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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

IN THE MATTER OF ORDER 19 OF THE COURTS (HIGH COURT) (CIVIL PROCEDURE) RULES, 2017,

CONSTITUTIONAL REFERENCE NUMBER 01 OF 2021

(Being Civil Cause Number 75 of 2021, Before Honourable Justice M.A TEMBO Sitting at Blantyre)

DIRECTOR OF PUBLIC PROSECUTIONS..... CLAIMANT

AND

NORMAN PAUL CHISALE.....1ST DEFENDANT

CHIMWEMWE t/a NAMAUYA INVESTMENTS.....2ND DEFENDANT

DEBORAH ZIMATHA CHISALE.....3RD DEFENDANT

ESNART GUGA.....4TH DEFENDANT

FLONEY GUGA.....5TH DEFENDANT

JANNET FATCH KAMANGA.....6TH DEFENDANT

CHRISTINA MVULA.....7TH DEFENDANT

CORAM: HON MR. JUSTICE DINGISWAYO MADISE

HON MR. JUSTICE KENAN MANDA

HON MS. JUSTICE ANNELINE KANTHAMBI

FOR THE CLAIMANTS:

Attorney General's Chambers;

Hon. Thabo Chakaka Nyirenda - Attorney General

Mr Clement Maulidi

Mr Owen Chuma

Directorate of Public Prosecutions;

Dr Steven Kayuni - Director of Public Prosecutions

Dr Jean Phillipo-Priminta

Mr Pirirani Masanjala

Financial Intelligence Authority;

Mr Edwin Mtonga

Mr Collin Chitsime

Anti-Corruption Bureau

Mr Imran Saidi

For the Defendants:

Mr C. Gondwe Counsel for the 1st, 3rd, 4th, 5th and 7th Defendant

Mr. J. Masumbu Counsel for the 6th Defendant.

Mrs. Mhone, Court Reporter

Mr Mathanda Court Interpreter

JUDGMENT

Madise, J

1.0 Introduction

1.1 On the of 25th of February 2021, The Director of Public Prosecutions (the Claimant in the original Court and Respondent herein) applied for and obtained, in the original Court, a preservation order by which a number of properties belonging to the Defendants (the

Applicants herein) was seized and brought under the control of the Director of Public Prosecutions, until the conclusion of forfeiture proceedings or until a contrary order was made by the original Court..

1.2 The application for the preservation order was made without notice to the Defendants pursuant to section 65 of the Financial Crimes Act (FCA) of 2017, and was granted having satisfied the original Court that there was reasonable suspicion that the property is proceeds of offences that are under investigation by the various organs of the State. The aforeStated preservation order also provided that the Defendants or any interested party who wished to challenge it could do so by filing a notice under section 66 of the Financial Crimes Act.

1.3 The sworn Statements filed by the Claimant on the application of the preservation order showed that the main party connected to all the property in question is the 1st Defendant who had previously served as a soldier in the military in the country and retired in 2007. Thereafter he served as a security aide to the late President Bingu Wa Mutharika between 1st July, 2009 and 19th June, 2012. As of June, 2020 he was Director of Security Services at the State House during the tenure of former President Arthur Peter Mutharika, having been employed on 19th June, 2014.

1.4 The Defendants did express their intention to oppose the preservation order. Having indicated to the Court that they sought the discharge as aforementioned, the Defendants also indicated that some matters constituting the grounds for the discharge also related to the application and interpretation of the Constitution. Thus as rightly observed by the original Court, the Defendants did not take up a substantive challenge to the Order but rather sought to raise a challenge based on preliminary issues of law and sought that the preservation Order be discharged on several grounds which were presented before the original Court as follows:

(i) That the State is not the right party (*dextra pars*) or competent authority to these proceedings in view of the fact that these are civil proceedings in terms of section 54 (1) of the Financial Crimes Act and on the authority of ***Jeffrey v Phiri and The Anti-Corruption Bureau*** MSCA Civil Appeal Number 12 of 2002.

(ii) That the Claimant who is 'the State' is not a legal person (*legis homo*) at law capable of instituting civil proceedings.

(iii) That the proceedings have been filed by the Director of Public Prosecutions who lacks *locus standi* in civil proceedings as his constitutional mandate is in criminal matters (*rebus criminalibus*).

(iv) The conduct of the Director of Public Prosecutions in commencing these civil proceedings in the Civil Division of the High Court is not consistent with the powers and duties of the Director of Public Prosecutions as enshrined in section 99 (2) (a) of the Constitution.

(v) The commencement of these proceedings by the Director of Public Prosecutions under section 65 (2) and (3) of the Financial Crimes Act is unconstitutional as it contravenes section 99 (2) (a) of the Constitution.

(vi) The Defendants cannot be properly called to be parties to the civil proceedings herein when Order 6 Rule 1 of the Courts (High Court) (Civil Procedure) Rules does not recognize those parties named Defendants as parties to proceedings.

(vii) Section 65 (1) of the Financial Crimes Act which permits granting of ex parte preservation orders is contrary to the right to equality and to equal treatment before the law as provided for under section 20 (1) of the Constitution.

(viii) The civil property preservation order granted by this Court without notice in terms of section 65 (2) of the Financial Crimes Act is tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42 (2) (f) (iii), section 28 and section 19 of the Constitution respectively.

(ix) The evidence in the form of sworn Statements adduced before this Court by the Claimant did not meet the threshold test to be applied at the preservation stage under section 65 (2) of the Financial Crimes Act to make this Court reasonably believe that the property concerned constitutes proceeds of an offence.

(x) The retrospective application of the Financial Crimes Act, as provided for in section 141 (2) of the Financial Crimes Act is not consistent with the principle of legality and rule of law which lies at the heart of the constitutional dispensation of 1994.

(xi) Ex parte orders under section 65 (2) of the Financial Crimes Act are clearly a draconian intrusion into the rights of the people who are affected by such orders,

as they authorize serious erosion of the rights contained in the bill of rights under Chapter 4 of the Constitution which is the cornerstone of Malawi's constitutional democracy as the said orders do not afford the affected parties an opportunity to challenge the same before the said preservation orders are made, and as such, such orders are unconstitutional.

1.5 The Defendants also added that matters indicated in IV, V, VIII, X and XI relate to the application and interpretation of the Constitutionand on that account, the Defendants prayed to the original Court to refer those issues to the Chief Justice for certification as such and be heard before a panel of not less than three judges. Alternatively, the Defendants indicated that they shall apply to have the preservation order herein discharged or varied on the basis of sworn Statements to be filed subject to determination of the preliminary issues.

1.6 The original Court went on to deal with the issues (i) and (ii) raised in the preliminary challenge above and then went on to consider the matters raised under issues (iii), (iv) and (v) above, namely; whether or not the Director of Public Prosecutions has the requisite *locus standi* to move civil applications under the Financial Crimes Act?; whether the Claimant has *locus standi* to apply for the grant of the preservation order?; whether the conduct of the Director of Public Prosecutions (DPP) in commencing civil proceedings is contrary to the powers and duties of the Director of Public Prosecutions as enshrined under section 99 (2) (a) of the Constitution of the Republic of Malawi?; and, whether the commencement of these civil proceedings by the Director of Public Prosecutions (DPP) under section 65 (2) and (3) of the Financial Crimes Act is consistent with the provisions of section 99 (2) of the Constitution of the Republic of Malawi?

1.7 The original Court noted that in their arguments on these issues the Defendants posed the question: who can bring civil proceedings under the Financial Crimes Act? The Court further noted that the Defendants' view is that the issue whether, in view of his powers under section 99 of the Constitution the Director of Public Prosecutions can institute civil proceedings under section 65 of the Financial Crimes Act, is a matter that expressly or substantially relates to the interpretation of the Constitution in terms of section 9 (2) of the Courts Act and that these proceedings ought to be decided by not less than three Judges of the High Court upon certification by the Chief Justice.

1.8 The Claimant on the other hand holds a contrary view. The Claimant's view is that the issues raised by the Defendants in relation to the Constitution do not expressly and substantively relate to, or concern the interpretation or application of the provisions of the Constitution. And that the issue does not meet the requirement under section 9(2) of the Courts Act.

1.9 The Claimant submitted that these are matters a single judge can dispose of and referred to the cases of ***Sauti Phiri v Privatisation Commission*** Constitutional case number 13 of 2005 and ***Malaya v Attorney General*** Constitutional Case number 3 of 2018. The Claimant submitted that the ***Malaya v AG*** case guides that the mere fact that a claim has been made in reference to multiple constitutional provisions does not qualify a case as one that needs constitutional interpretation. And that to qualify as a constitutional Court issue, the interpretation or application must be "the specific and particular fundamental issue before the Court. It must not be a side issue or an enhancement to the claim." The Claimant submitted that, in the present case, no specific issue is before the Court that qualifies for a constitutional interpretation or application. And that the Constitutional Court referral is presented as a side issue, to augment the Defendants' application for the discharge or variation of the Preservation Order.

1.10 On account of the foregoing, the Claimant submitted that the prayer for a referral of the matter to the Chief Justice for certification as a constitutional matter lacks legal basis and is a mere attempt to delay the forfeiture process in this matter.

1.11 The original Court observed that it was clear from the arguments before it that the interpretation of section 99 (2) (a) of the Constitution is fundamental to the resolution of the legal matters raised on the Defendants' notice, namely, whether a reading of section 99 (2) (a) of the Constitution allows the Director of Public Prosecutions to institute civil proceedings as provided in section 65 of the Financial Crimes Act. That the arguments whether such is the case or not relates substantially to the interpretation of section 99 (2) (a) of the Constitution.

1.12 The Court held the view that, as submitted by the Defendants, this matter as contained in preliminary issues IV and V raises an issue that expressly and substantially relates to the interpretation of the Constitution and the original Court conveyed the matter to the Chief Justice for his certification as such so that the whole matter is dealt with by a panel of not less than three High Court Judges as provided by section 9 (2) of the Courts Act. The question being, whether the commencement of these proceedings by the Director of Public Prosecutions

under section 65 (2) and (3) of the Financial Crimes Act, being civil proceedings, is unconstitutional and in contravention of section 99 (2) (a) of the Constitution.

1.13 The original Court also considered the opposing arguments by the parties on the preliminary issue number VIII and was of the view that those issues also expressly and substantially related to the application and interpretation of the Constitution. Those issues too were to be sent for certification by the Chief Justice to be heard by a panel of three Judges in terms of section 9 (2) of the Courts Act. The question being whether the civil property preservation order granted by the original Court without notice in terms of section 65 (2) of the Financial Crimes Act was tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42 (2) (f) (iii), section 28 and section 19 of the Constitution, respectively.

1.14 The Court went on to State that as is usually the case, the panel of three Judges shall have to also deal with the rest of the preliminary matters herein although they are not about constitutional interpretation. However, on reflection, this Court decided to restrict itself to the constitutional questions which were referred to it and thus elected not delve any further into the rest of the preliminary issues.

1.15 The matter was then adjourned by the original Court and be referred to the Chief Justice for certification in terms of Order 19 rule 7 (1) of the Courts (High Court) (Civil Procedure) Rules. Pursuant to the decision above, the original Court submitted a referral for the certification of the Honourable the Chief Justice under section 9(3) of the Courts Act on the 13th day of April in the year 2021 in respect of the following issues:

(a) Whether the commencement of the freezing proceedings before the original Court by the Director of Public Prosecutions (hereinafter referred to as the DPP), under section 65 (2) and (3) of the Financial Crimes Act, being Civil proceedings, is unconstitutional and in contravention of section 99(2) (a) of the Constitution; and

(b) Whether or not the civil property preservation order granted by the original Court without notice in terms of section 65(2) of the Financial Crimes Act is tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42 (2) (f) (iii), section 28 and section 19 of the Constitution, respectively.

1.16 Being of the view that a matter on the interpretation or application of the Constitutionhad arisen, the Honourable the Chief Justice duly certified the matter as raising constitutional issues, on 26th April 2021, and empanelled the present Court to determine what the Defendants perceived to be the Constitutional questions. And that is how the present matter found its way before this Court.

1.17 Pursuant to its mandate under the referral, this Court on 26th May, 2021 gave the following directions:

(a) That the exchange of documents be done within 28 days from 26th May, 2021.

(b) The Applicants be at liberty to reply 7 days thereafter;

(c) That the Applicants shall have one hour to address the Court and the Defendants shall have one hour to respond;

(d) The Applicants to have thirty minutes in Reply;

(e) That the hearing would be held on the 27th of July 2021 at Blantyre, at 9 O'clock in the forenoon.

(f) That Judgment would be delivered 60 days from the date of the hearing.

1.18 Before the said date of hearing however, the 1st Defendant herein, Norman Paulosi Chisale, brought in an application for the variation of the Preservation Order to enable him access his Bank Account domiciled at First Capital Bank of Malawi or him to be able to meet his reasonable living expenses and for legal costs. The Application was brought under Order 10 Rule 1 of the Courts (High Court) (Civil Procedure), Rules 2017 and Section 71(1) (a) of the Financial Crimes Act, 2017).

1.19 Upon receipt of this Application which was made without notice, this Court directed the Defendant to serve the same on the Claimant, who had 2 clear days to respond to the same. The Claimant obliged and opposed the application and prayed for an order dismissing the 1st Defendant's application for an order varying the preservation order on the basis that the Constitutional Court, to which the application was made, does not have the jurisdiction to hear the application for the variation of the preservation order. The Claimant was of the view that the application for variation is before a wrong Court. That the jurisdiction of the Constitutional Court is limited to the interpretation of the constitutional questions that are before it, and any matters ancillary to such interpretation. This Court agreed with the Claimant and dismissed the

1st Defendant's application for variation of the preservation order as granting the same would essentially have the effect of determining the issue that was referred to this Court prematurely.

2.0 The Issues for Determination

2.1. The preliminary issues having been dealt with, this Court is now called upon to determine the following issues:

a) What are the principles of constitutional interpretation that must be employed in this matter?

b) Whether the commencement of the freezing proceedings before the original Court by the Director of Public Prosecutions (hereinafter referred to as the DPP), under section 65 (2) and (3) of the Financial Crimes Act, being Civil proceedings, is unconstitutional and in contravention of section 99(2) (a) of the Constitution; and

c) Whether or not the civil property preservation order granted by the original Court without notice in terms of section 65(2) of the Financial Crimes Act is tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42 (2) (f) (iii), section 28 and section 19 of the Constitution respectively.

3.0 Standard of Proof

3.1 It is commonplace that the standard of proof in civil matters is that on a balance of probabilities. In ***Miller v. Minister of Pensions*** [1947] 2 All ER 372, Denning J said:

> *"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say; 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not. "*

3.2 In short, this means that a plaintiff/claimant must prove a fact by showing that something is more likely so than not: See also the cases of ***B. Sacranie v. ESCOM***, Civil Cause No. 717 of 1991, ***Mr. Lipenga (Administrator of the EState of Janet George) v. Prime Insurance Company Ltd,*** Civil Cause No. 1386 of 2005 and ***Alfred Pensulo and Hastings Mawerenga v. United General Insurance Company Ltd,*** HC/PR Civil Cause No. 592 of 2015.

4.0 Arguments in Support

4.1 Constitutional Interpretation:

The Defendants in the main matter before Tembo J but who are Applicants in this constitutional matter have argued that it is settled law that Interpretation of the Constitutioncalls for its own tools of interpretation to reflect the unique character and supreme status of the Constitution. This has led to an expansive debate on the origins, legitimacy and methodology of constitutional interpretation. **Section 11** of the ConstitutionStates that:

> (1) Appropriate principles shall be developed and employed by the Courts to reflect the unique character and supreme status of this Constitution.
>
> (2) In interpreting the provisions of this Constitutional Court of law shall-
>
> (a) promote the values which underlie an open and democratic society;
>
> (b) take full account of the provisions of Chapter III and IV; and
>
> (c) where applicable, have regard to current norms of public international law and comparable foreign case law.

That from the above background, the Constitutional scheme demands of the Court to, among other things, promote the values which underlie an open and democratic society and to take into account the provisions of the fundamental principles as well as the human rights provisions of the Constitution. They cited section 10.

Section 10 of the Constitution gives prominence to the Constitution in the interpretation, application and formulation of all other laws as well as resolution of political disputes as follows:

> (1) In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.
>
> (2) In the application and formulation of any Act of Parliament, and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the provisions of this Constitution.

Therefore, it is common cause that section 10 of the Constitution underscores the supremacy of the Constitution.

4.2 Constitutional interpretation: Local Authorities from Malawi

That in accordance with the dictation from section 11 of the Constitution, Malawi Courts have from time to time developed and embraced principles for constitutional interpretation.

The Constitution cannot be interpreted in isolation, but must be read in the context as a whole. The Supreme Court of Appeal in ***Nseula vs Attorney General and another*** 1999 MLR 313 – 324 the Court went to great lengths to lay a foundation for constitutional interpretation:

> *A Constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution. In the leading case of the Privy Council on interpretation of constitutions in the* ***Commonwealth, Minister of Home Affairs and another vs Fisher and another*** *[1980] AC 319, Lord Wilberforce in delivering the judgment of the Court said this:-*
>
> *"This is no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal document giving rise, among other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language.*

The Defendants Stated that it is quite consistent with this and with the recognition that rules of interpretation a recognition of the character and origin of the institution and to be guided by the principle of giving full effect to those fundamental rights and freedom with a Statement of which the Constitution commences." (Court's emphasis.)

> *That Statement, in our judgment can, with respect, apply with equal validity to members who took part in the drafting of the Constitution……*
>
> *We have had the advantage which members of the constitutional Consultative Conference, Members of Parliament and Members of the Law Commission did not have. We have*

received submission from very competent Counsel and have had the opportunity of considering cases from different jurisdictions. There is therefore sufficient relevant material before us to give a reasoned judgment on the meaning of the provisions of section 80(2).

The entire Constitution must be read as a whole without "one provision destroying the other but sustaining the other."

4.3 Constitutional interpretation: Comparison with other jurisdictions

The Defendants have argued that in the South African case of ***S vs Acheson*** 1991 (2) SA 805 (Nm) 813 A-C the former Chief Justice Mahomed defined the nature or a supreme Constitution in the following terms:

'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is '' a mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding the people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion'

That the South African case of **S v Makwanyane** 1995 (3) SA 391 (CC) is but one of the celebrated cases on constitutional interpretation. At page 395, the Court underscored the formal and substantive foundations of a Constitution as follows:

"All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and conditions upon which that power is to be exercised; the national ethos which defines and regulates that ethos; and the moral and ethical direction which that nation has identified for its future.

That Constitutional interpretation requires a cautious approach. The Supreme Court of Papua New Guinea in Supreme Court Reference No. 2 of 1995: ***Re Reference by Western Highlands Provincial Executive*** [1996] 3 LRC 28 held that in any questions relating to the interpretation or application of any provision of a constitution, the primary aids to interpretation had to be found in the Constitution itself and where a provision of the Constitution is so clear and unambiguous, an interpretation can be made of it without recourse to interpretational aids and recourse should only be had of such materials when the meaning of the words used is not clear. The Court should place emphasis on the words actually used, avoiding altogether any unexpressed assumptions which might be proposed.

Consequently, the Defendants submitted that the above cited authorities support the proposition that the Constitution must be interpreted as a whole. At a bare minimum, one provision should not be construed in a manner that it will destroy the other. Thus constitutional interpretation has to be generous and purposive. Suffice it to say that the Constitution is unique and the Court would be within its mandate to progressively fashion and adopt applicable principles for constitutional interpretation. Both the DPP and the Attorney General were in agreement with this position.as expounded by the Defendants.

4.4 Financial Crimes Act, 2017

Section 2 of the Act, unless the context otherwise requires-

> *(1) "competent authority" means where appropriate, office of the Attorney General, office of the Director of Public Prosecutions, office of the Registrar General, office of the Administrator General, a police officer, an immigration officer, a revenue officer, the Anti-Corruption Bureau, the Authority, the Reserve Bank of Malawi, the Registrar of Financial Institutions as defined in the Financial Services Act, and includes any person authorised by any of them in that behalf and any other person the Minister may by notice publish in the Gazette, designate.*

Section 54(1) of the FCA. All proceedings under this part, except where the section creates an offence, shall be civil proceedings.

Section 65(1) A Competent Authority may apply to the Court for an order prohibiting any person subject to the conditions and exceptions specified in the order, from dealing in any manner with any realizable or tainted property.

(2) The Court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned-

(b) constitutes proceeds of an offence.

(3) A Court making a preservation order shall, at the same time make an order authorizing the seizure of the property concerned by the competent authority and any other ancillary orders that the Court considers appropriate for the proper, fair and effective execution of the order.

Section 66(3) a person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture, or to apply for an order excluding his interest in the property concerned from the operation.

4.5 Constitution of the Republic of Malawi

Section 28;

(1) every person shall be able to acquire property alone or in association with others.

(2) No person shall be arbitrarily deprived of property.

Section 19 (2) in any judicial proceedings or in any proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

Section 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 expectations or interests are affected and known.

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

Section 12(1) This Constitution is founded on the following underlying principles-

(e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and

(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.

Section 15(1) the Human rights and freedoms enshrined in Chapter IV of the Constitution shall be respected and upheld by the Executive, Legislature, Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

Section 44 (1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law; which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

Section 44(2) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

Section 4 This Constitution shall bind all Executive, Legislative and Judicial organs of the State at all levels of government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.

Section 5 of the Constitution provides that any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

4.6. Constitutional Mandate of the Director of the Director of Public Prosecutions

Section 99(1) of the Constitution provides that there shall be a Director of Public Prosecutions, whose office shall be a public office.

Section 99(2) of the Constitution; The Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable so to do-

(a) to institute and undertake criminal proceedings against any person before any Court (other than a court martial) in respect of any offence alleged to have been committed by that person.

(b) to take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority; and

(c) subject to subsection (5) discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

Section 108(2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Section 46

(2) any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled-

(a) To make an application to a competent Court of law to enforce or protect such right or freedom.

(3) Where a Court referred to in subsection (2) (a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a Court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.

The Defendants argued that Rule of Law primarily refers to the requirements that decisions and actions of those in authority are based on the law and not on their whims or arbitrary discretion. A public officer is only allowed to do such things as he or she is allowed by the law in his or her capacity as a public officer. To act legally within their powers where they exist and not to act

where there are no such powers: (see ***In the Estate and Commissioner General of Malawi Revenue Authority ex-parte the Estate of Mutharika*** **HC/PR Misc. Civ. Cause No. 30 of 2013.)**

In ***Attorney General v McWilliam Lunguzi*** [1996] MLR 8 (MSCA) the supreme Court quoted with approval the following holding from the case of ***Kioa v Minister for Immigration and Ethnic Affairs*** [1985] 15 CLR 550, where the court Stated that:

> *"It is a fundamental rule of common law doctrine of natural justice in traditional terms that generally speaking, when an order is to be made which will deprive a person of some right or interest or legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it... the reference to" right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interest."*

That the law authorizes the High Court to grant a preservation order in respect of property believed on reasonable grounds to be proceeds or instrumentalities of criminal offences. An order of this kind preserves property to which it applies until a forfeiture order is granted, a request for forfeiture is refused or the preservation order lapses.

The Defendants Stated that this law was enacted in pursuit of legitimate and important government purposes of combating serious organized crime and preventing criminals form benefiting from proceeds of their crime. Among the arsenal of the tools employed to achieve these objectives is the authorization of seizure of property and restraint orders.

Such applications are generally made without notice (Ex-parte). Notice comes at service of the order. This makes such orders to be a draconian intrusion into the rights of the people affected by such orders as they do not have the right to respond at the time of the making of the order: ***National Director of Public prosecutions v Meir Elran*** **[2013] ZACC 2.** That these orders are granted merely on a reasonable belief that the property targeted was involved in the commission of crime or was its proceeds. The person affected by the order is not given a right to present his side of the story at the stage of the grant of a preservation order or a forfeiture order.

It follows therefore that if not interpreted and applied in accordance with the rights and values protected under the constitution, this piece of legislation could potentially have far reaching and

abusive effects: ***Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*** [2006] ZACC 24; [2007] (3) SA 484 CC; [2007] (3) BCLR 219 (CC).

That the Constitutional Court of South Africa has on numerous occasion warned itself on the requirements of interpreting this piece of legislation in a manner that promotes the spirit, purport or subjects of the Bill of Rights as enshrined in the Constitution (The Financial Crimes Act, 2017 of Malawi is word for word of the Prevention of Organised Crime Act of the Republic of South Africa). The South African Constitutional Court observed in ***Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae*** (ibid) that when interpreting the POCA preference must be given to construction that advances rights as opposed to the one that frustrates the exercise of rights.

4.7. Can the Director of Public Prosecutions bring Civil Proceedings?

The Defendants argued that Section 65 (1) of the Financial Crimes Act makes it clear that a competent authority may apply to the Court for an order prohibiting any person, subject to the conditions and exceptions specified in the order, from dealing in any manner with any realizable or tainted property. The definition of a competent authority is given in section 2 (1). These include among others the Attorney General, the Director of Public Prosecutions, the Financial Intelligence Authority and others. It was the Defendants' submission that the law does not say that the State shall make an application. In any case, the State is not a legal person as far as this Act is concerned.

The Defendants further Stated that section 54 (1) of the Financial Crimes Act, 2017 specifically provides that all proceedings under this part, except where the section creates an offence, shall be civil proceedings. Even before the promulgation of the Financial Crimes Act, 2017, the Supreme Court in ***Greselder Jeffrey v Brian Kachingwe Phiri & The Anti-Corruption Bureau*** MSCA Civil Appeal No. 12 of 2002; held that such applications are treated as civil in nature. The proceedings in this instant matter were brought by the Director of Public Prosecutions. The Director of Public Prosecutions, though Stated as a competent authority, is responsible for bringing criminal matters to Court and not civil matters. Section 99 (2) (a) of the Republic of Malawi Constitution clearly delimits the powers and functions of the Director of Public Prosecutions.

That the proceedings in this matter are civil as provided for under section 54 (1) of the Financial Crimes Act. The Director of Public Prosecutions is therefore not a competent authority as far as

the present proceedings are concerned. The only time that the Director of Public Prosecutions could have brought proceedings under the Financial Crimes Act, was if there was a commission of an offence by the Defendants.

That it is therefore clear that the Director of Public Prosecutions has gone beyond his powers by instituting civil proceedings. The Court ought not to have granted the order herein by virtue of the fact that the competent authority who brought these proceedings lacked *locus standi.*

That the Director of Public Prosecutions (DPP) is not the right party to these proceedings. From the list of competent authorities, the right party to prosecute these proceedings is the Attorney General considering that, these are civil proceedings. The DPP has no *locus standi* to move civil applications. The entity and authority charged with the enforcement of the Financial Crimes Act is prescribed by the Act itself. Even where the DPP is a competent authority under the Financial Crimes Act, the said DPP cannot move civil applications when the Attorney General who is also a competent Authority could have moved such applications.

That the functions and powers of the DPP are clearly spelt out under section 99 of the Constitution. The DPP is a stranger to civil litigation. Any provision under the Financial Crimes Act that gives powers to the DPP to institute civil proceedings offends section 99 of the Constitution and by such an offence or inconsistency it must be declared unconstitutional.

In conclusion they argued that the State or even the Director of Public Prosecutions (DPP) are wrong parties to these proceedings. According to ***Tembo & Kainja v Attorney General*** MSCA Civil Appeal No. 1 of 2003 for a Court to deal with issues before it, the correct parties must always be before the Court, otherwise the claim or issue before it should be dismissed or where an Injunction was granted, it should be vacated. There is no correct Claimant before this Court, Furthermore there are no Defendants as is required under Order 6 Rule 1 of the CPR, 2017. A Court must dismiss such proceedings that do not have correct parties.

4.8 Is the Preservation and Seizure Order in conformity with Human Rights under Chapter 4 of the Constitution?

The Defendants argued that the preservation order was granted ex-parte (without notice). The only requirement is that the Competent Authority must show the Court that there is reasonable belief

that the property is proceeds of crime. When the Court is exercising its discretion to grant the order, the Defendant is not present to present his side of the case.

Section 43 (1) of the Constitution provides that every person has a right to lawful and procedurally fair administrative action whenever his rights, freedoms and legitimate expectations are at stake. A preservation and eventually a forfeiture/seizure order is an order that affects someone's right not to have his property arbitrarily deprived of him. Attaching and seizing someone's property without according them a right to present an explanation is a violation of their right. Any violation of right is against the Constitution. As indicated earlier on, in construing the Financial Crimes Act, the Court should construe it in such a way that it reflects the promotion of the spirit, purport and objects of the bill of rights enshrined under Chapter 4 of the constitution.

That in addition, every person is presumed innocent when he is accused of a criminal offence. Further, in any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect of human dignity shall be guaranteed. It was submitted that the Defendants herein are being penalized for allegedly having property which is suspected to be proceeds of an offence. Further, the Defendants Stated that they have already been presumed guilty by the State that their property was ill-gotten. This violated their rights and it is unconstitutional.

Further still, the retrospective application of the Financial Crimes Act as provided for under section 141 (2) is not consistent with the principle of legality and the Rule of Law which lies at the heart of the current Constitutional dispensation. Any limitation to be placed on human rights enshrined in the Constitution has to be done in accordance with the law, has to be necessary in an open and democratic society and in accordance with established international human rights standards and the limitation must not curtail the exercise of the right. That the Defendants have all the right to acquire property and not to have such property arbitrarily deprived of them. The preservation order and the impending seizure deprived the Defendants this right.

For any limitation to be legally acceptable and recognized, certain conditions must be satisfied. Under section 44(1) of the Constitution, four requirements come out, that is, the limitation must be prescribed by law, must be reasonable, recognised by international human rights standards and must be necessary in an open and democratic society. Further, two more requirements are spelt out

under section 44 ([2]) of the Constitution, namely that the limitation should not negate the essential content of the right in question and that the limitation shall be of general application.

Therefore for any limitation to constitutional rights to be legally recognizable, section 44 (2) and (3) requires that the limitation must satisfy six requirements. They cited ***State and Another; Ex-parte Hophmally Makande & Another*** [2012] MLR 403 the Court in this matter was considering the reasonableness and constitutionality of the implementation of the CIRMS (Spy Machine case) under the Communications Act. The Court held that the usage of the CIRMS though prescribed by law, though of general application was unconstitutional as it violated the right to privacy. The Court Stated that the proportionality test (reasonableness) presupposes the existence of a rational connection between the purpose to be served by the limitation and the invasion of the right. (See also ***Mlombe & others v Mkwezalamba & others*** *[2011] MLR 68* where the Court held that under section 45 (1) of the Constitution it is only if there is a declaration of a State of emergency that there can be derogation from human rights contained in the constitution.)

That in ***Malawi Congress Party & others v Attorney General & another*** [1996] MLR 244 the Court addressed the application of section 44 (4) and section 28 (2) of the Constitution. The Court Stated that *the purpose of sections 28 (2) and 44 (4) of our Constitution is for all to see. It is based on the recognition that, by its very nature, Government or the State wield substantial power over its citizens. It recognizes the importance of property rights for its citizens and itself. Due process, the necessity of notifying and giving adequate opportunity for the hearing on competing claims of necessity by the State and the rights of citizens to property provides a balance which justifies deprivation of property by State. The purpose of due process is to protect the people from the State. The fundamental purpose of due process is to allow the aggrieved party due opportunity to present his case and to have its merits fairly judged. Our sections 28 (2) and 44 (4) were designed to prevent arbitrary decision making that can infringe the constitutional protected right to property. On the law of our land any action of Government or law which results in arbitrary deprivation or expropriation of property without compensation, notice and right of appeal to the Courts of our land will be struck down by our Courts for violating the Constitution."* Per Mwaungulu, J at 294. That the Court further said that any action of the Government or law which offends the Constitution or its principles, can be annulled by the High Court.

The Defendants stated that the Preservation Order was made without having the Defendants present their side of the story. Denying citizens the right to be heard and denying them to be presumed innocent is not in accordance with established international human rights standards, or necessary in an open and democratic society. The defendant then proceeded to refer to the cases of ***Attorney General v Mc William Lunguzi*** [1996] MLR 8 (MSCA) and ***Administration of the Estate of Dr. H .Kamuzu Banda Vs Attorney General*** [2002-2003] MLR 272 where it was noted that:

> *"It is a fundamental rule of the common law doctrine of natural justice in traditional terms that generally speaking, when an order is to be made which will deprive a person of some right or interest or legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it..... the reference to" right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interest"*

It is clear thus, that the original Court should have strictly construed the Financial Crimes Act in a way that did not seriously erode the fundamental rights as enshrined in the constitution. The original Court should have made sure that the reasonable belief that is required when granting a preservation order was substantiated with facts. Further it was argued that in ***Collins Monte Ng'ambi v Director of Anti-Corruption Bureau*** [2010] MLR 68 the Court was of the view that if the primary purpose of a restriction notice (which is akin to a preservation order) is to preserve for the purposes that in the event of a conviction, there should be something to salvage on then it was proper for the Court to grant and extend such an order. In the present case the Court should have at least heard from the Defendants as to how they acquired the properties in question despite that making the order is discretionary.

4.9. Disposition and Conclusion

The Defendants argued that they have shown that the present proceedings were brought by the Director of Public Prosecutions. The present proceedings are civil in nature and the Director of Public Prosecutions as far as these proceedings are concerned is not a competent authority. The Director of Public Prosecutions therefore lacks *locus standi* in the present proceedings. The Director of Public Prosecutions is not the right party (*dextra pars*) or competent authority to these

proceedings in view of the fact that these are civil proceedings in terms of section 54 (1) of the Financial Crimes Act, 2017 and on the authority of ***Greselder Jeffrey v. Brian Kachingwe Phiri & Anti- Corruption Bureau,*** MSCA Civil Appeal No. 12 of 2002.

That Section 65 (1) of the Act makes it clear that a competent authority may apply to the Court for an order prohibiting any person, subject to the conditions and expectations specified in the order, from dealing in any manner with any realizable or tainted property. The definition of competent authority is given in section 2 (1). These include among others the Attorney General, the Director of Public Prosecutions, the Financial Authority and others. The law does not say that the State shall make an application. In any case, the State is not legal person as far as the Act is concerned.

That Section 54 (1) of the Financial Crimes Act, 2017 specifically provides that all proceedings under this part, except where the section creates an offence, shall be civil proceedings. The proceedings in this instant matter were brought by the Director of Public Prosecutions. The Director of Public Prosecutions, though stated as a competent authority, is responsible for bringing criminal matters in Court and not civil matters. Section 99(2) (a) of the Republic of Malawi Constitution clearly gives the powers and functions to the Director of Public Prosecutions. The only time that the Director of Public Prosecutions could have brought proceedings under the Financial Crimes Act, was if there was commission of an offence by the Defendants. There is no evidence that the Defendants have been charged with any offence at present warranting the Director of Public Prosecutions to institute these proceedings.

That it is therefore clear that the Director of Public Prosecutions has gone beyond his powers by instituting civil proceedings. The Court ought not to have granted the order herein by virtue of the fact that the competent authority who brought these proceedings lack *locus standi*. The Defendants stated that they have demonstrated that the order was granted in violation of their rights. That the Defendants have shown that the Financial Crimes Act especially the provision that applies to preservation and eventually to forfeiture or seizure orders does not give the right to be heard.

The legislation gives an opportunity after initial order has already been made. The concerned party is never given an opportunity to present his/her case when the Competent Authority is making an application on the so called reasonable grounds. There is no definition of what are reasonable grounds. The competent authority can just decide that the Defendants have property then such property is gotten out of criminal activities. Such blanket use of discretion is dangerous and

violates the rights of the Defendants to acquire property and not have such property arbitrarily deprived of them.

That a closer look at section 65 (2) (3) of Financial Crimes Act, the language used is mandatory. The Court "shall"; it does not leave room for discretion despite the fact that there is no definition of reasonable grounds. Further, the Defendants are only allowed to make an application for an intention to challenge when the order has already been made. The challenge is in fact to the effect that a forfeiture or seizure order should be made. The Court will already have made a preservation order without hearing the side of the Defendants. As indicated earlier on, section 4 of the Constitution demands that all Executive, Legislative and Judicial organs of the State at all levels of Government and that all people shall be protected equally by the Constitution and laws made under it.

The Defendants argued that the Constitution guarantees the right to acquire property and not have such property deprived arbitrarily. The Financial Crimes Act, 2017 is a piece of legislation that allows the State to forfeit a citizen's property. This is done without first hearing the citizen. Applications for preservation orders are made without notice. In fact, the law states that the notice is given at the time when the State is serving the order. When the State is making a decision that will affect the rights of the citizens and their legitimate expectations, there is need that such person should be given an opportunity to be heard [Section 43 of the Constitution].

It is correct to state that not all the rights are absolute and that there can be limitations placed on human rights as argued above. However, there are requirements that need to be met when placing limitations on rights as provided in section 44 of the Constitution. The Defendants stated that it has been demonstrated herein that the Financial Crimes Act, 2017 is a piece of legislation that is punitive in nature especially in its quest to establish the Civil Forfeiture regime. That the Defendants did not have an opportunity to lodge a challenge at the initial stage. That specifically the Defendants has gone through an administrative action whereby the competent authority has formed an opinion that they acquired the properties through criminal activities and such property ought to be forfeited to the Malawi Government.

That surely, this is a draconian intrusion into the rights of citizens. As already alluded to, whenever the State or public body wants to make a decision that will affect the legitimate expectations and rights of the citizens there is need that the citizen has to be heard. Further, every person is

presumed innocent at all times until convicted by a Court of competent jurisdiction. The competent authority herein made a decision on the supposed reasonable belief that the Defendants had acquired his property through criminal activities.

The competent authority is not a Court of law. The Defendants have not been taken through the due process for them to be tried. That this runs contrary to the presumption of innocence. It follows therefore that when interpreting the Financial Crimes Act, 2017 Courts should advance the construction that advances the rights of citizens as opposed to one that frustrates the rights. Further, if this piece of legislation is not interpreted and applied in accordance with the rights and values that are protected under the Constitution it could have far reaching and abusive effects.

It is therefore the contention of the Defendants that this piece of legislation is unconstitutional as it violets the right to acquisition of property and not have such property arbitrarily deprived (section 28 of the Constitution) ; the right to presumption of innocence (section 42(2) (f) (iii) of the Constitution); the right to dignity as the Defendants are being punished unheard (section 19 of the Constitution). It is also a piece of legislation that makes it possible for the Director of Public Prosecution to go beyond his/her powers as provided for under section 99(2) of the Constitution as it allows the Director of Public Prosecutions to participate in civil matters.

5.0.Arguments in Opposition

5.1.Principles of Constitutional Interpretation vs the Competence of the Director of Public Prosecutions to commence Civil Asset Forfeiture Proceedings under the Financial Crimes Act

In support of their case the Claimant opted to conflate the issue of principles of constitutional interpretation and the Director of Public Prosecutions' competence to bring civil asset forfeiture proceedings. The Claimant argued that under this head of argument, the Defendants took a very legalistic approach to constitutional interpretation. Further, the Claimant alleged that the Defendants took issue with the fact that this matter was brought before the High Court by the Director of Public Prosecutions and that under the Constitution, the DPP is mandated to conduct criminal proceedings only. It was the position of the Claimant that this is erroneous in so far as our

settled constitutional interpretation is concerned. That, a fair and correct reading of the Financial Crimes Act would not lead the Defendants to the conclusion which they have made.

5.2 Legislation

The Clamant argued that the Constitution itself gives guidance in Chapter II on how Courts should go about its interpretation of this supreme law. Section 10 sets out the supremacy of the Constitution. Section 11(2) States as follows:

> *"In interpreting the provisions of this Constitution, a Court of law shall-Promote the values which underlie an open and democratic society; Take full account of the provisions of Chapter III and Chapter IV; and where applicable, have regard to current norms of public international law and comparable case law."*

The Claimant further argued that the long title to the **Financial Crimes Act (Cap 7:07) of the Laws of Malawi** (hereinafter the FCA) is very clear as to the purpose of the legislation and States as follows;

> *An Act to establish an independent and autonomous Financial Intelligence Authority; to better prevent, investigate and combat financial and related or consequential crimes; to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crimes; and to provide for connected and incidental matters.*

Section 2 of the Financial Crimes Act defines a Competent Authority as follows:

> *"Competent Authority" means where appropriate, Office of the Attorney General, Office of the Director of Public Prosecutions, office of the Registrar General, office of the Administrator General, a police officer, an Immigration Officer, a Revenue Officer, the Anti-Corruption Bureau, the Authority, the Reserve Bank of Malawi, the Registrar of Financial Institutions as defined in the Financial Services Act, and includes any person authorized by any of them in that behalf and any other person the minister may, by notice published in the Gazette, designate.*

The Constitution under section 99 (2) says:

> *The Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable so to do—*

(a) to institute and undertake criminal proceedings against any person before any Court (other than a Court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority;

When dealing with this provision from the Constitution, the Claimant implored this Court to consider these words from ***Ex Parte Muluzi and Another In Re: S v Electoral Commission*** ***((2 of 2009)) [2009] MWHC 8***; which quoted the South African ***Makwanyane*** case in the following manner:

"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."*

In this regard, the Claimants maintained that section 99 of the Constitution should not be analysed in isolation but together with the factors which the ***Muluzi*** case quoted with approval and employed. That this will assist the Court in arriving at a decision that is not out of touch with the realities of our society. So, in dealing with this provision on the mandate of the DPP, we must not

forget that the issues that the Defendants have raised emanated from the FCA. Therefore, the interpretation must not lead to an absurdity. Most importantly, the Claimant argued that Courts must apply a generous interpretation to the Constitution aimed at fulfilling the intention of Parliament. They stated that the Supreme Court of Appeal in ***Nseula v Attorney General and Another*** [1999] MLR 313 at 323-324 had the following to say with regard to interpretation of the 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 a 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 great purpose of the Constitution".*

That mere mention or points at a number of provisions as being in conflict with the Constitution does not amount to issues being of constitutional nature and in conflict with the Republican Constitution. The claimant cited ***Monuddian Mohammed Iqbar Sodogar and Attorney General and Reserve Bank of Malawi*** Constitutional Case Number 1 of 2018 (Unreported). It was the position of the Claimant that the Defendants advanced a very narrow interpretation of the Constitution to limit the powers of the DPP in pursuit of proceeds and instrumentalities of crime. However, the Claimant argued that the long title to the Financial Crimes Act is very instructive on the intention of parliament in enacting this piece of legislation which, among others, seeks to better prevent, investigate and combat financial and related or consequential crimes and to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crimes. That all these acts were in pursuit of crime which is the principal mandate of the DPP. That the FCA has expanded the options available to the competent authorities in the fight against financial crimes to include Civil Asset Forfeiture proceedings under Section 65 (2) of the FCA. That it would be a travesty if the DPP were to be excluded and limited in terms of other options legally available to pursue criminal proceeds and instrumentalities of crime.

The Claimant submitted, therefore, that Section 99 (2) of the Constitution, on the powers of the DPP, should be given a generous interpretation and not a strict legalistic interpretation which the law abhors. That further, in construing a statute, the Malawi Supreme Court of Appeal in the case of ***Attorney General –v- Mapopa Chipeta*** MSCA Civil Appeal Number 33 of 1994 said:

> *"...the Court's task is always to find the intention of Parliament and the principle that you must consider the words used in a particular statute which is being construed in order to give 'force and life to the intention of parliament.... It is also important to give a meaning to a statute or document which does not create an absurd situation."*

That all this brings us to section 65 of the Financial Crimes Act (FCA). This section forms the genesis of the initial preservation application by the Claimant, and it provides as follows:

> *(1) A competent authority may apply to the Court for an order prohibiting any person, subject to the conditions and exceptions specified in the order, from dealing in any manner with any realizable or tainted property.*
>
> *(2) The Court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—*
>
> *(a) has been used or is intended for use in the commission of an offence; or*
>
> *(b) Constitutes proceeds of an offence.*

From the foregoing, they took it that the DPP under section 2 of the FCA was a competent authority and therefore there is no dispute here. The section specifically provides that *"competent authority" means where appropriate, office of the Attorney General, office of the Director of Public Prosecutions..."* The Claimant also took it that under section 65 of the FCA being in Part VI of the Act, the initial preservation application was indeed a civil proceeding. However, the totality of section 65 in and of itself does not exclude the DPP from being a competent authority with power to bring the said preservation application even if it specifically a civil proceeding.

That it must be noted that the section says a competent authority can apply for an order prohibiting a person from dealing with *any realizable or tainted property* [emphasis theirs]. Section 2 of the FCA defines "tainted property" to mean proceeds, including income or other benefits derived from

the proceeds or instrumentalities used for or intended for use of, in money laundering or predicate offences. That it was clear here that the object of the section is to deal with matters that are criminal in nature, hence, the definition is about money laundering and predicate offences as well as proceeds or instrumentalities of crime. These are obviously criminal and money laundering terms. That the same section 2 of the FCA also gives the definition of *"realizable property" to be property of corresponding value—*

(a) held by a Defendant;

(b) possessed by a person to whom a Defendant has directly or indirectly made a gift as defined in this act; or

(c) to which a Defendant is a beneficiary entitled.

That the Act then generously provides that in terms of a gift, it includes "a direct or indirect transfer of property by a person to another person **after the commission of an offence by the first person,"** [emphasis theirs] or it could be "for a consideration the value of which is significantly less than the value of the consideration provided by the first person." A fair-minded reading of this will also show that the matters dealt with here are very much criminal in nature. It will be noted that the definition of a gift to include property given **for a consideration the value of which is significantly less than the value of the consideration provided by the first person** [emphasis theirs] is one of the most common processes in which money laundering, an offence, is committed across the world.

It is from the foregoing that the Claimant maintained the position that the DPP is not precluded from proceedings under section 65 of the FCA. If this office was, on account of the reading of section 99 of the Constitution, then both the ***Muluzi*** and ***Mapopa Chipeta*** cases would view that conclusion as tragic. The Claimant also submitted that this was neither the intention of Parliament with regard to the aim of the FCA nor was it in line with our current understanding of constitutional interpretation; a liberal and purposive one: see also ***Public Affairs Commission v Attorney General and another*** ((Civil Cause No. 1875 of 2003)) [2003] MWHC 71

That it was without question that the issues under section 65(1) of the FCA are very much of a criminal nature, albeit, being pursued in proceedings that are civil in nature. Moving on to section

(65) (2) which empowers a Court to grant the sought order if the property in question (a) *has been used or is intended for use in the commission of an offence* or (b) *constitutes proceeds of an offence* [emphasis theirs], the Claimant stated that the sworn statements which the Claimant relied upon in the initial application brought these facts to the fore. That is to say, that the property in question was in fact truly understood to fall under section 65(2) of the FCA and the property that had raised reasonable suspicion to have criminal elements to them, hence the Anti-Corruption Bureau (ACB) and other competent authorities were investigating the Defendants.

That the sworn Statements filed in support of the application arose from criminal investigations, an arena which the DPP interfaces with in every single case by nature of his Constitutional mandate over criminal matters and that the cases cited were meant to strengthen the Claimant's position and that within the region, Courts have also taken a similar approach. That when presented with the question whether the DPP could move a Court in civil proceedings to obtain a restraining order as done in the present case, the High Court of Botswana in ***DPP v Archibald Mosojane & Others*** [2018] MAHFT-000135-17 held that the DPP had *locus standi* to move civil applications under the Proceeds and Instrumentalities of Crime Act of 2014 (PICA). The Court further said as follows:

> *"the PICA is an instrument for fighting organized crime and other serious crimes. It is criminal law-based statute, which is enforced with mostly civil type actions...the actions are in pursuit of criminal investigations and possible prosecution. These fall within the realm of DPP's mandate."*

That the same applies to Malawi, in that the FCA is a criminal law-based statute and that the DPP has been granted power among other competent authorities to institute civil proceedings in dealing with property that is connected to financial and related crimes. That again, in ***Lewis Goodwill Nchindo and others v The Attorney General of Botswana and the Director of Public Prosecutions of Botswana*** Court of Appeal Case No. Caclb-056-09 (Unreported); 2010 BWCA 49(January 2010); 2010(1) BLR 205 (CA) 203 it was also argued that the DPP's powers were limited to criminal proceedings, according to section 51A (3) of the Constitution of Botswana. Their provision, in *pari materia* with our section 99, reads as follows:

> *(3) The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable to do so-*

(a) to institute and undertake criminal proceedings against any person before any Court (other than a Court martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

That it was submitted on behalf of the Defendants in that case that a restraining order was a civil matter and not part of criminal proceedings themselves, and therefore, the DPP had no competence to prosecute such matters. However, the Court held that section 15 of the Botswana Interpretation Act was clear that when an enactment confers a power or duty in relation to an act or thing, *all such other powers as are reasonably necessary to enable that act or thing to be done or are incidental to that act or thing, are deemed to be given.*

That the Court went on to find that whilst the power to apply for a restraining order was not a power reasonably necessary to enable a criminal prosecution, it was incidental to a criminal prosecution. Therefore, the argument that the DPP did not have the power to institute restraining order proceedings was rejected. The Court reasoned on page 10 of the judgment as follows:

"It would certainly defeat the latter's prosecutorial mandate to proceed with the trial while the accused person is at liberty to deal with the property that is the subject matter of the ongoing criminal case. It would have created an undesirable lacuna in the mandate of the Director of Public Prosecutions and also made the prosecution of offenders an unnecessarily difficult task."

That similarly, in the Malawian context, Botswana's section 15 of the General Interpretation Act is similar to section 34 of Malawi's General Interpretation Act which reads;

Where any written law confers power upon any person to do or to enforce the doing of any act or thing, all such powers shall be deemed to be so conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

Thus, the civil forfeiture process in the FCA is incidental to the overarching objective of combating financial and related crimes, to which the DPP is a key player, and not the Attorney General as the Defendants would want this Court to believe. The Claimant stated that the proceedings are civil in nature as a matter of procedure, but the objective is a purely crime control function which the Attorney General is not concerned with, primarily. The Claimant cited the Botswana case of ***Directorate of Public Prosecution v Kgori Capital (Pty) Ltd*** Case No. UCHGB-000065-18[2018]. Justice Nthomiwa Nthomiwa emphasised on paragraphs 59 and 60 of the judgment that:

> *"The DPP is the only authority in my judgment what the Constitution vests with the power to institute legal proceedings against criminal offenders. It is also the only authority that can ensure that property that is the subject matter of litigation is preserved until the Court makes its proper disposal. In my view the dispossession of people of proceeds of crime is incidental to the powers bestowed on the DPP. I therefore agree that all that the DPP is using are the powers that he has been given by Parliament to ensure, on behalf of the general public, that any person who has benefitted from a criminal conduct or activity pays the price by surrendering his or her ill-gotten gains to the State. There is no other State entity that is more proximate than the DPP to bring the proceedings before the Court. I therefore conclude that the issue of application for civil penalty orders resonates, and its incidental to, the powers given to the DPP by the Constitution. Thus, the current dispensation of the Proceeds and Instruments of Crime Act (PICA) in so far as it relates to the civil penalty order is not inconsistent and ultra vires with the Constitution and therefore void ab initio as if pro non scripto"*

That in the Zambian case of ***The Director of Public Prosecutions v Josephine Chileshe Chewe T/A Jocama General Dealers and others*** ***Civil Cause No.*** 2019/HP/1163, the Zambian DPP obtained a preservation order pursuant to the Forfeiture of Proceeds of Crime Act (FPCA), as did the DPP in the present case. It was the claimant's assertion that in reaction to the order, the Defendants advanced a similar argument that the DPP's powers were confined to criminal proceedings in accordance with their Constitution and the National Prosecutions Authority Act, and that the FPCA violated the Constitutional powers which limited the DPP's mandate to criminal proceedings. However, the Court held that the provisions of the FPCA were instructive, permitting the "public prosecutor" to apply for civil forfeiture. No evidence was brought to suggest that the

FPCA was not good law or had been held to be null and void by article 180 of the Zambian Constitution. Thus, the Court held that the FPCA is not bad law, and does not limit the powers of the DPP to pursue civil proceedings in relation to the asset forfeiture scheme.

The Claimant herein advanced the same argument, that section 65 of the FCA permits the DPP to apply for a preservation order in civil proceedings in relation to the asset forfeiture scheme created by the FCA, and that the FCA is not bad law at all as it does not offend the Constitution to any extent. The powers of the DPP under section 180 of the Zambian Constitution are same as those of the DPP in section 99(2) Malawi's Constitution.[1] Further, according to section 177(5) (c) of the Zambia Constitution, it is the Attorney General who is charged to "represent the Government in civil proceedings to which the government is a party". This was the same scenario in Malawi, and the Court in the above-cited case upheld that the DPP as the right party to bring civil preservation order proceedings.

That in the Malawian context too, the Constitution does not expressly give or deny the DPP powers to institute civil proceedings when they relate to a criminal case. The Constitution gives the DPP powers over any criminal case he or she desires to do any of the actions listed under section 99 (2). The Claimant argued that the section 99(2) list of what the DPP can do in respect of criminal cases is not exhaustive. There are certain powers which the DPP can exercise under other statutes in addition to the powers stipulated by section 99(2) of the Constitution, as long as they are in within the ambit of criminal justice and do not offend the criminal justice control powers granted to this office by the Constitution.

An example is the Criminal Procedure and Evidence Code (CP&EC), where under section 280 for example, the DPP has the power to direct further investigations and to order further depositions. This is a power in relation to the conduct of investigations which is not expressly granted to the DPP under section 99(2) of the Constitution, but is extended nevertheless to the DPP by statute, the CP&EC. This buttresses the point that the DPP can do more than what the Constitution

[1]S.180 (3) The Director of Public Prosecutions is the chief prosecutor for the Government and head of the National Prosecutions Authority. (4)The Director of Public Prosecutions may— (a) institute and undertake criminal proceedings against a person before a Court, other than a Court-martial, for an offence alleged to have been committed by that person; (b) take over and continue criminal proceedings instituted or undertaken by another person or authority; and (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or undertaken by the Director of Public Prosecutions or another person or authority.

instructs, as long as such additional powers relate to criminal cases in a manner expressed by any properly enacted law such as the FCA, and that such powers are exercised in a manner that is consistent with the spirit of the Constitution.

That when determining the DPP's competence to institute civil recovery proceedings in relation to section 65 of the FCA, the Court is further enjoined to consider the purpose of the Financial Crimes Act, rather than the form of the proceedings therein. The FCA is without doubt, a criminal law-based statute, which is enforced in some parts by civil proceedings. The name itself and the long title are very telling. **The long title for the FCA** clearly States that this law seeks to:

> *"...better prevent, investigate and combat financial and related or consequential crimes; to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crimes; and to provide for connected and incidental matters."*

Part VI of the FCA, though falling under civil proceedings, fulfils a very important criminal justice function of fighting crime and ensuring that tainted property is recovered from those that use or hold it. This, of course, is subject to the safeguards accorded by law to innocent third parties, and any affected persons such as the Defendants in the present case.

That undoubtedly, the Constitution places the DPP as a central authority in the administration of criminal justice by empowering the DPP in matters that are critical to the purpose of fighting crime. Thus impliedly, and reasonably, the Constitution places in the DPP powers that are incidental to the DPP's function in the combating of crimes, and in this case, financial crimes. Such powers include asset preservation and forfeiture powers. Indeed, the purpose of asset forfeiture legislation is to fight crime. See the South African case of ***National Director of Public Prosecutions v Mohamed*** No. 2002 (4) SA 843.

That in pursuit of the ultimate objective of confiscating tainted property either as instrumentalities or proceeds of crime, the DPP has incidental powers to approach Courts to obtain orders such as preservation orders both under sections 65 and 107 of the FCA. The purpose for such orders is to avoid the dissipation or disposal of the targeted tainted property while investigations are ongoing, pending subsequent forfeiture proceedings. The claimants submitted that they were strengthened in this view by the South African case of ***National Director of Public Prosecutions v Van Heerden***

and Others 2004 (2) SACR 26 (c). Thus, the DPP is empowered to do regardless of whether the ultimate forfeiture sought is conviction-based under Part VI, or non-conviction-based under Part VII of the FCA, as long as the objective is in line with the Constitution's section 99(2). The FCA does not expressly confine the powers or competence of the DPP in relation to obtaining preservation orders to Part VII alone. This in itself is instructive.

In this regard, the Claimant submitted that the only competent authorities that are relevant to Parts VI and VII of the FCA are those that are tasked to bring before Courts applications or proceedings that aim at combating crime in its broad sense. These, without further debate, would reasonably include offices such as the DPP, and other institutions to which the DPP delegates prosecutorial powers in criminal cases such as the Anti-Corruption Bureau, the Financial Intelligence Authority, the Malawi Revenue Authority and the Immigration.

For this reason, the obtaining of a preservation order in the present case by the DPP is on the understanding that even though the proceedings under Part VI of the FCA are civil in nature, this Part stipulates a supplementary criminal justice approach to the combating of financial and related crimes. It does so by providing a mechanism for the disgorgement of tainted property, both proceeds and instrumentalities of crime, in a process that is independent of a criminal charge, prosecution and conviction. This is possible because the process reaches property that is held by third parties who receive such tainted property as gifts, and are not subject to prosecution. Choosing to institute the preservation and recovery of tainted property either under Part VI or VII is merely a function of prosecutorial strategy to be exercised by the DPP and all competent authorities that are tasked to handle criminal cases which involve tainted property. Though independent from prosecution, this civil recovery mechanism remains a criminal justice function whose key player is the DPP.

Notably, the powers to recover tainted property in relation to crimes are incidental to the general powers over criminal cases given to the DPP by the Constitution. The claimant also noted that the Defendants argued that the DPP has no locus or sufficient interest in this matter owing to the civil nature of the proceedings. The Claimant countered this point by making reference to the case of ***Civil Liberties Committee v Ministry of Justice and Another*** ((MSC Civil Appeal No. 12 of 1999) [2004] MWSC 1. The Court stated in that case as follows:

"Again, in the field of public law, the statute which lays down the duties and powers of public officials and statutory authorities usually defines how such duties and powers may be exercised. The same statute would indicate who would be entitled to bring an action to enforce the proper carrying out and exercise of such duties and powers. The issue of locus standi may be resolved by the examination and interpretation of the relevant statute."

The Claimant, stated that the DPP is one of the competent authorities in the FCA. Under section 65 a competent authority is allowed to make an application for a preservation order. There is nothing in the FCA that prohibits the DPP from this of course of action. That the examination should not be confined to section 99 of the Constitution only, which the claimant argued to have shown is not the only law which gives the DPP powers. See for example the DPP brings to Court applications and matters pursuant to the Inquests Act and the Extradition Act yet the Constitution does not expressly mention anything about the conduct of inquest or extradition under section 99.

Thus, whether the DPP has sufficient interest in this matter must *be resolved by the examination and interpretation of the relevant statute,* the FCA. This Act did not bar the DPP as a competent authority from bringing this application. The claimant referred to the ***CILIC*** case and asked the court to look at the FCA again to know *who would be entitled to bring an action to enforce the a proper carrying out and exercise of such duties and powers.* It was the claimant's view that it is clear that the DPP is a competent authority under section 2 of the Act. That section 65 merely calls for a competent authority to make an application for preservation. That the DPP is at the centre of crime control in Malawi. In light of the foregoing, it was the claimant's submission that the position taken by the Defendants is short-sighted and thus unsustainable. The claimant thus maintained the view that the DPP is a competent authority who has sufficient interest in this matter.

In conclusion the Claimant submitted that the DPP is competent to institute civil proceedings under the FCA. That such competence is not inconsistent with section 99(2) of the Constitution, but it is rather an extension of the mandate granted to the DPP by the Constitution over the conduct of criminal matters. There would be an undesirable lacuna in the efficient handling of criminal matters if the DPP were to be precluded from pursuing tainted property merely because such mechanisms are civil in nature. According to the claimant, this competence is internationally recognised and accepted, as demonstrated by the foreign case law cited above.

That the civil proceedings are just a mechanism provided by the FCA which is a criminal law-based statute that emphasises on the recovery of tainted property as an approach to dealing with financial and related crimes more efficiently and effectively. That the Court should focus on the crucial role the DPP plays in dealing with crime, and not just the form in which the DPP deals with crime, *i.e.*, dealing with crime through civil proceedings. The claimant implored the Court not lose sight of the objectives of the FCA in as far as it promotes the DPP's Constitutional powers to deal with criminal matters. That the competence of the "competent authorities" should be assessed by focusing on the primary mandates of the institutions/authorities against the objectives of each part of the FCA.

6.0. Whether the civil property preservation order granted by the Court without notice in terms of section 65(2) of the Financial Crimes Act is tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42(2) (f) (iii), section 28 and section 19 of the Constitution respectively

6.1. The right to be heard

The Claimant stated that the Defendants argued that because the preservation order was granted ex-parte (without notice), this deprived them of the opportunity to present their side of the case and be heard since all that the Competent Authority has to show is that there is reasonable belief that the property is proceeds of crime in the absence of the Defendants. The Claimant is of the view that this is not the case. Such *ex parte* orders do not violate the right to be heard. The Claimant was of the view that such *ex parte* proceedings for a preservation order are necessary by the very nature of the subject matter to ensure that the property is preserved at the commencement of the proceedings. This is not uncommon in civil proceedings.

The Civil Procedure Rules abound with instances in which *ex parte* applications can be made and orders granted prior to the hearing *interpartes*. Orders under section 65 of the FCA are of temporary and limited duration, intended only to prevent the property the subject of the preservation order from being dissipated. Section 67 of the FCA provides that the life span of a preservation order is 90 days. Within that time frame, the FCA has provided mechanisms which guarantee the protection of the affected party's right to be heard. Under section 66(3) of the FCA

an interested party may give notice of intention to oppose the making of a forfeiture order in order to exclude their property or interest in the property. That further to that, under section 71 of the FCA, a person affected by a preservation order may apply to the Court which made the order to vary or rescind it. All these mechanisms in the FCA are there to safeguard the affected party's right to be heard before the property is finally forfeited to the government. This is similar to the return date of an injunction that has been obtained *ex parte*. The FCA preservation orders are granted *ex parte* in order to prevent the dissipation of the property.

That furthermore, as far as the right to be heard is concerned, the case of ***Jeffrey and another v The Anti-Corruption Bureau*** [2002–2003] MLR 90 (SCA) is appropriate here. In that case, the Supreme Court was dealing with the appellants' appeal application to have the seizure and freezing orders granted by the High Court ex-parte varied. They also claimed that they had not been given a right to be heard, much like the Defendants herein. The Supreme Court said:

> *"It is common practice in applications for an order such as the one brought by the Defendants that the initial application is made ex parte. The obvious reason is that such applications are made at a very early stage, even before the prosecution have full knowledge of the assets to which the suspected person is entitled. At the same time, the application must be made speedily and ex parte to ensure that the suspected person is not given an opportunity to remove, conceal or otherwise dissipate the assets before an inter partes order is obtained.*
>
> *After an ex parte order is obtained, it is the usual practice that the affected person against whom the order is obtained applies to the same Court that made the order to set aside the said order. During the hearing of such application, both parties are heard. The opportunity to be heard occurs at this stage."* [Emphasis theirs].

It was the Claimant's submission that the preceding quote is the correct position at law. According to the Claimants, the sentiments by the Supreme Court in the ***Jeffrey case*** find strength in section 66 (3) of the FCA which says that *a person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest in the property concerned from the operation thereof.*

That in compliance with section 66 of the FCA, the Defendants were served with the order within two days from the day it was granted and given an opportunity to seek exclusion orders if they wanted to. At the same time, before the elapse of 21 days, the preservation order was published in two newspapers with the widest circulation in Malawi. The claimant stated that these matters did not happened in secret or without following the law. Further stating that the point here is that the nature of *ex-parte* orders is such that an opportunity is always granted to the affected party to make his case, immediately after the order is granted. This is how the scheme of the law on ex parte orders operates. Thus, the claimant submitted that this Court must not allow the Defendants to erode the essence of ex parte orders through the arguments that they have advanced on this point.

6.2. Arbitrary Deprivation of Property

The Claimant stated that the Defendants also argued that attaching and seizing someone's property without according them the right to present an explanation violates their right not to have their property arbitrarily deprived from them. The Claimant argued against this position that as has been argued above, the safeguards built in the FCA guarantees the right to be heard. The Defendants may at any time after the order has been granted, apply to the Court to exclude their interests or may apply to vary or rescind the order by bringing evidence to show that the property in question was legally acquired and was wrongly made the subject of the preservation order. On this note, the claimant stated that in other Jurisdictions Courts have ruled on similar matters. An example was given of Ireland, in the case of ***Gilligan v Criminal Assets Bureau*** [1997] IEHC 106 where the Court had this to say on the arbitrary deprivation of property argument:

> *"While the provisions of the Act may, indeed, affect the property rights of a Defendant it does not appear to this Court that they constitute an "unjust attack" under Section 40.3.2, given the fact that the State must in the first place, show to the satisfaction of the Court that the property in question is the proceeds of crime and that thus, prima facie, the Defendant has no good title to it, and also given the balancing provisions built into Sections 3 and 4 as set out above.*
>
> *This Court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a*

place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held".

That in the Namibia the case of ***Lameck and Another v President of Republic of Namibia and Others*** [2012] NAHC 31 illuminates further on this subject:

"[51] The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to "constitute an offence or which contravenes any law". Mr Trengove's analogy of possession of stolen property illustrates both this and the previous point. It is the current possession which is criminalised (and not the prior theft) and further that that property would not be protected by art 16. The protection of property under art 16 is not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate object, as was made clear by the Supreme Court in ***Namibia Grape Growers and Exporters v Ministry of Mines and Energy and Others*** (SA 14/02)[2004]; NASC 6 (25 November 2004):

"If it is then accepted, as I do, that art 16 protects ownership in property subject to its constraints as they existed prior to independence, and that art 16 was not meant to introduce a new format free from any constraints then, on the strength of what is stated above, and bearing in mind the sentiments and values expressed in our Constitution, it seems to me that legislative constraints placed on the ownership of property which are reasonable, which are in the public interest and for a legitimate object, would be constitutional. To this may be added that, bearing in mind the provisions of the Constitution, it follows in my opinion that legislation which is arbitrary would not stand scrutiny by the Constitution.

The claimant also cited the case of ***Hackl v Financial Intelligence Unit*** [2010] Constitutional Case No 1 of 2009 [2010] SCCC 1 in which the Constitutional Court of Seychelles also dealing with a Defendant challenging the constitutionality of their property rights, had this to say :

"the right to property protected under the Constitution only extends to property lawfully acquired. It does not protect unlawfully acquired property. The restriction against disposal

of specified property at the commencement of proceeding that will determine whether such property is the benefit of criminal conduct is necessary in order not to render those proceedings nugatory. If no restraint was imposed on the current holder of such property it could be possible to dispose of the property as soon as one got wind of the commencement of such proceedings".

In this sense, therefore, the original Court went ahead to grant the order having seen the evidence by the Claimant and being satisfied that the preservation order be given since the property in question was reasonably suspected to be "realizable or tainted property" as defined under section 65(1) of FCA. The Claimant maintained that the Defendants cannot claim to exercise their rights or bemoan that there is violation of their constitutional rights when rights, such as property for example, only extends to property lawfully acquired: they cited ***Hackl v Financial Intelligence Unit*** (supra).

The Claimant further stated that in ***Misozi Chanthunya v The Republic*** MSCA Criminal Appeal No 02 of 2019 when dealing with an issue of the applicant seeking to assert his right to a legal practitioner of his choice under section 44(4) of the Constitution, the Supreme Court dismissed the application because the said lawyer was not within the definition of legal practitioner as envisaged in the provision. Chikopa, SC, JA. said:

"True the applicant has in accordance with section 44(4) of the Constitution the right to be represented by counsel of his choice. And in the instant case his choice of Counsel Maele should be respected and practised. We are of the view however that such right must be understood in context. The Constitution does not for instance speak of a lawyer of one's choice. Or of counsel of one's choice. It provides for a legal practitioner of one's choice. So that if a lawyer is without, for instance, a license a litigant will not be heard to insist on that lawyer in the name of being entitled to a legal practitioner of their choice because for as long the lawyer is without a license, they are not the legal practitioner envisaged in section 44(2). They are not therefore a legal practitioner in respect of whom a litigant can exercise their section 44(4) rights. [Emphasis theirs]

Coming back to the instant case it is our considered view that as soon as Counsel Maele was in this case declared conflicted and therefore incapable of acting for the Applicant he

immediately ceased to be a legal practitioner in respect of whom the Applicant could exercise his section 44(4) rights.

The Claimant submitted that the Defendants cannot at the moment claim violation of their property rights when the same assets were adjudged to be seemingly tainted by the Court that granted the preservation order on the prevailing standard of proof. That the Constitution cannot aid a citizen to exercise his rights over property which is not covered by the any of the Chapter IV rights. That the property/assets of the Defendants are automatically taken out of the Constitution and this Court should not let the Defendants to enjoy the proceeds of crimes by using the Constitution as a shield and a sword. It was the claimant's submission that the original Court granted the preservation order upon being satisfied with the contents of the sworn Statements, which laid the basis for the reasonable grounds for suspecting that the said property would be tainted property. That this takes away the arbitrary element. It could have been arbitrary deprivation of property if all the competent authority was to do is to simply move the Court to make the order, without laying down reasons in sworn Statements about the suspicion. That this was not the case and this is not what the FCA permits. The FCA complied fully with the Constitution's frown upon arbitrary deprivation of property and that the FCA is good law, in as far as the protection of property rights is concerned, given the many opportunities that it gives affected persons to exclude their property from such orders.

6.3. Violation of the Presumption of Innocence

The Claimants argued that the Defendants complained that their right to be presumed innocent has been violated because they have been presumed guilty already by the Claimant that their property was ill-gotten and that this is unconstitutional because every person is presumed innocent when he is accused of a criminal offence. The Claimant submitted that this argument is faulty because civil asset forfeiture proceedings under which the preservation order was obtained are not a criminal trial in nature. That these are an action *in rem and* not an action *in personam.* That they are proceedings against property and this is why orders are served on property holders, regardless of whether they participated in the underlying predicate offence from where the property was derived. They cited ***Prophet vs National Director of Public Prosecutions*** Case CCT 56/05 where the Court stated as follows:

"Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence".

In Seychelles, in addressing a similar subject and legislation, it was held that;

"As noted above, the POCA is not a penal statute. It does not possess the commonly known aspects of criminal legislation. No offence is created. No one is charged with an offence. No one is tried for any offence. Its thrust is to deprive ownership, possession, and control of property derived from criminal conduct from those that hold that property in the manner described at the time of initiating proceedings under the POCA". ***Hackl case*** cited above.

It is in light of the foregoing that the Claimant argued that the presumption of innocence was not violated because the proceedings which the preservation order relates to were not criminal in nature. They are civil proceedings against property, as such the presumption of innocence does not apply at all. Such arguments shall apply in criminal charges or prosecution, should the DPP or any another law enforcement agency shall ever elect to prosecute the Defendants on offences that relate to the property in question.

6.4. The Retrospective Application of the Provisions of the FCA

The Claimant stated that the Defendants took issue with the retrospective application of the provisions of the FCA as provided for in section 141 (2) of the FCA. That they argued that this is not consistent with the principle of legality and the rule of law which lies at the heart of the current Constitutional dispensation. The Claimant argued that the rule against retrospective application of the law is not rigid or inflexible. That there are certain exceptions in which retrospective application of the law will be legal. This position has been decided on by the Malawian Courts. In

the case of ***Lenson Mwalwanda v Stanbic Bank Ltd*** [2007] MLR 198 (HC) Mzikamanda J (as he then was) stated at page 208 that:

> *"The law is indeed settled that a statute shall not be construed to have retrospective operation unless such construction appears very clearly in the terms of the statute or it arises by necessary and distinct implication. The rule against retrospectivity of statutes or laws is a fundamental rule of law but one that is not rigid or inflexible. This means therefore that there will be situations where a law or a statute may be construed to have retrospective operation. That a statute or a law may have retrospective effect is not a rule but an exception to the general rule."*

That similarly this position was affirmed by the Supreme Court in the case of ***Stanbic Bank Limited v Mwalwanda*** [2008] MLR 361. Tambala JA Stated at page 363 that:

> *"We agree with the learned Judge in the Court below and we are satisfied that he correctly stated the law on the retrospectivity of a statute or law".*

The Claimant also cited the Kenyan case of ***Overseas Private Investment Corporation & 2 Others v Attorney General*** [2013] Eklr, Petition No. 319 of 2012 in which Majanja J stated, at paragraph 24, that:

> *"The Latin maxim lex prospicit non respicit encapsulates the cardinal principle that law looks forward not backwards but this principle is neither absolute nor cast in stone. In the case of **Municipality of Mombasa v Nyali Limited** [1963] E.A. 371 Newbold, JA, stated that "Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be*

had in order to ascertain that intention." This is the principle reiterated in ***Orengo v Moi & 12 Others*** *(No. 3) (2008) 1 KLR EP 715".*

The learned Judge proceeded to state at paragraph 26 that:

> *"I take the view that the rule against the retrospective application of law is not entirely guarded and in certain cases where the intention of the legislature is clear, the provisions may be construed to have retrospective effect. My reading of the authorities is therefore that retrospective operation is not per se illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of* ***Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others****, SCK Application No. 2 of 2011 [2012] eKLR where the Court observed that, "[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it :(i) is in the nature of a bill of attainder ;(ii) impairs the obligation under contracts ;(iii) divests vested rights; or (iv)is constitutionally forbidden".*

The learned Judge concluded on this point by stating, at paragraph 27, that:

> *"It is also worth noting that it is not the role of this Court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the Court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of Courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, Courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively".*

The Claimant also argued that in ***Republic v Lutepo (Directions on Confiscation and Pecuniary Penalties)*** Criminal Cause No. 02 of 2014 the Court had this to say on the subject;

"These authorities demonstrate that, save where the Constitution expressly prohibits the non-retrospective application of laws, the general principle in law is that although in general laws should not be made to apply retrospectively, Parliament might, in its wisdom, decide to make them apply retrospectively. Under the Constitution of the Republic of Malawi, section 42(2) (f) (vi) makes provision for the prohibition of particular species of the retrospective operation of laws in the realm of criminal proceedings.

The section provides that:

"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as an accused person, to a fair trial, which shall include the right not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed."

The claimant further argued that, where the effect of a law is to retrospectively criminalize conduct which did not previously constitute a criminal offence, such law would, to the extent that it is inconsistent with section 42(2) (f) (vi) of the Constitution, be invalid in terms of section 5 of the Constitution. This is because this specific type of retrospective operation of laws has been expressly prohibited under that section and, under section 45(2) (f) of the Constitution, such prohibition is heightened to the status of a non-derogable right. Again, where the effect of a new law is to retrospectively impose a stiffer penalty than was previously applicable for a particular offence, the same section 42(2) (f) (vi) of the Constitution imposes the same nature of prohibition as that applicable for retrospective criminalization of previously non-criminal conduct.

That apart from these two specific instances, there is no other proscription of the retrospective operation of laws whether under the Constitution or under statute; and the authorities that have been explored above provide guidance in terms of how to approach the issue. That in the present case, section 141 of the FCA makes it clear that generally, it was the intention of Parliament to legislate that although the Money Laundering Act (MLA)was repealed (see section 141(1) of the FCA), any acts taken under the MLA, which might be done under the FCA, should be deemed to be done under the FCA (see section 141(2) of the FCA). That if Parliament, had so wished, could

simply have repealed the MLA and said nothing more. The claimant further argued that in any case, the provisions of section 14(1) (a) and (b) of the General Interpretation Act (Cap 1:01 of the Laws of Malawi) would apply as the section reads as follows:

> *Where a written law repeals and re-enacts with or without modification, any provisions of any other written law, then unless a contrary intention appears—*
>
> *(a) all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed;*
>
> *(b) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights existing under any provision so repealed or in any other proceedings in relation to matters which have happened before the repeal, the provision so repealed shall continue to apply;*

The Claimant stated that in the ***Lutepo Case***, the Court found that:

> *"In the present matter, it is the finding of this Court that a contrary intention appears for purposes of section 14(1) of the General Interpretation Act. This contrary intention of Parliament clearly appears in the text of section 141(2) of the FCA. The effect of section 141(2) of the FCA is that any type of legal process commenced under the MLA which could be commenced under the FCA must be deemed to have been commenced under the FCA. Of particular significance to note under section 141(2) of the FCA are the words "anything done". Section 141(2) states that "anything done" under the MLA which can be done under the FCA should be deemed to have been done under the FCA, and the word "anything", in the view of this Court, means "anything." This is of course subject to constitutional limitations. Thus where, for instance, "anything" means commencing prosecution of an offence in respect of conduct which did not constitute an offence under the MLA, or proceeding to impose a penalty under the FCA for conduct preceding the coming into effect of the FCA and where such penalty would be more severe than under the old law (the MLA), then the FCA would not apply".*

In conclusion, the Claimant stated that a close look at the FCA will show that it is not a wholly penal statute. They noted that there are a few criminal offences and their attendant penalties that FCA creates which cannot operate retrospectively. Nevertheless, they asserted that the bulk of the FCA is concerned with recovering proceeds of crime. That it does not affect substantive rights of the Defendants and it has built in safeguards which serve to protect the rights of those whose property has been affected by its provisions. In addition to that, the non-penal provisions of the FCA such as section 65 under contention in this application, do not fall under the constitutionally prohibited situations of retrospective application of laws, *i.e.* criminalisation and punishment. That the retrospectivity provided for under the FCA is permissible in law and does not violate the rights provided for in the Constitution.

6.5.Does Section 65 of the FCA Pass the Test of Section 44(2) and (3) of the Constitution?

The Claimant argued that the Defendants stated that section 65 of the FCA constitutes a gross violation of the section 42 fair hearing rights of a person affected by a preservation order, and that such limitation of rights cannot be justified under section 44 of the Constitution. They submitted that section 65 of the FCA passes the limitations test of section 44 of the Constitution in that the rights which are said to be violated by section 65 are not absolute rights, and that the limitations set out by section 65 and the whole of Part VI of the FCA are justifiable.

The claimant stated that for the right to fair trial to be limited, the limitation must –(a) be prescribed by law; (b) be reasonable; (c) be recognized by international human rights standards; (d) be necessary in an open and democratic society; (e) not negate the essential content of the right or freedom in question, and (f) be of general application. They cited Jumbe ***and Another v Attorney General*** (1 of 2005, 2 of 2005) [2005] MWHC 15 (21 October 2005) where Justice Mkandawire, as he then was, laid the limitations test to be followed when section 25(B) (3) of the Corrupt Practices Act's reverse onus provision was challenged for its constitutionality. He started off with asserting that the right to be presumed innocent was not an absolute right;

> *"Having caused a survey of several decided cases ... I find that section 25 (B) (3) of the CPA creates a legal burden on the accused. This Section therefore does offend the right of an accused person to be presumed innocent in terms of section 42 (2) (f) (iii) of the Constitution. The provision can accordingly only be permissible if it is saved by the*

provisions of section 44 (2) (3) of the Constitution. It is imperative at this moment to remind ourselves that the presumption of innocence under section 42 (2) (f) (iii) is not an absolute right. It is one of those rights which can be limited. Actually worldwide, it is also accepted that the presumption of innocence can be limitable. There are abundant case authorities and examples on this. Closer to home here, in South Africa, the Courts there also recognize that the presumption of innocence is not an absolute right. The cases in point are those of ***State – vs – Mbatha*** *(1996) 2 LRC, 208,* ***State – vs – Zuma*** *(1995) ILRC, 145."*

That upon finding that the limitation on the right to be presumed innocent was prescribed by law, the Court proceeded to the question whether the limit was "prescribed by law". Similarly, in the present case, the Claimant stated that it is without question that the rights limitations brought by section 65 are prescribed by law because the Financial Crimes Act (Cap 7:07) of the Laws of Malawi is a duly enacted legislative provision. That apart from this prescription of a limitation by law, the State bears the burden of proving on a balance of probabilities that the limitation is reasonable, recognized by international human rights standards and necessary in an open and democratic society.

The claimants noted, that Mkandawire, J further found that

the objective of protecting the Malawi society from the grave ills associated with corruption was "one of sufficient importance" to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of Corruption makes its acknowledgement as a sufficiently important objective for the purposes of Section 44 (2), to a large extent, self – evident. Thus, the first criterion of a section 44 (2) inquiry, therefore, has been satisfied by the Attorney General.

That similarly, in terms of the Financial Crimes Act, the objective of dealing with financial and related crimes by recovering tainted property from those that acquire and hold it, is one of sufficient importance to warrant overriding certain rights temporarily as done by section 65, for example. The State should be empowered to prevent the dissipation and disposal of the property that it seeks to recover, when it has formed reasonable grounds for suspecting the same to be tainted property.

That in terms of the FCA the question is whether the *ex parte* preservation order is rationally connected to the objective of curbing financial and related crimes. The answer is in the affirmative. The effective approach to the fight against financial and related crimes is when tainted property, as proceeds of crime, is recovered from both criminals and whosoever they give or sell it to. Essentially this is removing the criminal's profit from the crime. An eventual successful recovery of such property demands that the property is secured by the State as soon as it is identified. This is to avoid dissipation or disposal of the property by those that hold it at the material time.

That in the same way that injunctions are granted on an *ex parte* basis, so as to maintain the *status quo* of issues or events and to stop people or events on good and compelling grounds, preservation orders must ideally also be granted *ex parte* at the first instance. The *inter parte* interface comes about when affected persons come forward to challenge the preservation orders, a right which Part VI generously grants and safeguards from the moment that the order is granted by a Court.

That without the *ex parte* application, once prior notice is given of a preservation application, there is an undeniable risk that those that hold the targeted property may dispose and deal with the property in a way that makes the recovery of the same under the FCA difficult or impossible. This should be considered in the same way the law regards warrants of arrest, search and seizure. They are granted *ex parte* for good justification, to avoid the risk of flight or disposal and hiding of things by the targeted person before the warrant is executed. There is therefore, proportionality in the granting of orders under section 65 of the FCA *ex parte* and the objective of securing assets that are under investigation and are subject to subsequent forfeiture proceedings. The Claimant then argued that without such orders, forfeiture proceedings would be rendered nugatory and the fight against financial crimes, inefficient.

On whether the limitations posed by section 65 of the FCA are recognized by international Human rights standards, the Claimant once Again cited, Justice Mkandawire in the ***Jumbe case*** (supra), where the Court stated that:

> *"What is however important here is the minimum standard that is required for a country to attain. Internationally, limitations are allowed so long as they pass the proportionality test. For example, the European Human Rights Courts have done that. A case in point here*

is that of ***Salabiaku – vs – France*** *(supra). Also judging from international Human Rights jurisprudence that I have referred to in this judgment, it is clear that such reverse onus burdens are recognized by international human rights standards. I therefore find that section 25 (B) (3) passes this test."*

The Claimants noted that there are many foreign jurisdiction cases cited earlier which point to the fact that many jurisdictions recognise and allow *ex parte* preservation order applications as a means of securing property that is subject to investigation and potential confiscation proceedings. The limitation of the rights affected by such orders is recognised by international human rights standards, which allow for such limitations as long as they meet the proportionality test, among other measures. The proportionality question has already been answered above.

That notably, the provisions of the FCA are not unique to Malawi. They emanate from international obligations in several treaties and conventions to which Malawi has ratified and acceded to. Examples of these include the ***United Nations Convention against Transnational Organised Crime, the United Nations Convention against Corruption*** and the ***African Union Convention on Preventing and Combating Corruption.*** That all these conventions emphasize on the need for State parties to concentrate on asset recovery, both conviction-based and non-conviction-based mechanisms such as the one stipulated under section 65 of the FCA. These instruments also enjoin countries to respect the rights of those affected by such orders, which is what the FCA has done generously by allowing third parties and all affected persons to challenge the *ex parte* orders.

The Claimants stated that in addition to that, several jurisdictions in the world have similar pieces of legislation as the FCA. These include the Republic of South Africa, The United Kingdom, Botswana, Namibia and Seychelles just to mention a few. Thus, the FCA is in line with what is obtaining on the international plane. In addressing a similar issue, the Botswana High Court in ***Director of Public Prosecutions v Archbald Mosojane and Others*** (2018) MAHFT-000135-17 had this to say on the subject:

"The Proceeds and Instruments of Crimes Act, is a new statute with very limited case law in our jurisdiction. However, there are comparable statutes around the world upon which our PICA is modelled. These include international instruments such as the African Union

Convention on Preventing and Combating Corruption, the United Nations Convention against Corruption, the South African Prevention of Organised Crime Act (POCA) and the Proceeds of Crime (Civil Confiscation Act) Seychelles. While alive to the foibles and idiosyncrasies of our own constitutional order, I will where appropriate rely on foreign case law to give meaning to the provisions of our PICA where they are in pari materia".

The Claimants stated that the other limb of the test is whether section 65 of the FCA is necessary in an open and democratic society? That the ***Jumbe case*** supra, further stated that *"the term necessary presupposes that there is the existence of a pressing social need. It is therefore the duty of each State to determine and prescribe whether there is a pressing social need warranting limitation of the right."* In the Malawian context, the long title to the FCA expresses the pressing need to **"better prevent, investigate and combat financial and related or consequential crimes; to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crime...."** [Emphasis theirs]

As regards the term open democratic society, the ***Jumbe case*** guides that *the test to be applied is an objective one. There is certainly no mathematical exactitude. What is however important is that the society should meet minimum standards. It is clear from section 13 of the Constitution that Malawi has entrenched principles of accountability and transparency. Therefore, what the Corrupt Practices Act is doing is merely to require persons to give an account of their deeds. This is very necessary in an open and democratic society."*

The Claimant submitted that the provisions of section 65 are necessary in an open and democratic society and are recognised by international human rights law. That there was an objective reason why the legislature enacted the FCA. The legislature thought it important to take away the benefits from crime. Criminals should not benefit from the fruits of their criminal conduct, and in relation to instrumentalities of crime, criminals should not use their property to facilitate the commission of crimes. This should be done regardless of whether there is a criminal prosecution of the one who committed the offence from where the property was obtained or not.

The Claimant stated that the nation is constantly losing its resources through criminal conduct. Looting of State coffers and commission of financial crime has become the order of the day. It has thus become of paramount importance for the State to put in place and implement measures that

will enable it to recover its resources lost through theft and plunder, and also to disincentivize criminal activity generally. This is something that is beneficial to the entire population of Malawi. It is also in line with section 13 of the Constitution which provides that the State shall introduce measures which will guarantee accountability, transparency, personal integrity and financial probity, and which by virtue of their effectiveness and visibility, will strengthen confidence in public institutions.

The last question is whether section 65 of the FCA does not negate the rights in issue and is of general application. The Claimant submitted that the provisions of section 65of the FCA do not negate the essential content of the rights that it has limited because it is an interim order which lasts for 90 days if it goes unopposed. In addition to that the FCA has built in safeguards in sections 66 and 71 which give the Defendants an opportunity to exclude their interest in the preserved property or to make an application to vary or rescind the order. This they can do immediately after the order is granted, once they are served with the order or brought to notice thereof. The longest this notice can take is 21 days, as stipulated by section 67 of the FCA.

A total negation of the rights would obtain at the forfeiture stage, which again, does not happen before the affected persons are given notice of the application under section 72 of the FCA. At preservation stage, ownership of the property remains with the property holders, the Defendants. Title only passes to the State at the forfeiture stage, which is never granted *ex parte*. The temporal nature of the preservation order also affirms that there is no negation of the essential elements of the rights in question.

The Claimant also maintained that section 65 of the FCA fits in perfectly with the approach expounded by Justice Mkandawire in the ***Jumbe*** and ***Mvula case*** (supra). The minority decision of Justice Mkandawire was affirmed by the Malawi Supreme Court of Appeal when the case was heard on appeal. See ***The Attorney General v Jumbe and Another*** Constitutional Appeal Number 29 of 2005. That section 65 of the FCA does not violate the rights guaranteed under the bill of rights in the Constitution of the Republic of Malawi.

6.6. Attorney General's Arguments

The Attorney General was initially not a party to these proceedings that are before the single judge but was served with process based on the provisions of Order 19 rule 8 of Courts (High Court) (Civil Procedure) Rules 2017 which require that every proceeding before the High Court sitting as a Constitutional Court shall be served on the Attorney General.

The Constitution

In his argument the Attorney General cited section10 (1), Section 10 (2), Section 11 (1) of the Constitution. According to section 11 (2) of the Constitution, in interpreting the provisions of the Constitution, a Court of law shall;

a) *Promote the values which underlie an open and democratic society.*

b) *Take full account of the provisions of chapter III and IV; and*

c) *Where applicable, have regard to current norms of public international law and comparable foreign case law.*

That several Judgments, both of the High Court and Supreme Court of Malawi have expounded the principles to be followed when interpreting the Constitution, so that one can now safely say that there has developed some consensus on the proper approach to be used when interpreting the Constitution. The Malawi Supreme Court of Appeal in ***The State and Malawi Electoral Commission - ex parte Ringtone Mzima,*** MSCA Civil Appeal No 17 of 2004 [see tab 1, pages 5 to 6] Tembo JA said:

> *"to begin with, we must state the relevant and applicable principles on constitutional interpretation. In so doing, we note the fact that such a statement ought to commence with the express acknowledgement of section 11 of the Constitution. This Court in the case of* ***The Attorney General vs Fred Nseula and Malawi Congress Party****, MSCA Civil Appeal No of 1997 made the following observations in that regard-*
>
> *"Section 11 of the Constitution expressly empowers this Court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop*

must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the Supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution... There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society ... Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding a strict legalistic interpretation. The language of a Constitution must be construed not in a narrow legalistic and pedantic way, but broadly and purposively.

The position taken by this Court on constitutional interpretation is on all fours with that taken by the Privy Council in the case of ***Minister of Home Affairs and Another vs Fisher and Another*** *[1979] 3 All E.R. p. 21, 25-26, where the Privy Council observed, among other things that constitutional interpretation calls for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms, thus, to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.*

The AG stated that the principle is that the entire Constitution must be read as a whole without one provision destroying the other but sustaining the other as was stated in the ***Presidential Reference Appeal No. 44 Of 2006*** and ***The Attorney General vs Fred Nseula and Malawi Congress Party***, MSCA Civil Appeal No of 1997 so that one provision of the Constitution cannot destroy another,

or be held to be inconsistent with another provision. He further cited ***James Vs. Commonwealth Of Australia*** [1936] A.C. 578, where Lord Wright said –

> *"A Constitution must not be considered in a narrow and pedantic manner and that a construction most beneficial to the widest amplitude of its power must be adopted."*

The Chief Justice of India, Kania in the case of ***A. K. Gopal vs State*** [1950] S.C.R. 88 AT 120 (50) in an often cited passage said -

> *"A Court of law must gather the spirit of the Constitution from the language used and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language which therefore must be construed according to well established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has not limited either in terms or by necessary implication, the general powers conferred upon the legislature, the Court cannot limit them upon any notion of the spirit of the constitution."*

The Attorney General argued that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. He cited ***Paul K. Ssemogerere and 2 others vs A.G*** Const. Appeal No 1 of 2002. That all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument **(see *South Dakota vs North Carolina*,** 192, US 268 (1940) LED 448.)

He submitted that the approach to be adopted in the present case should be what has been set out in the above cited cases. That the purpose and effect of the constitutional provisions subject of the present proceedings ought, therefore, to be given effect. That it is also worth pointing out here that section 5 of the Constitution recognizes two matters that can be declared invalid for being inconsistent with the Constitution, namely, (1) any act of Government, and (2) any law.

He further stated that the Defendants are challenging the constitutional validity of *ex-parte* applications for preservation orders provided for under section 65(2) of the Financial Crimes Act arguing that section 65(2) of the Financial Crimes Act violates the Defendant's right to be presumed innocent, their right to property and the right to dignity as provided for under section 42(2) (f) (iii), section 28 and section 19 of the Republic of Malawi Constitution. That they are also challenging the action of the Director of Public Prosecutions to institute proceedings for the preservation order which the Defendants think is civil in nature *vis-à-vis* the DPP's powers under section 99(2) of the Republic of Malawi Constitution.

In his skeleton arguments, the AG submitted that a broad and purposeful approach as opposed to the narrow and pedantic approach to the application of the Constitution should be adopted by applying the cases cited above. It was the Attorney General's submission that the Defendants have adopted a narrow and pedantic approach to the interpretation of the provisions of the Constitution.

The Legal Burden of Proving Unconstitutionality of a Statutory Provision

The Attorney General stated that there is always a presumption in favour of the constitutionality of a statutory provision (***Attorney–General v Malawi Congress Party and others*** [1997] 2 MLR 181 (SCA)). The Supreme Court of India in ***Ram Dalmia v Justice Tendolkar*** AIR 1958 SC 538 said of these on the presumption of constitutionality:

> *"that there is always a presumption in favour of the constitutionality of an enactment and this burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; (c) that it must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.. (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the time and may assume every stage of facts which can be conceived existing at the time of legislation; (f) that while good faith and knowledge of the existing conditions on the part of the legislature are presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons*

for subjecting certain individuals or corporation to hostile or discriminating legislation. (See [1975-77] SLR 231 at 237).

He submitted that the Defendants bear the burden of discharging the proof of unconstitutionality of the impugned provision of the Financial Crimes Act and the impugned action of the DPP per the case of ***Ram Dalmia v Justice Tendolkar*** [supra]; ***Attorney–General v Malawi Congress Party and others*** [supra]. That the Defendants have not rebutted the presumption of the constitutionality of section 65(2) of the Financial Crimes Act. They also have failed to prove the unconstitutionality of section 2 of the Financial Crimes Act, whose definition of the phrase 'competent authority' empowers the DPP to institute preservation order applications pursuant to section 65(2) of the Financial Crimes Act.

That the question to be asked here is similar to the one posed by Kapanda, J as he then was in ***In the Matter of the Admission of David McRester Nyamirandu and in the Matter of the Legal Education and Legal Practitioners Act (Cap. 3:03 of the Laws of Malawi*** is whether a fair minded Court, deliberating the purpose of legislation as against its effects on the individuals adversely affected, and upon giving due weight to the right of the Legislature to pass laws for the good of all, would find that legislative means adopted are unreasonable. He submitted that a fair minded Court would not conclude that the Legislature's deliberate intention to include the DPP as a competent authority to institute civil proceedings aimed at preserving property that represents proceeds of crime or forfeiting criminal proceeds of crime is unreasonable.

The AG stated that a bad law will neither be saved simply because it operates equally upon those to whom it is intended to apply nor will a law unavoidably be bad because it makes distinctions. In the wisdom of Kapanda, J then, who delivered the unanimous opinion of the Court in ***the Matter of David McRester Nyamirandu and in the Matter of the Legal Education and Legal Practitioners Act (Cap. 3:03 of the Laws of Malawi)***:

"It is our understanding that section 20 of the Constitution was not meant to be a tool for the wholesale subjecting any legislation to judicial scrutiny the way the Applicant wants this Court to believe. As we understand it, any distinction is enough to establish

discrimination but when discrimination is found to exist the Courts should immediately turn to its constitutional validity. As it were, discrimination under Section 20 must be undesirable in nature for it to fail the constitutional validity test. Indeed. It must result from an unreasonable classification or unjustifiable differentiation. Accordingly, purely any differentiation as it is in the matter at hand should not result in a resort to declaring it unconstitutional. We say this as that could not have been intended by section 20 that every legislative categorization should invite the striking out of a statute as doing so only trivialises the fundamental rights guaranteed by the Constitution as many important and socially acceptable distinctions such as restrictions on drunken driving and special provisions for care, protection and education of children would be subject to automatic review under the Republican Constitution."

Whether Director Of Public Prosecutions (DPP) Is A Competent Authority To Commence Civil Proceedings Under Section 65 Of The FCA In View Of The Powers Granted Under Section 99(2) Of The Constitution, And Whether By Obtaining The Said Order, The DPP Acted Ultra Vires?

The AG cited Section 99(2) of the Constitution and Section 2 FCA. That the long title to the Financial Crimes Act (Cap 7:07) of the Laws of Malawi (hereinafter FCA) is very clear as to the purpose of the legislation and states as follows:

"An Act to establish an independent and autonomous Financial Intelligence Authority; to better prevent, investigate and combat financial and related or consequential crimes; to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crimes; and to provide for connected and incidental matters."

Section 2 of the Financial Crimes Act defines a Competent Authority as follows:

"Competent Authority" means where appropriate, Office of the Attorney General, Office of the Director of Public Prosecutions, Office of the Registrar General, Office of the Administrator General, a police officer, an Immigration Officer, a Revenue Officer, the Anti-Corruption Bureau, the Authority, the Reserve Bank of Malawi, the Registrar of Financial Institutions as defined in the Financial Services Act, and includes any person

authorized by any of them in that behalf and any other person the minister may, by notice published in the Gazette, designate.

He submitted that in ***Royal International Insurance Holdings Ltd v Gemini Holdings Ltd and another*** [1998] MLR 318 (SCA), the Malawi Supreme Court of Appeal held that:

> *"It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of the statute are in 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.'*

That it has been generally accepted that law is law and it can only be changed or improved upon by an appropriate enactment by Parliament. The duty of the judiciary is to interpret the law as it is and not to make value judgments. See Kumitsonyo, J. in ***Kalemera v Kalemera*** [1996] MLR 379 (HC). At page 384 the learned judge said:

> *"Be that as it may, it must be appreciated that law is law and it can only be changed or improved upon by the appropriate amendment of legislation in Parliament. The duty of the judiciary is to interpret the law as it stands and not to make value judgments".*

Similarly the Attorney General cited ***Sisya v Attorney General*** [1993] 16(2) MLR 820 (HC), where Mwaungulu, R as he then was had this to say on the legislature's duty to enact laws:

> *"To expect the Courts to infer such a beneficent result as one in Order 77, rule 9 from received law is to require too much from the Courts particularly when it is accepted that Courts do not create rules where strictly Parliament should legislate. I think this is a matter which clearly Parliament should consider".*

The Attorney General further cited ***Blackburn v. Attorney General*** [1971] 2 All E.R. 1380. It was held that the treaty making power rested in the Crown, acting on advice of its ministers; and in negotiating and signing a treaty, even a treaty of such importance as the Treaty of Rome, Her Majesty's Ministers would be exercising the prerogative of the Crown and their actions in so doing

could not be challenged or questioned in the Courts. In ***Blackburn vs Attorney General*** (supra) Salman LJ remarked: -

> *"I deprecate litigation the purposes of which is to influence political decisions. Such decisions have nothing to do with the Courts. These Courts are concerned only with the effect of such decisions in and when they have been implemented by legislation. Nor have the Courts to interfere with the treaty making power of the sovereign. As to Parliament, in the present state of the law, it can enact, amend, and repeal any legislation it pleases. The sole power of the Courts is to decide and enforce what is the law and not what it should be now, or in the future".*

The AG also quoted Lord Denning in ***Magor and St Mellons vs Newport Borough Council*** [1950] 2 All 1226 as follows:

> *"We do not sit here to pull the language of Parliament to pieces and make nonsense of it. We sit here to find out the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis".* [Emphasis his]

The AG stated that while acknowledging that the DPP is a competent authority under section 2(1) of the Financial Crimes Act (paragraph 3.5.2, page 15 of the Defendant's skeleton arguments), the Defendants argued at paragraph 3.5.4 of the skeleton arguments that the Claimant is not a competent authority to institute civil proceedings under section 54 of the Financial Crimes Act and, therefore, the DPP lacks *locus standi* to institute the present proceedings.

He submitted that since a competent authority includes the DPP and that Parliament intended that any competent authority can institute civil proceedings connected to illegally obtained property, the Defendants' argument that the DPP lacks *locus standi* is without basis. It is a product of imagination and assumption. That what the Defendants are advocating that the DPP cannot institute civil proceedings under section 54 of the Financial Crimes Act is contrary to ***Kalemera v***

Kalemera [supra]; *Blackburn vs Attorney General* [supra] which are to the effect that the Court's role is only to interpret the law and not to enact the law.

That by stating that the DPP cannot institute civil proceedings under the Financial Crimes Act when as a matter of fact the Financial Crimes Act at section 2(1) empowers the DPP to institute such proceedings, the Defendants are inviting this Honourable Court to amend the law or destroy the law when the Court's only role per *Magor and St Mellons v Newport Borough Council* [supra] and *River Wear Commissioners v Adamson* [supra], is to decipher Parliament's intention. He submitted, therefore, that there is nothing unconstitutional with the Director of Public Prosecution Commencing civil proceedings aimed at recovering tainted property, and the DPP is a proper party to the case.

Whether Civil Property Preservation Order Granted By The Court Without Notice In Terms of Section 65(2) of The Financial Crimes Act Is Not Tantamount To An Unconstitutional Infringement of The Right To A Fair Hearing, The Presumption of Innocence, The Right To Property And The Right To Dignity As Provided In Section 42(2) (f) (iii), Section 28 And Section 19 of The Constitution respectively.

The AG submitted that the Financial Action Taskforce (FATF), a global anti-money laundering organization defines the term 'seize' as to prohibit the transfer, conversion, disposition or movement of property on the basis of an action initiated by a competent authority or a Court under a freezing mechanism. However, unlike a freezing action, a seizure is effected by a mechanism that allows the competent authority or Court to take control of specified property. The seized property remains the property of the natural or legal person(s) that holds an interest in the specified property at the time of the seizure, although the competent authority or Court will often take over possession, administration or management of the seized property.[2]

Section of the 19 of the Constitution provides as follows:

(1) The dignity of all persons shall be inviolable

[2] <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>

(2) *In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*

Section 28 provides in the following terms:

(1) Every person shall be able to acquire property alone or in association with others.

(2) No person shall be arbitrarily deprived of property.

Section 42(2) (f) (iii) provides as follows:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—

(f) as an accused person, to a fair trial, which shall include the right—

(iii)to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.

He stated that in ***the State v The Minister of Finance and Governor of Reserve Bank of Malawi ex parte Golden Forex Bureau Ltd and 13 others*** Civil Cause Number 16 of 2007, HC, PR, (Unreported), Twea, J then, delivering the unanimous opinion of the Court sitting as a constitutional panel made the following observations:

"I must state at the outset the arguments, as usual, and I repeat, as usual, were very superficial. I say so because, it is increasingly, becoming the norm before this Court that constitutional provisions are merely flagged out. Little effort is made to analyse and substantiate the constitutional provisions and the applicable laws."

A Court cannot infer the right to be heard where a statute does not expressly provide for the right to be heard (***Reserve Bank of Malawi v Finance Bank of Malawi Limited (In Voluntary Liquidation) and the Attorney General*** Commercial Cause No. 202 of 2008, Comm.D, PR, (Unreported))

The Attorney General argued that the Defendants have submitted that the *ex-parte* preservation order under section 65(2) of the Financial Crimes Act is unconstitutional since it affects the Defendants' constitutionally protected right to be presumed innocent, the right to acquire property and the right to dignity. This has been said in abstract terms as the Defendants have not demonstrated how the said provision substantially and significantly affect their fundamental rights and freedoms recognized by the Constitution of the Republic of Malawi contrary to what the Court directed in ***the State v The Minister of Finance and Governor of Reserve Bank of Malawi ex parte Golden Forex Bureau Ltd and 13 others*** [supra].

That in ***Jeffrey and another v The Anti-Corruption Bureau*** [2002-2003] MLR (SC), the Malawi Supreme Court of Appeal held that while seizure orders under the Corrupt Practices Act may indeed affect the right to property, it is well established that the right to property may be limited in accordance with prescriptions of law, which are reasonable and recognised by international human rights norms and necessary in an open and democratic society.

The Attorney General continued to state that the Court further held that:

> *"It is common practice in applications for an order such as the one brought by the Defendants that the initial application is made ex parte. The obvious reason is that such applications are made at a very early stage, even before the prosecution have full knowledge of the assets to which the suspected person is entitled. At the same time, the application must be made speedily and ex parte to ensure that the suspected person is not given an opportunity to remove, conceal or otherwise dissipate the assets before an inter partes order is obtained. After an ex parte order is obtained, it is the usual practice that the affected person against whom the order is obtained applies to the same Court that made the order to set aside the said order. During the hearing of such application, both parties are heard. The opportunity to be heard occurs at this stage.'*

That recently, the Court in ***Anti-Corruption Bureau v Professor Arthur Peter Mutharika*** Criminal Case No. 140 of 2020, stated as follows:

> *"The law provides for an application without notice for a reason: if the person against whose property the preservation order is being sought is aware of the application or impending application, he or she might dissipate or otherwise put the targeted assets*

beyond the reach of the competent authority before the preservation order is made. The element of surprise envisaged under that section was meant to address this risk and it is proper"Consider adding as part of the findings

He submitted that ***Jeffrey and another v The Anti-Corruption Bureau*** [supra] and ***Suisse Security Bank & Trust Ltd v Francis (in the Capacity of Governor of the Central Bank of the Bahamas*** [supra],apply Mutatis Mutandis to the present case and that the Claimant would not wait for the inter-partes hearing to avoid giving the Defendants the opportunity to remove, conceal or otherwise dissipate the assets before an inter partes hearing.

The Law Is Necessary and Is Recognisable In An Open And Democratic Society

On this point, the Attorney General cited ***De Lange v Smuts*** NO [1999] 2 LRC 598 in which the following observation on the interpretation of the Constitution were made:

"Where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of s 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the Constitution. If they are capable, they will ordinarily pass constitutional muster. This approach to the construction of a statute is consistent with the approach to constitutional interpretation which has been developed by this Court, where possible, legislation must be construed consistently with the Constitution".

At page 429 he said:

*"A Court should be reluctant to read in or sever words from a provision if to do so would require the Court to engage in the details of law making, a constitutional activity that is assigned to legislatures. Similarly, where curing a defect in the provision would require policy decisions to be made, reading in or severance may not be appropriate. So too where there are a range of options open to the legislature to cure a defect. The Court should be slow to make choices that are primarily to be made by the legislature (**Dawood v Minister of Home Affairs** [2000] 5 LRC 147 at [64]. Finally, it must be borne in mind that whatever remedy a Court chooses, it is always open to the legislature, within constitutional limits, to amend the remedy granted by the Court".*

The Attorney General stated that the FCA is about prohibiting criminals from transferring, converting, disposing or moving property pending conclusion of the forfeiture orders. Per ***Moinudidian Mohammed Iqbar Sodogar v Attorney General and Reserve Bank of Malawi,*** Constitutional Reference No. 3 of 2017, High Court of Malawi, Lilongwe District Registry (Unreported) such important law cannot be held to be unconstitutional.

That the proper approach to take when considering whether a provision in a statute is unconstitutional or not is first to consider whether the provisions in question can be read in a manner that is consistent with the constitution. The civil forfeiture regime under the Financial Crimes Act (FCA) and section 65(2) of the FCA are consistent with the principle that no-one should be allowed to benefit from his illegal or wrongful activities.

The Law is Necessary and is Recognisable in an Open and Democratic Society

The Attorney General cited section 44(2) and (3)of the Republic of Malawi Constitution which States,

> *(2)Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards, and necessary in an open and democratic society.*
>
> *(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."*

He argued that in the **Matter of the Admission of David McRester Nyamirandu and In the Matter of the Legal Education and Legal Practitioners Act (Cap.3:03 of the Laws of Malawi),** Kapanda, J. (as he was then):

> " *... except for the rights which are expressly identified as non-limitable under section 44(1) of the Constitution, the rest of the rights in Chapter IV of the Constitution can be derogated from, limited or restricted.*"

That in that regard, the rights in issue can be limited and the limitation must –

i) be prescribed by law,

ii) be reasonable

iii) be recognized by international human rights standards,

iv) be necessary in an open and democratic society,

v) not negate the essential content of the right or freedom in question, and

vi) be of general application.

That while considering section 44 of the Constitution, the Court must also consider the **principles of national policy of the Constitution**. Section 13 of the Constitution provides as follows:

> *The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and* ***implementing policies and legislation*** *aimed at achieving the following goals:*
>
> *(n) Economic Management*
>
> *To achieve a sensible balance between the creation and distribution of wealth through the nurturing of market economy and long-term investment in health, education and social development programs.*
>
> *(o) Public Trust and Good Governance*
>
> *To introduce measures that will* ***guarantee accountability, transparency, personal integrity and financial probity*** *and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions.*
>
> [all emphasis his]

The Attorney General further stated that in ***the Attorney General v Hon. Friday Anderson Jumbe and Humphrey Chimphando Mvula*** Constitutional Appeal Number 29 of 2005, MSCA (Unreported) the Malawi Supreme Court of Appeal held that the conjoined meaning of "necessary" in Section 44(2) of the Constitution would be that which is *"beyond mere convenience and should lend itself to that which is indispensable in order to achieve certain results."*

That when we choose to be persuaded by foreign case law, the basis is not the similarity of the constitutions of the nations that the decisions originate from with our Constitution, but rather, whether the issues are comparable and that the approach that should be adopted in interpretation of our Constitution is that which should reflect ***"the unique character and supreme status" of our Constitution as Section 11 (1) thereof enjoins us to do.***" Twea, JA delivering the unanimous opinion of the Malawi Supreme Court of Appeal Stated thus:

> *"... we have noted generally and, in this case, in particular, the preference by their Lordships of some constitutions: notably the Canadian Charter of Rights and the Constitution of the Republic of South Africa. This may not be wrong, but to prefer them on the basis that they have wording that is close or similar to our Constitution would not be a proper approach. A Constitution is a living document that reflects the history and aspirations of a people and their nation*. We may have similar wording in the instruments that set up the governing institution of our nations, but our history and aspirations are bound to be markedly different. Furthermore, since constitutions are not precedent, there is always a risk of subjugating our Constitution to constitutions of other nations. Such an approach would not promote an interpretation that reflects the "unique character and supreme status" of our Constitution as Section 11 (1) thereof enjoins us to do.*

He argued that in ***Zondi v. MEC*** 005 4 LRC at 423 Ngcobo J citing, amongst others, the case of ***Berstein v Bester*** [1996] 4 LRC 526 at [59], ***De Lange v Smuts*** NO [1999] 2 LRC 598 at [85] made the following observation on the interpretation of the Constitution:

> *"Where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of s 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the constitution. If they are capable, they will ordinarily pass constitutional muster. This approach to the construction of a statute is consistent with the approach to constitutional interpretation which has been developed by this Court, where possible, legislation must be construed consistently with the constitution".*

The Attorney General submitted that, section 65 of the FCA gives a competent authority the power to obtain a preservation order. Section 67 of the FCA – the preservation order has a duration of 90 days. Section 68 of the FCA provides for seizure of property under preservation order. Section 69 of the FCA provides for the dealing with immovable property subject to a preservation order. That the civil forfeiture regime is recognized internationally by amongst others, the Financial Action Taskforce, the World Bank and the International Monetary Fund. That the Preservation order regime set out at section 65 of the FCA is an implementation of Recommendations 4 and 38 of the FATF Recommendations.

He continued that as a matter of fact, Malawi as a country is assessed on minimum anti-money laundering compliance measures set by FATF (see for example the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) Mutual Evaluation Report of Malawi found at https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/ESAAMLG-Mutual-Evaluation-Report-Malawi-2019.pdf that assessed Malawi on amongst others, the effectiveness of the civil forfeiture regime in Malawi.

That as set out above, ex-parte preservation or seizure orders do not require the right to be heard. The law is necessary in an open and democratic society. Per the Malawi Supreme Court of Appeal in ***the Attorney General v Hon. Friday Anderson Jumbe and Humphrey Chimphando Mvula*** [supra] the Attorney General does not have a duty to bring empirical evidence to support constitutionality of a statutory provision.

The AG maintained that in the present case, the provisions of the FCA do not stop citizens from enjoying the rights that are enshrined in the Constitution. The provisions merely give the State powers to preserve the property which the State believes is tainted and the preservation does not mean that the State has taken the property. The State is required to file another application where the Defendant has a right to challenge the averments made by the State and at the end of the day it is the independent and an impartial judiciary which makes a determination on whether the property can be forfeited to the State or not. Further, the authorities cited by the 6th Accused Person have no application to the present case. They have just been cited in abstract terms.

That furthermore, the right to acquire and own property does not include acquiring property through illegitimate or illegal means. Section 28 of the Constitution only relates to legitimately acquired property. In that regard the Defendants have not demonstrated how their rights under section 19 of the Republic of Malawi Constitution have been violated. Section 19 of the Constitution has been cited in abstract terms. The right to dignity cannot be affected by mere fact that there was no prior hearing before the Defendants are restrained from using the illegitimately acquired property. Additionally, the Defendants have not demonstrated how the right to be presumed innocent has been violated when the procedure allows them to file an inter-partes application.

That moreover, all the rights that the Defendants contend that have been limited by the application for a preservation order are limitable (see for example, the decision of Mkandawire, J as he then was in ***Jumbe and Another v Attorney General*** (1of 2005, 2 of 2005) [2005] MWHC 15 (21 October 2005). That the argument against the retrospective application of the Financial Crimes Act has no constitutional basis in view of the Supreme Court decisions in ***Stanbic Bank Limited v Mwalwanda*** [2008] MLR 361 which sustained the retrospective application of the Employment Act. Further, section 18 of the General Interpretation Act provides that:

> *'Any subsidiary legislation, except where a contrary intention appears, may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which such subsidiary legislation is made, but so, however, that no person shall be made or become liable to any penalty whatsoever in respect of any act committed or failure to do anything before the day on which such subsidiary legislation is published in the Gazette.'*

That if a subsidiary legislation can operate retrospectively, what more a main statute? Section 18 of the General Interpretation Act provides that a statute can operate retrospectively. This should not be confused with the right under section 42(2) (f) (vi) of the Republic of Malawi Constitution which provides for the right of an accused person 'not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed.' In any event, the FCA carries over most of the provisions such

as civil confiscation orders that were covered by the now repealed Money Laundering, Proceeds of Serious Crime and Terrorist Act (see section 53 of the repealed Act).

The Attorney General stated that the Defendants cited the South African cases of ***Fraser v ABSA Bank Limited*** (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (15 December 2006) and that of ***National Director of Public Prosecutions v Elran*** (CCT 56/12) [2013] ZACC 2; 2013 (1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) (19 February 2013)_ in support of their objections against the *ex parte* order for the preservation of property. The case of ***Fraser v ABSA Bank Limited*** [supra], concerned the powers of the Court under the Prevention of Organised Crime Act (POCA), to grant *ex parte* restraint orders pertaining to property that constitutes the proceeds of crime and application concerning the discretion to be exercised permitting creditors to intervene in confiscation proceedings. The Court held that a Court must consider the 'accused's' fair trial rights and interest of the State in preserving the property and the property of creditors.

In that case, Mr. Fraser was arrested and charged with racketeering, money laundering and drug-related offences. A year later, the High Court ordered a provisional restraint order against his property, placing it in the hands of a curator. He subsequently applied, in terms of section 26(6) of the POCA, to the Durban High Court for an order directing the curator to sell the property and use its proceeds for payment of the legal expenses in his criminal trial. ABSA, a creditor of Mr Fraser with a four-year-old default judgment against him in its favour, applied to intervene in the proceedings. It opposed the application for the provision of legal expenses on the basis that, if Mr Fraser were successful, it would be unable to recover its judgment debt. The High Court dismissed ABSA's appeal. ABSA successfully appealed to the Supreme Court of Appeal. Mr. Fraser applied for leave to appeal to the Constitutional Court against the judgment and order of the SCA contending that the SCA's interpretation of POCA was constitutionally problematic. The Constitutional Court upheld the SCA's decision to allow ABSA to intervene in the proceedings, but held that the SCA was incorrect in holding that ABSA's claim against the applicant was secured against the provision for his reasonable legal expenses.

That the cases of ***Fraser v ABSA Bank Limited*** [supra] and ***National Director of Public Prosecutions v Elran*** [supra]do not support the Defendants' case. They support the Claimant's case since in those cases the Court granted *ex parte* preservation orders. Further, both cases relate to access to preserved property to meet living and legal expenses. As a matter of fact, the request for access to living expenses was denied in ***National Director of Public Prosecutions v Elran*** [supra] because the Applicant failed to show both that he could not meet the expenses concerned out of property not covered by the order and he failed to disclose all interests in the property. And the applicant's failure to make a full and frank disclosure of certain information meant that the Court could not exercise its discretion to grant the order.

The Attorney General submitted that, the cases cited above show that *ex-parte* preservation orders are recognized internationally and that they are necessary in an open and democratic society. In this regard, the Attorney General referred to the decision by Justice Cameron in ***National Director of Public Prosecutions v Elran*** [supra], that the law relating to dealing with proceeds of crime 'should be a friend to democracy, the rule of law and constitutionalism and is indispensable in a world where the institutions of State are fragile, and the instruments of law sometimes struggle for their survival against criminals who subvert them.' He concluded and stated that the Defendants have failed to challenge the constitutionality of the *ex parte* preservation orders and that the Director of Public Prosecutions' commencement of the civil proceedings under section 65 of the Financial Crimes Act is within the law.

That the civil property preservation order granted by the Court without notice does not infringe on any right under the Constitution as the said order aims at preventing dissipation of suspected tainted property. The civil preservation order regime is 'a friend to democracy, the rule of law and constitutionalism and as indispensable in a world where the institutions of State are fragile, and the instruments of law sometimes struggle for their survival against criminals who subvert them. He therefore submitted and prayed to this Honourable Court to dismiss the Defendants' prayers with costs.

FINDINGS

As noted that there are three questions which were presented before this Court and it is on those questions that we are going to make our findings. For purposes of reiteration, we shall list the questions. The issues before this Court are set out as follows:

a. What are the principles and methodology for Constitutional Interpretation?
b. Whether the commencement of the proceedings by the Director of Public Prosecutions under section 65(2) and (3) of the Financial Crimes Act, being civil proceedings, is unconstitutional and in contravention of section 99(2) of the Constitution?
c. Whether the civil property preservation order granted by the original Court without notice in terms of section 65(2) of the Financial Crimes Act is tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42(2)(f)(iii), section 28 and section 19 of the Constitution, respectively?

a. What are the principles and methodology for Constitutional Interpretation?

1.20 First of all we would like to note that this issue was not put before us for us to provide guidelines as to what principles and methodology are supposed to be adopted when interpreting the Constitution of Malawi. We believe and trust that such guidance has already been provided by the Supreme Court of Malawi in ***Nseula v Attorney General and Another*** [1999] MLR 313 at 323-324 where the Court had the following to say with regards interpretation of the 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 a 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 great purpose of the Constitution.*

1.21 We cannot agree any more or provide any better guidance that what the Supreme Court Stated suffice it to note that we did also bear in mind the decision in ***Ex Parte Muluzi and Another***

In Re: S v Electoral Commission ((2 of 2009)) [2009] MWHC 8; which quotes the South African ***Makwanyane*** case in the following manner:

> *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."*

In the context of this matter, we agreed that we are going to adopt a broader approach to the interpretation of the Constitution as held by Mahommed, J in ***S v Makwenyane***. Specifically in this instance we had to ask ourselves what is it that we are being asked to interpret? In this regard we did note that what the Defendants were arguing in this instance is that the DPP acted contrary to the provisions of section 99 of the Constitution when he initiated civil proceedings to obtain an order of preservation against the Defendants' properties. For clarity, section 99 of the Constitution, as above cited, establishes the office of the Director of Public Prosecutions.

A reading of section 99(2) does clearly state that the Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable to do so. If we do afford the Constitution a broader interpretation, the DPP has the discretion to decide which criminal cases he shall exercise his powers over. In this regard, it should be noted that there is no prescription in the Constitution as to what criminal cases the DPP can and cannot do.

In the context of the arguments by the Defendants, they are saying that the DPP acted outside the mandate which the Constitution gives him under section 99. By simple definition a mandate gives someone the authority to act in a certain way. By law, when one acts outside their mandate, they are deemed to have acted *ultra vires* which is a matter of administrative law and not constitutional law. Technically, if it is the Defendants argument that the DPP exercised Civil powers which the Constitution does not grant him, then they are suggesting that the DPP acted outside his powers. The question now becomes did the DPP act outside his powers? This leads us to the second issue that is before this Court.

b. **Whether the commencement of the proceedings by the Director of Public Prosecutions under section 65(2) and (3) of the Financial Crimes Act, being civil proceedings, is unconstitutional and in contravention of section 99(2) of the Constitution?**

As we have noted above, the Constitution has to be given a broad interpretation and this means that we acknowledge the fact that the Constitution cannot provide or legislate for everything. It is perhaps in this regard that the Constitution has given the DPP the discretion to decide on any criminal case for which he can exercise his or her power. Further, it is also our considered view that besides the Constitution, Parliament can confer additional powers on the DPP through an Act and that this can in no way be deemed to be unconstitutional, unless the Act is deemed unconstitutional.

In looking at the powers of the DPP as conferred by the Financial Crimes Act, we agree that the starting point should be the Long Title of the Act which sets out the purpose of the law. The long title of the Financial Crimes Act describes the Act as follows:

> *"An Act to establish an independent and autonomous Financial Intelligence Authority; to better prevent, investigate and combat financial and related or consequential crimes; to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crimes; and to provide for connected and incidental matters."*

The Act is thus aimed to prevent, investigate and combat financial and related or consequential crimes. This to enable the tracing, identification, tracking, freezing, **seizure or confiscation of proceeds of crimes** [emphasis ours]. It may of course be argued that the long title should be read as a whole and that in that regard the tasks and aims that are listed are supposed only to be within the purview of the Financial Intelligence Authority and no other authority. This however is not the case as the Financial Crimes Act has gone on to define what a competent authority under section 2 of Act as follows:

> *"Competent Authority" means where appropriate, Office of the Attorney General, Office of the Director of Public Prosecutions, office of the Registrar General, office of the Administrator General, a police officer, an Immigration Officer, a Revenue Officer, the*

Anti-Corruption Bureau, the Authority, the Reserve Bank of Malawi, the Registrar of Financial Institutions as defined in the Financial Services Act, and includes any person authorized by any of them in that behalf and any other person the minister may, by notice published in the Gazette, designate.

On this note we must agree with the decision of the the Malawi Supreme Court of Appeal in the case of ***Attorney General –v- Mapopa Chipeta*** MSCA Civil Appeal Number 33 of 1994 where it was said:

"...the Court's task is always to find the intention of Parliament and the principle that you must consider the words used in a particular statute which is being construed in order to give 'force and life to the intention of parliament.... It is also important to give a meaning to a statute or document which does not create an absurd situation."

In line with the sentiments expressed by the Supreme Court above and from the reading of section 2 of the Financial Crimes Act, clearly the DPP has been defined as a competent authority to act under that law and this is worth noting for purposes of avoiding absurdity. Clearly, here the intention of Parliament was to give the DPP, where appropriate, to take action under the Financial Crimes Act. This now brings us to consider section 65 of the Financial Intelligence Act. The stated section provides as follows:

(1) A competent authority may apply to the Court for an order prohibiting any person, subject to the conditions and exceptions specified in the order, from dealing in any manner with any realizable or tainted property.

(2) The Court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—

(a) has been used or is intended for use in the commission of an offence; or

(b) Constitutes proceeds of an offence.

[Emphasis ours]

What is clear from the reading of section 65 is that the DPP, as a **competent authority** [emphasis our] can apply to the Court for a prohibition order regarding any realizable or tainted property if there are **reasonable grounds** [emphasis ours] to believe that the property has been used or is intended to be used in the commission of the crime or constitutes proceeds of a crime. In this regard, it must be noted that the FCA has provided definitions or what constitutes realizable or

tainted property. Tainted property has been defined to mean proceeds, including income or other benefits derived from the proceeds or instrumentalities used for or intended for use of, in money laundering or predicate offences. There cannot be any doubt here that there is reference to criminal activities and not civil infringements.

Further, section 2 of the FCA also gives the definition of *"realizable property" to be property of corresponding value—*

(a) held by a Defendant;

(b) possessed by a person to whom a Defendant has directly or indirectly made a gift as defined in this act; or

(c) to which a Defendant is a beneficiary entitled

Further still, the FCA also went on to define a gift under the Act to include

(a) after the commission of an offence by the first person;

(b) for a consideration the value of which is significantly less than the value of the consideration provided by the first person;

and

(c) to the extent of the difference between the market value of the property transferred and the consideration provided by the transferee

Going through the thread of the definitions, the reference to criminality is quite clear and it therefore cannot be left in doubt that the FCA was intended to combat criminal activities and the combating of criminal activities is within the purview of the DPP, section 54 notwithstanding. As noted in ***Civil Liberties Committee v Ministry of Justice and Another*** ((MSC Civil Appeal No. 12 of 1999) [2004] MWSC 1;

" in the field of public law, the statute which lays down the duties and powers of public officials and statutory authorities usually defines how such duties and powers may be exercised. The same statute would indicate who would be entitled to bring an action to enforce the proper carrying out and exercise of such duties and powers. The issue of locus standi may be resolved by the examination and interpretation of the relevant statute".

It is of course noted that the FCA was enacted years after the Constitution came into force and that some of the things that are in the FCA might be considered to be "alien". However, the fact that something might be new does not make it unconstitutional. As we have already noted the

Constitution must be interpreted in a broader and purposive sense. Suffice to state that what seems to be an issue in this instance is the fact that the DPP took out proceedings which were civil in nature and which the Defendants believe he is not mandated to do. We now turn to that issue.

In answering the foregoing question, we must take note that the starting point must be the fact that section 65 of the FCA falls under Chapter VI of the Act which provides for Civil Forfeiture, Seizure, Detention, Freezing and Preservation of Assets. Simply defined, civil forfeiture is a legal process that enables a government to seize property and other assets belonging to persons suspected of committing a crime. The main purpose of civil forfeiture is to provide an effective means of prosecuting criminals and fighting organized crime. As noted by Latham LJ in ***Singh v Claimant of the Assets Recovery Agency*** [2005] EWCA Civ 580 para. 9. The rationale for civil forfeiture is stated as follows:

> *The proposed civil forfeiture regime is intended to provide:*
>
> *• a reparative measure – taking away from individuals that which was never legitimately owned by them; and*
>
> *• a preventative measure – taking assets which are intended for use in committing crime.*

Further, it has been observed by Justice Foskett in ***Serious Organised Crime Agency v Perry & Ors*** [2009] EWHC 1960 (Admin) (30 July 2009) that

> *" although civil forfeiture is not intended as a punitive measure, it can be expected to be keenly felt and strongly resisted by individuals who have grown accustomed to having possession of their unlawful assets. ... the large body of anecdotal evidence.... [shows] that individuals associated with criminal activities are as concerned about losing their assets as they are about losing their liberty, in some cases more so.*

It was further stated that

> *"Like other forms of asset recovery, civil forfeiture is a disincentive to crime – more effective recovery of unlawful assets will act to reduce the anticipated reward in the risk/reward trade-offs that some criminals make..... And it reinforces the rule of law – by demonstrating that the justice system will work effectively to remove illegal gains. In addition, it:*
>
> > *• opens up a new route to tackling assets that are currently beyond the reach of the law. Civil forfeiture should be used in particular to disrupt the activities of organised crime heads who are remote from crimes committed to their order, yet enjoy the benefits..... "*

What is clear from the above is that Civil Forfeiture is an ambit of law enforcement against organized crime which we believe is within the mandate of the DPP. In this regard, we were persuaded by the decision in ***DPP v Archbald Mosojane & Others*** [2018] MAHFT-000135-17

where the Court in Botswana held that the DPP had *locus standi* to move civil applications under the Proceeds and Instrumentalities of Crime Act of 2014 (PICA). The Court further said as follows:

> *"the PICA is an instrument for fighting organized crime and other serious crimes. It is criminal law-based statute, which is enforced with mostly civil type actions...the actions are in pursuit of criminal investigations and possible prosecution. These fall within the realm of DPP's mandate."*

We do also agree with the observations that were made in ***Directorate of Public Prosecution v Kgori Capital (Pty) Ltd*** [2018]. In that decision Justice Nthomiwa Nthomiwa emphasised in paragraphs 59 and 60 of the judgment that:

> *"The DPP is the only authority in my judgment that the Constitution vests with the power to institute legal proceedings against criminal offenders. It is also the only authority that can ensure that property that is the subject matter of litigation is preserved until the Court makes its proper disposal. In my view the dispossession of people of proceeds of crime is incidental to the powers bestowed on the DPP. I therefore agree that all that the DPP is using are the powers that he has been given by Parliament to ensure, on behalf of the general public, that any person who has benefitted from a criminal conduct or activity pays the price by surrendering his or her ill-gotten gains to the State. There is no other State entity that is more proximate than the DPP to bring the proceedings before the Court. I therefore conclude that the issue of application for civil penalty orders resonates, and its incidental to, the powers given to the DPP by the Constitution. Thus, the current dispensation of the Proceeds and Instruments of Crime Act (PICA) in so far as it relates to the civil penalty order is not inconsistent and ultra vires with the Constitution and therefore void ab initio as if pro non scripto"*

The PICA of Botswana has similar provisions to the FCA. We thus must reiterate that the FCA has clearly defined the DPP as a competent authority under the Act and thus the DPP has powers to act under the Act. We believe that this is not a matter of sufficient interest or *locus standi*, this is a matter about clear powers which the law has given to the DPP to act where it is appropriate. That similarly, in the Malawian context, Botswana's section 15 of the General Interpretation Act is similar to section 34 of Malawi's General Interpretation Act which reads;

Where any written law confers power upon any person to do or to enforce the doing of any act or thing, all such powers shall be deemed to be so conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

In this regard, we do fully agree with the decision in ***Civil Liberties Committee v Ministry of Justice and Another ((MSC Civil Appeal No. 12 of 1999)*** [2004] MWSC 1. We must also add that the proceedings are classified as civil proceedings because they are not intended to be penal but rather to recover property which one should not have, the same having been obtained from criminal activities (see ***Williams v The Supervisory Authority (Antigua and Barbuda)*** [2020] UKPC 15). These are not stand alone civil proceedings. This then brings us to the final question

c. **Whether the civil property preservation order granted by the Court without notice in terms of section 65(2) of the Financial Crimes Act is tantamount to an unconstitutional infringement of the right to a fair hearing, the presumption of innocence, the right to property and the right to dignity as provided in section 42(2)(f)(iii), section 28 and section 19 of the Constitution, respectively?**

In answering the above question, we felt that we should deal with the specific rights which the Defendants felt were violated when the Court granted the preservation order without notice. However before addressing the specific rights we first observed that what Parliament did when enacting the FCA was to provide for what is known as a "combined regime" of Civil forfeiture. This combined regime has two steps which are the obtaining of the preservation (freezing) Order and then the actual forfeiture.

The process starts under section 65(1) of the FCA which has made provision for preservation orders as the same are intended to prohibit a person, subject to conditions and exceptions specified in the order, from dealing in any manner with any realizable or tainted property. What was clear from our reading of this provision is that it is only meant to preserve the property and not necessarily deprive a person of the same. A preservation order, as the term states, is thus an interim order and not a final order. The next part of the process is the application for the actual order for forfeiture which is done under section 72(1) of the FCA. Further, section 72(2) of the FCA does state that the person whose property is the subject of an application for forfeiture must be given 14 days-notice. Following the service of the Notice, a person is given the opportunity to, among others, oppose the order; apply for an order excluding his interest in that property from the

operation of the order; or varying the operation of the order in respect of that property, as per section 72(4) of the FCA. Moreover under section 67, a preservation order only has a lifespan of 90 days, unless there is an application for forfeiture pending or pending criminal proceedings. Thus before the property which is the subject matter of a preservation order can be forfeited, one is given a chance to be heard.

The Right to a Fair Hearing

It was the Defendants' argument that a preservation order is draconian as it does not give a person the right to respond when the order is being made. This is on account that they are granted ex parte. On this note we did first note that the preservation order is granted in a civil proceeding and not in a criminal proceeding. The main purpose of the order is to preserve property which is suspected to be tainted. In civil proceedings, it is allowed for one to make an ex parte application and the same does not mean that a person is denied a right to a fair hearing. This is especially considering the fact that a preservation order is an interim one.

Further, preservation orders operate *in rem* rather than purely *in personam* as an ordinary freezing injunction would do. The application is to be made *ex parte*, presumably in recognition of the fact that there may often be a need for speedy action without notice to a defendant who might try to dispose of the property in issue. As was said in the UK Supreme Court of a similar civil forfeiture regime under review in ***R v Waya*** [2012] UKSC 51; [2013] 1 AC 294, para 21,

> *"the essence of the regime is to remove from criminals the pecuniary proceeds of their crime, rather than punishment or deterrence. It being suspected or established that the defendant is the sort of person who has been prepared to engage in criminal activity, the onus is then placed on him in respect of any property he owns which the Authority seeks to obtain from him to show, to the civil standard, that the property was not so derived."*

Further still, were are of the considered view that the law on this issue was ably settled by the Supreme Court of Appeal in ***Jeffrey and another v The Anti-Corruption Bureau*** [2002–2003] MLR 90 (SCA) where the Court said;

> *"It is common practice in applications for an order such as the one brought by the Defendants that the initial application is made ex parte. The obvious reason is that such applications are made at a very early stage, even before the prosecution have full*

knowledge of the assets to which the suspected person is entitled. At the same time, the application must be made speedily and ex parte to ensure that the suspected person is not given an opportunity to remove, conceal or otherwise dissipate the assets before an inter partes order is obtained. After an ex parte order is obtained, it is the usual practice that the affected person against whom the order is obtained applies to the same Court that made the order to set aside the said order. During the hearing of such application, both parties are heard. The opportunity to be heard occurs at this stage. [Emphasis added].

In addition, it is our conclusion that in as far as the right to a fair hearing is concerned the same is not applicable to *ex parte* applications for preservation orders in general and Civil forfeiture in particular. This is in the sense that the right to a fair hearing is provided for under section 42 of the Constitution which provides for arrest, detention and fair trial. Specifically, section 42(2) provides as follows:

(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—

(f) as an accused person, to a fair trial, which shall include the right—

(i) to public trial before an independent and impartial Court of law within a reasonable time after having been charged;

(ii) to be informed with sufficient particularity of the charge;

(iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

(v) to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;

> *(vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;*

The Defendants in this instance were neither arrested nor detained, neither have they have been charged with any criminal offences. As noted in ***Phillips v United Kingdom*** (2001) 11 BHRC 280, paras 34-35, which indicated that although a confiscation order could be regarded as a penalty for an offence within the meaning of article 7 of the European Convention on Human Rights (ECHR), yet since the purpose of the confiscation procedure was not to secure the conviction of the applicant it did not constitute the preferring of a criminal charge against him within the meaning of article 6, and article 6(2) was not applicable. Rather, the purpose of Civil forfeiture could be viewed more generally "as the State's response to the need to recover from those who seek to benefit from crime the proceeds of their unlawful conduct". This objective in the context of Malawi, was emphasized by the availability of protection for third parties with interests in the property sought to be recovered as provided for in section 66(3) of the FCA which says that;

> *"a person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest in the property concerned from the operation thereof."*

Further, there is also section 72(2) of the FCA which, as noted above, gives a person the opportunity to oppose the application for civil forfeiture. It thus follows that the application of section 42(2) of the Constitution would be inappropriate in the context of a scheme of the FCA to recover tainted property and would undermine its efficacy in an unwarranted manner. We must stress that these are civil proceedings and we thus wonder why Counsel for the Defendants brought in issues of section 42 which clearly caters for the rights of accused persons. In addition, we must state that the right to administrative action does not apply, this was a judicial process.

Presumption of Innocence

When it comes to the resumption of innocence, we also opine that some of the observations which we made with respect to the right to a fair trial do also apply *mutatis mutandis* to the right to be

presumed innocent. What we did stress however is the fact that the right to be presumed innocent applies to a person who has been arrested and charged with a crime (see ***Walsh v Director of the Assets Recovery Agency*** [2005] NICA 6; [2005] NI 383). This is not the situation in this instance.

As already noted, the aim of a preservation order is to ensure that property which is suspected to be tainted is not disposed of. The preservation order thus operates *in rem* and not *in personam*. The right to be presumed innocent operates *in personam* and thus is not applicable to property or tangible things. In other words, property or tangible things cannot assert the rights as advanced by Counsel, in particular the right to be presumed innocent. Extending the right to be presumed innocent to property or things will create an absurdity. It is not our intention to do that.

The Right to Human Dignity

The right to human dignity can be violated in about four ways. The first is through humiliation which refer to acts that humiliate or diminish the self-worth or self-esteem of a person or a group. The second would instrumentalization or objectification, which refers to treating a person as an instrument or as means to achieve some other goal. Thirdly, the right can be violated through dehumanization which are acts that strip a person or a group of their human characteristics. It may involve describing or treating them as animals or as a lower type of human beings.

Finally, the right to dignity can be also be violated through degradation. This refers to acts that degrade the value of human beings. These are acts that, even if done by consent, convey a message that diminishes the importance or value of all human beings. They consist of practices and acts that modern society generally considers unacceptable for human beings, regardless of whether subjective humiliation is involved, such as selling oneself to slavery, or when a State authority deliberately puts prisoners in inhuman living conditions.

From the foregoing, we did not see how the Defendants right to dignity could have been violated by the DPP obtaining a preservation order against them. Though the order was obtained *ex parte,* it cannot be stated that the fact that the Defendants did not have notice of the same amounts to humiliation, objectification, dehumanization or degradation. Further, the preservation order was made not against the Defendants as persons, so it cannot be argued that the same was an inhumane punishment or unacceptable treatment. In this regard we do note that under criminal law, law enforcement institutions are allowed to form reasonable suspicions in instances where they have a

strong feeling that a crime has been committed and this has never been deemed unconstitutional. We therefore find no violation of the right to dignity in the present matter. Suffice it to add that these are civil proceedings and in that regard we note that the MSCA has clearly set down the procedure in the ***Nseula*** Case and also that the FCA has set down procedures allowing for the Defendants to participate in the process of civil forfeiture before they are permanently dispossessed of their property by the State.

The Right to Property

With regard to the right to property, it was argued by the Defendants in this instance that:

> *"A preservation and eventually a forfeiture/seizure order is an order that affects someone`s right not to have his property arbitrarily deprived of him. Attaching and seizing someone`s property without according them a right to present an explanation is a violation of their right. Any violation of right is against the Constitution"*

From this argument, we note that the Defendants seem to be unclear as to what it is that they wanted this Court to determine. However, it was our observation that in terms of the facts of this case what we have obtaining is a preservation order and **NOT** a forfeiture order. It is not definite as to whether the original Court would eventually grant a forfeiture order and we therefore conclude that we cannot be asked to adjudicate on something that might be moot.

It should be stated however that in our considered opinion, a preservation order does not deprive one of property. The order merely prohibits a person from dealing with property which is suspected to be tainted in any manner. We do not think that there should be anything more read into this provision. Further, it is also our considered opinion that the right to property can only be asserted where the property is not tainted, that is, where the property has been lawfully obtained. It would be against public policy and a definite absurdity if a person can be allowed to assert a right to property over property that has been unlawfully obtained. To put this in context, and by way of example, the law and public policy would not allow a thief to keep the items that he stole on the argument that he acquired good title through the theft. That title will always be bad title.

Form the foregoing we thus agree with the observations in ***In Ireland in Gilligan v Criminal Assets Bureau*** [1997] IEHC 106 the Court had this to say on the arbitrary deprivation of property argument:

> *" While the provisions of the Act may, indeed, affect the property rights of a Defendant it does not appear to this Court that they constitute an "unjust attack"....., given the fact that the State must in the first place, show to the satisfaction of the Court that the property in question is the proceeds of crime and that thus, prima facie, the Defendant has no good title to it.."*

The Court went on further to State in para 136 that:

> *"This Court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held."*

1.22 A further decision which we also felt persuaded by is the Namibian decision in ***Lameck and Another v President of Republic of Namibia and Others*** [2012] NAHC 31 which gave a further explanation on this subject. In that case the Court said;

> *"The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to "constitute an offence or which contravenes any law"..... It is the current possession which is criminalised (and not the prior theft) and further that that property would not be protected by art 16."*

The Court further observed in paragraph 52 that;

> *"The protection of property under art 16 is not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate object.."*

Further still, the Court in ***Lameck and Another v President of Republic of Namibia and Others,*** *supra,* also cited the decision of the Supreme Court in ***Namibia Grape Growers and Exporters v Ministry of Mines and Energy and Others*** (SA 14/02) [2004]; NASC 6 (25th November 2004) where it was Stated that:

> *"If it is then accepted, as I do, that art 16 protects ownership in property subject to its constraints as they existed prior to independence, and that art 16 was not meant to introduce a new format free from any constraints then, on the strength of what is stated above, and bearing in mind the sentiments and values expressed in our Constitution, it seems to me that legislative constraints placed on the ownership of property which are reasonable, which are in the public interest and for a legitimate object, would be constitutional. To this may be added that, bearing in mind the provisions of the Constitution, it follows in my opinion that legislation which is arbitrary would not stand scrutiny by the Constitution."*

It is a general principle, essentially of private law, that good title cannot be derived from the proceeds of money laundering activity. It operates in a way similar to the illegality principle in private law, that a person should not be able to profit from their own unlawful acts: see ***Patel v Mirza*** [2016] UKSC 42; [2017] AC 467; ***R (Best) v Chief Land Registrar*** [2015] EWCA Civ 17; [2016] QB 23, paras 43-68; and the famous US case, ***Riggs v Palmer*** 115 NY 506 (1889) (holding that a beneficiary under a will who murders the testator cannot take property under the will). As was said in the UK Supreme Court of a similar civil forfeiture regime under review in ***R v Waya*** [2012] UKSC 51; [2013] 1 AC 294, para 21, the essence of the regime "is to remove from criminals the pecuniary proceeds of their crime", rather than punishment or deterrence. It being established that the defendant is the sort of person who has been prepared to engage in money laundering activity, the onus is then placed on him in respect of any property he owns which the Authority seeks to obtain from him to show, to the civil standard, that the property was not so derived.

From the foregoing, it is our very considered view that in as far as the facts are that there is only a preservation order in force, which order is temporary, the Defendants cannot plead violation of the right to property. Consequently, the Defendants cannot argue that they have been arbitrarily deprived of their property. We must further add, that it is our finding that where it is established on a balance of probabilities, that property is tainted then one cannot argue to have a right to that

tainted property. Therefore section 65 of the FCA does not offend any of the cited constitutional provisions, and cannot be held to be unconstitutional.

The Retrospective Application of the Provisions of the FCA

In the case of ***Lenson Mwalwanda v Stanbic Bank Ltd*** [2007] MLR 198 (HC) Mzikamanda J (as he then was) stated at page 208 that:

> *"The law is indeed settled that a statute shall not be construed to have retrospective operation unless such construction appears very clearly in the terms of the statute or it arises by necessary and distinct implication. The rule against retrospectivity of statutes or laws is a fundamental rule of law but one that is not rigid or inflexible. This means therefore that there will be situations where a law or a statute may be construed to have retrospective operation. That a statute or a law may have retrospective effect is not a rule but an exception to the general rule."*

That similarly this position was affirmed by the Supreme Court in the case of ***Stanbic Bank Limited v Mwalwanda [2008] MLR 361.*** Tambala JA Stated at page 363 that:

"We agree with the learned Judge in the Court below and we are satisfied that he correctly Stated the law on the retrospectivity of a statute or law".

The Claimant also cited the Kenyan case of ***Overseas Private Investment Corporation & 2 Others v Attorney General*** [2013] Eklr, Petition No. 319 of 2012 in which Majanja J stated, at paragraph 24, that:

> *"The Latin maxim lex prospicit non respicit encapsulates the cardinal principle that law looks forward not backwards but this principle is neither absolute nor cast in stone. In the case of **Municipality of Mombasa v Nyali Limited** [1963] E.A. 371 Newbold, JA, stated that "Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects*

procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention." This is the principle reiterated in ***Orengo v Moi & 12 Others*** *(No. 3) (2008) 1 KLR EP 715".*

The learned Judge proceeded to state at paragraph 26 that:

"I take the view that the rule against the retrospective application of law is not entirely guarded and in certain cases where the intention of the legislature is clear, the provisions may be construed to have retrospective effect. My reading of the authorities is therefore that retrospective operation is not per se illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of ***Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others****, SCK Application No. 2 of 2011 [2012] eKLR where the Court observed that, "[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England. 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it :(i) is in the nature of a bill of attainder ;(ii) impairs the obligation under contracts ;(iii) divests vested rights; or (iv)is constitutionally forbidden".*

The learned Judge concluded on this point by stating, at paragraph 27, that:

"It is also worth noting that it is not the role of this Court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the Court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of Courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, Courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively".

8.0 Conclusion

In these premises and in answer to the constitutional questions before this Court;

a) The approach and methodology followed in the Constitutional interpretation is the broader and purposive approach and not the restrictive and legalistic approach.

b) The DPP was within his mandate under the law when he instituted civil proceedings under the Financial Crimes Act in the original Court. Section 99(2) of the Constitution defines in a broader sense the DPP's mandate. The same should not be construed as limiting the powers of the DPP under section 65 of the FCA or indeed under any other the law. The law clearly accords the DPP additional powers under Acts of Parliament. Such conferring of power cannot be deemed to be a violation of the Constitution.

c) Preservation Orders are part of the combined regime which constitutes preservation orders as the first step, and forfeiture. It is settled law that preservation orders under the FCA are there to combat crime which is a matter of public policy. In our view, we thus find preservation orders obtained under section 65 of the FCA do not violate the right to a fair trial, right to be presumed innocent, the right to dignity and the right to property as enshrined in our Constitution.

d) Having determined the constitutional issues referred to this Court, we hereby remit the case back to the original Court for disposal of the issues before it.

9.0 Costs

Costs are the exclusive preserve of the Court, but they normally follow the event. The Defendants must pay the costs of these proceeding.

We so order.

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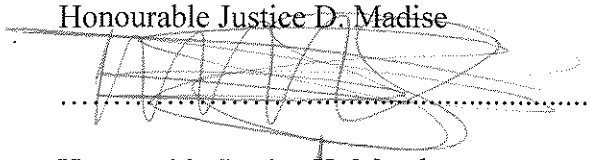
Pronounced in Open Court at Blantyre, this 26th day of January 2022.

Honourable Justice D. Madise



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Honourable Justice K. Manda

I concur .....

Honourable Justice A. Kanthambi

I concur .....