the right procedure as Order 19 rule 3 (1) provides that matters under the constitution must be commenced under Order 5. A reading of Order 19 rule 3(1) and Order 19 rule 7 clearly shows that for matters referred from

other courts there has to be a proceeding before referral and certification. Therefore, Order 19 Part 1 does not provide for originating proceedings, but for certification and post-certification procedure. Order 19 Part 1 is not meant to short circuit the commencement procedures provided for under other pieces of legislation, including, in the case at hand, the provisions of section 4 of the Act. Where a claimant intends to commence proceedings against the Attorney General, as the Claimant herein has done, that claimant has to comply with section 4 of the said Act by giving the three months' notice. As a matter of fact, certification is not a matter of course, as the Chief Justice can and is entitled to refuse to certify a matter as constitutional if in his considered opinion it is not so: *Enelessi Simon and two others v The Attorney General,* Constitutional Referral Case No. 9 of 2015. In the present proceedings the Claimant did not comply with the requirement for giving three months' notice.

126. In *Dr. Bakili Muluzi v The Director of the Anti-Corruption Bureau* the Supreme Court of Appeal held that an action commenced by way of originating summons under Order 7 of the Rules of Supreme Court was still subject to the requirement of the notice under section 4 of the Act. Under those Rules the originating summons procedure was prescribed for commencing actions for declaratory orders, interpretation of statutes or contracts or where the facts were not necessarily contentious. If this matter had been commenced under the previous rules, the originating summons procedure just alluded to, would have applied since the Claimant seeks the interpretation of section 10 of the Electoral Commission Act and section 42 of the General Interpretation Act as against section 75 of the Constitution and also seeks declaratory and consequential orders. Therefore, under the authority of the case of *Dr. Bakili Muluzi v The Director of the Anti-Corruption Bureau* the section 4 notice requirement is mandatory, and we so find.

127. We have had occasion to consider the case of *Dr. Jean Mathanga and Linda Kunje v The Electoral Commission and the Attorney General*. We observe that the proceedings in that case were different from the present proceedings in that they were commenced under Order 19 rule 27 of the

CPR, seeking various declaratory orders whilst the present one was by a summons under Order 5.

128. We take cognizance of the court's finding in that case that an aggrieved person can seek from the court a declaratory order without giving notice as required by section 4 of the Act. We find that this decision does not apply to the present proceedings for the reason that in so far as the present matter was commenced by a summons under Order 5 of the CPR, the requirement for the section 4 notice cannot be dispensed with. The case of *Dr. Jean Mathanga and Linda Kunje v The Electoral Commission and the Attorney General* is distinguishable from the present proceedings on this basis.

129. We find misleading the Claimant's reliance on section 2 of the Act, that section 4 of the said Act should not apply because the present proceedings are neither founded on contract nor tort but on public law and specifically on the alleged breach of a constitutional provision in so far as they confine its application to contracts and torts. This is because section 2 of the Act clearly extends to '… <u>any wrong</u> committed by any servant of the Government acting in his capacity and within the scope of his authority as such servant'. (emphasis ours). For the avoidance of any doubt, we find that in these proceedings the Claimant was obliged to give notice as per section 4 of the Act.

***Issue 7*: Whether the Claimant having deliberately contravened the law in recommending the appointment into the Commission, more than three nominees, should be allowed to benefit from its own illegality and whether it should be estopped from challenging the decisions of the members of the Commission who were appointed into the Commission in contravention of section 4 of the Electoral Commission Act.**

***Issue 8:* Alternatively, whether the present proceedings seek to benefit the Claimant from its own unlawful and illegal act.**

130. Relying on the cases of *Re Sigsworth* [1935] Ch 89, *Jasani v Nkhalamba* [1991] 14 MLR 109, *Thorncroft v Ward* [1998] MLR 410 (HC) and *Winga v Southern Bottlers Ltd* [1997] 1 MLR 373 the Defendant submitted that it is a well settled principle of law that no one can benefit from his own unlawful act. The Defendant contended that the Claimant would like to indirectly benefit from its own illegality and that to allow this case to proceed in light of the mess that it created would, in terms of *Re Sigsworth,* lead to a repugnant result in that the Claimant would be allowed to benefit from the mess it created. The Defendant went on to say that in blatant disregard of section 4 (2) of the Electoral Commission (Amendment) Act, the Claimant submitted names of five persons to the then President to be appointed as Commissioners, and the then President, who is also the President of the Claimant, appointed four persons from the submitted list of five, instead of three.

131. The Defendant re-stated that the Court in *Malawi Congress Party v The President of the Republic of Malawi* nullified the foregoing appointments as they were made contrary to clear legal provisions, but saved all the actions and decisions undertaken by the Sixth Cohort of the Commission and noted that the said judgment has never been appealed against and it remains law.

132. The Defendant argued that the Claimant, who, in the view of the Defendant, is the culprit behind the unlawful appointments, seeks a nullification of the FPE 2020 and the subsequent by-elections on the basis of the finding of the Court in *Malawi Congress Party v The President of the Republic of Malawi*, faulting the appointment of the Sixth Cohort of the Commission for the Claimant's own illegality on the basis of which illegality the Claimant seeks a nullification of the elections conducted by the Sixth Cohort of the Commission. The view of the Defendant regarding this is that if the nullification is allowed, the Claimant and its President stand to indirectly benefit from their own impunity and illegality as it will afford them an opportunity to field their Presidential candidate afresh.

133. The Defendant invited this Court to take judicial notice of the utterances of Professor Peter Mutharika at the *Muhlakho wa Alhomwe* celebration that took place on Sunday 10th October, 2021 where, according to the Defendant, he said that he would seek re-election on the Claimant's ticket following this Court's nullification of the FPE 2020 in these proceedings. We will summarily dismiss this. The law on judicial notice was discussed in *Chiume and others v Alliance for Democracy (AFORD) and another II* [2005] MLR 92 and we find that the circumstances obtaining here do not meet the requirements.

134. The Defendant referred us to paragraph 112 of the Judgment of the Court in *Malawi Congress Party v The President of the Republic of Malawi* where the Court held that the non-compliance with section 4 of the Electoral Commission Act was not an honest mistake, but that it was calculated to disobey the law with the clear view that the Claimant should have more than three commissioners in the Commission. The Defendant's position on this is that this was to the Claimant's benefit and akin to fraud. Accordingly, so argued the Defendant, the Claimant cannot hide under the claim that all it seeks is respect for 'constitutionalism and the rule of law' which the Claimant did not observe in the first place by illegally nominating five persons from which four were appointed as Commissioners. This, again, according to the Defendant, shows that the Claimant and the former President, Professor Mutharika, conspired to irregularly appoint four Commissioners from the list submitted by the Claimant instead of the maximum number of three Commissioners to force other presidential candidates including Dr. Chakwera to boycott the FPE 2020. The Defendant continued to argue that the plot having failed, the Claimant then conspired with the former President to challenge the FPE 2020, a demonstration of *mala fide* on the part of the Claimant and Professor Mutharika.

135. The Claimant agreed with the Defendant on the principle of illegality but argued that the maxim *ex turpi causa* has received extensive judicial commentary, more especially in contract, tort and trusts. The Claimant stated that the maxim has not attracted the same level of attention in public

law, and that the courts should be slow to transpose private law considerations and concepts to public law. The Claimant cited an article by M Rosenfeld, *Rethinking the boundaries between public law and private law for the twenty-first century: An Introduction,* International Journal of Constitutional Law, Volume 11, Issue 1, January 2013, 125-128, for the position it took. The Claimant contended that the Defendant had not provided this Court with evidence proving the alleged conspiracy and that therefore what he asserted was mere speculation.

136. The Claimant submitted that in *Malawi Congress Party v The President of the Republic of Malawi* whilst the Court faulted the decision of the Presidency in the appointment of members of the Commission, it did not fault any decision of the Claimant. On the basis of this fact alone, the maxim *ex turpi causa* does not apply to this case, more especially where the Defendant has not proven the conspiracy between the Claimant and the former President, Professor Mutharika, so went the argument.

137. The Claimant contended that the illegality defence only applies if a party to a proceeding is basing their cause of action on their own wrongdoing which, according to it, is not the case in these proceedings as the Claimant committed no illegal conduct at all to trigger the application of the said maxim.

138. The Claimant argued that the rule of law and constitutionalism will be vindicated if this Court allows a full consideration of this case on the merits. Relying on the case of *Tinsley v Milligan* [1994] 1 AC 340 the Claimant argued that this Court must take a principled approach when determining the question of illegality by taking into account the following factors:

(a) "*the triggering event of this action was the President's desire and determination to get rid of Commissioners Kunje and Mathanga. These two Commissioners, according to the Presidency, were illegally appointed Commissioners;*

(b) the conduct of the President and the Malawi Congress Party where an action was commenced, discontinued and recommenced or revived until they achieved their purpose of getting rid of the Commissioners;

(c) the refusal to accept that if the Commission was inquorate, all its decisions are also affected. In the present case, there is certainly a selective application of the law by the Defendant where there is insistence that the effects of the illegality must be suffered by the Commissioners while the President holds on to the benefit emanating from the illegality;

(d) *whether the integrity of the legal system will not be harmed by letting the Defendant hold on to that which is a product of illegality and in the manner they seek to do so*."

139. In response to the Claimant's argument on conspiracy, the Defendant submitted that conspiracy between the Claimant and the former President can be inferred from the pleadings (paragraph 21 of the amended defence) and the judgment in *Malawi Congress Party v The President of the Republic of Malawi* particularly at page 40, paragraph 112 where the Court stated that "this was again impunity on the part of the Defendant at play … trying to hit back at the National Assembly for throwing out the text of section 4 of the Act as proposed in the Government Bill".

140. We observe that the Court in *Malawi Congress Party v The President of the Republic of Malawi* held that the Claimant deliberately chose to flout section 4 of the Electoral Commission (Amendment) Act when it nominated five names to the former President out of which the latter appointed four as Commissioners. The Court also held that the former President could not have appointed the Commissioners as he did contrary to the law unknowingly, since in the instrument of appointment he specifically referred to the law enabling the appointment of the Commissioners. Contrary to the assertion of the Claimant in paragraph 181 of its final submissions, that it committed no illegal conduct, it is clear that

the question of illegality was already determined. Since this decision was not appealed against, it is no longer an issue for this Court's determination.

141. We have carefully considered the submissions from the parties on the Defendant's argument that in the present matter the Claimant seeks reliefs from which it will benefit from the illegality we have just referred to. We agree with the Defendant that the maxim *ex turpi causa non oritur actio* applies to this case. In the case of *Holman v. Johnson* (1775) 1 Cowp 341 at 343 it was stated that:

> "*The principle of public policy is this; ex dolo malo eno oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff*."

142. Applying this principle to the present case we agree with the Defendant that the reliefs sought by the Claimant have the effect of benefiting the Claimant from its own illegality. This is because, in the event this Court nullifies the FPE 2020 and the subsequent Parliamentary and Local Government by-elections, the status *quo* will revert to the pre-FPE 2020 political set up. This is the illegal benefit that the Claimant and the former President, who remains the president of the Claimant, will derive as governing party and State President, respectively.

143. It will be recalled that the Claimant argued that the rule of law and constitutionalism will be vindicated if this Court allows a full consideration of this case on its merits. The question whether the issue of illegality is a preliminary issue exercised our minds. However, on the premise of Order 16 rule 6 of the CPR we are fortified that this question can and will be resolved at this preliminary stage. This Court cannot turn

a blind eye to such blatant illegality just because the Claimant has clothed these proceedings with constitutionalism.

144. The principle behind the maxim *ex turpi causa* is to ensure adherence to the rule of law and constitutionalism. In the case of *Euro-Diam v Bathurst* [1988] 2 WLR 517 at 526 Kerr LJ said:

> "*The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances, it will be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts*."

The abovementioned case emphasises the principle that the Court cannot give legal effect to illegal nominations and appointments.

145. In as much as the Claimant is denying the issue of illegality, what we have are illegal nominations by the Claimant followed by illegal appointments by the former President who incidentally was at all material times the President of the Claimant. The Claimant has now turned around and claims that the FPE 2020 and subsequent by-elections were void because the Sixth Cohort of the Commission was inquorate and unconstitutional. We cannot imagine a more classic example of one wanting to benefit from their own illegality than this. Therefore, even if these proceedings were not caught by the defence of *res judicata*, we find that it will be against public policy and an affront to the public conscience to grant the Claimant the reliefs sought for. As a matter of fact, granting the reliefs would be tantamount to this Court aiding and rewarding the Claimant's illegality. This we will not do.

146. In upholding this preliminary issue we cite with approval the case of *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) at 100E – F (para 16) on the same *ex turpi causa* principle where Ponnan JA remarked:

"*[16] It is true that in matters of human behaviour we are often told not to judge by results, but in law, when considering whether a contention is well founded, the absurdity of the results to which it will give rise is not an immaterial consideration. That a person in the position of Brooks could by his own intentional wrongful act create in favour of his dependants a cause of action that would not otherwise exist is nothing short of preposterous; indeed in my view that would be a dangerous proposition. After all it is a trite principle of our law, that a person should not be allowed to benefit from his/her own wrongful act*."

Issue 9: **Whether or not the present proceedings are frivolous, vexatious and an abuse of the court process and a waste of the Court's time.**

147. The Defendant submitted that the Claimant is raising issues that were the subject matters in Judicial Review Cause No. 17 of 2021 between *The State (on the application of the Democratic Progressive Party) v The President of the Republic of Malawi and The Secretary to the President* commenced at the High Court Lilongwe District Registry, which the Claimant voluntarily withdrew without any basis before it was adjudicated upon. According to the Defendant, in the present proceedings, the Claimant is raising the same issues as the ones in the withdrawn matter, and it is utter abuse of the Court's time for the Claimant to commence a matter, withdraw it and recommence another on the same issues as the one withdrawn.

148. The Defendant submitted that the summons herein raises issues that were already adjudicated upon by the High Court in *Malawi Congress Party v The President of the Republic of Malawi* which has never been appealed against. However, the Claimant would like this Court to adjudicate over the same issues. This according to the Defendant makes the matter frivolous and vexatious, such that it ought to be dismissed with costs. The Defendant invited the Court to consider the principle that there must be an end to litigation which requires a litigant to bring forward his whole case at once and not to bring it forward piecemeal and referred to the cases of *Malawi Electoral Commission v Banda and another* [2005]

MLR 185 and *Nthara v ADMARC* (supra). According to the Defendant, the Claimant has, contrary to the decisions in the abovementioned cases, caused endless litigation pertaining to the validity of the decisions made by the irregularly constituted Commission.

149. The Defendant contended that the judgment in *Malawi Congress Party v The President of the Republic of Malawi* was not appealed against and the letter of rescission was revoked. The Defendant further contended that neither the judgment nor the letter of rescission can constitute a cause of action. The Defendant cited the case of *Mary Catherine Nkosi v Nedbank (Malawi) Limited*, High Court, Commercial Cause No. 170 of 2008 (unreported) as authority for asserting that the proceedings herein are an abuse of court process and must be dismissed. Further, the Attorney General stated that he cannot answer for the Malawi Congress Party and Dr. Chakwera who are not parties to the present proceedings. On whether the *Malawi Congress Party v The President of the Republic of Malawi* case would have been withdrawn if Professor Mutharika had won, the Defendant submitted that the Claimant is working on assumptions and imaginations.

150. It was the Claimant's submission that it is strange and unfortunate that the Defendant had chosen to trivialize the Claimant's claims as being vexatious, frivolous and an abuse of the court process. According to the Claimant, a reading of sections 4, 5, 198, 199 and 200 of the Constitution clearly shows that Malawi is a constitutional democracy based on the rule of law in which the Constitution is the supreme law and no other legal or political authority is above it. In order to ensure that a mechanism is available for resolution of any conflict between the Constitution and the rest of the legal or political order, section 5 provides that "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", so it was argued.

151. The Claimant stated that section 75 (1) of the Constitution provides for the offices of Commissioners of the Commission and submitted that under section 198 of the Constitution, the offices of the Commission must be defined and constituted in accordance with the Constitution, and not under any other legal or political authority. Therefore, the Claimant's claim in this matter that section 75 (1) of the Constitution has been violated, should not be taken lightly by this Court, let alone by the Defendant, so went the argument.

152. The Claimant contended that it is important to note that the Defendant has not identified the issues which were frivolous, vexatious or an abuse of court process in the judicial review proceedings in the case of *The State (on the application of the Democratic Progressive Party) v The President of the Republic of Malawi and The Secretary to the President* challenging the rescission of the appointment of the two Commissioners that were withdrawn; and also to note that the Defendant does not mention any issue that is frivolous, vexatious and an abuse of court process in this present matter.

153. According to the Claimant, the Defendant has failed to show and demonstrate the similar issues between *Malawi Congress Party v The President of the Republic of Malawi* and the present proceedings. The Claimant submitted that the preliminary issue that the present proceedings are frivolous, vexatious and an abuse of court process, must therefore be dismissed.

154. This Court having already established herein that the present proceedings are *res judicata* on the premise of the case of *Malawi Congress Party v The President of the Republic of Malawi* it goes without saying that the proceedings herein amount to an abuse of the court process and it is therefore vexatious and frivolous. The case of *Nthara v ADMARC* (supra), which establishes that it is an abuse of the court process to vex the other party twice on the same matter, is applicable in these proceedings. The principle of the law is that the court machinery must be used for a *bona*

fide purpose: *Mtemadanga Farm Limited v Agricultural Development and Marketing Corporation* 12 MLR 250.

155. Another case in point on abuse of the court process is that of *Burrow v Bankside* [1996] 1WLR 257 at 260b where it was stated as follows:

> "*The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed*."

156. In the case of *Bradford & Bingley Building Society & Others v Malcolm Wolsteinholme Seddon* [1999] 1 WLR 1482, Lord Justice Auld referred to the defendant's right not be vexed twice on the same cause as the defendant's right 'not to be unjustly hounded'. According to this case an abuse of the court process can still be established even where the parties in the current case are different from those in the earlier case.

157. Presently we find that though the Claimant was not a party to the case of *Malawi Congress Party v The President of the Republic of Malawi*, on the premise of our finding that the Claimant is a privy of the Interested Parties in that case, it is an abuse of the court process for the Claimant to bring these proceedings in the manner it has done.

158. We have addressed our minds to the Claimant's proposition that we should follow the approach taken in the case of *Professor Arthur Peter Mutharika and another v Dr. Saulos Klaus Chilima and another*, MSCA Constitutional Appeal No. 1 of 2020, (unreported) by the Supreme Court of Appeal where it opted not to dismiss the appeal regardless of the appellants' failure to comply with the rules of procedure. The situation obtaining in that case is distinguishable from the present circumstances, on account of the nature of the defect in that case. Whereas in the abovementioned case the Supreme Court of Appeal was dealing with

breaches of procedural requirements, including failure to comply with Order III rule 2 of the Supreme Court of Appeal Rules, this Court is dealing with, among others, the legal principle of *res judicata.* Whilst, a court can, in appropriate circumstances, exercise its discretion to disregard a breach of procedural requirements it cannot ignore a breach of a substantive and fundamental legal principle. The CPR in Order 2, rule 2 provides for instances where the court can cure irregularities, i.e. an irregularity in a proceeding, or a document, or a step taken, or order made in a proceeding. However, the scope of the irregularities does not include substantive issues. The principle of *res judicata* is one of the bedrocks of our justice system that guards against chaos in the pursuit of justice, a breach of which cannot be cured under the CPR.

159. To restate, we have established that this matter is effectively not only an appeal in disguise but also re-litigation clothed in constitutionalism. The fact that the Claimant is crying out 'constitutionalism and the rule of law' does not firstly change the nature of the proceedings before us into a 'constitutional matter'. Secondly, it does not compel us to sanction abuse of the court process.

Issue 10: **Whether or not the courts are there to offer gratuitous constitutional or legislative interpretation.**

160. The Defendant argued that since the Claimant accepted both the rescission letter and the judgment in *Malawi Congress Party v The President of the Republic of Malawi* this implies that there is no real dispute for this Court to determine and that the Claimant merely seeks the Court's advisory opinion and therefore, the matter is not yet ripe. The Defendant pointed out that as a matter of fact, in compliance with the decision in *Malawi Congress Party v The President of the Republic of Malawi* the Claimant submitted names of three nominees whom the President proceeded to appoint as Commissioners. The Defendant noted further that the Claimant concedes that it is not concerned with the consequential reliefs in this action which include the nullification of the results of the FPE 2020. The Defendant further submitted that the Claimant

is shooting itself in the feet by making this concession as well as stating that it is merely seeking the Court's opinion and interpretation of the judgment. The Defendant argued that courts do not entertain cases where no dispute has arisen.

161. The Defendant relied on the authorities of *Maziko Charles Sauti-Phiri v Privatisation Commission* (supra), *James Phiri v Muluzi and Another*, (supra) and *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General* (supra). The Defendant also referred to Professor Tribe's article, *Ban on Advisory Opinions and the Problems of Declaratory and Partially Circumventable Judgments*, Laurence H. Tribe's book *American Constitutional Law*, second Edition, by Ralph S Tyler Jr Professor of Constitutional Law at Harvard University.

162. As to whether or not courts are there to offer constitutional or legislative interpretation, the response of the Claimant was in the affirmative. The Claimant did not dispute the fact that the Judiciary is there to interpret the Constitution and all laws as provided under section 9 of the Constitution. The Claimant stated that this mandate is exercisable only where there are legally relevant facts or a particular dispute to be resolved, otherwise, doing so will be tantamount to asking the court to offer gratuitous legal opinions, which is a duty of legal practitioners. The Claimant argued that courts will interpret provisions of the Constitution where there is a specific matter to be adjudicated or where there is a Presidential Referral. The Claimant submitted that the issues raised in this Constitutional Referral impact on the mandate of an illegally constituted Commission to perform its functions as provided for in section 76 of the Constitution. The Claimant further submitted that the Commission's lack of constitutional powers and mandate has the potential of affecting the political rights of the Claimants and all people of Malawi and that the matters in the present proceedings cannot be regarded as academic or moot.

163. The Claimant referred to the following authorities: sections 9 and 103 (2) of the Constitution, section 9 of the Courts Act, the cases of *The State and the President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury, ex parte Malawi Law Society* Constitutional Cause No. 6 of 2020 (unreported), *Maziko Charles Sauti–Phiri v Privatisation Commission and the Attorney General*, (supra), and *James Phiri vs Bakili Muluzi and The Attorney General*, (supra).

164. Section 9 of the Constitution provides that:

> "*The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law*."

165. Section 40 (1) (c) provides that:

> "*(1) Subject to this Constitution, every person shall have the right—*
>
> *(c) to participate in peaceful political activity intended to influence the composition and policies of the Government*."

166. Section 41 provides for access to justice and legal remedies as follows:

> "*(1) Every person shall have a right to recognition as a person before the law.*
>
> *(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.*
>
> *(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law*."

167. Whilst under section 9 of the Constitution the Judiciary has the responsibility of interpreting the law, the said responsibility is not exercised in a vacuum. The provision expressly stipulates that the law is

interpreted within the context and framework of legally relevant facts. Section 9 must be read together with section 41 which also clearly stipulates that the right of access to a court of law is for final settlement of legal issues, which according to section 41 (3) are acts violating the rights and freedoms granted by the Constitution or any other law.

168. Save for Presidential Referrals under section 89 (1) (h) of the Constitution, there is no provision granting courts jurisdiction to provide advisory opinions. The fact that the Claimant and indeed every Malawian has the right to enjoy the political rights enshrined in section 40, this in and of itself does not create a legal dispute to invoke the jurisdiction of the court. It is violations of section 40 that would trigger a dispute for settlement by the court. In our assessment, the Claimant has not shown that such a dispute has been triggered. Put differently, as we have earlier shown, no cause of action has arisen. We therefore agree with the Defendant that the present proceedings are meant to seek this Court's advisory opinion, contrary to the principles in the cases cited above.

169. The Claimant cited section 103 (2) of the Constitution to support its argument that this Court should entertain this matter. Section 103 (2) grants the judiciary jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue is within its competence. This provision should not be read as granting the judiciary unbridled jurisdiction. The jurisdiction has to be exercised judiciously by considering all relevant facts and applicable law. In fact, courts being creatures of statute must exercise jurisdiction granted by their respective enabling legislation. This Court is no exception. The exercise of our jurisdiction must not only be with regard to legally relevant facts but must also be within the prescriptions of the law, *inter alia*, section 108 of the Constitution and section 9 of the Courts Act. Having done that in the present case, we have arrived at the conclusion that the present matter is not within the jurisdiction and competence of this court in so far as the issue of the granting of a gratuitous opinion is concerned.

***Issue 11*: Whether or not the matters herein are moot or academic issues.**

170. According to the Defendant the concession by counsel for the Claimant that it merely seeks the court's interpretation or guidance on the impact of the judgment shows that the Claimant's matter is purely moot, hypothetical and academic. The Defendant argued that seeking constitutional interpretation does not translate to legally protected interest and that it is not the business of this Court to engage in hypothetical, moot or academic exercises. The Defendant further argued that validity of a case before this court depends more upon a specific contingency needed to establish a concrete controversy than on the general development or underlying facts. According to the Defendant the mere desire to obtain a reply from this Court to some of the constitutional questions which the Claimant considers to be fundamental, even if it is understandable, is not capable of conferring on the Claimant the legal standing within the meaning of *James Phiri v Dr. Bakili Muluzi and Another* (supra), *Maziko Charles Sauti–Phiri v Privatization Commission and the Attorney General,* (supra), and *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General,* (supra).

171. The Claimant submitted that academic or moot issues are abstract and have no practical effect and present no existing or live controversy, prejudice or threat of prejudice. The Claimant submitted that the principle that underlies this doctrine is that it is not the role of the courts to spend time adjudicating matters that are conjectural and of little or no relevance to the resolution of a legal dispute. The Claimant went further to submit that as a general principle, courts do not give purely advisory opinions and do not pronounce on abstract questions of law when there is no dispute to be resolved. The Claimant acknowledged that the only exception is in the case of a Presidential Referral.

172. The Claimant contended that where an issue has a potential of affecting people's rights and interests, the same should not be treated as a moot or purely academic issue. According to the Claimant the interpretation of the provision that has triggered this matter goes to the root of the democratic

values that the nation agreed upon, such as political rights. The Claimant submitted that since elections shape the future of any nation, the question of the impact of the composition of the Commission *vis a vis* section 75 of the Constitution is not moot or academic. The Claimant referred to the following authorities to support this proposition: *JT Publishing (pty) Ltd & Another v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC), *S v Manamela and Another* 2000 (3) SA 1 (CC), *Ainsbury v Millington* (1987) WLR 379 at 381, *ABSA Bank Ltd vs Van Resburg* (228/13) [2014] ZASCA 34, *The Registered Trustees of the Women and Law (Malawi) Research & Education Trust v The Attorney General and others* (supra).

173. We observe that the arguments raised under this head are substantially the same as those just discussed under *Issue 10* above. For the sake of completeness, if nothing else, we will address them, albeit summarily.

174. Firstly, the constitutional provisions pertaining to political rights, including those of the Claimant, must be construed as against the Constitution read as a whole. In every case there must be a dispute between parties, presented before a court for legal settlement as envisioned in section 41 of the Constitution. In the Claimant's own words, with which we agree entirely, "a case is moot when it fails to present an existing or live controversy or the prejudice, or threat of prejudice, to the Plaintiff no longer exists". The circumstances of this case fall within that phrase to the extent that there is no "existing or live controversy". We have already stated above that the only exception is a Presidential Referral. That the Constitution did not provide for a referral other than a Presidential Referral brings the matter within the scope of the *expressio unius* maxim. Therefore, we conclude that the framers of our Constitution did not intend that the courts should entertain moot, hypothetical or academic questions.

175. Secondly, as to the importance of the interpretation of section 10 of the Electoral Commission Act and section 42 of the General Interpretation Act *vis a vis* section 75 of the Constitution, we have already established that the Court in *Malawi Congress Party v The President of the Republic of*

Malawi determined and resolved these issues to finality, so that they are *res judicata*. Therefore, to that extent the Claimant has indeed raised moot, hypothetical and academic issues.

***Issue 12*: Forum shopping**

176. Before we make our final pronouncements in this matter, there is a pertinent issue that we are compelled to address. It is to do with the vexing and somewhat unrelenting malpractice of forum shopping, at all levels of the bar, it would appear. We are raising this issue of our own motion.

177. Forum shopping takes many forms. For example, in *Republic v Aubrey Sumbuleta*, High Court, Lilongwe District Registry, Criminal Case No. 11 of 2021, (unreported) the Court defined forum shopping as follows:

> "*In essence, this is a practice where litigants inexplicably avoid a court of competent jurisdiction which is nearer and to every objective mind more convenient for the parties, and instead take the matter to a rather distant court in order to deal with the matters*."

178. In *Bvalani & Kabwila v Electoral Commission and others*, Civil Cause No. 40 of 2020 High Court, Lilongwe District Registry (unreported) the Court termed the same practice "judicial tourism." The applicants in that case, who were based in Lilongwe, had inexplicably filed their application at the Zomba District Registry. The Court in Zomba declined to entertain the matter and transferred it to the Lilongwe District Registry, which was deemed to be the most convenient forum to the parties. Commenting on this, the Court in Lilongwe said:

> "*This is not the first time when [eyebrows] have been raised by these courts in the way some matters are being filed in our courts especially the High Court. At times this has led to speculation by members of the public that court users are involved in forum shopping*."

We agree with these sentiments and wish to add that this is one malpractice that fuels public perception of corruption within the judiciary. In this regard it is crucial for the Judiciary to be vigilantly on guard against this malpractice.

179. We raise this issue herein because we get the distinct impression that what has transpired in the matter before us is one instance of forum shopping.

180. The origins of the case before us lie in the case of *Malawi Congress Party v The President of the Republic of Malawi* filed and disposed to finality at the Lilongwe District Registry. As we have established above, for reasons best known to the Interested Parties, that decision was not appealed against. Instead, the Claimant herein, who has a privity of interest in the issues raised by the Interested Parties in that case jumped aboard and commenced fresh proceedings on the self-same issues at the Principal Registry in Blantyre, which culminated into this Constitutional Referral.

181. We reiterate our earlier finding that this matter is an appeal in disguise or an attempt to have the matter reviewed or an attempt to have the matter re-litigated. To achieve these ends and in order to have audience before the Principal Registry, the Claimant suppressed the fact that these issues had already been disposed of by the Court in *Malawi Congress Party v The President of the Republic of Malawi*. In our view the conduct of the Claimant in commencing the fresh proceedings at the Principal Registry was forum shopping, as its conduct was tantamount to fishing for a favourable outcome in another forum. This leads us to the inevitable conclusion that the Claimant consciously avoided the Lilongwe District Registry which had already decided on the matters with the hope of obtaining a favourable outcome at the Principal Registry.

182. The malpractice does not end there. The avoidance of taking up an appeal and instead bringing the matters afresh to the High Court is a sign that, the Interested Parties, again for reasons best known to themselves, elected to avoid the prescribed route of appealing to the Supreme Court in favour of re-appearing before the High Court under the guise of the present Claimant.

183. The Supreme Court of Appeal strongly disapproved of this malpractice in *Nseula v Attorney General and another* (supra) where it said at page 321:

> "*There is another matter on which this Court would like to voice its strong disapproval. There are some Counsel who have formed a habit of "judge shopping" by asking clerks in the registries to take cases to their preferred judges. We would like to condemn this practice as totally unethical and it is clear violation of the principle of judicial independence. The allocation of cases is an internal matter for the judiciary and no counsel has the right to choose which judge should deal with a particular case. We hope that counsel who engage in this unprofessional conduct will stop it immediately*."

184. The highest court in this land stated in no uncertain terms that this practice should stop immediately. Further, in Chapter 1, rule 3 of the Malawi Law Society Code of Ethics, "a lawyer must not act in a manner that weakens public respect for the law or justice system or interfere with its fair administration." We therefore wonder why the malpractice is still persisting when counsel are officers of the court and are under a duty to obey orders and directions of the courts.

185. As we have stated above, it is crucial for the Judiciary to be vigilantly on guard against this malpractice. To arrest this malpractice, we direct and order Registrars to diligently scrutinize originating processes and invoke Order 5, rules 9 to 13 of the CPR which empowers them to reject documents.

Summary and Conclusion

186. This matter is a Constitutional Referral from the High Court, Principal Registry, Civil Cause No. 230 of 2021. Prior to our determining the constitutional questions placed before us by the Referral, the Defendant raised preliminary issues. During the course of the hearing, the Claimant in turn raised one additional preliminary objection. We have dealt with the

said preliminary issues at length and have made determinations in regard to each one of them. We now proceed to summarise our findings.

***Issue 1*: Whether the Attorney General must take an oath of office in order to have standing in court.**

187. Our finding is that the framers of the Constitution did not intend for the Attorney General to take an oath of office. We find that the Attorney General is properly before us. Consequently, we dismiss this preliminary objection.

***Issue 2*: Whether the High Court has jurisdiction to overturn or review its own decision, whether a High Court judgment can constitute a cause of action, and whether the present proceedings are aimed at reviewing or appealing against a decision of the High Court on similar issues.**

a. Effect of certification

188. The Claimant advanced the view that the certification rendered it mandatory for this Court to proceed with the determination of the questions in the Referral and to disregard the preliminary issues. Having found that the certification was made subject to the Referral and that Order 16 rule 6 of the CPR allows a court to consider preliminary issues, we conclude that the said preliminary issues are rightly before us and this Court is within its legal mandate in entertaining them. The certification does not have the effect alleged by the Claimant and we dismiss what the Claimant advanced herein.

b. Whether this matter is an appeal

189. We have established that the issues in these proceedings are the same as those in *Malawi Congress Party v The President of the Republic of Malawi*. Therefore, this is an appeal in disguise and this Court has no jurisdiction to entertain it. Consequently, we uphold this preliminary objection.

c. Whether this matter is res judicata

190. Our finding is in the affirmative as the three prerequisite elements establishing *res judicata* namely, existence of a final judgment, identity of parties and identity of subject matter obtain in this matter. Consequently, we uphold this preliminary objection.

d. Whether or not this court is functus officio

191. The concept of *functus officio* is inapplicable in the present case for the reason that it is not this Court which rendered the judgment in *Malawi Congress Party v The President of the Republic of Malawi*. Consequently, we dismiss this preliminary objection.

e. Whether or not the judgment in Malawi Congress Party v The President of the Republic of Malawi constitutes a cause of action

192. The Defendant argued that these proceedings were incompetent because the Claimant was relying on the judgment in *Malawi Congress Party v The President of the Republic of Malawi* as its cause of action. We have established that that judgment does not constitute a cause of action. Consequently, we uphold this preliminary objection.

***Issue 3*: Whether the present proceedings should have been commenced by way of petition as opposed to summons.**

193. We reject the Defendant's assertion that this is an election matter which should have been commenced by way of petition. The reason is that the three factors that must obtain in an election petition have not been satisfied, in that (i) the complaint did not arise "due to an act or omission during an election," (ii) the Claimant had no right to be elected at an election and (iii) the Claimant was not a candidate at such election. We therefore dismiss this preliminary objection. Notwithstanding our position on this issue, we maintain our finding that this action is an appeal in disguise and/or an attempt by the Claimant to have a second bite at the cherry.

***Issue 4*: Whether or not the present proceedings are statute barred under section 100 of the PPEA, having been commenced more than seven days from the declaration of the result of the election.**

194. Having established that these proceedings do not constitute an election matter the limitation period of seven days under section 100 of the PPEA does not apply. The Defendant's preliminary objection is accordingly dismissed.

***Issue 5*: Whether a political party has *locus standi* to challenge the results of an election and whether the Defendant is a proper party to the present proceedings.**

a. locus standi of the Claimant

195. Having established that this present action is an appeal in disguise and/or a re-litigation of the issues, our finding is that the Claimant lacks standing to approach the Court in the manner it has done by commencing fresh proceedings. We therefore dismiss this preliminary issue on that premise.

b. status of the Defendant as a party

196. The Claimant commenced these proceedings against "The Attorney General (on behalf of the 'Office of the President of the Republic of Malawi')". In our finding there exists no juristic person known as the 'Office of the President of the Republic of Malawi'. Whilst the Attorney General can be sued on account of the actions or omissions of the Government or a public officer, he is not sued in abstract. Since the 'Office of the President of the Republic of Malawi' is not a legal person, the Attorney General has been sued in abstract and is therefore a wrong party. The action is futile and we uphold the preliminary objection on this issue.

197. Notwithstanding our position on this issue, we maintain our finding that this action is an appeal in disguise.

***Issue 6*: Whether non-compliance with section 4 of the Civil Procedure (Suits by or against the Government or Public Officers) Act is fatal to the proceedings commenced against the Attorney General and whether the present proceedings can be dismissed for failing to comply with section 4 of the said Act.**

198. We find that the requirement for the section 4 notice cannot be dispensed with for the reason that these proceedings were commenced by a summons under Order 5 of the CPR. We uphold the preliminary objection on this issue.

***Issue 7*: Whether the Claimant having deliberately contravened the law in recommending the appointment into the Commission, more than three nominees, should be allowed to benefit from its own illegality and whether it should be estopped from challenging the decisions of the members of the Commission who were appointed into the Commission in contravention of section 4 of the Electoral Commission Act.**

***Issue 8:* Alternatively, whether the present proceedings seek to benefit the Claimant from its own unlawful and illegal act.**

199. The Court in *Malawi Congress Party v The President of the Republic of Malawi* specifically held that the conduct of the Claimant in nominating more than three names and the appointment of more than three Commissioners representing the Claimant to the Sixth Cohort of the Commission were illegal. We find that the principal relief sought by the Claimant, namely, nullification of the results of the FPE 2020 and the subsequent Parliamentary and Local Government by-elections, if granted, would have the effect of benefiting the Claimant from its own illegality, in that the status *quo* would revert to the pre-FPE 2020 political set up. The preliminary objection is upheld.

Issue 9: **Whether or not the present proceedings are frivolous, vexatious and an abuse of the court process and a waste of the Court's time.**

200. Having found that these proceedings are an appeal in disguise or an attempt to re-litigate the issues in *Malawi Congress Party v The President of the Republic of Malawi* which are caught by the doctrine of *res judicata*, we conclude that the present proceedings are frivolous, vexatious and an abuse of the process of the court. The preliminary objection is upheld.

Issue 10: **Whether or not the courts are there to offer gratuitous constitutional or legislative interpretation.**

201. Under section 9 of the Constitution the Judiciary has the responsibility of interpreting the law within the context and framework of legally relevant facts and final settlement of legal disputes. The issues raised in this matter were dealt with to finality in *Malawi Congress Party v The President of the Republic of Malawi.* The Claimant accepted both the rescission letter and the judgment in *Malawi Congress Party v The President of the Republic of Malawi.* This implies that there is no dispute for this Court to determine and that the Claimant merely seeks the Court's advisory opinion. We find that the present matter is not within the jurisdiction and competence of this court. The preliminary objection is upheld.

Issue 11**: Whether or not the matters herein are moot or academic.**

202. Having established that no cause of action has arisen and that the Claimant has not shown that any dispute has been triggered and that the Claimant only seeks this Court's advisory opinion, we conclude that the present matter is moot, hypothetical and academic. The preliminary objection is upheld.

ORDERS

203. In consequence of the foregoing findings we make the following orders:
    a. The action is struck out in its entirety on account of:

i. the proceedings being an appeal in disguise;
ii. the proceedings being *res judicata*;
iii. the judgment relied upon not constituting a cause of action;
iv. a non-existent party being sued;
v. the Claimant's failure to comply with the notice requirement under section 4 of the Civil Procedure (Suits by or against the Government or Public Officers) Act;
vi. the Claimant being precluded from benefitting from its own illegality; and
vii. the proceedings being frivolous, vexatious and an abuse of the court process.

b. The Claimant's action having been struck out the Claimant is condemned in the Attorney General's costs.

Delivered in Open Court at Blantyre this 26th day of November, 2021.

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S. A. KALEMBERA
JUDGE

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R. MBVUNDULA
JUDGE

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D. nyaKAUNDA KAMANGA
JUDGE

_____

A. MTALIMANJA
JUDGE

_____

T.R. LIGOWE
JUDGE