DRAFT

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

(Electoral case No 2 of 2014)

BETWEEN

JESSIE KABWILA
CANDIDATE

AND

ELECTORAL COMMISSION
TRIBUNAL

CORAM: JUSTICE D.F. MWAUNGULU

Chalamanda, for the Electoral Commission

K. Amuli, for the Candidate

Mwaungulu J

DIRECTIONS TO THE REPORTING OFFICER FOR SALIMA DISTRICT UNDER SECTION 40 OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT

Introduction

This matter comes to this Court because, Dr. Jessie Kabwila, requested the Returning Officer for Salima District under section 40 of the Parliamentary and Presidential Elections Act to transmit the matter to this Court for direction to the Electoral Commission to accept or reject her nomination as a candidate for member of the National Assembly for Salima Northwest in the general election slated for 20th May 2014. The Electoral Commission did three things: the Electoral Commission, purportedly, rejected Dr. Kabwila's nomination; the Electoral Commission omitted to publish Dr. Kabwila's name as required under section 41A of the Parliamentary and Presidential Elections Act; and the Electoral Commission transmitted the case to the Registrar under section 40 of the Parliamentary and Presidential Elections Act so that this Court could give directions. To this Court the Electoral Commission exceeded its powers under the section in rejecting a valid nomination under section 39 of the Parliamentary and Presidential Elections Act. Consequently, the Electoral Commission should have published Dr. Kabwila's name under section 41A of the Parliamentary and Presidential Elections Act. Under section 40, there was no need, even though she was in public office, for her to resign because, at the time of submission of her papers, she was not holding or acting in the public office, her contract, based on the conditions of service of the contract, being terminated by the kind of leave of absence allowed by her employer. Moreover, as a Civil Servant whose functions are not directly concerned with the formulation and administration of the policies of government, she is exempted from resigning in order to participate directly in political activities. On 26th February 2014 this Court directed the

Electoral Commission to accept Dr. Kabwila's nomination as candidate as a Member of the National Assembly for Salima Northwest. To hasten the electoral process, the Electoral Commission and all sundry should regard this direction as final and there is no right of appeal against it to the Supreme Court of Appeal.

This is a case where Counsel for the Electoral Commission cited the cases of *Nseula v Attorney General and anothe*r [1999] MLR 313 *Nseula v Attorney General, sub nomino … , Re Mirrams* [1891] 1Q.B. 594*; Spring v Constantino* 168 Conn. 563, 362 A2d 871; *State v Taylor* 260 lowa 634, 144 N.W. 2d 289; *Town of Arlington v Bds. Of Conciliation and Arbitration* 352 N.E.2d 914 at 914; *Georgia Dep't of Human Resources v Sistrunk* 249 Ga 543, 291 SE2d 524; *Madlener v Finley* (1st Dist) 161 III App 3D 796; and *Chikago Park v Dist. V Kenroy*, Inc., 78 III 2 t 555. Counsel for Dr. Kabwila cited the cases of *Kioa v Minister of Immigration and Ethnic Affairs* (1985) CLR 550; *Attorney General v Lunguzi and Another* [1996] MLR 8. The Court quoted the above cited case with approval; *Ridge v Baldwin* [1963] 2 ALLER 66; *Mchawi v The Minister of Education, Science and Technology,* Miscellaneous Civil Cause No. 82 of 1997; *The President of Malawi v National Assembly and RB Kachere*, [1995] 2 MLR 616; *The State and Malawi Electoral Commission-ex-parte Mzima* MSCA Civil Appeal No. 17 of 2004; *Taffour vs Attorney General* (1980) G.L.R 637; *Felix Mchawi v The Minister of Education, Science and Technology,* Miscellaneous Civil Cause No. 82 of 1997. These decisions informed this Court.

Fundamentally, problems, and this is one instance, arise because, pertinent statutes, the Courts Act and the Parliamentary and Presidential Elections Act, align rather imperfectly with the Constitution. The Constitution creates the Electoral Commission on a juridical model, almost akin to a Tribunal. The Electoral Commission cannot adopt a litigious approach where it is being sued and sues for actions and appeals and is appealed against for decisions in its juridical jurisdiction. The Electoral Commission, like any tribunal, must, under section 76 (3) of the Constitution, be appealed from and is subject to judicial review under (section 75 (5) (a) of the Constitution. The Constitution of Malawi 1994 is more resolute on the Electoral Commission's functions and jurisdiction than its 1966 predecessor. It is this perspective that informed this decision. It will be necessary, therefore, to examine how the Parliamentary and Presidential Elections Act aligns itself to the Constitution.

History

This is how this matter is in this Court. Dr. Kabwila until 5th February, 2014 was a member of academic staff of the University of Malawi. The Electoral Commission is the authority responsible, *inter alia*, for the conduct of general elections, a process by which public offices in the legislature, the executive and local government are filled. This court takes judicial notice that Dr. Kabwila, a firebrand human rights activist, rather than influence government policy and action from an interest or a pressure group, decided to be involved in government directly by running for public office. Section 51 (2) (e) of the Constitution, which the Court examines closely later, restricts nomination and election to public office those who hold or act in public office, a term which, following this Court's and Supreme Court decisions, sparks controversy than calm among practitioners and academics alike. Generally, universities, private or public are very independent institutions at law. Public universities generally, by enabling legislation, formulate their own policies and by-laws. As we will see shortly, the University of Malawi, like most universities internationally, has by-laws governing, as here, how staff may, *inter alia*, participate in public office. Consequently it is unclear whether by her written request for leave of absence dated 29th January 2014 and accepted by the University of Malawi on 5th February 2014 it was because of section 51 (2) of the Constitution that limits those holding or acting in public office for nomination or election to the National Assembly or it was because of section (21) (c) of Regulations and Conditions of Service for Academic and Administrative Staff in the University of Malawi that allows academic staff leave of absence to pursue alternative employment or political office.

Be that as it may, on 13th February 2014, after the University of Malawi granted leave of absence, Dr. Kabwila, all formalities observed, presented to the Returning Officer for Salima District her nomination papers for election as a Member of Parliament for Salima North West constituency. On 21st February 2014, the Electoral Commission, without informing Dr. Kabwila, inquired of the University of Malawi Dr. Kabwila's status. The Electoral Commission has not exhibited the letter. The University Registrar, however, responded on 24th February 2014, informing the Electoral Commission that Dr. Jessie Kabwila was not an employee from 5th February 2014 when she was granted leave of absence and was no longer on the University's payroll. On 27th February 2014 the Electoral Commission wrote Dr. Kabwila informing her that they had rejected her nomination. The Electoral Commission wrote Dr. Kabwila that day that the Electoral Commission rejected her nomination because, still holding or acting in public office, she suppressed that fact. The letter from the Electoral Commission, signed by Mr.

Willie Kalonga, the Chief Elections Officer, is titled ***'Notification of Rejection of your Parliamentary Candidature under Section 40 of the Parliamentary and Presidential Elections Act.'***

On 28th February, 2014, the Electoral Commission published, without Dr. Kabwila's name, the list of nominees under section 41 of the Parliamentary and Presidential Elections Act. Dr. Kabwila phoned the Electoral Commission. On 2nd March 2014, Dr. Kabwila received the letter of rejection sent by the Electoral Commission. On 3rd March 2014, Dr. Kabwila, followed by another letter dated 13th March 2014, through her lawyers, Barnet & Jones wrote the Chief Elections Officer to refer the matter to the Registrar under section 40 (1) of the Parliamentary and Presidential Elections Act because, granted that the University of Malawi allowed her leave of absence to pursue a political office, she was not holding or acting in a public office. She queried the Electoral Commission for acting without granting her a hearing. Dr. Kabwila attached all communications with the University of Malawi. The Electoral Commission responded through an undated letter, received by the Registrar of the High Court on 13th March 2014, referring the matter to this Court. Justice Potani, who later recused himself, was initially assigned the matter. Using our random system of allocating cases to Judges, I heard the matter. Reading all the information on this application and the skeletal and oral arguments, there are jurisdictional, procedural and substantive matters on which to dispose of the matter. Dr. Kabwila complains bitterly that the Electoral Commission never heard her on the decision. She does not understand why the Electoral Commission never published her name on 28th February 2014, as required by law.

The Uniqueness of the Electoral Commission

The Constitution creates the Electoral Commission as an institution *sui generis* with a uniqueness that stands alone. It is singular and typical of Constitutions, while preserving individual rights and autonomy, to locate the centre of legal power (as belonging to the people); allocate legal power to institutions it creates for exercise of the power; and determine the process and procedure to fill those institutions. Concerning the latter, the Constitution, fully recognising that ultimate and authority, prescribes only one way of filling those positions, elections and, it is elections that are the basis of the appointive powers of elected officials. In that sense, appointive powers are exercisable by elected officials and, therefore, the legitimacy of appointed public officials derives directly from the people who clothed elected officials with the legitimacy and withal to appoint other public officials. Elections, and with them, the Electoral Commission, are the plenipotentiary process and authority for filling of constitutional positions, public offices. Indeed, the Constitution subjects this unique process and institution to checks and balances by the legislature (section 75 (4)), legislature (sections 75 (1), 76 (1), 76 (2) (e) and the Judiciary (sections 75 (1), 76 (3) and 76 (5) (a)). The domain, dominion, province and reach of the Electoral Commission, in this regard is contagious, pervasive and *nulli secundus* as confirmed by section 76 (4) of the Constitution and section 6 of the Electoral Commissions Act.

The Electoral Commissions Powers

Section 76 (2) (a) and (b) of the Constitution create administrative powers which are subject to legislative control under section 76 (5) (b). Section 76 (2) (e) creates general powers which are subject to judicial review under sections 76 (5) (a). Sections 76 (2) (d) and (e) create quasi judicial powers that are subject to appeal to the High Court under section 76 (3) of the Constitution. Section 76 provides:

> *"(1) The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament.*
> *(2) The duties and functions of the Electoral Commission shall include—*
> *(a) to determine constituency boundaries impartially on the oasis of ensuring that constituencies contain approximately equal numbers of voters eligible to register, subject only to considerations of—*
> *(i) population density;*
> *(ii) ease of communication; and*
> *(iii) geographical features and existing administrative areas;*
> *(b) to review existing constituency boundaries at intervals of not more than five years and alter them in accordance with the principles laid down in subsection (2) (a);*
> *(c) to determine electoral petitions and complaints related to the conduct of any elections;*
> *(d) to ensure compliance with the provisions of this Constitution and any Act of Parliament; and*
> *(e) to perform such other functions as may be prescribed by this Constitution or an Act of Parliament.*
> *(3) Any person who has petitioned or complained to the Electoral Commission shall have a right to appeal to the High Court against determinations made under subsections (2) (c) and (2) (d).*

(4) The Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by other authority or any person.

(5) Without prejudice to subsection (3)—

(a) the High Court shall have jurisdiction to entertain applications for judicial review of the exercise by the Electoral Commission of its powers and functions to ensure that such powers and functions were duly exercised in accordance with this Constitution or any Act of Parliament; and

(b) the National Assembly shall confirm all determinations by the Electoral Commission with regard to the drawing up of constituency boundaries but may not alter the boundaries of any constituency, except upon the recommendation of the Electoral Commission."

The Electoral Commissions Juridical Powers

Under section 76 2 (c) and (d) the Constitution creates the Electoral Commission as a juridical institution to hear petitions and complaints related to the conduct of elections and ensuring compliance with provisions of the Constitution and any Act of Parliament. The exercise of this jurisdiction is only subject to appeal. Section 76 (2) (c) requires one to petition or complain to the Electoral Commission and the Electoral Commission to hear petitions and complaints: "[t]he duties and functions of the Electoral Commission shall include … to determine electoral petitions and complaints related to the conduct of elections." Section 76 (2) (d) requires the Electoral Commission 'to ensure compliance with the provisions of this Constitution and any Act of Parliament.' Section 76 (3) presupposes that one has actually petitioned or complained to the Electoral Commission on both sections 76 (2) (c) and (d) the Electoral Commission has determined or adjudicated on the matter: "Any person who has petitioned or complained to the Electoral Commission shall have a right to appeal to the High Court against determinations made under subsections (2) (c) and (2) (d). The Electoral Commission is in the nature of a tribunal.

The framers of the Constitution intended the Electoral Commission these quasi-judicial powers ahead of the Judiciary should be seen from what was in our Republican Constitution in 1966, the repealed Constitution. Section 31 and 32 of the Constitution clearly excluded the Electoral Commission from determining such matters. Section 31 provided:

"(1) For the purposes of elections to the National Assembly, the Republic shall be divided into fifty constituencies in such manner as the Electoral Commission, acting with the approval of the National Assembly signified by resolution, may prescribed

(2) So far as appears to the Electoral Commission practicable and subject to subsection (3), every constituency shall contain the number of voters registered on the voters roll that is equal to the electoral quota in respect of the voters roll.

(3) The Electoral Commission may depart from the principles specified in subsection (2) to such extent as it considers expedient in order to take account of –

(a) the density of population;
(b) the means of communication;
(c) geographical features; and
(d) the boundaries of existing administration area.

(4) The Electoral Commission shall review the boundaries of all constituencies at intervals of not less than three nor more than five years, and may alter the boundaries of the constituencies in accordance with the provisions of this section.

(5) Any alteration of the constituencies under this section shall come into effect upon such date as the President may by Order direct

(6) For the purposes of this section the electoral quota in respect of the roll of voters shall be the number ascertained by dividing the number of voters for the time being registered throughout the Republic of that roll by fifty".

Section 32 provided:

"(1) The High Court shall have jurisdiction to hear and determine any question whether –

(a) any person has been validly elected as a member of the National Assembly or the seat of any such member has become vacant;

(b) any person has been validly elected as Speaker of the National Assembly from among persons who are not members of the Assembly or, having been so elected, has vacated the office of Speaker

(2) Parliament may make provision with respect to –

(a) the persons who may apply to the High Court for the determination of any question under this section;

(b) the circumstances and manner in which and the conditions upon which any such application may be made; and

(c) the powers, practice and procedure of the High Court in relation to any such application.

(3) The determination by the High Court of any question under this section shall not be subject to appeal.

Only the High Court, and no appeal lay to the Supreme Court, had jurisdiction. What was supposed to be prescribed by an Act of Parliament in the 1966 Constitution was done directly and comprehensively by the 1994 Constitution splitting and streamlining the powers between the High Court and Electoral Commission. Unlike the 1966 Constitution where the Constitution itself prohibited appeals from the High Court to the Supreme Court; the prohibition of a second appeal to the Supreme Court is prohibited by section 114 (5) of the Parliamentary and Presidential Elections Act.

High Court Jurisdiction

Sections 76 (2) (c), 76 (2) (d), 76 (3) and 76 (5) (a), notwithstanding section 108, of the Constitution confers two jurisdictions to the High Court relating to the institution of the Electoral Commissions and subject matter and procedure relating to elections. Under section 108 (1) of the Constitution, the subject matter provision, the High Court can hear any matter, civil or criminal, under any law. Section 108 (2) of the Constitution empowers the High Court to review, for conformity with the Constitution, any law and any action or decision of Government. The High Court, under the same section, has additional jurisdiction and powers under the Constitution. An example *par excellence* of power conferred by the Constitution on the High Court is section 76 conferring the High Court review and appellate jurisdiction over election matters and the Electoral Commission. Moreover, the exercise of the High Court's jurisdiction is 'save as otherwise provided by the Constitution.' In section 76, the Constitution prescribes a procedure and jurisdiction to which subservient legislation or laws must comply.

High Court Judicial Review Jurisdiction

Section 76 (2) of the Constitution(a) confers different powers for the Electoral Commission and the High Court and (b) creates rights for citizens to complain to or petition the Electoral Commission. Concerning the former, section 76, apart from section 76 (c), also creates other general powers. Concerning the latter, the only way to proceed is by way of judicial review. The power must mean that, notwithstanding section 76 (5) (b) concerning recourse to the legislature, this court can review boundary matters, not necessarily on the other powers of general review, but more especially on the principles of the right to be heard by those affected by the boundary decision, legitimate expectation and reasonableness principle in *Associated Pictures Ltd v Wednesbury Corporation* [1948] 1 K.B. 223. Section 76 (2) (d) however is more pervasive. The Electoral Commission has power to 'ensure compliance with provisions of this Constitution and any other Act of Parliament. This duty conflates into two perspectives. The Electoral Commission has general police and plenipotentiary powers to ensure that, apart from itself, all and sundry comply with the provisions of the Constitution and an Act of Parliament. The Electoral Commission's exercise of such power over others is subject to judicial review. The second perspective is, therefore, where, like here, the challenge covers what the Electoral Commission decided. That, on reading of section 76 (3) depends on whether the citizen has petitioned or complained to the Electoral Commission or, on reading section 76 (2) (d), the subject matter can be construed as intended to ensure compliance with the provisions of the Constitution. Where the matter is without the two categories, therefore, the citizen should proceed by judicial review. The citizen cannot proceed by way of appeal.

Judicial Review Excludes All other Modes of Commencing Proceedings

In those cases where the citizen proceeds by judicial review, the citizen cannot proceed in any way other than by motion for judicial review. It is contrary to public policy, so much so that proceeding in any other way would be frivolous and vexatious. The citizen cannot proceed by petition or originating summons. The citizen must proceed by a motion for judicial review (*O'Reilly v Mackman* [1983] 2 A.C. 237).

The High Court Appellate Jurisdiction

According to section 76, the primary way the High Court is seized of electoral matters from the Electoral Commission is by way of appeal. Section 76 (5) (a), dealing with judicial review, is without prejudice to section 76 (3) that invokes two circumstances for its exercise: sections 76 (2) (c) and 76 (2) (d). The right to appeal presupposes a hearing and a determination *nius prius* because the ordinary meaning of the words 'Appeal,' in relation to courts, connotes a hearing, on the facts and/or law, by the authority from which impugned decision is appealed from. The High Court, therefore, has no jurisdiction where, after a complaint or petition to it, the Electoral Commission has not heard the matter and made a determination.

The Constitution and the Parliamentary and Presidential Elections Act

Since section 76 of the Constitution confers on the Electoral Commission juridical powers and defines how the High Court is to be seized of electoral matters from the Electoral Commission certain provisions of the Parliamentary and Presidential Elections Act require scrutiny for consistency with the Constitution. Section 76 (1) of the Constitution provides:

> *"The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament."*

The use of the words 'or' in the subsection section may be problematic. This is a case where the word 'or' means 'and'. It cannot have been the intention of the legislature that an Act of Parliament would undo or overdo what the Constitution itself provides. For under section 10 (1) of the Constitution, the Constitution is "in the interpretation of all laws and in the resolution of political disputes", in its provision "the Supreme arbiter and ultimate source of authority. An Act of Parliament can adumbrate or expand a provision in the confines set in the Constitution for the provision. An Act of Parliament and indeed any law deriving from the Constitution cannot abrogate or arrogate a constitutional provision. Section 199 of the Constitution provides

> *"This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution".*

Juridical Model

The most significant departure of the 1994 Constitution from the 1966 Constitution 1966 is establishment of the Law Commission as a juridical body, a tribunal. Section 32 of the Malawi Constitution 1966, as we have seen, vested all juridical power, without a right of appeal to the Supreme Court, to the High Court. The Electoral Commission, because of sections 76 (2) (c), 76 (2) (d), 76 (3), and 76 (5) (a), is in the nature of a tribunal that receives and determines complaints and petitions and, therefore, subject to appeal under section 76 (3) and judicial review under section 76 (5) (a) of the Constitution. Like the judiciary, it has and deserves its own independence as stated in section 76 (4):

> *"The Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by other authority or any person"*

As a tribunal, therefore, in exercise of its juridical functions, the Electoral Commission cannot be sued or made a party to any proceedings. There can only be judicial review or appeal on its determinations. There is no right of appeal to the Supreme Court where the High Court is exercising its appellate jurisdiction from the Electoral Commission. Consequently it might be useful to examine some procedures in the Parliamentary and Presidential Elections Act and establish whether they conform to the juridical model in the Constitution.

The intention of the Legislature was to allow the election process to proceed and let such matters, including eligibility to be challenged by the candidates after the election process. The procedures the Parliamentary and Presidential Elections Act, in accordance with sections 76 (2) (c), 76 (2) (d) and section 76 (3) of the Constitution, namely, direction procedure (section 40), petition procedure (section 100), complaint procedure (section 113) and appeal procedure (section 114), confirm that the legislature intended, notwithstanding the direction procedure in section 40 and complaint procedure113, that matters be resolved after the election.

Summary Procedure under section 40 of the Parliamentary and Presidential Elections Act

Section 40 of the Parliamentary and Presidential Elections Act provides:

> *"(1) If, after the close of the period allowed for nominations but before the polling day, the returning officer is of the opinion that—*
>
> *(a) a candidate whose nomination paper has been lodged with him has not been duly nominated in accordance with this Act or is not qualified for election or has obtained nomination by fraud or false pretences;*
>
> *(b) any symbol or abbreviation specified in respect of a candidate pursuant to paragraph (d) or (e) of section 37 (2) is indecent or obscene or is too complex or elaborate to be reproduced on a ballot paper or so closely resembles the symbol of any candidate contesting the election in the constituency concerned or the*

> *recognized symbol or abbreviation of any other candidate or of any political party, other than the political party, if any, for which the candidate concerned is standing or which is sponsoring him as to be likely to cause confusion; or*
>
> *(c) where the nomination paper states that a candidate is to stand for or to be sponsored by a political party, there is reason to believe that that fact is not true; or*
>
> *(d) the nomination paper lodged with the returning officer in respect of any candidate is for any other reason not in order; or*
>
> *(e) the deposit referred to in section 45 was not lodged with a candidate's nomination paper; or*
>
> *(f) a candidate is not qualified for election at that election; or*
>
> *(g) a candidate has been duly nominated for election for another constituency,*
>
> *the returning officer shall forthwith notify such candidate or his election representative giving the reasons for such opinion, and, if so requested by the candidate or his election representative, the returning officer shall draw up and sign a statement of the facts and his opinion based thereon and transmit it, together with the nomination paper and any certificate or affidavit which has been lodged with such nomination paper, to the Registrar of the High Court for hearing and decision by the High Court at the earliest opportunity; and a copy of the statement shall, at the same time, be delivered to the candidate or his election representative and to the Commission.*
>
> *(2) If no request is made under subsection (1) the candidate shall be deemed not to have been duly nominated.*
>
> *(3) The High Court may call for further information from the person making the request or from the returning officer.*
>
> *(4) The High Court shall after determination of the matter direct the returning officer either to accept or to reject the nomination and the returning officer shall comply with such direction.*
>
> *(5) Where any nomination has been referred to the High Court under the provisions of this section, the proceedings under sections 41, 42 and 43 shall be suspended pending determination of the matter.*
>
> *(6) Without derogation from subsection (1), the returning officer shall not take the action under that subsection—*
>
> *(a) solely on account of any minor variation between the name of any person as it appears on the nomination and as it appears on the voters register if the returning officer is reasonably satisfied that the variation is due to an error or is without significance;*
>
> *(b) any other imperfection in the nomination paper if the returning officer is reasonably satisfied that there has been substantial compliance with this Part."*

Section 40 only applies after the closing of nominations and before the polling day. The procedure only applies to nomination as candidate as a Member of the National Assembly and not to nomination for election for president (*Chisi v Malawi Electoral Commission* (2014) Election No 1 (HC) (PR) (unreported)). The procedure under it is created for the Electoral Commission to address irregularities and situations sections 40 (1) (a) to (g) mention. From a drafting perspective, there is no difference between section 40 (1) (a) and 40 (f) concerning qualification. The procedure is of a summary nature. It is at the aegis of the Electoral Commission through a Reporting Officer appointed by the Electoral Commission under section 34 of the Parliamentary and Presidential Elections Act. There is no time set for the action; the action must however be after the closing date of nomination and before the polling day. Where the Returning Officer intends not to publish a candidate's name under section 41 A of the Parliamentary and Presidential Elections Act, the action must be before expiry of fourteen days, subject to section 46 of the General Interpretation Act.

Section 40 of the Parliamentary and Presidential Elections Act conforms and confirms the juridical model. The action, as noted, does not commence with the candidate, the Electoral Commission is fulfilling its functions under section 76 (2) (d) of the Constitution. The Reporting Officer examines the document and forms an opinion and conjures reasons for such an opinion. The Reporting Officer sends the opinion and reasons to the candidate. If the candidate remains silent or accepts the opinion, the candidate deemed nominated under section 39 of the Parliamentary and Presidential Elections Act, is deemed not nominated under section 40 (2) of the Parliamentary and Presidential Elections Act. The candidate may, however, request the Reporting Officer to transfer the matter to the High Court for directions to the Electoral Commission. It is this action by the candidate that is a complaint to the Electoral Commission for purposes of section 76 (2) (c) or (d) of the Constitution and section 113 of the Parliamentary and Presidential Elections Act. Section 40 (1) of the Parliamentary and Presidential Elections Act requires the Returning Officer to examine the candidate's request and draw up and sign a statement of facts and make an opinion thereon. This opinion is the determination. The Reporting Officer will have examined the matter. Certainly, where the Reporting Officer agrees with the Candidate or does not request the Reporting Officer, there is no need to refer the matter to the High Court. Where the Reporting Officer does not agree with the candidate, the Reporting Officer must draw the facts. The Reporting Officer shall sign a statement. The Reporting Officer shall draw up an opinion. The Reporting Officer shall transmit the signed statement of fact and the opinion to the Registrar for the High Court to give directions to the Electoral Commission.

At the High Court, the Court can act on the papers. In other words, the High Court can make a determination just on the papers. If need be the High Court can ask for more information, not evidence. The High

Court determines the matter. The High Court is not required to deliver a judgment. The High Court is required to give directions. The direction can only take two forms: the High Court can direct the Reporting Officer to accept the nomination; the High Court can direct the Reporting Officer to reject the nomination.

The Reporting Officer is then required to comply with the order. The section creates no right of appeal for either the candidate or the Reporting Officer. This is precisely because there are no parties to the matter in the referral in the High Court. The Reporting Officer acts *suo motu*. The issue is not initially at the aegis of a candidate. The candidate would have not raised the issue. The Parliamentary and Presidential Elections Act is creating in between nomination day and election a procedure of addressing irregularities and qualification issues. The procedure is of a summary nature

The question is whether the High Court acting under Section 40 (1) of the Parliamentary and Presidential Elections Act is acting under its appeal or review powers? The sequel question is whether section 40 (1) is a procedure *sui generis* and *aliunde* the appeal jurisdiction in sections 76 (3) of the Constitution and section 114 of the Parliamentary and Presidential Elections Act and review jurisdiction of this Court under section 76 (5) (a) of the Parliamentary and Presidential Elections Act or the complaint jurisdiction of the Electoral Commission under section 76 (2) (c) of the Constitution. The first point to consider is the nature of complaints raised in section 40 of the Parliamentary and Presidential Elections Act. All of them relate to the Electoral Commission's functions in section 76 (2) (d) of the Constitution. It is clear from the wording in section 76 (3) of the Constitution giving citizens to appeal to the High Court against the Electoral Commission's decisions that the citizen will already have had petitioned and complained to the Electoral Commission. It is obvious that the citizen querying the Electoral Commission's decision under section 76 (2) (d) in the section 40 procedure of the constitution must appeal to the High Court. Consequently, the judicial review procedure is an available to the citizen on matters under section 40 of the Parliamentary and Presidential Elections Act.

The second consideration is what was discussed earlier that the whole process in section 40 (1) of the Parliamentary and Presidential Elections Act fits in the juridical model of complaint to the Electoral Commission, appeal to the High Court and no appeal to the Supreme Court. Section 40 (1) of the Parliamentary and Presidential Elections Act procedure is, therefore, not *sui generis* and *aliunde* the appeal jurisdiction in sections 76 (3) of the Constitution and section 114 of the Parliamentary and Presidential Elections Act and review jurisdiction of this Court under section 76 (5) (a) of the Parliamentary and Presidential Elections Act or the complaint jurisdiction of the Electoral Commission under section 76 (2) (c) of the Constitution. The candidate's response and request as the case may be is the complaint to the Electoral Commission: the candidate questioning the decision of the Reporting Officer. The Reporting officer, performs a quasi-judicial function, on the facts and information from the candidate. The Reporting Officer has to examine the facts alone because there is no opposite party to the matter. No one complained.

Under this summary procedure, the Electoral Commission is acting as a court *nius prius* and, in so doing, is not prosecuting or litigating. The Electoral Commission, through a Reporting Officer, only seeks this Court, in the words of section 41 (4) of the Parliamentary and Presidential Elections Act, to direct either to accept or reject the nomination. As a tribunal seeking this Court's directions, the Electoral Commission, cannot appeal against the direction. This is because the Electoral Commission will not have rejected the nomination up to this point. There is nothing in section 40 that suggests that the Electoral Commission should reject the nomination. The assumption is that the nomination is valid according to section 39 and by sending the matter to the court the Electoral Commission wants the nomination rejected. It is the decision of this Court that constitutes the rejection of the candidate. The electoral Commission has no jurisdiction in the section to reject a valid nomination. The Electoral Commission, as a tribunal, is asking this Court to review its decision, it cannot, therefore, appeal against this Court's directions. The candidate cannot appeal either because, since in section 400, the High Court is invoking its appellate jurisdiction, as opposed to judicial review, the decision of this Court is final under section 114 (5) of the Parliamentary and Presidential Elections Act.

Section 40 of the Parliamentary and Presidential Elections Act does not apply to Presidential Candidates

Sections 36 to 47 are in Part IV, Division 2 of the Parliamentary and Presidential Elections Act styled 'Nomination of Members of the National Assembly.' Sections 48 to 55 are in Part IV, Division 3 of the Parliamentary and Presidential Elections Act styled 'Nomination for Election to the Office of the President.' Section

49 (3) only applies sections 37 (2), 38 and 39 *mutatis mutandis* to nomination for election to the office of President. Section 40 of the Parliamentary and Presidential Elections Act does not, therefore, apply to nomination for President.

The Principle of Interpretation is Case expressio unius est exclusio alterius

If the Legislature had intended to apply section 40, which applies to nominations for members to the National Assembly, it would have, like it did with sections 37 (2), 38 and 39, included it in section 49 (3) of the Parliamentary and Presidential Elections Act. The fact that they did not comports that the Legislature never intended, to apply the procedure to presidential candidates in the first place. In *Lewin v The Queen*, 2011 DTC 1354 [at 1979], 2011 TCC 476, Bédard J., said

> *"The Latin maxim "***expressio unius est exclusio alterius***", also known as the principle of implied exclusion, states that where the legislator causes a provision to apply to a number of categories but fails to include one that that could easily have been included, one may infer that the legislator intended to exclude that category from the application of the provision".*

Casus Omisus

In my judgment, this is not a case where the Legislature by oversight overlooked providing for applying section 40 to the presidential candidates as already demonstrated the applied the sections in this part of the Parliamentary and Presidential Elections Act to the President. This was a case where the Legislature deliberately and deliberatively never intended to apply section 40 to presidential candidates.

Post Election Petitions under section 100 of the Parliamentary and Presidential Elections Act

Section 100 of the Parliamentary and Presidential Elections Act confers a right to (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* to petition the High Court directly by 'reason of irregularity or any other cause whatsoever' on a complaint alleging "undue return or undue election" election of a person as a member of the National Assembly or to the office of the president. The post election procedure under section 100 of the Parliamentary and Presidential Elections Act in many material particulars is incongruent with the juridical model. Its urgency and purport are germane. Section 100 of the Parliamentary and Election's Act provides:

> "(1) *A complaint alleging an undue return or an undue election of a person as a member of National Assembly or to the office of President by reason of irregularity directly to the High Court within 7 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.*
>
> *(2) In proceeding with respect to a petition under subsection (1), the Commission shall be joined as respondent.*
> *(3) If, on the hearing of a petition presented under subsection (1), the High Court makes an order declaring-*
> *(a) that the member of the National Assembly or the President, as the case may be, was duly elected, such election shall be and remain valid as if no petition had been presented against his election; or*
> *(b) that the member of the National Assembly or the President, as the case may be, was not duly elected, the Registrar of the High Court shall forthwith give notice of the fact to the Commission which shall publish a notice in the Gazette stating the effect of the order of the High Court.*
>
> *(4) Pursuant to an order of the High Court under subsection 3(b) declaring that the member of National Assembly or the President, as the case may be, was not duly elected, a fresh election for the seat of the member of the national Assembly or to the office of the President, as the case may be, shall be held in accordance with this Act.*
> *(5) A declaration by the High Court under subsection (3) (b) shall not invalidate anything done by the President before that declaration.*

Section 100 of the Parliamentary and Presidential Elections Act, in so far, as it suggest that there can be direct access to this Court other than by judicial review of or appeal from the Electoral Commission was passed without considering sections 76 of Constitution. If not, it was assumed from the words "by this Constitution or an Act Parliament' in section 76 (1) of the Constitution comport that an Act of Parliament can override what the Constitution has already prescribed or proscribed. Moreover, as long as proceedings under section 100 of the Parliamentary and Presidential Elections Act are commenced by a petition other than a petition of appeal under

section 114 (1) of the Parliamentary and Presidential Elections Act, they should, as a matter of course, be commenced under section 76 (2) (c) of the Constitution to the Electoral Commission. Sections 76 2 (c), 76 (2) (d) of the Constitution confers electoral issues in the domain of the Electoral Commission, not the Courts. Section 76 (3), on matters under sections 76 (2) (c) and 76 (2) (d), gives this Court appellate jurisdiction only. This section in so far as it suggests that a petition can lie directly to the High Court contradicts section 76 (3) as read with section 76 (5) (a) of the Constitution. As stated earlier, the scheme of the Constitution is to make the Electoral Commission a tribunal with power to determine complaints and petitions on conduct of elections and when ensuring compliance with the Constitution or any Act of Parliament. Sections 40 and 100 of the Parliamentary and Presidential Elections Act create a prosecution role.

Section 100 (2) of the Parliamentary and Presidential Elections Act still suggests that in matters under this section the commission should be joined as a respondent. This provision is clearly based on the 1966 Constitution and the Parliamentary and Presidential Elections Act passed under that Constitution. The juridical model of the Malawi Constitution 1994 makes the Electoral Commission a tribunal. The Electoral Commission cannot, as a quasi judicial institution, be dragged to court for matters within its juridical competence except maybe when certain matters in its other functions necessitate judicial review. To the extent that section 100 (2) of the Parliamentary and Presidential Elections Act suggest that the Electoral Commission can be included as a respondent undermines that the Electoral Commission is a tribunal whose decisions can only be reviewed or appealed from of course. I am aware of section 3 of the Electoral Commission's Act:

> *"The Commission shall be a body corporate with perpetual succession and a common seal and be capable of –*
> *(a) Acquiring, holding and disposing of real and personal property;*
> *(b) Suing and being sued in its own name; and*
> *(c) Doing or performing all such acts and things as bodies corporate may by law do or perform".*

This is a power a different kind, conferring a corporate personality to an otherwise an independent functional and jurisdictional institution to be able to look and act as suggested in section 3 (c) of the Electoral Commissions Act. It is not a basis for suing the Electoral Commission or the Electoral Commission suing on decisions in its juridical competence.

This Court, therefore, faced with a section 100 of the Parliamentary and Presidential Elections Act, must reject it for want of jurisdiction because section 100 of the Act contravenes sections 76 (2) (c) of the Constitution. This rejection allows the candidate to have the Electoral Commission to examine the matter and correct it before it arrives to this Court. It should only be in those cases where the Electoral Commission has refused to act to the satisfaction of the parties that should be amenable to appeal. Section 76 (2) (c) of the Constitution provides that the duty of the Electoral Commission is 'to determine electoral petitions and complaints related to the conduct of any election.' This power is expansive and intensive and only limited by judicial review and appeal. On either case the citizen for all matters, including disqualification of a candidate or postponement of an election, must go to and through the Electoral Commission before recourse to this Court.

The wording of section 100 of the Parliamentary and Presidential Elections Act are so blatantly contradictory to section 76 (2) (c) of the Constitution which states that the duties of the Electoral Commission shall include 'to determine electoral petitions and complaints related to the conduct of elections' and section 76 (3) which provides that "any person who has petitioned or complained to the Electoral Commission shall have a right of appeal against determinations made under subsections 2 (c) and 2 (d)'. Section 100 gives the right full throttle to the High Court: "A complaint alleging an undue return or an undue election of a person as a member of National Assembly or to the office of President by reason of irregularity directly to the High Court …"

Complaint procedure to the Electoral Commission under section 113 of the Parliamentary and Presidential Elections Act

This section conforms to section 76 (c) of the Parliamentary and Presidential Elections Act in that it sets out the original jurisdiction of the Electoral Commission under the Malawi Constitution 1994:

> "*Save as otherwise provided in this Act, any complaint submitted in writing alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed the Commission shall take necessary action to correct the irregularity and the effects thereof".*

The section is a cog in the juridical model. Unlike section 40 of the Parliamentary and Presidential Elections Act, it can be invoked at any stage of procedure. The Electoral Commission exercises this jurisdiction on "any" irregularity. There is an intersection, therefore, between the procedures in sections 40 and 113 of the Parliamentary and Presidential Elections Act where, for example, a reporting officer informs a candidate under section 40 (1) of the Parliamentary and Presidential Elections Act, the candidate who, instead of requesting registrar to refer the matter to the High Court, lodge a complaint with the Electoral Commission in order that the Electoral Commission examine it and decide where the irregularity should be one that it can correct without recourse to the High Court. The reasons for such actions would be to avoid the costs and delay. There could be another advantage in case the Electoral Commission decides differently in that to both the Electoral Commission and the candidate there has not to be an appeal to the Supreme Court as provided in section 114 (5) of the Parliamentary and Presidential Elections Act.

Judicial review avails where a citizen has no other recourse or remedy. The complaint structure in sections 113 and 114 entail that there will be very few and specific occasions when this Court will use its judicial review jurisdiction.

Appeal procedure under Section 114

The appeal procedure set in section 114 of the Parliamentary and Presidential Elections Act conforms with and confirm section 76 (3) of the Constitution which gives appellate jurisdiction to this court over the Electoral Commission's decisions. This section does not suggest that the appeals to the High Court are those in section 113 of the Parliamentary and Presidential Elections Act. The appellate power in section 114 of the Parliamentary and Presidential Elections Act is, therefore, independent of complaints under section 113 of the Parliamentary and Presidential Elections Act. It would therefore cover referrals under section 40 of the Parliamentary and Presidential Elections Act where, through a summary procedure process, the High Court assumes appellate jurisdiction over the Electoral Commission's decisions. The powers of the court on appeal are pervasive they include the power of the High Court to re-examine the question whether a candidate was properly qualified or improperly rejected (section 114 (3) (e)). The hallmark of the appeal procedure is that under section 114 (5) of the Parliamentary and Presidential Elections Act, this Court Court's decisions are final. Consequently, under section 21 (c) of the Supreme Court of Appeal Act, an appeal never lies to Supreme Court against this Court's decisions:

> *"An appeal shall lie to the court from any judgment of the High Court or any judge thereof in any civil cause or matter:*
>
> *Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is –*
> *(a) an order allowing an extension of time for appealing from a judgment;*
> *(b) an order giving unconditional leave to defend an action;*
> *(c) a judgment which is stated by any written law to be final;*
> *(d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:"*

The discrepancies between the Constitution and the various laws made under it and among the subservient laws themselves are only resolved in the supremacy of the Constitution over subsidiary laws. Where, therefore, there are diversions from or gross differences between the Constitution and the Courts Act, Parliamentary and Presidential Elections Act, Courts Act, Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and Practice Direction No 2 of 2009: (Abridgement of Time Periods in Cases of Election Petitions and other Complaints under the Parliamentary and Presidential Elections Act, the procedure in the Constitution must, as it must be, prevail. This is not a question of whether to declare a statute unconstitutional. This is just a question of a Court faced with distinct procedures, one under the Constitution and another under an Act of Parliament, in case of discrepancy, the Constitutional procedure must be adopted.

The juridical model is unique in its purpose and functioning. From a functional perspective, given that the Electoral Commission is deeply involved in a an enormous process where contestation is inevitable, while assuming this judicial role may seem an additional burden, inundating the High Court may be a serious distraction that slows, undermines, compromises and brings uncertainty to the process. The Electoral Commission has better and more insights on the process and those involved, candidates and electoral staff, than the High Court to arbitrate on complaints or petitions which to the Electoral Commission are elementary and routine. Moreover, the framers of the

Constitution must have wanted the Electoral Commission to correct the error and filter it before resorting to this Court. Teleologically, the judicial model coheres with the overarching power the Constitution gives to the Electoral Commission as the sole and preeminent authority over elections and the electoral process. The Electoral Commission's independence is assured by minimal interference from the Courts

Applying these principles, for Dr. Kabwila, the Electoral Commission, from the letter 20 February 2014, proceeded under section 40 of the Parliamentary and Presidential Elections Act. The analysis was important in order to isolate different process in the Constitution and the Parliamentary and Presidential Elections Act to streamline the procedures and locate the points at which in between nomination day and the election what can and cannot be done. For purposes of this case, the Returning Officer and the Electoral Commission either acted inadvertently or acted beyond the section in relation to publication of Dr. Kabwila's name. There is nothing in section 40 that empowers rejection of the nomination. The Returning Officer and the Electoral Commission, therefore, had a duty to publish Dr. Kabwila's name and retain her as a candidate for Salima Northwest. According to section 39 of the Parliamentary and Presidential Elections Act, Dr Kabwila was deemed nominated and the nomination was valid: Dr. Kabwila is not dead; the Returning Officer did not fault the nomination based on the five matters in the section. Section 39 provides

> "*Where a nomination paper is delivered in conformity with this Part and it is not withdrawn, the candidate shall be deemed to stand nominated unless the returning officer is satisfied of the candidate's death or decides that the nomination paper is invalid on one of the following grounds, but on no other grounds, namely—*
>
> *(a) that the description of the candidate is insufficient to identify him;*
> *(b) that the nomination paper does not comply with this Act;*
> *(c) that the nomination paper was not tendered within the time prescribed;*
> *(d) that any supporting document required to accompany the nomination paper has not been lodged with the returning officer; or*
> *(e) that the evidence delivered to the returning officer under section 37 (3) is*"

Based on this the Returning Officer proceeded to investigate matters based on section 40 of the Parliamentary and Presidential Elections Act. On close reading of sections 39 and 40, there is no interruption or abeyance, after section 39 of the Parliamentary and Presidential Elections Act, in the nomination or its validity unless the candidate who has received the Returning Officer's opinion does not request the Returning Officer to refer the matter to, the Registrar. The Reporting Officer has not proved that Dr. Kabwila is dead. The Reporting Officer has not demonstrated that the nomination paper was invalid for the reasons in section 39 of the Parliamentary and Presidential Elections Act. *Nota bene*, the candidate is deemed nominated, for all purposes, unless the candidate is dead, withdraws the nomination or the nomination is invalid for reasons mentioned in the section and no other. Qualification is not any of the ground. Dr. Kabwila, therefore, is deemed elected.

There is nothing in section 40 that empowers the Electoral Commission or a Returning Officer to reject nomination of a candidate and for that matter for any reason, including qualification. Section 40 is only directory. The Returning Officer and the Electoral Commission must have been misled by the wording in the marginal notes: 'Rejected Nomination.' Surely, there is no suggestion in the actual provision that nears anything like empowering a Reporting Officer or the Electoral Commission to reject a nomination. Section 40(1) provides that where, like here, a reporting officer thinks that the candidate does not qualify for election, a reporting officer must take three courses of action: (a) form an opinion, (b) formulate reasons for the opinion and (c) inform the candidate. May be this is how to have a 'rejected nomination.' There is nothing in this section, relied on heavily by the Electoral Commission and Dr. Kabwila that suggests that there must be some action, patent or latent, rejecting the nomination. The assumption, according to section 40 (2) must be that it is the failure to request that amounts to rejection of the nomination. It must indeed be perfunctory for the Electoral Commission to write the candidate that the candidate is being rejected. This will follow as a matter of course, of course, when the candidate remains silent or accepts the reporting officer's opinion and reasons. Informing the candidate pushes the buck to the candidate. All that the Returning Officer is supposed to do is form an opinion, as in this case, that the candidate does not qualify and inform the candidate of the Returning Officer's opinion.

The Candidate then has three courses of action: (a) remain silent, (b) accept the opinion or (c) request the reporting to transmit the matter to the Registrar. Remaining silent or accepting the opinion, as we have seen, deems the candidate not nominated and, therefore, not nominated. Proceeding on section 40 (1) of the Parliamentary and Presidential Elections Act, since Dr. Kabwila lodged a request under section 40 (1) of the, based on section 40 (2), there was nothing to 'undeem' the 'deeming' in section 39. Section 40 (2) provides: "If no request is made under

subsection (1) the candidate shall be deemed not to have been duly nominated". The converse is that if there is a request the deeming in section 39 continues unabated. There is, therefore, no abeyance in the nomination if the candidate where there is such a request. Under section 40 on which the Electoral Commission proceeded to reject, there is only a rejection if the candidate does not request the Reporting Officer to transmit the matter to the Registrar of the High Court. Once the matter is with the Courts, the Electoral Commission is technically, *functus officio*. I see no power in that section that forms the basis of rejecting a candidate duly nominated. The Electoral Commission and Reporting Officer have no power, as described, to reject the nomination. The letter they wrote, if based on section 40, was perfunctory.

Equally, there is no abeyance where the Returning Officer has not given any notice on the candidate of an objection so much so that the Returning Officer must publish the candidate's name where on the date for that publication the Returning officer has not given a notice of rejection. Section 40 (5), however, provides:

> *"Where any nomination has been referred to the High Court under the provisions of this section, the proceedings under sections 41, 42 and 43 shall be suspended pending determination of the matter."*

Section 41A of the Parliamentary and Elections Act provides:

> "*After receiving nominations of candidates for election as a Member of Parliament under this Part, the Commission shall, after fourteen days after receiving the nomination, cause to be published in the* Gazette *and on the radio and in at least two newspapers in general circulation in Malawi the names of all candidates who have been validly nominated for election as a Member of Parliament in alphabetical order of surnames"*

Once again, whether, this is what is meant by a rejected nomination, there is no power, latent or patent, to reject the nomination. Of course, the section suggests that the publication of the name in the *Gazette* must be suspended. There is nothing to suggest that the nomination is invalid or the candidate deemed as not nominated. The Reporting Officer and the Electoral Commission must, however act speedily and before the date set for publication. In this case, the Returning Officer received the nomination on 13 February 2014. The last day for publishing Dr. Kabwila's name was 27 February 2014. The Electoral Commission published the names of others on 28 February 2014. The Electoral Commission only wrote Dr. Kabwila on 27 February 2014. Dr. Kabwila received the letter on 2 March 2014. At the time of publication of the names Dr. Kabwila was a candidate 'validly nominated for election as a Member of Parliament in terms of section 41A of the Act. The letter of rejection was sent and received at such a late stage that Dr. Kabwila could not act so as to suspend publication.

There is nothing in section 40 of the Parliamentary and Presidential Elections Act that empowers the Electoral Commission or a Reporting Officer to reject a nomination as they did. I have searched everywhere in the Act to see whether there is such a power. I have found none and I have painfully searched for a power to do so everywhere in the Act. I have found none. I have even tried to think that may be the Electoral Commission can act under the guise of section 76 (2) (d), to wit that it is trying to comply with the Constitution. The spirit of the Parliamentary Act, however, is that such matters, unless proceeded under section 40, which gives no power to the Electoral Commission, but the High Court, to reject the nomination, matters of qualification are better left to the end for the candidates to contest before the Commission or the High Court. The Electoral Commission would have such power if someone complains under section 113 of the Parliamentary and Presidential Elections Act. In that case, there would be an appeal under section 114. This was not the case here. The Electoral Commission opted to proceed under section 40 of the Parliamentary and Presidential Elections Act *suo motu.* In any case, even if there is such a power, it is not the basis on which the Dr. Kabwila was rejected. Dr. Kabwila's rejection is based on section 40 of the Parliamentary and Presidential Elections Act. There was no basis for rejecting the nomination. If, as it turned out, the Electoral Commission, thought Dr Kabwila was ineligible, the course of action was what it did in due course, after Dr. Kabwila requested, it brought the matter to this Court to determine the eligibility issue. It could not itself reject the nomination. The court should, where the candidate has requested for remittance of the matter to this Court, direct the rejection. The rejection letter was otiose. The Electoral Commission should, therefore, have published the name as on 28 February 2014.

As long as the matter remained in this Court, under section 40 of the Parliamentary and Presidential Elections Act, activities under section 41 and 45 were suspended. This Court would still be under an obligation to determine the matter and direct the Reporting Officer to either accept or reject the nomination. The way the Reporting Officer and Counsel argued shows that the Reporting Officer, on the facts, approached the issue of

qualification differently from the constitutional framework in section 51 of the Constitution. If they had followed the process, they would not have come to the conclusion that they did that Dr. Kabwila should have resigned. On the facts of the matter, the approach to Dr. Kabwila's eligibility should not have been what it certainly turned out to be. The Returning Officer approached it from that, if one is holding or acting in a public office, failure to resign is a disqualification with the consequence that if you are still in 'employment' you are disqualified from election. That is not borne out by section 51 (2) (e) of the Constitution. The scheme of the Act is to establish the qualifications, disqualifications and exceptions. A returning officer must follow the scheme in that order. To better apply section 51 (2), it is important to appreciate the scheme of the section. The scheme of the Act is first to lay down the qualifications (section 51 (1) :

> *"(1) A person shall not be qualified to be nominated or elected as a member of the Parliament unless that person—*
>
> *(a) is a citizen of the Republic who at the time of nomination has attained the age of twenty-one years;*
>
> *(b) is able to speak and to read the English language well enough to take an active part in the proceedings of Parliament; and*
>
> *(c) is registered as a voter in a constituency."*

Secondly, section 51 (2) the section creates disqualifications:

> *"(2) Notwithstanding subsection (1), no person shall be qualified to be nominated or elected as a member of Parliament who—*
>
> *(a) owes allegiance to a foreign country;*
>
> *(b) is, under any law in force in the Republic, adjudged or otherwise declared to be mentally incompetent;*
>
> *(c) has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude;*
>
> *(d) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in the Republic;*
>
> *(e) holds, or acts, in any public office or appointment, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment or where that person resigns from that office or appointment in order to stand;*
>
> *(f) belongs to, and is serving in the Defence Force of Malawi or the Malawi Police Service; and*
>
> *(g) has, within the last seven years, been convicted by a competent court of any violation of any law relating to election of the President or election of members of Parliament or local government elections."*

Finally the section 51 (2) (e) and (g) create exceptions. The secret is to ask the right questions in the right sequence and at the right time. One does not start with the disqualifications or the exception. The resignation question is the last question. One faced, as the Returning Officer was, with any candidate who may be ineligible for holding or acting in a public office must go through the following six steps deliberately and deliberatively, ensuring that correct questions are asked at the right time.

Stage 1: Does the candidate qualify

The first question to ask, therefore, is whether a candidate qualifies under section 51 (1) of the Constitution with the result that if the candidate does not qualify the candidate must be regarded ineligible and if the candidate qualifies the candidate must be regarded eligible. Where one does not qualify at all it is unnecessary to inquire of the candidate about the disqualifications and exceptions in section 51 (2). Dr Kabwila was not bridled with any problems in section 51 (1) and was consequently eligible.

Stage 2: Does the Candidate have disqualifications

Once a candidate qualifies under section 51 (1) the next question to ask is whether the candidate has any disqualifications in section 51 (2) of the Constitution with the result that if there are no disqualifications the candidate is eligible and that if the candidate has disqualifications the candidate is ineligible. Dr. Kabwila was not shown to have been convicted at all. It is unnecessary, therefore, to consider this aspect. Dr. Kabwila, however, is or was in public office and, therefore, has/had a disqualification under section 51 (2) (e).

Stage 3: Was or is the Candidate in Public office

Where the disqualification is that one holds or acts in a public office or appointment the next question is whether the candidate is or was in public office with the result that if the candidate was or is not in public office the candidate is eligible for election and that if the candidate is in public office the candidate is ineligible. The question

here is whether Dr. Kabwila, a member of the academic staff of a public university is or was in public office. There are two decisions of the Supreme Court of the Philippines and many authoritative works on the matter which I consider later.

The matter raised in this case is not academic because of two decisions of the Supreme Court one suggesting that it is only offices that are designated as public offices in the Constitution that are public office. In *The President of Malawi and Speaker of National Assembly v R.B. Kachere & Others*

> *"This is an ingenuous way of interpreting the Constitution. I have indicated earlier on the meanings attached to the words "President" and "public officer" by the General Interpretation Act. Applying the definition to the issues before us, there is no reason why we should construe the words "President" to mean also a public officer. Even in the present Constitution a "public officer" has been designated by the Constitution itself and there is no provision in the Constitution which says the President is a public officer. In the present Constitution, where a public office is created, the provision creating that office clearly stipulates that, that office is a public office. For example, sections 99, 154 and 163 of the Constitution clearly stipulate that the DPP's, Inspector General's and Prison Commissioner's offices respectively are public offices and, therefore, the holders of these offices are public officers. Similarly, the offices of a Minister, Deputy Minister, the Chief Justice, Judges and members of the Civil service Commission, for example, are not public officers in terms of the Constitution, although these officers perform functions of a public nature."*

This decision would let many off the hook, Board Members of constitutional institutions like the Reserve Bank (section 185 (2)0, Chairmen of boards in statutory bodies (section139 (1) and (2)), who come in the Chapter of Civil Servants (section 194), Law Commissioner (section133 (a)) Local Government (section 146), Local Government service (section 147 (2) and (3)), Local Government Finance Committee (section 151), then Chairman and Members of the Compensation Tribunal (section 139 (1) and (2)), to name a few. Curiously, it would exclude civil servants, except for certain civil servants who have been designated public officers; nowhere in the Constitution is the office in the civil service declared a public office. This decision was *per in curium* the then sections 40 (3) and 94 (3) (e) of Constitution.

What did the Supreme Court actually decide?

The second decision, *Nseula v Attorney General and Another*, where the Supreme Court, in interpreting the Constitution, restricted the meaning of the words "public office" to "a public office in the civil service." Justice Tembo, who in (2014) Miscellaneous Petition No 5 (HC) (PR) (unreported), proceeded on that *Nseula v Attorney General and Another* was binding on this court, was so persuaded.

Nseula v Attorney General and Another defines a public office in the Constitution as "a public office in the civil service." Despite the ambiguity, this definition leaves an uncertainty about what the words mean in section 51 (2) (e) in relation to a legislator who close to an election wants to compete in a bye-election in another constituency while holding to another constituency 51 (2) (e) and in section 94 (3) in relation to appointment as minister. Once we accept, as the Supreme Court of Appeal does and, of course as this Court in *Ngwale v Malawi Electoral Commission* does, that it is only public officers who are in the civil service who are targets of the prescription and proscription sections 51 (2) (e) and 94 (3), it is difficult, since section 183 already proscribes the civil service from direct political participation, who the section is intended to target. At worst, it is overkill of the civil service. At best it is using a gun to kill a fly! I do not think that the civil service deserves two provisions to prevent them from participating in political activity. In one sense, confining the meaning to what the Supreme Court said would release many who should really be the target of this proscription. There are many offices created in the Constitution that are by definition public offices and not public offices in the civil service in the manner described by this court in *Ngwale v Malawi Electoral Commission*: Board Members of constitutional institutions like the Reserve Bank (section 185 (2), Chairmen of boards in statutory bodies (section139 (1) and (2)), who come in the Chapter of Civil Servants (section 194), Law Commissioner (section133 (a)) Local Government (section 146), Local Government service (section 147 (2) and (3)), Local Government Finance Committee (section 151), then Chairman and Members of the Compensation Tribunal (section 139 (1) and (2)), to name a few. Certainly, teleologically, these should be

caught by section 51 (2) (e) and 94 (3) of the Constitution. The Supreme Court decision has no explanation for why these should be excluded if they, unlike ministers and deputy ministers, are not in the civil service.

This Court, of course, is not bound by Supreme Court of Appeal decisions that are *per in curium.* Equally, this Court is not bound by decisions of courts with concurrent jurisdiction. This Court, on principles of comity, can only depart from a decision of the same Court at the peril of reasons. Tembo J in *Electoral Commission v Ngwale* relied on the *ratio decidendi* of the Supreme Court's decision in *Nseula v Attorney General*:

> *"We have considered the Constitution as a whole and have looked at the use of the words 'public office' where it appears in several sections. We are satisfied having regard to the tradition and usage that have been given to the meaning of the words 'public office' the interpretation which should be given to its use in the Constitution is strict sense of 'public office in the civil service." [Emphasis]*

Reading this statement, it will be seen that the Supreme Court makes a subtle distinction between 'a public office that is in [within] the civil service' and 'a public office that is out of [without] the civil service.' Public offices in (within) and out (without) the civil service, by the Supreme Court statement, are both 'public offices. Up to that point the Supreme Court is not in the statement defining the words 'public office'. It means that the words 'public office' must be defined in their ordinary meaning in order to ascertain whether the offices in the civil service are public officers for purposes of the Constitution. The Supreme Court then isolates a public office that is meant in the Constitution: this *in strict sensu* is a "public office in the civil service."

From this statement, when one considers whether, somebody is disqualified on account of holding or acting in a public office, the approach must be dualistic, not monolithic. A monolithic question is, is Dr Kabwila a public servant? The answers are 'yes' and 'no' with the result that, if the answer is yes, Dr Kabwila is disqualified and, if the answer is No, Dr Kabwila is not disqualified. Tembo J concludes as follows:

> "*This Court concludes in agreement with both the respondent and the Malawi Electoral Commission that it is bound to find that the words public office when used in the Constitution connotes public office in the civil service as defined by the Supreme Court of Appeal in its decision that has binding effect on this Court.*

The next statement approaches the matter monolithically:

> "*The next question then is whether the respondent, a university lecturer, is a person in the civil service. That question would best be answered by defining what is the civil service that the Malawi Supreme Court of Appeal referred to, given that the Supreme Court did not define the words as rightly observed by the respondent and the Electoral Commission?"*

A monolithic approach is right where the Supreme Court has defined the words 'public office' to mean, omitting the 'words 'public', 'an office in the civil service.' The Supreme Court never defined the words 'public office' that way. The Supreme Court defined the words 'public office' to mean a 'public office in the civil service. The statement has the following implications: there are public offices that are not in the civil service; and, there are certain offices in the civil service that are not public offices for purposes of the Constitution.

The monolithic approach is strange to the Supreme Court's decision in *Nseula v Attorney General and Another*. It leads to a definition of the words 'public office' to mean civil service so that if you are not a civil servant, for example, you are Chairman of the Civil service Commission or a Board member of a statutory board, you are not in public office result. The Supreme Court from the statement analyzed never intended such a conclusion. Such a conclusion implies that all public offices are civil service offices, this as we see shortly, is not the case. Conversely, it means that all public offices in the Constitution are civil service offices, again this is not true. What is true is that all civil service positions are public offices. The converse is not true: all public offices are civil service offices.

The Supreme Court recognizes that not all public offices are civil service. Since the test in section 51 (2) (e) is whether you are in public office (not whether you are in the civil service), according to the Supreme Court's in *Nseula v Attorney General and Another*, there must be two questions. The first question to ask is whether somebody

is in 'public office' that is why the Supreme Court says the office must be a public office in the first place in the clause 'public office in the civil service.' The consequence of this question is so that if one is not in the public office in the general sense is *cadit questio*. If one is in a public office, the second question is whether one is in the 'civil service.' If, according to the Supreme Court, one is in a public office and one is also a civil servant, then he is in public office for purposes of the Constitution and is ineligible under section 51 (2) (e). Conversely, if you are in a public office which is not in the civil service, you are not in public office and you are eligible under section 51 (2) (e). The upshot is that you can be in public office and not be a civil servant. According to *Nseula v Attorney General and Another*, if you are a public officer who is not in the civil service, you are safe. The Supreme Court's formulation was to exclude Ministers and legislators who clearly were in public office. The formulation demonstrates that not all public offices are civil service. One, therefore, having concluded that a person is in public office must answer the next question which is whether that public officer is in the civil service. The formulation creates a problem of burden of proof. Based on the Supreme Court's decision, faced with academic staff in state and national universities, the Court has to ask whether it is public office and a public office in the civil service.

As seen earlier, the inclusion of the word public in the statement public office in the civil service' could mean many things. It would mean that even within the civil service, there could be offices that are not public offices. Just as it can mean that there are public officers who are not civil servants. It can also mean that all civil servants are in public office. That is possible depending on how you define 'civil service.' For, if civil service is used just to distinguish civil service from military service, elected and appointive positions in government service would be civil service. On the other hand, in relation to government, the word civil service is used to distinguish it from other holders of public office who are not government employee, namely, president ministers and legislators. Among employees, the term civil service is restricted to central government employees. Sometimes among employees, the word connotes, apart from military service, the whole corpus of employees of government other than judges and (sometimes) the police. All these permutations are the mosaic of a broader concept.

Judicial statements *in curium* and *ex cathedra* are not expected to be treated and interpreted as statutory provisions. It is never the intention of any judicial officer when laying broad statements of law which constitute the basis of a decision that the Judge's particular diction or choice of diction would undergo the rigorous and necessary principles and rules we ascribe to statutory construction or interpretation. Statutes are a different set of laws where each word must count and matter and not be used in a manner that it will mislead the populace. Judgments that judges write are written broadly and generally in general language as to convey how we came to a particular conclusion. It should be rare indeed when each word a Judge uses is given treatment like was given by this Court to the words 'civil service' used by the Supreme Court of Appeal. As it turned out, this Court ended defining words upon words. The Court chose where to stop. It stopped at where one would have asked does an institution have to be a department in order to belong to the civil service? What is a department of a ministry? There would have been no doubt in taking judicial notice that a public university, namely, University of Malawi, is in the Department of Higher Education in the Ministry of Education, Science and Technology and is, under section 25 (1) (a) of the University of Malawi Act, funded by Parliament through the Ministry of Education, Science and Technology. As Mr. F Ng'ambi observes, in his article, 'Malawi Effective Delivery of Public Education Service' (http://www.afrimap.org/english/images/report/Afrimap%20Malawi%20web-ready.pdf)

> *"At the university level, the University of Malawi and the University of Mzuzu provided public university education to about 7 972 students in 2008.8 These universities are regulated by an Act of Parliament, making them autonomous in operation, though they are overseen by the MoEST Department of Higher Education"*

Indeed, by defining the words 'public office' in another concept 'civil service' equally needing definition, the Supreme Court raises more questions than answers. It is unclear whether the Supreme Court meant 'civil service' generally in which case, searching for a dictionary meaning, however inadequate, may be apposite. The Supreme Court probably meant the sense in which it is used in the Constitution. That is not very clear either. The civil/public/service/office conundrum can be problematic. Here is a World Bank report:

> *"The public sector comprises a range of employment regimes. Unfortunately, there is no standard definition of civil servant or civil service. Arrangements vary between countries, though generally the civil service constitutes a distinct body of staff within the public sector. (In other words, there are often numerous groups public employees in addition to civil servants.)*
>
> *The essence of civil servant status is that the legal basis for employment -- the laws and regulations that shape the nature of employment contracts -- is different from that found elsewhere in the economy as defined by the general labor law. It also is generally different from that found elsewhere in the public sector, such as in the health or education sectors or in state-owned enterprises."*

It concludes:

> *"These are generalizations, not absolutes. There are many exceptions. For example, in France and Germany, both teachers and doctors are subjects to the civil service laws. Generally, however, civil service legislation is more complex than the legal arrangements governing employment in other sectors. This is because civil servants are not simply employees of the state; they also have a constitutional role. The intent of civil service legislation is to balance the requirement these employees be responsive to the government of the day, with the parallel requirement that they respect and maintain state institutions over time."*(http://www1.worldbank.org/publicsector/pe/PEAM_Who%20and%20What%20is%20a%20Civ%20Servant.doc)

Moreover, in relation to Academic staff in public or national universities, administrative or academic, whether they are civil servants or not vary from one legal system to another. A short search of authoritative writers will establish the point. This is a comment about the position in Ireland:

> *"Job security is generally quite high for those that obtain permanent contracts. About 80% of the academic staff in Ireland hold permanent tenured positions. All full time academic staff are civil servants and tenured in the sense that they cannot be fired without a serious cause, such as incompetence or outrageous conduct. This is very different from the systems of the UK and the US. For example, in the UK only about 55% hold permanent contracts and there is no tenure. The academic staff who are not protected by tenure are those who are in part time or temporary employment. In recent years, there has been an increase in the numbers of academics who are employed on non-permanent conditions.* (*http://www.eui.eu/ProgrammesAndFellowships/AcademicCareersObservatory/AcademicCareersbyCountry/Ireland.aspx*)

José-Ginés Mora in 'Trends in the Management of Human Resources in Higher Education, Stimulating Productivity of Academic Staff,' IMHE-OECD, Paris, 25th -26th August 2005, reports that Staff: "Professors and most non-academic staff have a civil servant status. They are members of national bodies: same duties and salaries everywhere." (http://www.oecd.org/edu/imhe/35332587.pdf). In all this maze and in circumstances like the present, the Supreme Court of the Philippines concludes that academic staff are 'government employees', civil servants. In *Civil service Commission v Court of Appeals and Others* GR No. 176162, October 9, 2012, the Philippines Supreme Court, referring to *Civil service Commission v Sojor* (GR NO 168766, May 22, 2012), said:

> *"Also noteworthy is the fact that the complainants before the CSC in Sojor were faculty members of a state university and were, thus, government employees."*

In this sense, a member of academic staff, is much like the Supreme Court said, "a public office in the civil service." The Philippines Supreme Court looks at academic staff from the panorama of employees and government, a point this court considers in detail. There is no difference between my conclusion and the Supreme Court decision in *Nseula v Attorney General*. Accepting the dualistic approach of the Supreme Court, academic staff in public universities is in public office. Academic staff, as public office, must be, according to the Supreme Court, in the civil service, however, in order for them to be exempt under section 193 (3) of the Constitution.

Different rules and regulations govern different cadres of the Civil Service

One argument pursued vehemently for Dr. Kabwila is that academic staff in a state university is not civil service because it is not governed by regulations that govern civil servants in (central) government, the Public Service Act. Tembo J, although the matter was raised by Counsel, did not decide on it. On the reading of the judgment as a whole, he probably agreed with the argument. Tembo J in *Electoral Commission v Ngwale* then said:

> *"The immediate foregoing conclusion is supported in this case, by the scenario submitted on by respondent, that the Civil service Commission which has jurisdiction over the civil service in terms of section 187 of the Constitution does not have authority over the University of Malawi which is governed by the Council of the University under the University of Malawi Act."*

Kalaile JA was likeminded in *President of Malawi and the Speaker v R.B. Kachere*. There is probably a misconception here which, as we see later, led to the problems created in the Malawi Supreme Court. That misconception relates to two concepts in the executive branch of government. The functions of the Executive Branch are spelled out in section 7 of the Constitution. That section defines the dual scope of the Executive Branch of government: initiation of policies and legislation, on the one hand, and implementation (execution), on the other:

> *"The executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution".*

There is evidence of a drafter's error. The section states that the executive shall be responsible for the initiation of policies and legislation. Certainly, policies have to be implemented too. In the implementation the drafter only refers to laws. The assumption cannot be that all policies end up as legislation, they do not. The drafter should have said implementation of laws and policies. There is inevitability that policies will be implemented. To this Court, this is, as the Supreme Court of India observed in *Union of India v. Dharmendra Textile Processors*, (2008) 306 ITR 2770, a true *casus omissus* by either a drafter's inadvertence or on the principle *quod enim semel aut bis existit praetereunt legislatores*. Consequently, policies will be implemented. Whatever wants in section 7 is adumbrated in section 193 (3) which, together with section 7, support the distinction which this Court wants to make:

> *"No Government or political party shall cause any civil servant acting in that behalf to exercise functions, powers or duties for the purposes of promoting or undermining the interest or affairs of any political party or individual member of that party, nor shall any civil servant acting in that behalf promote or undermine any political party or member of that party, save as is consistent with the provisions in this section".*

The scope of the Civil service

These two sections create a dual function of the executive branch to which the Constitution creates two aspects of the institutions of the executive branch. The Executive branch is responsible for formulation of policies and laws, on the one hand, and implementation/administration/execution of laws and policies, on the other. The Constitution creates the executive branch of government responsible for formulation and initiation of policies in sections 78 to 102 for central government and local government in sections 146 to 151. The implementation or execution of laws and policies can scarcely be implemented by the few who are responsible for formulation. The Constitution in sections 186 to 194 creates a corpus of employees, known as civil service, to perform that function of government relating to execution/implementation/administration of laws and policies. The concept of the civil service, therefore, is, as distinct from the armed service, refers to a corpus of career servants who implement, administer or execute the policies and laws which that branch of the executive responsible for creating them makes. This is the sense in which the concept of civil service is used in the Constitution and broadly

These career public servants, variously called, serve not only the executive branch, they serve the judicial and legislative branches. They exist in various forms: police, prison officials, central government employees, local government employees and employees in national and state institutions. All these belong to the civil service in this general sense: the civilian wing of the Executive branch of government that implements and executes policies and law general government makess. The Constitution recognises these public officers or civil servants and creates different ways of recruitment by different commissions: the police, judicial and civil service commissions, to name a few. To the extent that the civil service is a generic term, the framers of the Constitution extricated other categories of civil servants from the purview of the civil service commission. The Constitution in section 189 recognizes the profundity of the concept of civil service as a concept and extricates other aspects of the civil service that should not be governed by the Civil service Commission created in section 186 of the Constitution. Section 189 provides:

> *"(1) This Chapter shall not apply where this Constitution has otherwise provided for the appointment or removal of a civil servant or other public appointee, or to appointments that are regulated by the Judicial Service Commission, the Police*

Service Commission, the Prisons Service Commission, by provisions relating to appointments in the Defence Force of Malawi nor shall it apply to the following offices—

(a) the Chief Justice, the Attorney General and Director of Public Prosecutions;

(b) such personal staff of the President as he or she shall determine subject to approval of the Public Appointments Committee or as an Act of Parliament may allow;

(c) the Secretary to the Cabinet;

(d) Ambassadors, High Commissioners and other principal diplomatic staff, within the meaning of section 190;

(e) the High Command of the Defence Force;

(f) the Inspector General of Police;

(g) the Chief Commissioner of Prisons;

(h) the office of a Principal Secretary;

(i) such other public office of sufficient seniority as may be prescribed by an Act of Parliament.

(2) Unless otherwise provided by this Constitution or by an Act of Parliament, the power to appoint persons to the public offices specified in paragraphs (a) to (i) of subsection (1) shall vest in the President.

(3) In any case where the Civil service Commission, the President or any other authority has the power of appointment of the Clerk or the Clerk-Assistant to the National Assembly, before exercising that power, the Commission, the President or any such other authority shall consult the Speaker of the National Assembly".

The removal of these other civil servants, in the general sense from the purview of the Civil service Commission is constitutional and functional. The hallmark of the judiciary is its independence and impartiality. The Constitution already provides for removal of judicial officers. The nature of prison functions are such that a general civil service commission may be overburdened overwhelmed and stalled.

A similar corpus of career public servants has not been created for the legislature. The Constitution only refers to the office of Clerk of Parliament in section 189 (3). The assumption must be that a similar corpus for the legislature must be available in the general service. If, as some may contend, these are not civil servants, why would the Constitution want to exclude them in that part of the Constitution? One reason would be that because they are not civil servants in the first place. That is not convincing because where the Constitution covers those within the purview of the Judicial, Police Prison, to name a few, there is no negation of other Commissions, let alone the Civil service Commission. The reason would not explain why certain clearly civil service positions, Principal Secretaries and the Secretary to the President and Cabinet, are excluded from the Civil service Commission.

The explanation might be that because they are designated 'public offices.' The fact that certain offices have been designated public office does not mean that they are not civil service in the specific or general sense. These civil service offices are designated public in the Constitution mostly because they need direct appointment by the President, are fixed in duration and can terminate at the pleasure of the president or afflux of time. In certain cases, certain functions can be performed by private institutions as well as public institutions, Attorney General, prisons, police and prosecution. Historically, the office of Attorney General was not a public office; private lawyers were Attorney General. Under our laws, private prosecutions are legal and constitutional. The term public office there just means that the function will be assumed by a public office or entity. There is nothing in the words that suggests that those in public office are not civil service.

Section 189 actually represents or samples the corpus of government employees, the civil service. It is only those civil servants, in the general sense, represented. The implication of section 189 (1) is that although, the Principal Secretary, for example, is a civil servant, to the extent that the Principal Secretary's appointment is by other than the Civil service Commission, since power to appoint includes power to dismiss, the Civil service Commission, cannot act. There is nothing in the section to suggest that other official mentioned there are not civil

servants in the constitutional sense or that civil servants are not in public office. Section 194 adds another cadre of civil service in the general sense (Chairs of boards, commissions, councils, etc.)

The power to create civil service is with general government

Speaking generally, the Constitution only provides for the existence of the office of the civil service and principles which should govern the civil service generally. The actual positions of the civil service are not for the Constitution to create. Creation of civil service positions is with general government, the executive, local government, the legislature and the judiciary. Once general government decides on the civil service required, the functions of the Civil service Commission in sections 186 to 188 arise. The scope and purview of the Civil service Commission is not unlimited. Section 186 sets two limitations: the Constitution and an Act of Parliament.

> *"There shall be a Civil service Commission which shall have the powers and functions conferred upon it by this Constitution or any Act of Parliament and which shall consist of a chairperson, deputy chairperson and not less than six nor more than ten other members".*

This is clear from reading section 187 (1) of the Constitution; the Civil service is only responsible to appoint those "who hold or act in the Civil service and can, "subject to this Constitution and any Act of Parliament" exercise disciplinary control over persons holding or acting in any office to "which this Chapter applies."The Constitution has defined the functions of the Civil service Commission. Section 187 provides:

> *"(1) Subject to this Constitution, power to appoint persons to hold or act in offices in the civil service, including the power to confirm appointments, and to remove such persons from office shall vest in the Civil service Commission.*
>
> *(2) The Civil service Commission shall, subject to this Constitution and any Act of Parliament, exercise disciplinary control over persons holding or acting in any office to which this Chapter applies".*

The Constitution has also demarcated beyond which the Civil service Commission has no business. Section 189 provides:

> *"(1) This Chapter shall not apply where this Constitution has otherwise provided for the appointment or removal of a civil servant or other public appointee, or to appointments that are regulated by the Judicial Service Commission, the Police Service Commission, the Prisons Service Commission, by provisions relating to appointments in the Defence Force of Malawi nor shall it apply to the following offices—*
>
> *(a) the Chief Justice, the Attorney General and Director of Public Prosecutions;*
>
> *(b) such personal staff of the President as he or she shall determine subject to approval of the Public Appointments Committee or as an Act of Parliament may allow;*
>
> *(c) the Secretary to the Cabinet;*
>
> *(d) Ambassadors, High Commissioners and other principal diplomatic staff, within the meaning of section 190;*
>
> *(e) the High Command of the Defence Force;*
>
> *(f) the Inspector General of Police;*
>
> *(g) the Chief Commissioner of Prisons;*
>
> *(h) the office of a Principal Secretary;*
>
> *(i) such other public office of sufficient seniority as may be prescribed by an Act of Parliament.*
>
> *(2) Unless otherwise provided by this Constitution or by an Act of Parliament, the power to appoint persons to the public offices specified in paragraphs (a) to (i) of subsection (1) shall vest in the President.*

> *(3) In any case where the Civil service Commission, the President or any other authority has the power of appointment of the Clerk or the Clerk-Assistant to the National Assembly, before exercising that power, the Commission, the President or any such other authority shall consult the Speaker of the National Assembly".*

The residual functions and limitations are to be prescribed by any Act of Parliament. What these Acts prescribe or proscribe is part of the civil service discourse beyond and not in the dictionary sense.

The Statutory Civil service

The power reserved in these constitutional provisions for legislation by Parliament is substantive and adjectival. It is substantive because it must be that an Act of Parliament may create many cadres of civil service for different aspects of government. It is also adjectival in the sense that the Act could prescribe different procedures and institution for different cadres of the civil service. Based on these constitutional principles we have the Government Teaching Service Commission (section 3 of the Government Teaching Service Commission Act), the Parliamentary Service Commission (section 5 of the Parliamentary Service Act), and Local Government Commission (section 9 of the Local Government Service Act). The legislature could actually not create such regulations and delegate that power to the institution it creates (Section 4 of the Ombudsman Act); Section 30 of the Human Rights Commission Act; Section 4 of the Law Commissions Act; Section 3 of the Judicature Administration Act; Section 8 of the Malawi Book Service Act; Schedule to Malawi National Examination Board Act; Schedule to Council for Herbarium and Botanic Gardens of Malawi; Section 9 (b) (i) and (ii) of the Malawi Institute of Management; section 21 (1) of the Science and Technology Act; Section 13 of the Malawi Housing Act; to name a few. This is what has happened in case of the University of Malawi Act. Section 10 (1) (k) provides:

> *"(1) The Council shall be the governing body of the University and shall be responsible for the management and administration of the University and of its property and revenues, and, shall exercise general control and supervision over all the affairs of the University including its relations with the public, and, without prejudice to the generality of the foregoing, the functions and powers of the Council shall include the following powers and functions—*
>
> *after consultation with the Senate, to determine terms of service and general conditions relating to the employment of academic staff, and to establish, disestablish or otherwise make or discontinue financial provision for appointments to such posts;"*

A provision of the same number and words is in the Mzuzu University Act. Where, therefore, like here, the legislature has through legislation created another cadre of the civil service and delegated that cadre of the Civil service to create its own regulations or conditions of service, that cadre of civil service still remains a civil service in this general sense. It does not cease to be a civil service simply because it has different rules or that another cadre of the civil service is governed by different rules. The critical question is whether the cadre of Civil service has been created by general government as a way of implementing, administering and executing its policies and laws. Consequently, the distinction, canvassed for Dr. Kabwila vehemently and vociferously, that academic staff are not civil servants because academic staff are not governed by regulations and controls of central government is inane.

The University of Malawi implements government policy and law on higher education

In relation to education, it is the policy of Government to provide higher education in Malawi. For many years missionaries sponsored higher education by sending our able citizens outside the country, in Africa or elsewhere. It was government policy to provide higher education locally since the University of Malawi. Over the years, there has been the College of Medicine. More recently there has been Mzuzu University. To advance these policy initiatives the government has passed the University of Malawi Act and Mzuzu University Act. The University of Malawi Act creates a cadre of civil servants responsible for the implementation of this government policy on higher education. The University of Malawi Act empowers the University Council and Senate to create a cadre for Civil service, academic or administrative, to implement its policies. The University of Malawi Act empowers the University Council and the Senate to promulgate and implement regulations and conditions for this cadre of the Civil service. If the words "Civil service" are understood in this legal, constitutional sense, it is undeniable that academic staff in public universities is in civil service and in public office.

The Supreme Court's decision on public office

The Supreme Court in the statement often quoted here understood the words 'civil service' in this general sense and not in the dictionary sense because of the issues that arose in *Nseula v Attorney General sub nomino.* The issue that arose in that case was whether Fred Nseula, who was a Member of Parliament and later appointed minister, crossed the floor when, on the evidence, he attended and shouted slogans, wearing party insignia, had crossed the floor. I, sitting at a court of first instances, had to deal with all legal matters, even if not raised by Counsel on the facts presented. In doing so I was following what every Judge would do. It would be an affront to justice, where, on the facts, legal matters are exigent on determination of the matter, for a Judge to ignore them or accept what Counsel have submitted if Counsel have overlooked the matter or are in fact agreed on a wrong principle or a legal position that overlooks what the Judge, on the facts, sees. Pertinent to the matter before me at the court of first instances was not so much section 51 (2) (e). Two provisions were pertinent: the first related to when the seat in the National Assembly became vacant on account of a member of the National Assembly assuming a public office; the second related to limitations on appointment of a minister in section 94 (3) (e) of the Constitution.

Sub nomino I took the view that the words 'public office as used in the Constitution was broad enough to cover public offices, however, defined, with the consequence that legislators and the President as elected holders of public office, and ministers who are holders of public office by appointment would be caught by the limitations or impediments. The Supreme Court concluded that the sections should not have these consequences on ministers appointed from the house. The reasoning of the Supreme Court was that the words "public office" in the Constitution, despite that presidents, ministers, legislators and councilors are in public office, in the Constitution do not refer to public offices of that branch of government that is responsible for the formulation of policies. Rather the words "public office" deal with a public officer who, as employees, is in the civil service, hence one in public office was one who was "in a public office in the civil service", to distinguish one in a "public office that was not in the civil service."

The words "civil service" were used in the general sense described so as to exclude ministers and legislators from the implications of the words "public office, in the Constitution. The Supreme Court of Appeal in not defining the words "civil service" took the cue from the framers of the Constitution who, aware that the civil service in the manner described would, in space and time, come in all shapes and sizes, felt it unnecessary to define and circumscribe the concept of the "civil service". The Supreme Court therefore was looking, as it should have done, at an expanded and distended meaning of civil service not in the dictionary sense. It is because of this that the Philippines Supreme Court, in *Civil service Commission v Court of Appeals and Others,* accepting this general understanding, not the dictionary sense, of the civil service said academic staff are 'government employees', civil servants:

> *"Also noteworthy is the fact that the complainants before the CSC in Sojor were faculty members of a state university and were, thus, government employees."*

The Supreme Court's decision *President of Malawi and the Speaker v R.B. Kachere,* restricting the words 'public office' based on their mention in the Constitution, and *Nseula v Attorney General and Another* confining the words 'public office' to 'public office in the civil service," are *per in curium* the Constitution. Starting with the Kachere case, the Supreme Court, was not right to suggest that the words 'public office' had the constrictions they suggested. As we see later, its definition of public office would not have been the same had it read section 40 (3) of the Constitution as it was until the amendment to it in 2010. *President of Malawi and the Speaker v R.B. Kachere* was a unanimous decision of Chatsika, Mtegha and Kalaile JJA, where only Kalaile and Mtegha JJA gave reasoned opinions. Mtegha JA, said:

> *"This is an ingenuous way of interpreting the Constitution. I have indicated earlier on the meanings attached to the words "President" and "public officer" by the General Interpretation Act. Applying the definition to the issues before us, there is no reason why we should construe the word "President" to mean also a public officer. Even in the present Constitution a "public officer" has been designated by the Constitution itself and there is no provision in the Constitution which says the President is a public officer. In the present Constitution, where a public office is created, the provision creating that office clearly stipulates that, that office is a public office. For example, sections 99, 154 and 163 of the Constitution clearly stipulate that the DPP's, Inspector General's and Prison Commissioner's offices respectively are public offices and, therefore, the holders of these offices are public officers. Similarly, the offices of a Minister, Deputy Minister, the Chief Justice, Judges and members of the Civil service Commission, for example, are not public officers in terms of the Constitution, although these officers perform functions of a public nature. I see no reason why the*

> *courts should interpret these provisions widely as Mr Msisha is advocating. Applying the principles, the President is clearly not a public officer in the context of the Constitution*.**"**

Senior Counsel's argument, if I understood well, was that the President was, on the general definitions, in public office. He never, as the Justices of Appeal state, suggested that the word President means 'public officer.' On the second argument, the Supreme Court cannot have been laying the principle that 'public officers' are those designated as such. *Ex hypothesi*¸ members of the civil service are not public offices because the Constitution never designates them as public offices. It is clear from the Justice of Appeal that sections 40 (3) and 94 (3) (e) of the Constitution, as they then were, were never accounted. The Justice of Appeal never understood section 88(3)1 of the Constitution.

Kalaile J proceeds on similar approach. Equally, in his judgment, there is no reference to section 40 (3), 88 (3) or 94 (3) (e)as it was. He discusses other provisions which I will consider when reviewing the Nseula decision. Kalaile JA, said:

> *"It was argued by the learned Solicitor–General that the underlined words in section 2(1) of the General Interpretation Act emphasise that any of the listed definitions should be read and understood in their context. The solicitor general, further argued, in support of this point, that the Constitution states in section 98(5) that the office of the Attorney–General may either be the office of a Minister or may be a public office. This clearly shows that the office of the Attorney–General can be held by a politician or a civil servant. Another example cited by the solicitor general is that of section 94(3)(e) of the Constitution which relates to the appointment of Ministers. That section provides that notwithstanding subsection (2), no person shall be qualified to be appointed as a Minister or Deputy Minister who holds or acts in any public office or appointment, except where this Constitution explicitly provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment, or where that person resigns from that office in order to stand.*
>
> *The words "public office" do not appear anywhere in the definition of the office of President or the speaker. However, it is interesting to note that the office of Inspector General, the Chief Commissioner of Prisons, the Ombudsman, the Director of Public Prosecutions and Auditor General are specifically designated "public offices" under the Constitution, where as those of the State President, speaker of the national assembly, Chief Justice and Judges of the High Court and Supreme Court of Appeal are not so designated, and, furthermore the latter have immunity for anything performed in the course of official duties. This occurrence did not happen by inadvertence, but was so made on sound policy grounds to avoid the kind of litigation now before us.*
>
> *Clearly, the Constitution draws a distinction between political posts held by those who are elected under constitutional provisions as well as the Parliamentary and Presidential Elections Act from persons who hold their posts pursuant to the provisions of the Public Service Act (Act No. 19 of 1994).*
>
> *Furthermore, the Solicitor–General brought to the attention of this Court the provisions of section 51(2)(e) of the Constitution which lays down that no person shall be qualified to be nominated or elected as a member of Parliament who holds, or acts, in any public office or appointment, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that appointment or where that person resigns from that office in order to stand.*
>
> *This is yet another manifestation of the clear intention of the framers of the Constitution's intention to draw a line between public offices from political office holders."*

The Constitution has not defined the words 'President' or 'Speaker.' The Constitution does make a difference between the 'policy,' as opposed to political wing of government. It does not make that difference as clearly as the Justice of Appeal suggests. Certainly, it does not make that difference by using the words 'public office' for, as we have seen, the civil service has not been designated as a public office. The Constitution, therefore, is not making a difference between political offices and another. As we have seen the Public Service Act targets some aspect of the Civil service, not all. Reference to it brings more cloud than light.

Purpose of Section 98 (5)

In so far as the Supreme Court of Appeal never considered other pertinent constitutional provisions, the case cannot bind the Supreme Court or this Court. The Supreme Court in *Nseula v Attorney General*, however, relied on *President of Malawi and the Speaker v R.B. Kachere* heavily. That case was not brought to the attention of the Court *sub nomino.* I sat at *nius prius*. I would certainly never have deliberately overlooked a Supreme Court decision brought to my attention. The Supreme Court, however, as it did in subsequent cases, stood by its decision.

The decision in *Nseula v Attorney General* was unanimous and delivered by Banda C.J. The Chief Justice goes quite some way considering all provisions considered *Sub nomino.* The Chief Justice never considered section 40 (3) of the Constitution. It is not necessary to consider all the sections referred to in the judgment for there is one thread running among them all which I consider later. I need just to consider two sections which have cause intrigue, one of which is discussed vaguely by the two decisions of the Supreme Court. The first one is section 98 (5):

> *"The office of Attorney-General may either be the office of a Minister or may be a public office."*

The Chief Justice thought that the effect of this provision is that the office of Minister is not a public office. Like Kalaile J in *President of Malawi and the Speaker v R.B. Kachere,* the Chief Justice thought that this section is distinguishing a political office from that of public office so that the word 'public office' must mean an office in the civil service. The conclusion is *Non sequiter.* The conclusion can only be correct if the two words are opposites. Where the two words are not opposites, there has to be further inquiry. That is why in the court below, the Court below used the give me a car or Benz analogy. A man who says give me a Benz saloon or a car is not thereby suggesting a Benz saloon is not a car. What he says, on close examination, is that find me a Benz and, if you do not find one, bring me a car, any car, anyway. There is nothing in that statement that suggests that a Minister is not in public office. The Supreme Court should have looked at that provision for what it wanted to achieve. Banda C.J. said:

> *Section 75(2):*
>
> *"A person shall not be qualified to hold the office of a member of the Electoral Commission if that person is a Minister, Deputy Minister or a Member of Parliament or a person holding a public office."*
>
> *Section 98(5) provides:*
>
> *"The office of Attorney-General may either be the office of a Minister or may be a public office."*
>
> *We find the provisions of section 75(2) and section 98(5) of the Constitution rather instructive. It is our view that section 98(5) makes very clear that the office of the Attorney-General can either be the office of a Minister and therefore political or it can be a public office. "Public office" in this context can only mean the office in the civil service, thereby making a distinction between a political office and a civil service one. Similarly, section 75(2) makes a distinction between a political office and civil service office. The learned Judge stated that the use of the word "public office" in this section was an example of the application of the eiusdem generis rule. But that rule of general interpretation only applies where a particular class is spoken of first and general words follow. The class mentioned first is to be taken as the most comprehensive and the general words are treated as referring to matters eiusdem generis with such a class. In section 75(2), the word "public office" which would be descriptive of a class comes at the end of the general words. In these circumstances, we are satisfied that the eiusdem generis rule does not apply."*

That section achieves two things. First, the provision ensures that whoever is Attorney General is not a Minister as Attorney General and Attorney General as a public officer at the same time. Where the Attorney General doubles a position advice to government is compromised. Where the Minister is Attorney General, he should not hold that office as a public officer in the general sense of civil service, a government employee. The prohibition is for someone in another public office in the general sense and in the civil service sense to take the office of Attorney General in ministerial position. This is consistent with section 81 (3) that we come to shortly. The Chief Justice inference that public office in the section means public office in the civil service sense is *non sequiter.* If that is the case, the President would appoint a mayor, for example, to be attorney general while a mayor continues to serve in local government. The framers never intended that; they want anyone who is in public office, civil service, statutory body or local government not to ascend to the office of the Attorney General.

The second consequence is that section 98 (5) has the opposite effect of what the Chief Justice suggests. That section actually means that a Minister is in public office. To see the point, let us look at section 75(2) the Chief Justice discusses together with this section:

> *"A person shall not be qualified to hold the office of a member of the Electoral Commission if that person is a Minister, Deputy Minister or a Member of Parliament or a person holding a public office."*

What was said about section 98 (5) applies here. What I want to consider here is the stress or emphasis. In section 75 (2) without denying that Ministers, Deputy Ministers and Members of the National Assembly are in public office, the framers are stressing. The idea here is to remove all government officials. Notice that even a mayor, who is not a civil servant, is covered by the rule. No contrast this section with section 98 (5). The framers in that section are excluding other public officers like Members of Parliament, the President, councilors, Board members, civil servants in the general sense from becoming Attorney Generals. The consequence of section 98 (5) is that only Ministers or public officers in the general sense of the civil service.

Moreover, declaring the office of Attorney General as a public office is historical. In the United Kingdom historically, the Attorney General was a private citizen. It was only subsequently that the Attorney General was in public office. In a sense, section 98 (5) epitomizes the historical constitutional debate of a political Attorney General like the one raging in 'Reform of the Office of Attorney General,' House of Lords, Select Committee on the Constitution, 7th Report of Session 2007-2008. The section is therefore prescriptive rather than proscriptive.

Purpose of section 88 (3)

The Supreme Court never dealt with the point that labored the Court below which was that the words 'any other' in section 88 (3), unless inadvertently inserted, leave the President and Members of cabinet as public officers. Sitting at *nius prius* and appeal, I have often proceeded on the principle that statute drafters, and more so drafters of a Constitution, are more economical with words they use and, therefore, they do not use words unnecessarily; and they put unusual care to ensure that the words they use have weight and significance. The Chief Justice said:

> *"The lower court held that the provisions of section 88(3) were unambiguous in making the President and other members of the Cabinet public officers. We find some difficulty in following the judge's reasoning in coming to that conclusion, because we have searched in vain and neither section 88(3) nor any provision in the Constitution makes members of the Cabinet public officers. He has repeated that statement in his judgment on more than one occasion. Section 88(3) states:*
>
> *"The President and members of the Cabinet shall not hold any other public office and shall not perform remunerative work outside the duties of their office and shall, within three months from the date of election or appointment, as the case may be, fully disclose all of their assets, liabilities and business interests and those of their spouses, held by them or on their behalf as at that date; and unless Parliament otherwise prescribes by an Act of Parliament, such disclosure shall be made in a written document delivered to the Speaker."*

Curiously, in the Supreme Court of Appeal, without reading the record, concluded from a statement across the bar to the bench that Counsel had presented to the lower court the case of *President of Malawi and the Speaker v R.B. Kachere*. If the case had been referred to me, it would not have made any difference. In *President of Malawi and the Speaker v R.B. Kachere*, the Supreme Court of Appeal concluded that the President's office is not a public office, it is a political office. Fortunately or unfortunately, the Constitution does not create or describe offices as political office. There is no reason in law or in fact, however, why a political office cannot be a public office; there is no reason in law why a public office cannot be a political office. There are political offices which are public offices; there public offices that are political. There are, however, problems with the Supreme Court's conclusion, namely, meaning of the words 'public office in the civil service' the interpretation which should be given to their use in the Constitution is *in strict sensu* of 'public office in the civil service." The problems come from the premises for the conclusion. There are two premises: (a) considering the Constitution as a whole and (b) tradition and usage.

Public Office in Corresponding Statutes

The Supreme Court reasoned that the conclusion was reached from usage and tradition. One premise is usage and tradition. It is unclear what usage or tradition was played in aid. It is clear that the Supreme Court was acting *aliunde* the Constitution to find the meaning of the words "public office.' The Supreme Court was looking for usage of the words from other legislation and the common law within or without. Without the Jurisdiction the words 'public office' have a wider meaning and certainly used for offices which are not offices of employment, which is what civil service is, in government of remuneration based on merit and not favour or political affiliation. It is the

hallmark of the civil service that its members are recruited on merit and not favour or political affiliation. There is nowhere in decided cases where the words 'public office' have been defined only to include paid up employees of government appointed on merit. Reference will be made later to cases spanning three centuries and cases from other jurisdictions where the words have not by usage come to mean what the Supreme Court said.

If it be that usage meant how those words are used in different statutes, the Supreme Court should have gone no further than the Constitution of the Republic of Malawi 1966, the Penal Code and the General Interpretation Act. Section 2 of the General Interpretation Act defines the words 'public office' as:

"[A]ny office the holder of which is invested with duties of a public nature."

I am aware of what the Supreme Court of Appeal said in the *Kachere case* that the General Interpretation Act could not aid interpretation of a Statute. The Supreme Court, however, premised its ruling on usage. Section 3 of the Penal Code provides:

"person employed in the public service" means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely—

(a) any civil office including the office of President, the power of appointing a person to which or of removing from which is vested in the President or in a Minister or in any public Commission or Board; or

(b) any office to which a person is appointed or nominated by Act or by election; or

(c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either of the two last preceding paragraphs of this definition; or

(d) any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act; and the said term further includes—

(i) a member of a commission of inquiry appointed under or in pursuance of any Act;

(ii) any person employed to execute any process of a court, including a Traditional Court;

(iii) all persons employed in the armed forces or police force of the Republic;

(iv) all persons in the employment of any government department of the Republic;

(v) a person acting as a Minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnisation of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;

(vi) a person employed in the service of any Local Authority or of any board, Council, society or other authority, whether incorporated or otherwise, established by or under any Act, other than the Companies Act; Cap. 46:03

(vii) a person employed in any class of employment which may be specified as public service by the Minister by notice published in the Gazette;

(viii) a member of the National Assembly;

(ix) any Chief".

There was better evidence of usage of the term in the 1966 Constitution. *Sub nomino* the Court referred to section 98 (3) 1966 Constitution which clearly excluded the office of the President, the Speaker or the Deputy Speaker of the National Assembly, any Minister or Parliamentary Secretary, a member of the Assembly, a member of any Commission established by the Constitution. It may be useful to do what was note done in *Nseula v Attorney General sub nomino,* reintroduce the relevant provisions in section 98 of the Malawi Constitution 1966. Section 98 (1)of the Constitution of the Republic of Malawi 1966 defined the words 'public office' as "an office of emolument in the public service." The Republic of Malawi Constitution 1966 defined the words 'public service' in section 98

(1)as "public service" means, subject to the provisions of subsections (2) and (3), the service of the Government in a civil capacity. "Section 98 (2) of the 1966 Constitution provided:

> *"In this Constitution, unless the context otherwise requires, references to offices in the public service shall be construed as including references to the office of Justices of Appeal and Judges and to the office of Magistrate, and to the offices of members of the Malawi Police Force, being offices the emoluments attaching to which are paid directly out of moneys provided by Parliament".*

Section 98 (3) of the 1966 Constitution provided:

> *"In this Constitution, reference to an office in the public service shall not be construed as including references to the office of the President, the Speaker or the Deputy Speaker of the National Assembly, any Minister or Parliamentary Secretary, a member of the Assembly, a member of any Commission established by the Constitution."*

In the Court below in *Nseula v Attorney General* the Court below was conscious of these definitions. It reasoned that there was a sea change in the 1994 Constitution and, therefore, meaning of words in the repealed Constitution, even though they could aid in interpretation in the new Constitution, were subject to this novation. It concluded that this meaning could not have been brought into the 1966 Constitution. The Supreme Court did not specifically reverse the lower court on this point except may be by simply asserting that the meaning of the words have to be understood from usage and tradition. The Supreme Court, however, surely, much like the Court below, proceeded on that it could not easily bring the definitions in the 1966 Constitution.

Nseula v Attorney General and President of Malawi and the Speaker v R.B. Kachere are irreconcilable

One reason for concluding that the president is not a public office was that the Constitution did not designate the office of president as a public office. The reasoning was that the Constitution declared what public offices were and the office of president was not so declared. Curiously, the Supreme Court of Appeal did not reverse itself on this point in *Nseula v Attorney General and Another*. So much so that *Nseula v Attorney General and Another* was *per in curium* the decision in *President of Malawi and the Speaker v R.B. Kachere* in holding that the words 'public office' means civil service. Nowhere in the Constitution, except by inference, is the civil service designated a public office. If, as *President of Malawi and the Speaker v R.B. Kachere* suggest, a public office is one which has been designated as such, *Nseula v Attorney General and Another* cannot be reconciled in holding that a public office is one where a person is in a public office in the civil service where the Constitution has not designated an office in the civil service as a public office. This Court would be bound by the latest decision. The latter decision, however, is *per in curium*.

The Supreme Court of Appeal decisions have a fit problem

Specifically, the Supreme Court only "read' the constitutional provisions; the Supreme Court of Appeal did not in the judgment interpret the provisions in the Constitution where the words 'public office' were used. If the Supreme Court had tried to do that, there certainly was going to be a 'fit' problem in many sections of the Constitution. Section 88 (3), for example, would create an absurdity:

> *"The President and members of the Cabinet shall not hold any other public office and shall not perform remunerative work outside the duties of their office and shall, within three months from the date of election or appointment, as the case may be, fully disclose all of their assets, liabilities and business interests, and those of their spouses, held by them or on their behalf as at that date; and, unless Parliament otherwise prescribes by an Act of Parliament, such disclosure shall be made in a written document delivered to the Speaker of the National Assembly who shall immediately upon receipt deposit the document with such public office as may be specified in the Standing Orders of Parliament".*

The words 'any other' would have, if put in section 88 (3) of the Constitution, suggested that the President is a civil servant. That would be unusual. If *President of Malawi and the Speaker v R.B. Kachere* was what to go by, the President would be civil servant who is in political office. Poignantly, even without the use of the words 'other', now dropped from section 88 A (they remain in section 81(3) so that only the words 'any' remains, section 88 A)

would mean different levels of the civil service from clerk to the Secretary to the Office of the President. I do not see any reason in law or in fact why the framers of the Constitution in restricting people in public office for nomination or election to the National Assembly in section 51 (2) (e) or appointment to Minister in section 94 (3) (e) would have been targeting civil servants only. For in normal usage, ministers and members of parliament are not civil servants and civil servants are already excluded by the Constitution from holding a public office or involved in political activity compromising or undermining their impartiality. Use of the words 'public office' in the section 51 (2) (e), and indeed in many sections where it is used to exclude public officers holding or acting in public officer, was intended to haul more than civil servants. A contrary suggestion would result in Judges, councilors, mayors, policemen, members of the armed forces, to name a few, not being caught by the restrictions in sections 51 (2) (e). This would not only create an absurdity and the Constitution cannot be interpreted as to create absurdity. In *Civil service Commission v Court of Appeals and Others,* the Court said:

> *"It is a well-established rule that laws should be given a reasonable interpretation so as not to defeat the very purpose for which they were passed. As such, "a literal interpretation is to be rejected if it would be unjust or lead to absurd results."20 In Secretary of Justice v. Koruga,21 the Court emphasized this principle and cautioned us on the overzealous application of the plain meaning rule:*
>
> > *The general rule in construing words and phrases used in a statute is that in the absence of legislative intent to the contrary, they should be given their plain, ordinary, and common usage meaning. However, a literal interpretation of a statute is to be rejected if it will operate unjustly, lead to absurd results, or contract the evident meaning of the statute taken as a whole. After all, statutes should receive a sensible construction, such as will give effect to the legislative intention and so as to avoid an unjust or an absurd conclusion. Indeed, courts are not to give words meanings that would lead to absurd or unreasonable consequences."*

Besides, this would be a very restrictive and pedantic meaning and not concomitant with what the Supreme Court of Appeal had said earlier about interpreting a Constitution:

> *"Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation, avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. It is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution. In the Indian case of* Gapalan v State of Madras *[1950] SCR 88 at 109, this principle is stated in the following terms:*
>
> > *"The Constitution is a logical whole, each provision of which is an integral part thereof and it is, therefore, logically proper and indeed imperative to construe one part in the light of the provisions of the other parts."*
>
> *Such construction is imperative in our judgment because the true meaning of the words used and the intention of Parliament in any statute and particularly in a Constitution can best be properly understood if the Constitution is considered as a whole. It is a single document and every part of it must be considered as far as it is relevant in order to get the true meaning and intent of any part of the Constitution. The entire Constitution must be read as a whole without "one provision destroying the other but sustaining the other".*

A little background to the section may suffice. Under the 1966 Constitution the President's executive powers were absolute and tentacle like. Under section 8 (1) of the 1966 the executive power of the president was absolute:

> *"There shall be a President who shall be the Head of State, the supreme Executive authority of the Republic, and Commander-in-Chief of the Armed Forces."*

The President was meant to ignore and overlook advice, if he ever sought it or it was given. Section 8 (3) provided:

> *"Except as may otherwise be provided by an Act of Parliament, in the exercise of his functions the President shall act in his own discretion and shall not be obliged to follow advice tendered by any other person."*

Even the power the President had, in the proverbial prodigal son in the biblical story, to those who have more, more will be given, more power was given to the President. The President could be a Minister too. Section 54 provided:

> *"The President may, by his direction in writing, assign to himself or any Minister responsibility for any business of the government, including the administration of any department of the Government."*

Section 98 (1) of the 1966 Constitution defined a Minister:

> *"Minister means a Minister of the Government appointed by the President under the provisions of section 49 and 50 and includes the President when he is himself exercising the functions of a Minister under the provisions of this Constitution."*

Section 88 (3) undid all that. The President and the Ministers could not have another public office. In a stroke of a pen, the Supreme Court, in *Nseula v Attorney General* undid that with, as it is up to today, a President holding the office of a Minister.

There could have been a fit problem with section 94 (3) of the Constitution as it was at the time of the Supreme Court's decision in *Nseula v Attorney General.* A close reading of this section shows that it also referred to legislators as being in public office. The section read:

> "*Notwithstanding subsection (2), no person shall be qualified to be appointed as a Minister or Deputy Minister who ... holds or acts in any public office or appointment, except where this Constitution explicitly provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment, or where that person resigns form that office in order to stand."*

This section clearly shows that to substitute in this section the meaning "a public officer in the service" for the word 'public office' would cause a repugnancy. This would mean that civil servants, according to the Supreme Court's interpretation, are in for election. The section also stands for the proposition which was the lower court's that elected official, namely, legislators are in public office. The section supports the wider proposition which was the lower court's that the words 'public office' were supposed to go beyond the civil service. This section also supports the proposition which was the lower court's that the elected public officials targeted were not only legislators.

Before the Supreme Court's decision in *Nseula v Attorney General and Another*, the Law Commission released the 'Law Commission Technical Report on the Review of the Constitution.' The Report was not available to the Supreme Court and the report itself was released before the Supreme Court decision. Authoritative works of authors are sources of law; unfortunately, the report was unavailable to the Supreme Court. Section 51 has now been amended following the recommendation. There is now section 51 (3):

> *"For the purposes of subsection (2) (e), an appointment as a Minister or Deputy Minister in accordance with section 94 (1) shall not be construed to be an appointment to a public office or to be a public appointment".*

The Law Commission's recommendation that section 94 be amended so as to allow the President to appoint from the National Assembly never carried. Section 51 (3) of the Constitution is expressed as being 'for the purposes of subsection 2 (e).' Consequently, section 51 (3) only allows Ministers to be nominated and elected as legislators. Query whether they can be appointed as ministers in view of the limitation in section 94 (3) (e) and 88 (3) of the Constitution. The Law Commission's surmise, and the Supreme Court of Appeal was like minded, which only compared our legal system to what obtains in the United Kingdom, never, examined our Republican Constitution 1966. The Law Commission concluded, rather curiously, that it was never intended to have strict separation of powers as in a perfect presidential system. Suggesting that the Constitution is a hybrid of parliamentary and presidential system, it recommended that the Constitution be amended by granting power to the President to appoint from the house.

The Law Commission's analysis is wanting precisely because it ignored an examination of the 1966 Malawi Constitution. On that Malawi was a hybrid system, the Law Commission, in ignoring the 1966 Constitution, overlooked interpreting the Constitution from its wording. It was really up to the Constitution to speak from its wording that it was a hybrid system. Certainly, from its wording, the 1966 Constitution was a hybrid system, not the 1994 Constitution. The 1966 Constitution in section 49 clearly required the President to appoint Ministers from the National Assembly:

> *"(1) There shall be such offices of Minister of the Government as may be established by an Act of Parliament or, subject to the provisions of any Act of Parliament, by the President.*
>
> *(2) Subject to the provisions of section 50, appointments to the office of Minister shall be made by the President from among the members of the National Assembly to assist Ministers in the performance of their duties".*

Section 50 (1) provided:

> *"The President may, whenever he considers it desirable or expedient so to do, appoint to the office of Minister such persons, not exceeding at any time three in number, who are not members of the National Assembly whom he considers, by reason of their special qualifications, knowledge or experience, to be fit and proper persons to hold such office".*

Under section 27 Ministers appointed outside the National Assembly could attend and participate in parliamentary proceedings but were not entitled to vote:

> *"A minister who is not a member of the National Assembly may attend and take part in the proceedings of the Assembly or of any committee of the Assembly, but nothing in this section shall entitle a person who is not a member of the Assembly to vote in the Assembly or any of its committees".*

The 1994 Constitution never retained sections 49, 50 (1) and 27 of the Constitution of Malawi 1966. It is for this reason that the Law Commission recommended and the legislature never obliged that the President appoints from the House.

Limitation based on holding or acting in public office were only introduced in the 1994 Constitution

It is significant that the disqualification for holding or acting in public office never existed for the president, ministers or legislators in the 1966 Malawi Constitution.

Section 23 of the Republic of Malawi Constitution 1966 provided:

> *"Subject to the provisions of section 24, a person shall be qualified to be elected as a member of the National Assembly if, and shall not be so qualified, unless, he –*
>
> *(a) is a citizen of the Republic of Malawi who has attained the age of 25unles, in a particular case, the President shall certify the age of 21;*
> *(b) is able to speak and read the English language;*
> *(c) is registered as a voter in a constituency;*
> *(d) is a member of the Party*

Section 24 of the Republic of Malawi Constitution 1966 provided:

> *"(1) No person shall be qualified to be elected as a member of the National Assembly who –*
>
> *(a) is under a declaration of allegiance to some country other than the Republic;*
> *(b) is, under any law in force in the Republic, adjudged or otherwise declared to be of unsound mind;*
> *(c) is under sentence of death imposed on him by any court in the Republic either before or after the appointed day, or under a sentence of imprisonment (by whatever name called) imposed on him at any such time by any such a court or substituted by competent authority for some other sentence imposed on him by such a court;*
> *(d) is detained under a detention order or is subject to a control order or a restriction order; or*
> *(e) is an un discharged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in the Republic.*
>
> *(2) No person who holds the office of President, or who has been nominated as a candidate for that office under the provisions of section 11, shall be qualified for election as a member of the National Assembly.*
>
> *(3) Parliament may provide that, subject to such exceptions and limitations (if any) as may be prescribed by law, a person shall be disqualified for membership of the National Assembly by virtue of –*
>
> *(a) his holding or acting in any office or appointment that may be prescribed by Parliament;*

> *(b) his belonging to any of the armed forces or to any police force;*
>
> *(c) his having been convicted by any court of any offence that is prescribed by Parliament and that is connected with elections of the President or of the members of the National Assembly:*
>
> *Provided that in any such case the period of disqualification shall not exceed a period of 7 years from the date of such conviction; or*
>
> *(d) has having been required to vacate his seat in the Assembly under the provisions of section 28 (2) (g):*
>
> *Provided that in any case under this paragraph the period of disqualification shall not exceed a period of five years from the date when such person was required to vacate his seat.*

Section 49 (4) provided:

> "*The office of a Minister who is a member of the National Assembly … shall be vacant …*
>
> *(a) if the holder of the office ceases to be a member of the National Assembly otherwise than by reason of a dissolution of Parliament;*
> *(b) if, at the first sitting of Parliament, the holder of the office is not a member of the National Assembly, unless he is immediately appointed a Minister;*
> *(c) if the President so directs;*
> *(d) upon the assumption by any person of the office of President; or*
> *(e) if the Minister … dies or resigns from office.*

Against all this, sections 51 (2) (e), 94 (3) (e) and 88 (3) are born in 1994 and, as if civil servants could be ministers, presidents or legislators, the Supreme Court and the Law Commission, suggest that it was civil servants who were targeted and that the 1994 Constitution was hybrid. It can be said very confidently, that just as we moved away from the British Parliamentary system, we moved from the 1966 Constitution. This is beside the point.

President of Malawi and the Speaker v R.B. Kachere and *Nseula v Attorney General and Another*, although followed later by the Supreme Court, were *per in curium section 40 (3) and 94 (3) of the Constitution*

The critical thing, however, is that both *President of Malawi and the Speaker v R.B. Kachere* and *Nseula v Attorney General and Another* were *per in curium* section 40 (3) and 94 (3) of the Constitution. Section 40 (3), before the amendment in 2010, provided:

> *"Save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for public office".*

President of Malawi and the Speaker v R.B. Kachere is *per in curium* the section because, besides section 88 (3) which, because of the words 'any other public office' meant the President was in public office, section 40 (3) meant all in elective public offices were in public office, legislators, councilors and the President. The Constitution, therefore, designated the President as in public office. Section 40 (3) of the Constitution, as it was until 2010, way after *President of Malawi and the Speaker v R.B. Kachere* and *Nseula v Attorney General and Another*, demonstrates that all our elected officials are in public office. The implication if this section were to read civil service, as was touted by the Supreme Court, is enormous. These decisions mean we had a right to vote or be voted into the civil service; the Constitution in sections to 186 to 194 talked of appointment of civil servants, not election of the civil service. Conversely, it means that our presidents, councilors and legislators are civil servants and may need appointment by the Civil service Commission. In *Secretary for Justice v Koruga* (G.R. No 166199, April 24, 2009, 586 SCRA 513, the Supreme Court of the Philippines said:

> *""It is a well-established rule that laws should be given a reasonable interpretation so as not to defeat the very purpose for which they were passed. As such, "a literal interpretation is to be rejected if it would be unjust or lead to absurd results."20 In Secretary of Justice v. Koruga, 21 the Court emphasized this principle and cautioned us on the overzealous application of the plain meaning rule:*

> *The general rule in construing words and phrases used in a statute is that in the absence of legislative intent to the contrary, they should be given their plain, ordinary, and common usage meaning. However, a literal interpretation of a statute is to be rejected if it will operate unjustly, lead to absurd results, or contract the evident meaning of the statute taken as a whole. After all, statutes should receive a sensible construction, such as will give effect to the legislative intention and so as to avoid an unjust or an absurd conclusion. Indeed, courts are not to give words meanings that would lead to absurd or unreasonable consequences."(*21 G.R. No. 166199, April 24, 2009, 586 SCRA 513; 2 Id. at 523-524)

The words 'public office' were removed from section 40 (3) of the Constitution in 2010 and replaced with the words elected office. That would not make any difference. The question would still remain the same. The restrictions in section 51 (2) (e), 88 (3) and 88A and 94 (3) (e) of the Constitution relate to public office, not civil service. Any candidate for a seat in the National Assembly has to consider whether they are in public office. Civil servants; councilors, chiefs, legislators are in public office. The definition of public office cannot be based on one cadre of public offices.

The problem can best be illustrated by considering a Member of the National Assembly who close to an election wants to seize a next constituency because the legislator will not succeed in the current constituency. Section 51 (3) of the Constitution only absolves a Minister or Deputy Minister. The question is whether the legislator should continue in the house while competing in another. Many think that the answer is in section 37 (6) of the Parliamentary and Presidential Elections Act:

> "No candidate may be nominated for election in more than one constituency or, in case of a by-election while he is a member of the National Assembly."

If that is the case, section 37 (6) of the Parliamentary and Presidential Elections Act would be unconstitutional for introducing a limitation or disqualification not in the Constitution. The only justification for section 37 (6) is that it is a confirmation that the legislator, albeit in an elected position, is in fact in public office and has not been exempted as a Minister and Deputy Minister.

Nseula v Attorney General and Another was also *per in curium* section 94 (3) (e) of the Constitution, only amended in 2001 . This section, form its wording, absolved those public officers who, if they needed election to hold or act in those offices, had either to be those who either the Constitution stated they need not to resign in order to stand or actually resigned. These are elected public officers. They are not civil servants, appointed by the President or Minister. Section 94 (3) (e) provided:

> "*notwithstanding subsection (2), no person shall be qualified to be appointed as a Minister or Deputy Minister who holds or acts in any public office or appointment, except where this Constitution explicitly provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment, or where that person resigns from that office in order to stand."*

Generally the public service or office refers to people who are working for government. Not all are civil servants. They include politicians holding or acting in public office, employees and policy officials in statutory boards and members of the armed force police. They include, according to the Electoral Commissions Act, staff appointed under section 13. The definition of Government in section 209 is very informative and pervasive as to make the Supreme Court's definition doubtful indeed:

> *"(1) All persons who have rights in property at the date of the commencement of this Constitution shall continue to have such rights under this Constitution and any other law.*
>
> *(2) This section shall not apply in respect of rights in property that have been acquired or vested by or on behalf of the Government where that property was acquired or vested at any time since 6th July, 1964, and where that right in property was obtained from citizens or permanent residents of Malawi—*
>
> *(a) unlawfully according to the laws then in force in Malawi;*

(b) by virtue of any law not being a penal law passed during that time that did not provide for adequate compensation; or

(c) through abandonment by reason of duress of circumstances.

(3) For the purposes of this section "Government" shall mean the President, the Cabinet, the Ministries, other organs of the President and Cabinet and their agents, including individuals and bodies under the authority of the President, the Cabinet or the Ministries.

(4) Rights in property which are not recognized by virtue of this section shall be vested in the National Compensation Fund and shall be disposed of in accordance with the principles, procedures and rules of the National Compensation Tribunal.

(5) Persons occupying or using property vested in the National Compensation Fund shall continue to occupy and use that property, as if they retained full legal and equitable title until such time as the National Compensation Tribunal otherwise orders."

The decision of the Supreme Court therefore that restricted the meaning of the words "public office" to civil servants was *per in curium*. I am not bound by it. It is very clear from section 40 (3) and sections 94 (3) (e) as they were at the time of the decision that elected officials were in public office. It is also clear from section 189 that public office includes people from the civil service (Principal Secretary, section 189 (h); Secretary to the President, section 189 (b); prisons (Chief Commissioner of Prisons, section 189 (g); police (Inspector General of Police, section 189 (f)); defence forces (the High Command, section 189 (e); diplomats (ambassadors, high commissioners and other principal diplomatic staff, section 189 (d); personal staff of the President (section 189 (cc), Judiciary (The Chief Justice, section 189 (a), law officers (Attorney General and Director of Public Prosecutions, section 189 (a); members of boards, commissions, councils, committees (section 194) and parliamentary staff (section 189 (3). Government has been defined in section 209 and if public office refers to government officials, these are in public office according to the Constitution: the President, the Cabinet, Ministries, other organs of the president and cabinet and their agents, including individuals and bodies under the authority of the President, the Cabinet and Ministries. From usage public office means anyone performing functions of a public nature (section … of the 1966 Constitution; Section … of the General Interpretation Act. To call all these public offices is apt in that it includes even core civil service and others, including military service which, by definition, is not civilian. There is nowhere in the Constitution where the words 'public office' mean civil service. There is nowhere in the Constitution where the office in the civil service has been designated as a public office except in section 189 where patently civil servants have been designated as public office, Secretary to the President and Cabinet and Principal Secretaries. If the inference is that these are representatives of the civil service, this applies to most offices there. Judges, High Command in the Armed Forces would be civil servants. That would be telling the truth, and the whole truth because in a sense all the hotchpotch, in the general definition of the "civil service", implement and execute policies and laws of those who the Constitution empowers to formulate the policies and the laws.

Section 11 of the Constitution encourages us, when interpreting this unique Constitution mandates us , where applicable to have regard to comparable foreign case law. Since 1765 when (1675*) R v Parker* 2 Lev 140 was decided and as recent as 2010 when *R v Belton R v Belton* [2010] EWCA Crim 2857 was decided and from one national jurisdiction to another, the words 'public office have never been restricted to public offices in the civil service (Coroner (1675*) R v Parker* 2 Lev 140; Constable (1703) *R v Wyatt* 1 Salk 380;Accountant in the office of the Paymaster General (1783) *R v Bembridge* 3 Doug K.B. 32; Justice of the Peace (1791) *R v Sainsbury* 4 T.R 451;Executive or ministerial officer (1819) *R v Friar* 1; Chit.Rep (KB) 702;Gaoler (1827) *R v Cope* 6 A%E 226; Mayor or burgess (1828) *Henly v Mayor of Lyme* 5 Bing 91; Overseer of the poor (1891) *R v Hall* 1 QB 747;Army officer (1914) *R v Whitaker* 10 Cr.App.R.245; County Court registrar (district judge) (1968) *R v Llewellyn-Jones* 1 Q.B.429; Police officer (1979) *R v Dytham* 69 Cr.App.R.387; Council maintenance officer (1995) *R v Bowden* 4 All E.R 505; Local councillor (2004) *R v Speechley* [2004] EWCA Crim 3067; Member of the Independent Monitoring Board for prisons (2010) *R v Belton R v Belton* [2010] EWCA Crim 2857); *R v Williams* (1986) 39 WIR 129; *R v Sacks* [1943] SALR 413; *R v Boston* (1923) 33 CLR 386.

The words 'public office' in the Constitution must be interpreted widely and in context because they are used widely and wisely in the Constitution. As we have seen, in different provisions in the Constitution, where used, they fulfill a certain purpose and it is that purpose which is indicative of the meaning where they are used. In such a case it is unsafe to paint all sections with one brush. What is clear from these provisions is that the words public

office' cover all aspects of officers dealing with the functions in section 7 of the Constitution: those responsible for formulation of law and policies and those involved in implementing it. The word civil service refers to the latter. The civil service generally refers to a corpus of career servants of many kinds who implement government policies and laws. They may be recruited differently by different bodies and governed by different or similar conditions of service or regulations at the pleasure of government or the legislature. Sometimes a dictionary meaning is not an answer to a complex and compound phenomenon. The concept of civil service is pervasive. So is the concept of public office. Speaking generally civil service refers to government employment for which a person qualifies on the basis of merit rather than political patronage or personal favor. In that sense, in so far, as it is restricted to employment, is narrower and certainly encapsulated in the wider public office. In *R v Whitaker* (1914) KB 1283 the court said:

> "A public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.'

Moreover, it is irrelevant how you are recruited. Lord Mansfield in *R v Bembridge* (1783) 3 Doug KB 32 thought a public officer holds as:

> ' … an office of trust concerning the public, especially if attended with profit ... by whomever and in whatever way the officer is appointed'.

Dr. Kabwila is both in public office and in the civil service as intimated by the Supreme Court in *Nseula v Attorney* and, on question 5, is exempt under section 193 (2) (c) as read with section 193 (2) (a) of the Constitution.

Stage 4: Is the candidate holding or acting in public office

Where a person is in public office the next question is whether he is holding or acting in that public office with the result that if the candidate is no longer holding or acting in that public office he is eligible and if he is holding or acting in that public office he is ineligible. The Malawi Constitution is not the only Constitution where there are restrictions on certain employees vying or assuming public office. There are many states with such restrictions. Indeed institutions, private or public may restrict their members or employees from vying for public office. Over the years, both in the private and public sector, a dual system has emerged. Other systems refuse participation in public office and require resignation; other systems require their members to seek leave of absence in order to participate in public office. In relation to Malawi, section 51 (2)(e) seems to suggest that one must resign in order to vie for public office. That rendition of section 51 (2)(e) must not be interpreted superficially. It must be interpreted in a manner in which it is understood that resignation will only be necessary where a candidate for a member of the National Assembly is in fact and in law acting or holding a public office. Understood that way, it must imply that there is no prohibition on one obtaining leave of absence in order to vie for public office. In that way it must be understood that it is a matter between the employer and the employee and not a matter of public law that the employer will allow the employee leave of absence in order to vie for political office. First, the civil service can be a good niche for a political career; the civil service corpus is inculcated with government operations, systems and procedures that are handy for political life. Secondly, and this happened in Malawi after independence, many civil servants opting for political careers because there were few able politicians out there. Thirdly, a particular civil servant may possess rare skills that would be needed at the end of a political tour. It must be left to the government, statutory body, the university to weigh its needs when an employee leaves.

Leave of Absence is the modern approach

These reasons apply *mutatis mutandis* It is for this reason that the University of Malawi much like all universities have in their conditions of service and statutes provided that their staff can be granted leave of absence in order to vie for political office. It is not, therefore a matter for the Electoral Commission to stifle such arrangements between employer and employee. It is up to the employer (and employee) to determine whether to permit employees or members to vie for public office. It is not only universities that have allowed employees leave of absence, public institutions have (*Gray v. Bolger* (1958) 157 Cal. App. 2d 583, 587 [321 P.2d 485]. Cf. *McCoy v. Board of Supervisors* (1941) 18 Cal. 2d 193, 198-199 [114 P.2d 569]; and *Dierkes v City of Los Angeles,* (1945) 25 Cal. 2d 938, 944 [156 P.2d 741].)

It is not only the University of Malawi that has allowed academic staff leave of absence to pursue alternative careers. Leave of absence must be distinguished from sick leave, annual leave, maternity leave and even sabbatical leave. These leaves have two hallmarks: the employment is live, although work is suspended; the employee, as between employee and employer, will certainly return. Curiously it looks like the University of Malawi was well advised on the legal position when in conditions of service and statutes it provided clearly and specifically that its employees on leave of absence do so on no expectation on return of re-employment in the same position or another, a distinction drawn clearly in. Section H (13) (c) (vi) of Regulations and Conditions of Service for Academic and Administrative Staff in the University of Malawi provides:

> *"Leave of absence shall mean non-paid Leave Granted to a domiciled Staff Member in order to enable him/her take up alternative employment or party or any other political office … The University is not obliged to reengage a Staff Member returning from leave of absence."*

The University of Malawi had this provision aware of the decision of *Lewis v. Unemployment Ins.* Appeals Bd.56 Cal. App. 3d 729, making a distinction between circumstances where leave of absence results in cessation as to suggest that one is not holding or acting in a public office:

> *"[2] We conclude from the foregoing considerations that the effect of an individual's being unemployed, subsequent to his taking a so-called "leave of absence" pursuant to an agreement reached with his employer, is to be assessed according to the terms of the agreement. Its terms may present two alternative situations, as follows:*
>
> *(1) The first occurs where the agreement amounts to actual termination of the employment, with the employee receiving no more than a promise of reemployment if there is a job available for him when the "leave" expires. The distinctive features of this arrangement are the termination of the one job and the prospect of reemployment at another. Their effect means that the arrangement is not a true "leave of absence," even if the parties call it one. This is because the "continuity of the employment status" at the one job, as ordinarily connoted by the term "leave of absence"* (Chenault v. Otis Engineering Corporation, *supra, 423 S.W.2d 377 at p. 383;* South Cent. Bell Tel. Co. v. Administrator, Div. of E.S., *supra, 247 So.2d 615 at p. 617), terminates with the job.*
>
> *An employee in this situation is "unemployed" throughout the period of the so-called "leave of absence" because he is performing no work and receiving no pay. (§ 1252.) fn. 8 However, if he took the "leave" voluntarily and for purely personal reasons only, he is "disqualified for unemployment compensation benefits" during the leave period because of the crucial fact that he "left his most recent work voluntarily without good cause." (§ 1256;* Perales v. Department of Human Resources Dev., *supra, 32 Cal. App. 3d 332 at pp. 336-337;* Zorrero v. Unemployment Ins. Appeals Bd., *supra, 47 Cal. App. 3d 434 at pp. 437-440.) If he is denied reemployment in another job at the end of the period, the disqualification persists because the former job was terminated for the same reason. This result is required because, the termination having initially been effected "voluntarily without good cause" upon the employee's part, his consequent unemployment at any time thereafter is attributable to his own "fault." (See § 100, quoted supra;* Perales v. Department of Human Resources Dev., *supra, at pp. 335-336.) [56 Cal. App. 3d 742]*
>
> *(2) The alternative situation occurs when a true "leave of absence" is agreed upon by employer and employee, in that they contemplate a continuity of the employment status (as distinguished from its termination) but that no work will be performed, and no remuneration will be paid, during the leave period.* (Chenault v. Otis Engineering Corporation, *supra, 423 S.W.2d 377 at p. 383;* South Cent. Bell Tel. Co. v. Administrator, Div. of E.S., *supra, 247 So.2d 615 at p. 617.) The distinctive features here are the ongoing employment "status" at the one job (as distinguished from its termination) and the contemplation that active work at that job -- not "a" job -- will be resumed when the leave expires."*

The rationale in this decision is that there are certain leaves of absence that result in one leaving employment. It is clear from this decision that Dr. Kabwila was not holding or acting in (public) office when she presented her nomination paper to the returning officer in Salima since the granting of the permission by the University Registrar for her to go on leave of absence resulted in cessation of employment Dr. Kabwila was not acting or holding a (public) office in the University of Malawi. If as on the date when she received that letter she ceased to be in the employment of the University of Malawi, there was no need for her to resign. One cannot resign from an office or employment that is not there in the first place. It is irrelevant in these circumstances to ask the question whether Dr. Kabwila resigned or should have resigned

Stage 5: Is the Candidate exempt

Where a person is holding and acting in that public office the next question is whether the candidate is in a public office where the candidate under the Constitution may be nominated or elected while holding or acting in that

public office (a Minister or Deputy Minister) with the result that if the Constitution allows the candidate the candidate is eligible and if the Constitution does not allow the candidate to stand while in that public office the candidate is ineligible. On this aspect, conceptually, Dr. Kabwila's matter ended at stage 4. It is clear, however, that only three public offices, Dr. Kabwila was holding or acting in none of them, are exempt under the Constitution: section 51 (3) exempts the public offices of Minister and Deputy Minister. On the other hand, Dr. Kabwila is both in public office and in the civil service as intimated by the Supreme Court in *Nseula v Attorney* and, as demonstrated in question 3, is exempt under section 193 (2) (c) as read with section 193 (2) (a) of the Constitution. Based on this question, Dr. Kabwila was under no obligation to resign:

> *"(1) Members of the Civil service shall ensure that the exercise of participation in political activities does not compromise their independent exercise of their functions, powers and duties as impartial servants of the general public.*
>
> *(2) The National Assembly may prescribe a category of civil servants, who by reason of their seniority shall not be able to directly participate in political activities:*
>
> *Provided that—*
>
> *(a) the civil servants so restricted shall have the right to resign in order to participate directly in political activities;*
>
> *(b) nothing in this section shall be deemed to prejudice any civil servant having the absolute right to vote in accordance with this Constitution;*
>
> *(c) without prejudice to subsection (1) any civil servant whose functions are not directly concerned with the formulation and administration of the policies of the Government shall be exempt from restrictions under this section; and*
>
> *(d) nothing in this section shall prejudice the right of any civil servant to hold office in, or be a member of, any association, group or professional body, the purposes of which are principally to represent their member's interests in relation to the terms and conditions of employment or the general carrying on of any profession or trade or the promotion of any interest, not pertaining directly to the promotion of a political party, or its campaign or philosophy.*

Stage 6: Has the Candidate resigned

Where a public officer is acting in or holding a public office where the Constitution does not allow to stand while in that public office (Civil servants, police, armed forces, judges, councilors, local government officials and service, chiefs, to name a few) the next question is whether the candidate has resigned with the result that if the candidate resigned the candidate is eligible and if the candidate has resigned he is ineligible. As we have seen for Dr. Kabwila, this question never arises. She was not holding or acting in a public office. Her leave of absence must mean that she was not holding in the sense of retention or being an occupant of that office; she was not acting, in terms of taking actions in the job in space and time. Leave of absence must mean that one has left is in leaving and is absent as in not being there to perform the functions of that office. Such leave or absence where, between employer and employee, there is all prospect of return, does not have the same effect as when, between the employer and employee, no one harbours a real resumption of the employment contract. She, therefore, could not resign from a job she never had. The effect is the same as retirement; a person who opts for early or attained retirement needs not to resign. On retirement the candidate is entitled to her pension, for example. As was observed in *Matanga v Old Mutual* (201) Civil Appeal No4 (HC) (PR) (unreported), a pension is based on the contract of employment, but it is distinct and different contract. I say this because it was contended for the Reporting Officer that the fact that after leave of absence the Dr Kabwila is responsible for pension contribution means that Dr. Kabwila is still employed. I do not think that is relevant because pensions are based on a different contract; the employment contract will have come to an end while pension obligations and benefits remain. In *Matanga v Old Mutual* this Court said:

> I cannot agree more. His statement was accepted as recent as 13 December 2013 by the Supreme Court of Canada in *IBM Canada Ltd* (2013 SCC 70, per Cromwell J). Lord Reid said:

"What, then, is the nature of a contributory pension? Is it in reality a form of insurance or is it something quite different? Take a simple case where a man and his employer agree that he shall have a wage of £20 per week to take home (leaving out of account P.A.Y.E., insurance stamps and other modern forms of taxation) and that between them they will put aside £4 per week. It cannot matter whether an insurance policy is taken out for the man and the £4 per week is paid in premiums, or whether the £4 is paid into the employer's pension fund. And it cannot matter whether the man's nominal wage is £21 per week so that, of the £4, £1 comes from his" wage " and £3 comes from the employer, or the man's nominal wage is£23 per week so that, of the £4. £3 comes from his "wage" and £1 comes from the employer. It is generally recognised that pensionable employment is more valuable to a man than the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement. His earnings are greater than his weekly wage. His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought lo be regarded as having earned that sum per week. The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income.

"But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance what he gets back depends on how things turn out. He may never be off duty and may die before retiring age leaving no dependants. Then he gets nothing back. Or he may by getting a retirement or disablement pension get much more back than has been paid in on his behalf.

"A pension is intrinsically of a different kind from wages. If one confines one's attention to the period immediately after the disablement it is easy to say that but for the accident he would have got £X, now he gets £Y, so his loss is £X-Y. But the true situation is that wages are a reward for contemporaneous work but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind."

The 1966 Malawi Constitution recognized this and provided in section 98 (4):

"For purposes of this Constitution, a person shall not be considered as holding public office by reason only of the fact that he is in receipt of a pension or other like allowance in respect of service under the government."

Conclusion

In relation to Dr. Kabwila, therefore, the Electoral Commission must publish Dr. Kabwila's name in terms of section 41 (A) of the Parliamentary and Presidential Elections Act. Her nomination was valid as on 28 February because the Electoral Commission had not by that time sent an opinion inter section 40 to enable her to put a request in terms of the section. Dr. Kabwila only received the opinion written on 2nd March 2014. That was too late. Dr. Kabwila, who was a public officer in the civil service, was exempted by section 193 (2) (c) as read with section 193 (2) (a) of the Constitution because Professor Chisi, as academic staff of University of Malawi, is not a civil servant whose functions are directly concerned with the formulation and administration of the policies of Government. It was not necessary for her to resign. Moreover, Dr. Kabwila was not at the time of presentation of papers holding or acting in a public office. The nature of his leave of absence according to section H (13) (c) (vi) of Regulations and Conditions of Service for Academic and Administrative Staff in the University of Malawi, although styled as leave of absence, was in law and fact a termination, not suspension of employment. The Electoral Commission will, after the election, be seized of the matter and only if the candidates contest the matter under section 100 or there is a complaint under section 113 of the Parliamentary and General Elections Act. The Electoral Commission should act as directed. I direct that Dr. Kabwila who was a public officer in the civil service was exempted by section 193 (3) of the Constitution because she is a person whose functions are not directly concerned with the formulation and administration of the policies of the government. It was not necessary for her to resign. Moreover, Dr. Kabwila was not at the time of presentation of papers holding or acting in a public office. The nature of her leave of absence according to the conditions of service, although styled as leave of absence, was in law and fact on termination, not suspension of employment. The Electoral Commission should act as directed. There cannot be an appeal from this

decision by the Electoral Commission because it was a tribunal from which this court is exercising its appellate jurisdiction. A tribunal cannot appeal against a decision of a court exercising appellate jurisdiction over it. If the decision was adverse, Dr. Kabwila could not appeal either because of section 114 (5) of the Parliamentary and Presidential Elections Act.

Made this 4th Day of April 2014

D.F. Mwaungulu

JUDGE