JUDICIARY
JUDICIAL REVIEW CAUSE NUMBER 38 0F 2014

BETWEEN:

THE STATE

AND

THE ELECTORAL COMMISSION …….…… RESPONDENT

***EX-PARTE*:**

FRIDAY ANDERSON JUMBE ……..…… 1ST APPLICANT

AMOSI MAILOSI …… 2ND APPLICANT

DAVE KAZINJA …… 3RD APPLICANT

ALLAN NGUMUYA …… 4THAPPLICANT

DR LAZARUS CHAKWERA	**-**	**1ST INTERESTED PARTY**
ATUPELE MULUZI	**-**	**2NDINTERESTED PARTY**
CHARLES MWAMBYALE	**-**	**3RD INTERESTED PARTY**

CORAM: THE HON JUSTICE H.S.B.POTANI
Messrs Kaphale, Tembenu and Mbeta, of Counsel for the Applicants
Mr. Msisha SC, of Counsel, for the Respondent
Messrs Kaliwo and Likongwe, of Counsel for the 1st Interested Party
Messrs Phaka, Tandwe and Nyambo, of Counsel for the 2nd Interested Party
Mr. L. Gondwe, of Counsel, for the 3rd Interested Party
Mrs. D. Mtegha, Court Clerk

ORDER

Kenyatta Nyirenda, J.

Introduction

This matter was initially before my brother Judge, Justice Potani but he recused himself from handling this case on 29th May 2014 and I took over the case. Before his recusal, and following a pre-trial conference, Justice Potani made an order regarding the conduct of the case. It would be useful to set out the relevant part of the order-

> *"This order emanates from what has transpired at the pre-hearing conference. The court would wish to commend the parties in attendance for expressing, right at the outset, their commitment to objectivity in the manner of proceeding with the matters before the court. As earlier indicated by the court the matters at stake are of great national importance. In that spirit, the parties have readily come an agreement that all the matters raise two broad questions, that is,* ***firstly whether the Electoral Commission can recount [physically audit] votes before announcement of results and secondly whether the courts can extend the period for the announcement of the results****. The parties therefore have endorsed that all the three matters be consolidated and dealt with at the same time as soon as possible and Mr. Kaphale has proposed that the matter be heard in the afternoon of today while Mr. Kaliwo has proposed tomorrow morning.*
>
> *In the end result, it is herby ordered and directed that the matter shall be heard on Thursday, May 29, 2014, at 10.00 am before a single High Court Judge. The parties to file with the court and serve among themselves written arguments and submissions on the two issues at the centre of the matter as agreed and any other relevant processes by 8.00 pm today. For completeness of the record and as agreed by the parties, Counsel Tembenu should file a formal petition spelling out the issues for the court's determination. It is anticipated that the hearing should at most take no more than three hours and each party shall be allocated thirty [30] minutes to present their case. The court undertakes to deliver its judgment at the latest by 4.30 pm on Friday May 30,2014."*

Issues for decision

As may be noted from the "Introduction", there are two issues for decision –

1. Is the Electoral Commission entitled under the law to conduct a physical audit of election results before announcing them?

2. Whether the 8 days time limit for publishing election results can be extended by the Electoral Commission or the Court or Parliament.

First issue - Is the Electoral Commission entitled under the law to conduct a physical audit of election results before announcing them?

There were mainly two positions taken by the parties on this issue. The Interested Parties and the Respondent gave a positive answer to this issue. The Applicants took a different view.

The Interested Parties advanced four main points in relation to the first issue. Firstly, Counsel Likongwe submitted that a careful reading of Exhibit APM1 (in particular the third paragraph of that document) which is exhibited to the Notice of Application for Leave to Apply for Judicial Review shows that what the Respondent agreed with the political parties is a "physical audit" and not necessarily a "vote recount". He also submitted that the Respondent has wide powers in conducting elections, including "*to take measures and to do such other things as are necessary for conducting free and fair elections*" as provided in s. 8(1)(m) of the Electoral Commission Act. It was his contention that physical audits fall within the said provision.

Secondly, Counsel Likongwe submitted that s.97 of the Parliamentary and Presidential Elections Act [hereinafter referred to as the "PPE Act"] gives the Respondent further power to "take a decision on any matter which has been a subject of a complaint". It was thus argued that the Respondent is entitled to conduct a physical audit in order to take a decision on complaints of vote rigging.

Thirdly, Counsel Likongwe opined that s. 114(4) of the PPE Act does not say that the Respondent shall not conduct a recount unless so ordered by the High Court. It was his submission that there is no provision in the law that stops the Respondent to recount unless ordered by the High Court. On the contrary, so he contended, the Constitution, the PPE Act and the Electoral Commission Act give the Respondent wide powers in the conduct of elections.

Fourthly, Counsel Likongwe also relied on s. 96(1) of the PPE Act and s. 8(1)(m) of the Electoral Commission Act. S. 96 (1) of PPE Act states that the Respondent shall determine the result of a general election. S. 8(1)(m) of the Electoral Commission Act states that one of the functions of the Respondent is "*to take measures and to do such other things as are necessary for conducting free and fair elections.*"

Counsel Likongwe strongly urged the Court to find that the functions spelt out in these provisions necessarily give the Respondent power to conduct a recount of votes if it is of the view that recounting is necessary for conducting free and fair elections.

For the Applicants, Counsel Kaphale submitted that the Respondent can only exercise its statutory and constitutional functions in accordance with the Constitution and by an Act of Parliament. He stressed that in exercising such functions as conferred upon it, the Respondent has to do so independently "*of any direction or interference by other authority or any person*"

Counsel Kaphale was also firm on his submission that no manual voter recount can be used in the determination of the national results. He argued that records only can be used in the determination of the national result. He placed much reliance on s.96(1) of the PPE Act which he contended was in mandatory terms. The subsection provides that the Commission shall determine and publish the national result of a general election based on the records delivered to it from the districts and polling stations. It was his contention that s. 96(2) of the PPE Act requires the process of determining the national result to "*continue uninterrupted until concluded*" subject only to s. 96(3) of the PPE Act. S.96(3) of the PPE Act provides-

> *"if a record from any district or other element necessary for the continuation and conclusion of the determination of the national result of the election is missing, the Chairman of the Commission shall take necessary steps to rectify the situation and may, in such case, suspend the determination for a period not exceeding seventy two hours"*

On the basis of the said section, Counsel Kaphale invited the Court to note that the determination of the national result is required to be based on records received there are time periods set under s. 99 of PPE Act for the determination of the national result and such set time periods must be strictly complied with. It was further contended that the set time periods may not be met if the law allowed for a manual or physical audit of all the ballots in the whole country and for all the elections.

Counsel Kaphale finally submitted that the manual count would only come into play following complaints of an undue return and only if the court so orders it to be done. He contended that to argue that the determination of the national result can be done based on a manual recount of the votes is to do violence to the clear

language of ss.96(1) and 96(2) of the PPE Act as a manual recount would obviously entail an interruption of the process of the determination of the national result through records only, which is the only prescribed mode for such a determination.

To my mind, the starting point in seeking to address the first issue is look at the written laws that confer power on the Respondent. All the parties indentified these provisions to be s. 76 of the Constitution, s.8 of the Electoral Commission Act and the PPE Act

S.76 of the Constitution is couched in the following terms-

> *"(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) determine constituency boundaries. . .*
> *(b) review existing constituency boundaries . . .*
> *(c) determine electoral petitions and complaints relating to the conduct of any elections;*
> *(d) ensure compliance with the provisions of this Constitution and any Act of Parliament; and*
> *(e) 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 of appeal to 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) 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."* – [Emphasis by underlining supplied]

It is noteworthy that there are no other powers are conferred on the Respondent by the Constitution. Any further powers would have to be found in Acts of Parliament.

S.8 of the Electoral Commission Act lays down additional functions of the Commission.

> *"In addition to the broad functions and powers conferred on the Commission by the Constitution and* ***subject to the Constitution****, the Commission shall* ***exercise general direction and supervision over the conduct of every election*** *and without prejudice to the generality of such power, it shall have the following further functions-*
>
> *(a) to determine the number of constituencies for the purposes of elections*
> *(b) to undertake or supervise the demarcation of boundaries of constituencies;*
> *(c) subject to the Local Government Elections Act and any other written law to undertake….*
>
> *Provided that:*
>
> *(i) in the case of the City of Blantyre, the total number of wards shall not exceed thirty;*
> *(ii) in the case of the City of Lilongwe, the total number of wards shall not exceed thirty;*
> *(iii) in the case of the City of Mzuzu, the total number of wards shall not exceed fifteen;*
> *(iv) in the case of the City of Zomba, the total number of wards shall not exceed ten;*
> *(v) in the case of the Kasungu Municipal Council, the total number of wards shall not exceed thirty;*
> *(vi) in the case of the Lunchenza Municipal Council, the total number of wards shall not exceed eight;*
> *(vii) in the case of the Mangochi Town Council, the total number of wards shall not exceed ten;*
> *(viii) in all other cases, the total number of wards shall not exceed two for each parliamentary constituency,*
>
> *and the Commission shall ensure that ward boundaries do not cross local authority boundaries:*
>
> *(d) <u>to organize and direct the registration of voters;</u>*
> *(e) <u>to devise and establish voters registers and ballot papers;</u>*

(f) *to print, distribute and take charge of ballot papers and voting registers;*
(g) *to approve and procure ballot boxes;*
(h) *to establish and operate polling stations;*
(i) *to establish security conditions necessary for the conduct of every election in accordance with any written law governing elections;*
(j) *to promote public awareness of . . .*
(k) *to promote and conduct research into electoral matters;*
(l) *to perform the functions conferred upon it by or under any written law; and*
(m) *to take measures and to do such other things as are necessary for conducting free and fair elections."* - [Emphasis by underlining supplied]

The PPE Act sets out, among other matters, the process of determining the result of an election.

I have studied these provisions and I am unable to see how they can be said to bar the Respondent from conducting a physical audit of election results before announcing them. There can be no clearer indication of the latitude given to the Respondent than the words in s. 8(1)(m) of the Electoral Commission Act, that is, "*to take measures and to do such other things as are necessary for conducting free and fair elections"*. The only limitation that I do find is that s. 76(2)(d) of the Constitution requires that whatever the Respondent does, it must "*ensure compliance with the provisions of this Constitution and any Act of Parliament*. As long as the measures and things are necessary for conducting free and fair elections and they do not run afoul of s. 76 of the Constitution, such measures and things would, in my considered view, be within the powers of the Respondent.

In the premises, I have no hesitation in giving my answer to the first issue as being positive, that is, the Respondent is entitled under the law to conduct a physical audit of election results before announcing them.

Second Issue - Whether the 8 days time limit for publishing election results can be extended by the Electoral Commission or the Court or Parliament?

Just as was the case on the first issue, there were chiefly two positions taken by the parties on this issue. The Interested Parties are of the view that the 8 days time limit for publishing election results can be extended. The Applicants and the Respondents hold a contrary view.

It may be useful to start with the position taken by the Applicants. The first point taken by Counsel Kaphale is that Courts may only extend time allowed under a statute for doing a thing where it is so allowed by the relevant statute or law. He referred to s. 47 of the General Interpretation Act which is as follows-

> *"Where, in any written law, a time is prescribed for doing any act or taking any proceeding, and power is given to court or other authority to extend such time, then unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed"*

Counsel Kaphale submitted that unlike Rule 4 of the Supreme Court Appeal Rules (providing for the enlargement of time and departure from the rules), Order 3 rule 5 of the Rules of the Supreme Court (giving courts the power to abridge or extend time within which to do certain things relating to civil procedure) and the Limitations Act (providing for extension of time limits prescribed by the said Act), no such power is given under s. 99 of the PPE Act and thus it must not be so assumed.

To buttress his position, Counsel cited a host of cases, including the American case of **Bowles v. Russell, 2007 WL 1702870 (U.S. 2007)** the Ugandan case of **Makula International Ltd. vs. His Eminence Emanuel Cardinal Nsubuga & another and Halsbury's Laws of England,** 4th edition, volume 37.

Bowles v Russell, supra, was relied on for the proposition that statutory time limits are jurisdictional and only Congress has the power to determine the lower federal court's subject matter jurisdiction, and appellate jurisdiction cannot be altered by court order "*because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.*"

In Makula International Ltd. vs. His Eminence Emanuel Cardinal Nsubuga & another, the Court of Appeal of Uganda held that it is well established that a court has no residual or inherent jurisdiction to enlarge a period laid down by statute. Counsel referred the Court to the following observation by the Court-

> *"It is clear from this case that a period of limitation laid down under Civil Procedure rule can be extended if a statutory provision that permits the courts to extend time is made applicable to it by any enactment or rule. What the court cannot do is to go outside the limits of the Act, and extend time "in the purported exercise of a general discretion under his inherent powers". In other words, it is the use of the residual or inherent power to extend or enlarge time, when there is no enactment or rule that permits it, that is not*

authorised."

It was Counsel Kaphale's contention that the cited provisions fortify his arguments, based on s. 47 of the General Interpretation Act as read with s. 99 of the PPE Act, that neither the Court nor any other authority is given power to extend the time for the determination of the national results of the poll beyond the 72 hours allowed the chairman under section 96(3) of the PPE Act (with respect to cases of missing records).

The last point taken by Counsel Kaphale related to the agreement between the Respondent and political parties for extension of time. He submitted that the agreement lacked proper basis in that the law does not allow for consultation or for such an extension. Counsel contended that it was wrong for the Respondent to allow itself to be influenced by political party leaders instead of acting independently as required by section 76 of the Constitution. It was further contended that by allowing itself to be influenced by person outside the Commission, the Respondent had, in effect, abdicated from its responsibilities and fettered its discretion by allowing to be bound by the political parties agreed. He cited **R (L) v Secretary of State for the Home Department** [2003] 1 WLR 1230 at [67] and **Lavender (H) & Son Ltd v Minister of Housing and Local Government** [1970] 1 WLR 1231; **R v Secretary of State for Trade and Industry, ex p Lonrho plc** [1989] 1 WLR 525, 538C for the proposition that a public body is not entitled to surrender its independent judgment to a third party.

The submission by Counsel Msisha SC, on behalf of the Respondent, very much followed the same line taken by the Applicants. He submitted that the electoral process has various stages, that is, from issuance of an Order by the Commission declaring that a general election is to be held, to determination of results.

Counsel Msisha SC stressed that the process is guided by a calendar of events and that there is nothing in that calendar which allows for a contraction or expansion of the electoral calendar. He contended that extensions of time cannot be sought under the "take any measure for conducting free and fair elections" because there would a direct violation of the statutory time table for the elections. Such a violation would create an "irregularity". He further argued that there is no provision for extension of time in the Constitution or the Acts and that where any extension is provided for the time is indicated.

Counsel Msisha SC finished his submissions by drawing the courts attention to the principles to be applied in construing statutes. He summarized the major principles relevant to this matter as follows-

"8.1.1 Where different words are used on the same subject-matter, different meanings will be implied - Monteiro v. Acme Constr. Co. Ltd. (H.C.) (1923-60) 1 ALR Mal 862

8.1.2 The express mention of something will exclude that which is not mentioned (expressio unius est exclusio altenus). - Rep. v. Brown (H.C.) (1975-77) 8 MLR 190

8.1.3 The Court will adopt a common sense interpretation if it does not lead to absurdity - Wright v. Rep. (H.C.) (1973-74) 7 MLR 292; Mwakawanga v. Rep. (S.C.A.) (1968-70) 5 ALR Mal 14; Nyrho Developments. (Pvt.) Ltd. v. Mudi River Water Board. (H.C.)

8.1.4 It is not permissible to interpret a provision in order to give it particular or preferred meaning if it is unambiguous. The duty of the Court is to apply the will of legislature as it appears in the words used in a statute. Where a statutory provision is ambiguous, the Court must look for the legislative intent in the statute as a whole and may look at the preamble and headings to restrict or extend the range of possible meanings - Malawi Law Society v. Banda (S.C.A.) (1987-89) 12 MLR 29

8.1.5 Where the words of statute are unambiguous, they must be given their ordinary meaning- Mussa v. R. (H.C.) (1923-60) 1 ALR Mal 693; Atlas Garage v. Blantyre Town Council (R.M.C.) (1923-60) 1 ALR Mal 852; Monteiro v. Acme Constr. Co. Ltd. (H.C.) (1923-60) 1 ALR Mal. 862; Osman v. R. (H.C.) (1964-66) 3 ALR Mal 595.

8.1.6 Reference to foreign or English statutes should not be made as an aid to interpretation if there is no ambiguity in the statute being construed - African Lakes Corp. Ltd. v. D.P.P. (S.C.A.) (1973-74) MLR 154

8.1.7 Amendments made to a statute and other relevant information may be consulted in seeking to resolve ambiguities in a statute - Murphy v. Liquidating Agency (H.C.) (1967-68) 4 ALR Mal 15

8.1.8 The clear intention of legislature should not be overridden by general principles of construction - R. v. Kunyambo (H.C.) (1923-60) 1 ALR Mal 74".

The stand by the 1st Interested Party is that the provisions of s.99 of the PPE Act should yield to the provisions of the Constitution which provide for universal suffrage, supremacy of the will of the people and free and fair elections. It may be useful to set out in full the relevant part of the written submissions by the 1st Interested Party-

*"4.1 The Electoral Commission has not said it will never publish the results of the election. The Electoral Commission has said under the heading "Vote Tallying" on page 2 of Exhibit APM1 "**but the results will not be announced until the vote***

recount outcome is known and compared with." *The Electoral Commission is saying it will not announce the results until it has verified and it is satisfied that the results it has are correct.*

4.2 This matter should be looked at holistically. Elections are a crucial part of democracy. In elections, the people of Malawi are electing people who will govern them and represent them for 5 years. Section 6 of the Constitution states:

"Save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this Constitution in a manner prescribed by an Act of Parliament."

4.3 The duty of the Electoral Commission is a serious duty to ensure that the people getting into the positions of President, Member of Parliament and Councillor are indeed those people that the people of Malawi have elected. The Electoral Commission therefore has a duty to verify the integrity of the results and that there is no fraud."

Reliance was also placed on the cases of **Chakuamba and Others v Attorney General and Others [2000-2001] MLR 26** , **Malawi Human Rights Commission v The Attorney General [1000-2001] MLR 246** and **Attorney General v Malawi Congress Party and Others [1997] 2 MLR.**

These cases deal with the interpretation of the Constitution. **Chakuamba and Others v Attorney General and Others** was cited for the well-known dictum that "*Constitution is a single document and every part of it must be considered as far as it is relevant to get the true meaning and intent of any part of the Constitution. The Constitution must be considered as a whole and to ensure that its provisions do not destroy but sustain each other."*

In **Malawi Human Rights Commission v The Attorney General**, supra, Nyirenda, J. (as he then was), at page 251, said-

> *"The principle at which to approach this matter is to be reminded that constitutional interpretation ought to be given all the due diligence, thought and seriousness it deserves. One would not wish to take away from the constitution that which it gives to its subjects but, at the same time, it would be a betrayal of the wishes of the subjects to give that which it does not give."*

In the case of **Attorney General v Malawi Congress Party and Others**, supra, the Supreme Court of Appeal expounded on the doctrine of necessity. At page 214, the MSCA quoted with approval the **Re Manitoba case**-

> *"Analogous support for the measures proposed can be found in cases which have arisen under the doctrine of state necessity. Necessity in the context of governmental action provides a justification for otherwise illegal conduct of Government during a public*

> *emergency. In order to ensure rule of law, the courts will recognize as valid the constitutionally invalid Acts of the legislature. According to Professor Stavsky* The Doctrine of State Necessity in Pakistan (1983) 16 Cornell Int LJ 341 at 344: '*If narrowly and carefully applied, the doctrine constitutes an affirmation of the rule of law' (emphasis added)"*

Counsel Likongwe submitted that in applying the doctrine of necessity the courts are primarily concerned that the rule of law be upheld. Counsel Likongwe stressed the observation by the Supreme Court of Appeal that that "*the courts will not allow the Constitution to be used to create chaos and disorder."*

Counsel Likongwe concluded by asking the Court to take note of the fact that there presently exceptional circumstances existing in Malawi in that there are serious irregularities affecting the credibility of the elections. . It was therefore Counsel Likongwe's submission that-

> *"If the Respondent is forced to announce the results within the 8 days in section 99 of the PPEA, the people of Malawi, so he argued, will be deprived of their right under section 6 of the Constitution to be governed by people chosen through free and fair elections. As such, the time limit in section 99 of PPEA should not deprive the people of Malawi their right under section 6 of the Constitution. Announcing results that lack credibility could create chaos in Malawi. The lesser evil is to wait: to give the Electoral Commission adequate time to come up with credible results. In such event, the Electoral Commission or the Court has power to extend the 8 days."*

The 3rd Interested Party brought in a new dimension to the second issue. Counsel Gondwe contended that notwithstanding the use of the word "*shall*" in s. 99 of the PPE Act, the "*shall*" remains "*directory*" and not "mandatory".

S.99 of the PPE Act deals with publication of national results. Essentially, the matter turns on the interpretation of the said section. It is, therefore, necessary to reproduce the section here. It provides-

> *"The Commission shall publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national result of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof and shall, in such publication, specify—*
>
> *(a) the total number of voters registered for the election;*
>
> *(b) the total number of voters who voted;*
>
> *(c) the total number of null and void votes; and*

(d) the total number of valid votes cast for each classification of votes as specified in section 91."

Counsel Gondwe submitted that principles of interpretation draw clear distinction between construction of "*directory*" and "*mandatory*" legal provisions. He cited the Indian cases of **Diraj Kuer (Rani) v. Amar Krishna Narain Singh (Raja) AIR 1960 SC 444** and in **Rubber House v. Excelsior Industries Pty. Ltd** AIR 1989 SC 1160 which held that "*if a statutory requirement is held to be mandatory, an act done in breach of it will be held to be invalid, but if it is directory the act will be held to be valid even if the non-compliance may give rise to some other penalty or legal consequence provided by the statute".*

Counsel Gondwe further argued that the essence of a statutory requirement or a statutory prohibition is that there should be a sanction for the failure to comply or the contravention. Otherwise the requirement or prohibition would be a mere entreaty or "*pious aspiration*". It was said that this is more relevant where the provision is silent on the question of what consequences are intended to flow from failing to comply with the requirement.

Counsel cited the cases of **Project Blue Sky Inc. vs. The Australian Broadcasting Authority** [1998] HCA 28, the New South Wales Supreme Court and **Victoria v. The Commonwealth and Connor [1975] HCA 39; (1975) 134** CLR 81] for the following four principles that apply when construing statutes that do not provide for the legal consequences for non-compliance-

(a) the problem is to be solved in the process of construing the relevant statute. Little, if any, assistance will be derived from the terms of other statutes or any supposed judicial classification of them by reference to subject matter;

(b) the task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance;

(c) the only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute; and

(d) the intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement.

Based on these principles, Counsel Gondwe submitted that s. 99 of the PPE Act is "*directory*" and not "*mandatory*" in that, for instance, if the Respondent publishes the national result later than 8 days, the result will still be valid. He contended that the election will not be nullified just because the Respondent has published the result outside the statutory period. It was thus his submission that the national result of the election should not be announced until the Respondent has recounted all the votes.

This determination of this issue, to my mind , stands or fall on the proper rules of interpretation that have to be applied to s. 99 of the PPE Act. I have read and re-read s. 99 of the PPE Act and I see nothing therein that is ambiguous. The provision enjoins the Respondent "*to publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national result of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof*". What is not clear clear?

S. 99 of PPE Act is a statutory provision. The approach to be taken by a court when faced with a statutory provision that is clear was spelt out by the Supreme Court of Appeal in **Royal International Insurance Holdings Ltd v Gemini Holdings Ltd and another [1998] MLR 318**. In the words of Unyolo, CJ (as he then was), at page 32-

> *"It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of a statute are themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such a case the intention of the legislature is best declared by the words themselves."*

In my recent judgment in the case of **Nippo Corporation v Shire Construction Limited, HC/PR Civil Cause No. 372 of 2011, unreported,** I took the occasion to underscore why courts and Parliament need to know their mutual relationship regarding legislation. It may not be out of place to quote some relevant parts from my judgment in that case-

"Parliament and the Courts

To be effective according to legislative intent, legislation must carry the same meaning to those who will exercise it as to Parliament. For all legislative instruments, the ultimate audience includes the Courts. Courts are often called upon to interpret legislation. It is very important that Parliament and the courts understand their mutual relationship. As Cross has written in his book "Cross on Statutory Interpretation" at page 171-

> *"It is important to appreciate the mutual dependency of the draftsman and the courts when the latter are engaged in statutory interpretation. The draftsman will find it difficult to convey the parliamentary intent to the court unless he knows they will attach the same meaning to his words as that in which he employs them. Hence the need for a common standard of interpretation."*

Over the years, presumptions have been developed to afford guidance as to the legislator's prima facie intention regarding the working of the enactment. "Bennion on Statute Law" (www.francis.bennion.com/pdfs/fb/1990-002-158-statute-law-pt2-chII.pdf) lists, among others, the following key presumptions-

1. *Presumption that Text to be Primary Indication of Intended Meaning – When called upon to construe an Act, the court takes its primary duty as being to look at the text and say what, in itself, it means: "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first, reference to cases":* ***Barrel v Fordree [1932] AC 676, 682***

2. *Presumption that an Enactment is to be given a Literal Construction – The meaning of an enactment intended by Parliament is taken to be the literal meaning. The literal meaning corresponds to the grammatical meaning where this is straight forward. If, however, the grammatical meaning, when applied to the facts of the case, is ambiguous, then any of the possible grammatical meaning may be described as the literal meaning. If the grammatical meaning is garbled or otherwise semantically obscure, then the grammatical meaning likely to have been intended is taken as the literal meaning.*

3. *Presumption that Court to Apply Remedy Provided for the Mischief – Parliament intends that an enactment shall remedy a particular mischief. It therefore intends the court, in construing the enactment, so to apply the remedy provided by it as to suppress the mischief. Except in a very limited number of cases, virtually the only reason for passing an Act is to change the law so the reason for an Act's passing must lie in some defect in the*

law. If the law were not defective, Parliament would not need or want to change it.

4. *Presumption that Court to Apply a Purposive Construction – Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act and the implications arising from those words, should aim to further every aspect of the legislative purpose. A purposive construction is one which gives effect to the legislative purpose by either (a) following the literal meaning where that is in accordance with that purpose, which may be called a purposive and literal construction; or (b) applying a strained meaning where the literal meaning is not in accordance with the purpose, which may be called a purposive and strained construction:* ***A-G of New Zealand v Ortiz [1982] 3 ALL ER 432*** *and* ***Kammins Ballrooms Co. Ltd v Zenith Investments (Torquay) Ltd [1971] 3 AC. 850****, 879*

5. *Presumption that "Absurd" Result not Intended – A court has to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts are required to give a wide meaning to the concept of "absurdity", using it to include virtually anything that appears inappropriate, unfitting or unreasonable. In* ***Williams v Evans (1876) 1 ExD. 277****, the court had to construe section 78 of the Highway Act 1873, which created an offence of furious horse riding but omitted to include this in the penalty provisions. Grove J. said (p.282) that unless a strained construction was applied, the court would be holding that the legislature had made an "absurd mistake". Field J. agreed, adding (p.284)-*

> *"No doubt it is a maxim to be followed in the interpretation of statutes, that the ordinary grammatical construction is to be adopted; but when this leads to a manifest absurdity, a construction not strictly grammatical is allowed, if this will lead to a reasonable conclusion as to the intentions of the legislature."*

6. *Judicial Duty not to Deny the Statute – Subject only to the Constitution, it is the duty of the court to accept the purpose decided on by Parliament. This applies even though the court disagrees with Parliament. It even applies where the court considers the result unjust, provided that it is satisfied that Parliament really did intend that result. In the apt observation by Lord Scarman in* ***Duport Steads Ltd v Sirs [1980] 1 WLR 142, 168****-*

> *"... in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactment. In this field,*

> *Parliament makes and unmakes laws [and] the judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgement best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute"*

My duty as a judge is to interpret and apply the law, not to change it to meet my idea of what justice requires. At the risk of stating the obvious, a Judge is a public officer. **In the Matter of the State and Commissioner General of the Malawi Revenue Authority, ex parte the Estate of Mutharika, HC/PR Miscellaneous Civil Cause No. 3 of 2013 (unreported)**, Mwaungulu, J. (as he then was) issued a clarion call to all public officers "*to act legally within our powers where they exist and not to act where there are no such powers*".

To sum up then on the second issue, neither the Respondent nor this Court has the power to extend the time limits, set out in s. 99 of the PPE Act, for publishing election results.

Conclusion

I wish to express my very real sense of indebtedness to counsel. The case which, though of great national interest (perhaps this explains why none of the parties raised the issue of costs), has been undeniably burdensome. My gratitude is quite general and undifferentiated. It was most pleasing to see that all the parties were represented by well seasoned counsel, one of whom is a senior counsel. It may be unusual but I hope that it will not be thought improper if I say that however disappointed some of the parties may be at the result of my judgment, they have every reason to be deeply grateful to their respective counsel for their eloquent submissions and arguments and for their skilful (and sometimes tenacious) presentation of their respective positions.

Made in open court this 30th day of May 2014.

Kenyatta Nyirenda
JUDGE