IN THE HIGH COURT OF MALAWI

Principal Registry
CONSTITUTIONAL CIVIL CAUSE NO. 2 OF 2009
(Being MISCELLANEOUS CIVIL CAUSE NO 36 OF 2009)

BETWEEN:

THE STATE,
THE ELECTORAL COMMISSION…..... RESPONDENT

-AND-

EX-PARTE: DR. BAKILI MULUZI ……...……..…1ST APPLICANT

UNITED DEMOCRATIC FRONT ..…. 2ND APPLICANT

CORAM: THE HON. JUSTICE TWEA
THE JUSTICE POTANI
THE HON. JUSTICE DR. MTAMBO
The Attorney General, Dr. Ansah S.C., Solistor General, Mr A. Kamanga S.C., Mrs Kanyuka, Mr Nyamirandu, Mr Kayira and Mr Nkhowani of Counsel for the Applicant.
Mr Kaphale , Mr J. Banda of Counsel for the Respondent
Mrs Matekenya, Official Interpreter
Ms Chiphwaya, Typesetter

TWEA, J.

JUDGMENT

The 1st applicant, Dr Bakili Muluzi, is the National Chairman of the 2nd applicant, the United Democratic Front (UDF) party. The respondent is the Electoral Commission. The applicants, on 9th April, 2009 obtained leave to move for judicial review against the decision of the respondent rejecting the 1st applicant to stand as a presidential nominee for the second applicant in the 19th May, 2009 presidential elections.

By the notice of amended statement on Form 86A, the applicants, in the main raised two issues. These were that the applicants were not granted the right to be heard, in accordance with Section 43 of the Constitution. Secondly, that the decision of the respondent was wrong at law. The applicants raised three main issues against the decision of the respondent. These were, firstly, that the respondent erred at law when deciding the eligibility of the first applicant as presidential nominee. Secondly, that the respondent erroneously interpreted Section 83(3) of the Constitution, and further, that the respondents took into account irrelevant factors so as to render their decision unreasonable. Thirdly, that the decision of the respondents infringed the applicants political right to freely and peacefully participate in politics and to run for public office. The applicants then sought the following reliefs:

(1) An order similar to certiorari quashing the determination of the Respondents prohibiting the first applicant from contesting and/or declaring the applicant ineligible to contest in the forthcoming Presidential Elections.

(2) A declaration that the said determination of the Respondents is unreasonable, irrational and unconstitutional.

(3) A declaration that the decision of the Respondent is illegal and unenforceable.

(4) An order similar to prohibition stopping the Respondent from implementing its impugned decision.

(5) ***An order similar to mandamus compelling the respondent to allow the 1st applicant to contest as a presidential candidate in the presidential elections scheduled to take place on 19th May 2009, and 2nd applicant to be given a chance to participate therein.***

(6) An order be granted under Section 67(1) of the Constitution extending the presidential election by a period of seven days and further that the respondents be restrained from enforcing the said decision and determination till this matter is determined by the court or further order of the court.

(7) An order for costs.

The other reliefs sought related to the interim reliefs which are not relevant to the present determination.

The facts in this case are not disputed. It is deposed that the 1st applicant, as chairman of the 2nd applicant, was nominated as the party's presidential nominee for the 19 May, 2009 elections. The first applicant presented his nomination papers to the respondent in February, 2009 as is required under Section 48(1) of the Parliamentary and Presidential Elections Act, (PPEA). By its letter, dated 20 March, 2009, the respondent informed the applicant that his nomination had been rejected because he was ineligible. The reason was that he had already served as President for two consecutive terms as stipulated under Section 83(3) of the Constitution. The respondent further referred to the pre-constitution debates in the National Assembly and conferences which condemned life presidency and recommended limitation of presidential terms and also the post Constitution debates in Parliament, during the presidential tenure of the 1st applicant, attempting to introduce a third presidential term or an open term. Both of them were rejected in Parliament.

It is important to mention that the respondent raised a preliminary issue and sought to discharge the applicants' leave to move for judicial review. This Court found in favour of the applicants and hence this hearing.

We wish to acknowledge that this has been a long and emotional case. This is evidenced by some arguments on both sides which were directed towards moral persuasion than legal discourse. Such were the emotions. However, we are most grateful to the Attorney General and Counsel on both sides that, despite the pressure of time and the difficult nature of the case, they came up with good material. The research, on both sides was good. The arguments too were good. We say this because notwithstanding that both sides, at times, cited the same cases, they sought to persuade this Court differently.

We wish to start by giving our opinion on the duty of the court in judicial review. The purpose of judicial review is well settled before this court. We will refer to the

decision of Mkandawire J, in the case of ***In the Matter of the Constitution of the Republic of Malawi and in the Matter of the Removal of Mac William Lunguzi as Inspector General of Police and in the Matter of Judicial Review,*** Misc. App. 55 of 1994, where he said:

> ***"Before I proceed further, perhaps I should say something about what judicial review is all about. Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power…"***

These courts have followed this, through and through. However, throughout the discourse of judicial review, these courts have followed the tenets of Section 108(2) of the Constitution which enjoins the court ***"to review any law, and action or decision of the Government, for conformity with this Constitution…"***

This power is equally reflected in Section 76(5) of the Constitution which states that:

(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 jurisdiction to ensure that such powers and functions were duly exercised in accordance with this Constitution or any Act of Parliament;…"

This is premised on Section 5 of the Constitution, which makes the Constitution supreme. In this respect we accept the arguments and the views of both the applicants and the respondent that the Constitution is supreme and sets the standard against which all acts and actions of the Government must be tested and judged. Further, we agree with the applicants' submission, that our Constitutional position is akin to that of South Africa. We quote with approval the case ***Matiso v Commanding Officer, Port Elizabeth Prison*** (1995) 4 SA 631 (CC) that:

> ***"The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that***

legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution."

Because the Constitution is supreme every thing else derives from it and must conform to it. The courts therefore, have, invariably, to concern themselves with examination, to some degree, of whether or not the Constitution is followed. In this respect the courts have gone ahead to decide whether or not an act or action by Government was Constitutional or not. This is clear from the declarations made in the ***Lunguzi Case (supra)***, ***The State, the Minister of Transport and Public Works Ex-parte Minibus Owners Association of Malawi*** Civil Cause 297 of 2007 and also ***The State, The Minister of Finance and the Governor of the Reserve Bank of Malawi Ex-parte Golden Forex Bureau and Others*** Civil Cause 16 of 2007. In this respect therefore, we do not think we are constrained from examining the determination by the respondent as to whether or not, it conforms to the Constitution.

We would first of all consider the rights under Section 43 of the Constitution which the applicants alleged were infringed. The respondent, on the other hand, alleged that there was no infringement. Section 43 of the Constitution provides:

"43, Every person shall have the right to-

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

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

The applicants argued that they were entitled to be heard before the respondent made a determination on the eligibility of the 1st applicant as a presidential nominee. It was their contention that this was their legitimate expectation, more particularly since the nomination was rejected. The respondents, however, argued that they complied with the Constitution and the statute in that they did what they were required to do and provided the reasons for the determination in writing.

The argument of the applicants is premised on the ***"presumption that procedural fairness is required whenever the exercise of a power adversely affects an***

individual's rights protected by common law or created by statute." [1]

In this respect the applicants want their rights to be heard protected. The right to be heard is steeped in the principles of ***"natural justice,"*** which, they claim, have been violated. The question remains how does one acquire a legitimate expectation?

A legitimate or reasonable expectation may arise from a statutory instrument or be induced by the decision maker or from the existence of a regular practice which the claimant can reasonably expect to have: See ***Council of Civil Service Union vs Minister of Civil Service*** (1985) A.C. 374 at page 404, see also ***Khrishna Vishnu Patel, Kamal Vishnu Patel and the State and The Minister of Home Affairs*** Misc. Civil Cause 24 of 2001. This court also take into account the views of the learned author Clive Lewis in ***Judicial Remedies in Public Law***, Sweet and Maxwell London, 1992, page 97 that:

> "In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or a representation made by a public body, or from a previous practice of a public body. The promise of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken…"

It is therefore important to examine the relationship between the complainant and the decision maker.

In the present case, the applicants are an aspiring presidential nominee and his party. The respondent is the Electoral Commission charged with the duty to run general and presidential elections. Elections are governed by the PPEA. Section 39 provides for invalid nomination and applies to presidential nominees. It reads as follows:

> ***"39. 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 nomination paper does not comply with this Act…"***

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[1] Dr Smith, Woold and Triwell: ***Judicial Review Administrative Action***, Sweet & Maxwell, 1995 page 410

Section 54 of PPEA in respect of presidential nominees provides:

"54. Where –

(a) …

No candidate nominated for election to the office of President is qualified in accordance with the constitution for election as President; …

> ***The Commission shall, by notice publish in the gazette, declare that all proceedings relating to the election to the office of President are void and that proceedings shall be immediately commence afresh in accordance with this Act."***

In the present case, there were more than two other presidential nominees validly nominated, therefore Section 55 of PPEA applied. The fact of the matter, however, is that according to Section 39, the first applicant would have been deemed to have been validly nominated had the Electoral Commission not informed him that his nomination paper did not qualify in accordance with the Constitution. The respondent was therefore required to inform the applicants in order ***"to ensure compliance with the provisions of this Constitution and any other Act of Parliament."*** See Section 76 (2) (d) of the Constitution. We are mindful of the fact that the applicants were greatly influenced by the perception that the PPEA does not provide a procedure for a rejected presidential nominee to make representations to the respondent. In our earlier ruling, on the preliminaries, we found that a rejected presidential nominee has the same rights as a rejected nominee for the National Assembly under Section 40 of the PPEA. We therefore find that Section 39 of PPEA, does not provide for prior hearing before a decision is made. However, it does not preclude a hearing after.

We have also examined the affidavits. We find that the applicants did not lead any evidence to show that the respondent induced them to believe that they would be heard before a decision is made, or that there was a practice of allowing a hearing before a decision is taken so as to create a legitimate expectation.

In this respect, the case of the ***State and Malawi Electoral Commission Ex-parte Yeremiah Chihana*** Misc. Civil Cause 21 of 2009, Mzuzu Registry, can be distinguished. It is clear that in the ***Chihana case***, the respondent received a complaint from a third party making allegation against Mr Chihana. The respondent then made a determination. We agree with the learned Judge, on this aspect, that Mr Chihana was entitle to be told of the allegations made against him and to be given him an opportunity to confront the accusers or make representation. It was unfair to attempt to justify the action after the determination.

In coming to this decision, we take into account that in the ***Chihana Case*** the

learned Judge did not have the benefit of arguments in respect of the PPEA. We would therefore be most reluctant to endorse the other parts of the judgment.

There was consensus between the parties that a right to be heard can be had before or after a decision. The only caveat that the applicants made was that, in the ordinary course of things, one should be heard before a decision is made. The learned authors: De Smith, Woolf and Jowell in ***Judicial Review of Administrative Action*** (supra) page 488 said:

> ***"A prior hearing may be better than a subsequent hearing, but a subsequent hearing, for example an appeal, is better than no hearing at all, and in some cases the courts have held that statutory provisions for an administrative appeal, or even full judicial review on the merits are sufficient to negative the existence of any implied duty to have hearing before the original decision is made."***

This point of view is supported by the case ***Doody vs Secretary for the State Department and Other Appeals*** (1994) I.A.C. 531, cited by the respondent. In the present case, therefore, the PPEA would have afforded the applicants the right to be heard after the determination by the respondent. However, since the determination was made after the period for presenting nomination papers was closed, we allowed the applicants to move for this judicial review. We therefore find that the applicants were not prejudiced.

We will now consider the applicants' dissatisfaction with the determination of the respondents.

The applicants have argued that the 1st applicant was eligible to stand as presidential nominee. It was contended that issues of eligibility are determined by Section 80(6) and (7) of the Constitution. It was further contended that Section 83(3) was about tenure of office and not eligibility.

We have examined Section 80(6) and (7). It is not disputed that subsection 6 provides for the qualifications for nomination for election for the office of president and appointment of first vice president and second vice president. The qualifications are that such a person should be a citizen of Malawi by birth or descent and has attained 35 years of age. Subsection 7 provides seven factors which would render a person not eligible for nomination for election for office of president or first vice president or appointment as first vice or second vice president. To these however, must be added: firstly, Section 86(2)(d) which disqualifies the president or first vice president who was convicted by way of

impeachment from holding future office. Secondly Section 83(3) of the Constitution which provides limitation of terms that one may serve as president, first vice president or second vice president. It is important to note that Section 86 provides for removal from office of the president or first vice president, while Section 83 provides for tenure. It cannot be denied however, that the cited subsections refer to qualification and do affect the eligibility of a person for nomination to the office of president or first vice president. The applicants therefore cannot be heard to say that qualification and eligibility are determined by Section 80(6) and (7) of the Constitution only. Nor would it be correct to say that Section 83 of the Constitution is restricted solely to tenure of office. There is an inevitable over-lap between removal, tenure and eligibility.

We now come to the dispute on the interpretation of Section 83 of the constitution.

We note that there was no issue taken with Section 83(1). It is straight forward. The President shall hold office for five years from the date his or her oath of office is administered. However, he or she shall remain in office until his or her successor has been sworn in: See also Section 81(4) of the constitution. According to Section 81(3) of the constitution a person elected to be President or appointed first vice president or second vice president shall be sworn into office within thirty days of being elected or appointed. The President, therefore, and, where applicable, the first vice president and second vice president, will be in office for five years plus or minus thirty days.

We have also considered Section 83(2) of the Constitution. We find that there was no dispute about it. It provides that the first vice president and second vice president shall hold office from the date of the administration of oath of office on them until the end of the President's term of office, unless their office should come to and end sooner in accordance with the Constitution. This subsection makes it possible that the date for taking of oath for the first vice president and second vice president may differ from that of the President. This is inevitable because both may come into office by way of appointment. In respect of the second vice president, regard should be had to Section 80(5) of the Constitution, which gives the President the discretion, in the national interest, to appoint a second vice president.

In what circumstances would the tenure of the first vice or second vice president come to an end sooner? This would be in case of death or resignation under Section 84 of the Constitution. For the first vice president, in the event of a conviction by way of impeachment in accordance with Section 86(2)(d) of the Constitution. In respect of the second vice president, when removed from office by the President under Section 86(3) of the Constitution. Other than this they are

entitled to be in office until the President's term of office expires.

The controversy we have is centered around Section 83(3). We wish to point out that both parties did not refer to the full text of the subsection. The applicants deemed the other part of the subsection irrelevant. The respondent did not give their view but responded to the views of the applicants.

We will start by looking at the full text of the subsection. Section 83(3) states:

> ***"83(3) The President, the first vice President and the second vice President may serve in their respective capacities a maximum of two consecutive terms, but when a person is elected or appointed to fill a vacancy in the office of President of vice President, the period between that election or appointment and the next election of a President shall not be regarded as a term."***

The interpretation of this subsection has been very controversial and is the crux of this case. We will not go over all the Constitutional arguments and the approaches to Constitutional interpretation. We are, as we said earlier, most grateful for the arguments and authorities offered by both parties. It is our view however, that the starting point should be the views espoused by Chipeta J in the ***Public Affairs Committee Case***, Civil Cause No. 1861 of 2003, where he said-

> ***"I have just advocated for a chance to be given to the Constitution to speak with an uninterrupted voice and to first try and understand what it means before rushing to borrow the influence of decisions in other jurisdictions for the construction of our Constitution. I should think it is only when a direct understanding of the Constitution proves difficult to capture that resort can be meaningful had to such other guiding materials or precedents."***

The views of Justice Chipeta are also reflected in the case of ***Supreme Court Reference No. 2 of 1995: Re Reference by Western Highlands Provincial Executives*** (1996) 3 LRC 28, cited by the applicants, that the primary aids to interpretation of the Constitution must be found in the Constitution itself. Recourse to external aids to interpretation should only be had where the words used are unclear. These views are supported by Section 10 and 11 of our Constitution.

We also wish to point out, from the outset, that we are bound to have regard to the provisions of Section 11(1) which provides:

> ***"11(1) Appropriate principles of interpretation of this Constitution shall be***

developed and employed by the courts to reflect the unique character and supreme status of the Constitution."

It has been pointed out to us, now and again, that the unique character and supremacy of the Constitution must guide us. To reflect the many arguments and approaches to Constitutional interpretation that we have been urged to adopt, we would settle for the approach by ***Mahommed J.*** in ***S vs Makwanyane*** (1995) 3 SA 391 (CC) that:

> "What … is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different legal provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical consideration bearing on the problem; the significance and meaning of the language used in the relevant provisions of the content and sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all factors to determine what the Constitution permits and what it prohibits."

The bottom line is that we should be slow to declare any word in the Constitution as irrelevant or meaningless.

Before we go further, we should look at Section 83(4), that provides that:

"(4) Whenever there is a vacancy in the office of the President, the first vice President shall assume that office for the remainder of the term and appoint another person to serve as First Vice President."

This subsection was not referred to, at all, by either party. Its import however, is clear. The First Vice President assumes the office of the President. He is not elected at all under this subsection. His term therefore is not interrupted. On the other hand, one that he chooses as the First Vice President is appointed to the office and would fall under subsection 3, that is, he or she will serve a non-term vice Presidency and would not fall under the limitation. Consequently, a first vice president who assumed office under this subsection will be deemed to have served a term. This tallies with ***"their respective capacities"*** referred to in subsection 3, which we will look at later. There was no controversy about this subsection.

We now come back to the controversy that we have been referred to in Section 83(3).

First it must be recognized that the subsection provides that the mentioned officers

"may serve". The relevance of this is that according to Sections 38, 48, 49 of the PPEA, a presidential candidate has to elect whether or not he or she wants to serve again. This is signified by him or her pending his or her signature to the nomination paper acknowledging his or her consent to the nomination. It is not therefore, mandatory that one should make oneself available for re-election.

The second issue is that the officers may serve ***"in their respective capacities."*** The restriction is not limited to the respective capacity in which they serve, it applies to their respective capacities. It is important to note that of all the Constitutional provisions from the foreign jurisdictions, cited to us by both parties, none is couched in the language of our Constitution; to cover the first vice president and second vice president. In fact the Constitutions of Georgia; article 70(1), Luthuania; article 78, Slovokia; article 103(2) and Finland; article 54, refer to the "***same person***." This restricts service to the capacity in which one served. Be this as it may the said constitutional provisions do not refer to the vice president. This feature therefore, is unique to our Constitution. Ordinarily, a vice president would be eligible to contest for the office of the president when the president's tenure comes to an end. However, our Constitution bars this. If this were not so, one could, in ascending order, be a second vice president, then be a first vice president and then the president, or, in descending order, be the president, first vice president and then the second vice president. This, in effect, would have permitted a person to serve the presidency for thirty years or more. In this respect the phrase: ***"in their respective capacities,"*** bars an officer even when he changes capacity between the offices. Section 83(4) of the Constitution clearly demonstrates this, as we have seen earlier.

Thirdly, the subsection provides that they serve ***"a maximum of"*** two consecutive terms. This was greatly contested. The applicants submitted that the word ***"maximum"*** is a misplaced emphasis and a classic example of ***"putting the cart before the horse."*** The applicants further submitted that emphasis on the word "***maximum"*** should not be at the expense of the word ***"consecutive"*** because it may serves to distract us from focusing on who is addressed as ***"the President."*** On the other hand the respondent proffered a dictionary definition of Blacks Law Dictionary 6th Edition, that it is ***"the highest or greatest amount, quality, value, or degree."*** As we said earlier, the words in the Constitution should not be regarded as irrelevant or superfluous. In this respect we take heed of the fact that the language of the Constitution cannot be ignored for convenience. We accept the respondents submission, and adopt the dictionary definition proffered.

Fourthly, the subsection provides that they may serve in their respective capacities a maximum of ***"two consecutive terms."*** These words have been interpreted

differently and greatly contested. While both sides agree, and, we also agree, that ***"consecutive"*** means ***"successive, succeeding one another in regular order, to follow in uninterrupted succession,"*** the agreement ends at that. The applicants contended that two consecutive terms means the order in which the terms must be served. The respondent contended that it is the maximum of terms that one may serve.

Fifthly, the subsection stipulates that ***"but when a person is elected or appointed to fill a vacancy in the office of the President or vice President, the period between that election or appointment and the next election of a President shall not be regarded as a term."*** This is the part of the subsection which the applicants deemed irrelevant and ignored. The respondent too did not refer to it. Again we take heed not to ignore the express provisions in the Constitution.

The above referred phrase clearly defines what is regarded as a term in the Constitution. A term means being in office from the swearing in after the general and presidential elections to the swearing in after the next general and presidential elections. The term must conform to Section 83(1) of the Constitution. The effect of the qualifier is that the Constitution provides for ***"a term presidency"*** and ***"a non-term presidency."*** In this respect, one who is elected or appointed under subsection (3) is referred to as ***"a person,"*** and the period he or she serves is not regarded as a term. Would such a person be a President or vice-President? The answer is overwhelmingly YES. He or she would be President or vice President. Would such a person be regarded as having served a term? The answer, is NO. The significance of this is that the terms ***"the president, first vice president and second vice president"*** in subsection 3, in respect of the limitation of tenure, refer only to persons who served a term, as the president, first vice president or second vice president. We wish to refer to Section 88(2) of the Constitution of South Africa, which has a similar provision:

> ***"(2) No person may hold office as president for more than two terms, but when a person is elected to fill a vacancy in the office of president, the period between that election and the next election of a president is not regarded as a term."***

This, like our Constitution, creates ***"a non-term presidency"*** which does not render a person subject to the limitation of the terms of office. A person who has not served a term is therefore not limited and cannot be defined as the president, first vice president or second vice president under subsection 3.

The argument by the applicants, that the term president refers to the incumbent is not tenable under this subsection. An incumbent president will be deemed to have

served a term when the next general election is determined and he or she hands over to his or her successor. He or she may resign, be impeached or die before he or she serves a term. We also wish to point out that the case of ***The State, the Director of Public Prosecutions and Others, ex parte Dr Cassim Chilumpha,*** High Court, Constitutional Case 5 of 2006, was wrongly quoted by the applicants. That case did not define the term ***"the President"*** in Section 91(2) of the Constitution to mean the incumbent. It is clear that the immunity of office therein only accrues to a ***"person holding the office of president or performing the functions of president."*** This may be the incumbent or an Acting President under Sections 85 or 87(3) of the Constitution. The argument by the applicants is therefore misleading. The applicants' arguments on this point are therefore dismissed.

It is important to consider circumstance in which one would come into the office of the President or vice President by election or appointment under subsection 3. Appointments would be, for a first and second vice President, upon death or resignation under Section 84 of the Constitution, upon impeachment of the first vice President under Section 86(2)(d) of the Constitution. Elections would be had where the office of both the president and the vice president become vacant at the same time under Section 85 of the Constitution. In such a situation the Cabinet will elect, among themselves, an Acting President or Acting vice President, to hold office for sixty days. This could come about where the election of the President is declared invalid under Section 100(4) of the PPEA, where both are convicted by way of impeachment under Section 86 of the Constitution, when the incapacity of the President is not reversed after the expiry of 12 months under Section 87(5) of the Constitution, or indeed, should both died at the same time. Clearly, the ones who hold the office as Acting President or Acting Vice President would not have served a term and therefore not be subject to limitation of tenure.

These provisions clearly demonstrate that one may serve in the office of the President, or vice President without causing time to run on the terms. Under the Constitution therefore, one may serve in the office of President or Vice President for more than 10 years where he or she has served a non-term Presidency or Vice Presidency.

With all this in mind, we come back to consider the import of the phrase ***"a maximum of two consecutive terms."*** We reaffirm that a term is defined in Section 83(1) of the Constitution.

As we said, the approach of the applicants differs from that of the respondent. We have examined the several possible meanings that have been suggested.

The applicants have suggested that ***"two consecutive terms"*** refers to the order in which the Presidency must be served. In this respect they have argued that since there is no mention about a person who serves a single term, such a person can come back to serve as President, for as many times as is possible, after a break. This, they contended, unnecessarily restricts the rights of a person who serves consecutive terms. Such a person they argued, should therefore be allowed to, as they put it, ***"bounce back"*** after a break: just like the one who serves a single term and comes back after a break. It was contended that in any case, such a person would have to be elected at the polls and would be called upon to answer for his actions during the break. The main stay of this argument was that there can, in the literal sense, be no life presidency and that this would not infringe the democratic values and principles of accountability.

The respondent argued that the phrase refers to the maximum number of terms that a person can serve as President. They contended that the words are ***"clear and unambiguous. It is not permitted to interpret the phrase as permitting another term after the prescribed maximum."***

The applicants took issue with the stand of the respondent. They challenged the respondents assertion as to clarity and simplicity of the phrase in view of the respondents reliance of the historical approach to Constitutional interpretation.

We have considered both views, we again wish to defer to the opinion of Mahomed J in the ***Makwanyawe case*** (supra) that "***the text and context, interplay between different legal provisions public international law, factual and historical considerations, meaning of language used, balancing particularly conflicting consideration must all influence a judicious interpretation and assessment to determine what the Constitution permits or prohibits."***

We note that the approach proffered by the applicants create the absurdity of barring a person who has served two consecutive terms. However, it would allow a single term President to come back as long as he or she does not serve consecutive terms. We must point out that such an interpretation is largely influenced by ignoring the phrase ***"a maximum of"***. As a result of the absurdity created by this approach, we have been called upon to wear our human rights lenses to allow the first applicant to stand again, or, ***"bounce back"*** as they put it.

On the other hand, the Respondent argues that there is no ambiguity. They contended that a liberal and purposive approach should be used. They did not go further than this.

We note that both parties got stuck. The applicants, with an "***absurdity"*** and the

respondent with ***"lack of further explanation."*** We would therefore acknowledge that from the submissions proffered we are stuck. As a court therefore, we have to examine the phrase in the light of the whole subsection, Section and the Constitution. Where necessary we will have recourse to external aids.

We wish to reject the approach by the applicants. We do not believe that the Constitution intended to create an absurdity. The interpretation that the applicants are seeking would, in effect, remove the term limits. This could not have been what was intended.

We would accept the interpretation that the phrase ***"a maximum of"*** defines the number of terms that one can serve under the Constitution: "***two consecutive terms."*** Such an approach would take into account the Constitutional facts that it is not mandatory to re-run for office, that election to office depends on the electorate's choice at the polls, that a person may serve as President without serving a term, and lastly, that the Constitution actually puts limits; not only on the President but the first vice president and the second Vice President as well.

In this respect therefore a person who serves two consecutive terms, as the first applicant did, would have served the maximum. When one serves one term and decides not to re-run, or fails at the polls, he or she would be eligible to run again and be elected as a president after the break. Should he or she serve the second term after a break, he or she would have served the maximum. Thus becomes ineligible to run again as president, first vice president or second vice president. To hold otherwise would effectively remove the term limits.

This court is re-enforced in this view, by the fact the pre-constitution proceedings and debates in the National Assembly and all resolutions at Constitutional Conferences endorsed the limitation of terms of Presidency to two. We take note of the views of the Supreme Court in ***Gwanda Chakuamba and Others*** MSCA Civil Appeal No. 20 of 2000, that we should be cautious when considering external aids to interpretation. We are, however, comforted by the fact that both parties cited to us cases which give legitimacy to such sources: ***Chin Chin and Others vs Inspector General of Police,*** (1998) LRC 477. Further, the Supreme Court of Appeal in ***AG vs Dr Mapopa Chipeta*** MSCA Civil App. 33 of 1994 implored courts to interpret the Constitution in a manner that give force and life to the words used by the legislature and at all time avoid an interpretation that produces absurd consequences.

It is therefore our judgment that the Constitution limits the terms, that a person who has served a term as the President, First Vice President or second vice president, to ***'a maximum of two consecutive terms"***. In this respect the first

applicant is not eligible for office. Having served a maximum he is not eligible to come back, not even for a non-term President.

Lastly, we have considered whether the political rights of the applicants under Section 40 of the Constitution have been infringed. Section 40(1) and (2) which provides for individual persons' rights, stipulates that such rights are subject to the Constitution. One, therefore, can only enjoy such rights as are not limited by the Constitution. It has been demonstrated that the Constitution limits the terms that one can serve as president, first vice president or second vice president. It has also been demonstrated that such a limitation is accepted internationally in democratic societies, notwithstanding the variations from jurisdiction to jurisdiction. In this respect therefore we do not find that the political rights of the applicants have been infringed.

It is our judgment that the respondent's determination did not infringe the political rights of the applicants. It was not unconstitutional or unreasonable. This application therefore, must fail in its entirety. The applicants are not entitled to any of the reliefs sought. We have considered the question of costs. Normally costs would follow the event; the successful party. However, we take into account that the issue of eligibility of the first applicant has been before this court in the ***James Phiri and Attorney General vs Dr Bakili Muluzi,*** Constitutional Case No. 1 of 2008, and also ***Dr Bakili Muluzi and UDF vs Malawi Electoral Commission*** Constitutional Case No. 1 of 2009. This would tend to indicate the strong views that the applicants held on the constitutional position. We also take into account the quality of research by both parties and the fact that, subject to the parties right to appeal and to the views of the Supreme Court of Appeal, this settles the issue on this point in our Constitution and jurisprudence. Since costs are at our discretion, in the light of these observations, we order that each party should bear its own costs.

PRONOUNCED in open court this 16th day of May, 2009 at Blantyre.

JUSTICE E.B. TWEA

JUSTICE H.S.B. POTANI

JUSTICE DR. M.C. MTAMBO