IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 1B OF 1999

IN THE MATTER OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT 1993

AND

IN THE MATTER OF THE ELECTORAL COMMISSION ACT

BETWEEN

GWANDA CHAKUAMBA……..1ST PETITIONER

AND

KAMLEPO KALUA ……..2ND PETITIONER

AND

BISHOP DANIEL KAMFOSI MNKHUMBWE……3RD PETITIONER

AND

THE ATTORNEY GENERAL……1ST RESPONDENT

AND

THE MALAWI ELECTORAL

COMMISSION……..2ND RESPONDENT

AND

THE UNITED DEMOCRATIC FRONT…….……3RD RESPONDENT

CORAM: MTAMBO, SC, J,

Stanbrook, QC/Munlo, SC/Mhango, of counsel for the Petitioners

Fachi, SC/Goudie, QC/Matenje, of counsel for the 1st Respondent

Kaphale/Chisanga, of counsel, for the 2nd Respondent

Maulidi/Latif, of counsel, for the 3rd Respondent

Sambo,, Court Clerk

Maore, Recording Officer

RULING

By way of petition, Gwanda Chakuamba, Kamlepo Kalua and Bishop Daniel Kamfosi Mnkhumbwe, hereinafter referred to as the petitioners, have commenced action for a number of remedies on the ground generally that, by reason of irregularities, there was an undue return or an undue election of a certain candidate to the office of President of the Republic of Malawi in the election which was held in June 1999. The petitioners too were candidates in the election.

On April 17, 2000, when the trial of the action was called on, the court was informed that the hearing on that day was only to deal with two legal issues: the first issue was that raised in paragraph 4 of the petition, namely, "that the appointment of a Justice of Appeal to head the Electoral Commission was unconstitutional and the chairperson must be a High Court Judge"; the second issue is that raised in paragraph 9 of the petition, namely, "that the Commission unlawfully declared the have been elected President a candidate who obtained a majority of the votes at the poll instead of a majority of the electorate." The court was also informed that the issue raised, in paragraph 4 would not be pursued and was accordingly, not argued. Only the issue raised

in paragraph 9 was therefore, argued, and this ruling is in respect of that issued only.

The question before the court concerns the interpretation of s. 80(2) of the Constitution of the Republic of Malawi, hereinafter referred to as the Constitution. For full appreciation of the issue, I think one has also to read sub-section (1) of that section. The relevant parts of the two sub-sections read as follows:

"80(l). The President shall be elected in accordance with the provisions of this Constitution in such a manner as may be prescribed by an Act of Parliament ……

(2) The President shall be elected by a majority of the electorate through direct, universal and equal suffrage."

The Act, or one of the Acts, of Parliament referred to in sub-section (1) is the Parliamentary and Presidential Elections Act, hereinafter referred to as the Act, which, among other things, provides for the procedures to be followed at an election. Section 96(5) of that Act provides as follows:

"96(5) Subject to this Act in any election the candidate who has obtained a majority of the votes at the poll shall be declared by the Commission to have been duly elected.

What s.96(5) provides for is what is sometimes called "the first past the post" system.

It has been submitted on behalf of the petitioners that there is an important time element in the relationship between the Act and the Constitution in that the first past the post system only applied to the first multi-party election which was held in 1994 and not to any other election thereafter. It has been submitted that this view is confirmed by the inclusion of a special transitional provision in s. 202 of the Constitution which reads:

"202, For the purposes of this Constitution, the first President after the date of commencement of this Constitution shall be the person successfully elected in accordance with the Act of Parliament then in force for the election of a person to the office of President."

It has been contended, therefore, that by virtue of standard rules of interpretation, the inclusion of s. 202 providing for a derogation in respect of the first presidential election excludes the possibility of any 'Such derogation to any subsequent presidential election. What is being said, in short, is that the first past the post system could only be used in the

first presidential election (i.e. the 1994 election) and that thereafter the constitutional provision in s. 80(2) would apply. In other words, the point that is being made is that s. 202 of the Constitution indicates that there is a difference in meaning between s. 96(5) of the Act and s. 80(2) of the Constitution. It is, therefore, contended that it was not open to the Electoral Commission to use the criterion contained in the Act, namely, **"that the person that scored the most votes cast would be declared the winner of the Presidential poll in accordance with the Parliamentary and Presidential Elections Act."** Learned counsel, after referring to sections 5 and 200 of the Constitution, then said, **"the Electoral Commission's deliberate and explicit adoption of the Parliamentary and Presidential Elections Act is quite remarkable and bluntantly unconstitutional,"** in the face of those sections. Both sections 5 and 200 indicate, among other things, that where there is a clash between any law and the Constitution, the constitutional provision prevails. Learned counsel, therefore, suggests, as I have already indicated above, that there is such a clash between s. 96(5) of the Act and s. 80(2) of the Constitution.

Referring to s. 80(2) learned counsel for the petitioners expressed the view that it is difficult to imagine a section whose meaning is clearer. It is true, he said, that the phrase "direct, universal and equal suffrage" is not an everyday expression. He said that the word **"electorate",** on the other hand, is in common use. He said that a glance at any dictionary will tell the reader that a majority of the electorate means more than half of those qualified or, in the present case, registered to vote.

It can be seen from the foregoing that the petitioners' argument falls into two parts. First, that what the successful candidate must achieve is a majority of those entitled or qualified to vote (whether this also means those registered to vote is another matter) and not a majority of those actually voting. Secondly, they say that "a majority" means at least 50% plus one and not a number greater than the number achieved by any other candidate. The petitioners say, therefore, that if no candidate achieves the number of votes equal to 50% plus one of those entitled to vote, or registered to vote, in a presidential election, then, they say, the election must be re-run.

On behalf of the respondents, with reference to s. 202 of the Constitution, it was submitted that the petitioners' argument that that section indicates that there is a difference in meaning between s. 96(5) of the Act and s. 80(2) of the Constitution is misconceived; there is no difference between the two sections, it was submitted. It was further submitted that the reason for the inclusion of s.202 was because there was need for a transitional provision to indicate who was to be the first president under the new Constitution and not that that in itself should mean that the two sections are regarded as having different meaning. It was merely to make it clear that the then already existing law (i.e. the Parliamentary and Presidential Elections Act) governed the results of the first presidential election, it was submitted.

As to the pool a presidential candidate is required to secure **"a majority"** of, the

respondents say that it is of those who will have actually voted, and that a candidate attains a majority if he receives more votes than any other candidate.

Essentially, such are the circumstances in which I must interpret s. 80(2) . But before I do so let me refer to some fundamental principles regarding the interpretation of a Constitution. It is common ground that the interpretation of a Constitution is different from the interpretation of any ordinary statute. In this regard, I can do no better than offer the words of Banda, C.J. in delivering the judgment of the Supreme Court of Appeal in the case of **Fred Nseula -v- Attorny General and Malawi Congress Party** M.S.C.A. Civil Appeal No. 32 of 1997, when he said this:

"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."

This, however, is not to suggest that there are no rules of law which should apply to the interpretation of a Constitution. In this connection, a court must heed the reminder by Lord Willberforce in the lead case of **Minister of Home, Affairs and Another v. fisher and Another,** (1980) AC 319 that even a Constitution is a legal instrument the language of which must be respected, when he said:

"This is in 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 instrument 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 the traditions and usages which have given meaning to that language It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

And after referring to the above passage, the court in the Nseula case went on to say this:

"The starting point therefore is that a Malawi court must first recognise the character and nature of our Constitution before interpreting any of its provision. The purpose of interpreting any legal document is to give full effect to what Parliament intended and you cannot give full effect to that intention unless you first appreciate the character and nature of the document you are interpreting."

The Court then continued to say:

"Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pendatic 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. AU the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the greater purposes of the Constitution."

The Court then referred to the Indian case of **Gapalan v, State of Madras** (1950) SCR 88 at page 109, in which the principle is stated in the following terms:

"The Constitution is a logical whole each provision of which is an integral part thereof and it is therefore logically proper and indeed imperative to construe one part in the light of the other provisions of the other parts."

It is common ground that the primary rule of construction is that the words of a statute must prima facie be given their ordinary meaning. The criterion is that an enactment should have the legal meaning taken to have been intended by the legislator. But if, for instance, the result of a literal construction is absurd or unworkable, the court must of necessity ask itself whether the legislator can really have meant it. If the court concludes that the legislator cannot have intended the absurd or unworkable result the court must be entitled to adopt an alternative construction. It is always presumed that the legislator intends the interpreter of an enactment to observe the maxim UT RES MAGIS VALEAT QUAM PEREAT (it is better for anything to have effect than to be made void). On this maxim, Francis Bennion in his book entitled **"STATUTORY INTERPRETATION,** Third edition at page 432 says this:

"It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim UT RES MAGIS VALEAT QUAM PEREAT (it is better for a thing to have effect than to be made void); so that he must, construe the enactment in such a way as to implement rather than defeat the legislative purposes."

Furthermore, it is a basic principle of legal policy that law should serve the public interest. Therefore, when construing an enactment a court should presume that the legislator intended to observe this principle and so avoid adopting a construction which is adverse to the public interest.

Yes, I agree with all the above stated general principles about statutory interpretation and about the special nature of constitutional interpretation. I will certainly bear these in mind throughout this ruling. But in the case of the Constitution of the Republic Malawi, a court need also to bear in mind the provisions of s. I I thereof, and I will do so. Subsections (1) and (2) of that section provide as follows:

"11(1)Appropriate principles of 'interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character of the supreme status of this Constitution.

(2) In interpreting the provisions of this 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 Chapter IV; and

(c) where applicable, have regard to the current norms of Public international law and comparative foreign case law."

(Chapter III is concerned with fundamental principles upon which the Constitution is founded, and Chapter IV is about human rights and the protection thereof).

The starting point is whether s. 202 indicates that there is a difference in meaning between s. 96(5) of the Act and s. 80(2) of the Constitution. It will be recalled that the first presidential, or multi-party, election was held before the Constitution came into force. Section 202, therefore, would clearly appear to have been a transitional provision, and there can be no doubt that there was a need for it in order to clearly indicate how the first President under the new Constitution was to be elected. This, in my view, cannot in itself be taken to mean that the two sections (i.e. s. 96(5) and 80(2) are regarded as having different meaning.

That said, I should also consider whether there is in fact a difference in meaning between the two sections. If I conclude that there is in fact a difference in meaning then the petitioners will be correct in their contention that the inclusion of s. 202 provided for a derogation in respect of the first presidential election and thereby excluded, by virtue of standard rules of interpretation, the possibility of any such derogation to any subsequent presidential election. The question that I must put, therefore, is whether on the true and proper construction of s. 80(2), the requirement of election of the president by a majority of the electorate through direct, universal and equal suffrage is satisfied by a candidate who has secured more than 50% of the votes cast at the poll or more than 50% of the

votes of those entitled, or registered, to vote or who has obtained a majority of the votes at the poll. The phrase that calls for construction, therefore, is: "a majority of the electorate through direct, universal and equal suffrage".

There can be no doubt that the word "majority" is in common use. A glance at any dictionary will show that it means a greater number. In Oxford Advanced Learners Dictionary", Fourth edition the word "Majority" is defined, for the present purposes, as **"the greater number or part; most"** In Collins English Dictionary" it is defined as: **"the greater number or part of something"**. It would seem therefore that the word **"majority"** in its common and literal use means, for the present purposes, a number of votes greater than the number secured by any other candidate. I must, however, not stop there. I must go beyond and look at the use of the word, as used in the Constitution, in order to discover whether there is any other meaning which the framers of the Constitution intended to ascribe to it. The word has, for example, been used in sections 49(2), 53(l) and 73(3) of the Constitution. The word "majority" is used in s. 49(2) in respect of legislation that an Act of Parliament shall be a Bill which has **"been laid before and passed by a majority of the National Assembly" or a majority of the Senate.... "** In s. 53(l) the word is used in respect of election of the Speaker of the National Assembly and the Speaker of the Senate that these office bearers "shall be elected by majority vote of the Chamber." The word is used in s. 73(3), again, in respect of legislation that it would be “passed by a majority of the National Assembly." It is clear to me that in all these sections, the word **"majority"** is used to mean a greater number and, indeed that is what the word is used in s. 96(5) of the Act to also mean. Let me just add here that I myself feel sure that if the framers of the Constitution intended to ascribe a different meaning to the word, they would easily have said so. The conclusion I reach, therefore, is that the word **"majority"** as used in the Constitution means, for the present purposes, a number of votes greater than the number secured by any other candidate.

As for the word **"electorate"** any dictionary will show that it means **"all the qualified electors considered as a group"** and that an **"elector"** is “a person who has the right to vote in an election", according to "Oxford Advanced Learner's Dictionary". Put differently, the electorate means all the qualified persons who have the right to vote in an election considered as a group. And the law is that every citizen of Malawi residing in Malawi and who, on or before the polling day, shall have attained the age of eighteen years is a qualified person to vote. But one thing is for certain. It is that not every qualified person will have the right to vote in an election. This is because the law requires that in order to be entitled, or to have the right, to vote one's name must first appear in an electoral register which will have been prepared for an election. It, therefore, seems to me that the word "electorate" as used in the Constitution means those persons registered as voters in an election considered as a group, and I so conclude.

That, however, is not the point at which to stop because the Constitution itself goes further. It provides that those persons registered to vote in an election (the electorate) shall elect the President **"through direct universal and equal suffrage."** The

word **"suffrage"** according to **“Oxford Advance Leaner's Dictionary"** means the "right to vote in political elections" and the words "direct, universal and equal" are used to qualify **"suffrage"** in order to indicate that the right to vote should be exercised directly and that it is of all the electorate; this necessarily entails actually exercising the right by actually voting. In any case it will be remembered that a right counts or matters only when it is exercised. Equally, therefore, a right to vote will count -or matter only when it will have been exercised, for why should any weight at all be attached to a vote that will not have been cast. Why should any regard be had to such a vote at all in determining the results of an election? And, in this connection, it must not be ignored that a person may not vote in an election for a variety of reasons, even when there might be compulsory voting. In the circumstances, the conclusion I reach is that the pool the framers of the Constitution intended a successful candidate in a presidential election to secure a majority of is of those who will have actually voted in an election. I further conclude that on the true and proper construction of s. 80(2) of the Constitution, the requirement of election of the President by a majority of the electorate through suffrage is satisfied by a candidate who obtains more votes of the votes cast at the poll than any other candidate. Accordingly, I find that there is no difference in meaning between s. 96(5) of the Act and s. 80(2) of the Constitution. The purpose for the inclusion of s. 202 of the Constitution,, I further find, was simply to indicate that -the results of the election of 1994 (the first multi-party election) were to be governed by the Act only and that in respect of the subsequent elections the results are governed by the Constitution and the Act taken together.

Assumming, on the other hand, that the petitioners' interpretation of s. 80(2) were correct, what would be required in order to be elected President is that a candidate should secure at least 50% plus one of the votes of those registered to vote. The way to proceed, therefore, would be to first ascertain the total number of individuals on the electoral register prepared for an election and then ask whether any candidate attained a number of votes equal to more than 50% of that number. There can be no doubt that that is a very high hurdle for any candidate when it is remembered, as I have already said earlier in this ruling, that people may not vote in an election for a variety of reasons. If that were the correct construction then it would have followed, firstly, that there was a conflict between the said s. 80(2) and the said s. 96(5) which would have meant that as between the Act and the Constitution, the Constitution would have taken precedence see s. 5 of the Constitution. It would, secondly, have meant that no candidate in the presidential election obtained the requisite number of votes to have been elected President. That would, thirdly, have meant that the incumbent president prior to the election would have continued in office until his successor will be sworn in - see s. 83(l) of the Constitution. It is pertinent to mention here that the successor would have to be elected on the same rules which might very well mean that the successive election or a series thereof, might well fail to produce a candidate with the requisite majority. The outcome of all this would be to subvert the democratic purposes of the Constitution especially as it might turn out that the incumbent prior to an election will remain in office even when he might be the least popular candidate for the office or even when he will have served the maximum tenure of office. The situation is further complicated by the silence of the Constitution as to when a

successive election would take place and as to how many candidates or who will contest in the election. Should it only be some of the contenders or all of them? Or should nominations be re-opened? And such other questions. In the circumstances, I am of the view that the framers of the Constitution could not have intended the absurdity of a continuous series of presidential elections with 'no assurance that any of them will produce a winner. On this basis, I would have been entitled to adopt an alternative construction if the petitioners' interpretation were the ordinary meaning of the section, I thought I should mention.

In conlusion, therefore, I find that the declaration by the Electral Commission to have been elected President a candidet who obtained a majority of the votes at the poll was lawful.

PRONOUNCED in the open court this 19 day of May, 2000 at Lilongwe.

I. J Mtambo, SC

JUDGE