IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PRESIDENTIAL REFERRAL NO. 2 OF 2005
IN THE MATTER OF PRESIDENTIAL REFERENCE OF A DISPUTE OF A
A CONSTITUTIONAL NATURE UNDER SECTION 89(1) (h) OF THE CONSTITUTION
AND
IN THE MATTER OF SECTION 65 OF THE CONSTITUTION
AND
IN THE MATTER OF THE QUESTION OF CROSSING THE FLOOR BY MEMBERS OF PARLIAMENT

CORAM: THE HON. MR. JUSTICE E.B.TWEA

THE HON. MR. JUSTICE F.E.KAPANDA

THE HON. MR. JUSTICE H.S.B POTANI

Mbendera and Kanyuka of Counsel for the Referror
Mvalo, Kaphale, Msowoya, Mhango, and Mwakhwawa of Counsel for friends of the Court

Jere, Official Interpreter

Place and Date of hearing: Blantyre 4th October 2006

Date of Determination: 7th November 2006

DETERMINATION

Kapanda,J:

Introduction

The matter before us is a Presidential Reference. It has been taken out pursuant to Section 89(1) (h) of the Constitution. Indeed, the State President has decided to invoke the provisions of the said Section 89(1) (h) of the Republic of Malawi Constitution, the relevant part of which states:

> "The President shall have the following powers and duties – to refer disputes of a constitutional nature to the High Court---"

We must point out that there are other people who the Court allowed to join the proceedings as friends of the Court. These are viz. The Registered Trustees of Public Affairs Committee (PAC), the Law School of the University of Malawi, the Malawi Law Society, and the Civil Liberties Committee (CILIC). Further, the Court also accepted the following political parties, namely, Alliance for Democracy (AFORD), Malawi Congress Party (MCP) and the United Democratic Front (UDF) as *amicus curae*. It must be stated that Democratic Progressive Party (the DPP) and People's Progressive (PPM) Movement although they submitted skeleton arguments and appeared as friends of the Court during the early stages of the case they do not appear to have taken any further steps in the matter. Indeed, the DPP, through Counsel, informed the Court that they had pulled out as friends of the Court. The non-appearance of PPM is however not explained.

It is important to mention that the President has sought an opinion, an interpretation and determination on some questions which he says have been bothering him concerning Section 65 of the Constitution of the Republic of Malawi. The President sent to this Court a Statement of Facts under his hand and seal in which he gives a narration on why he decided to invoke the provision in Section 89(1) (h) of the Constitution.[1]

1 The following is what is in the Statement of Facts by the State President:

> 1. **WHEREAS** it is provided in Section 65(1) of the Republic of Malawi Constitution (the "Constitution") that the Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represents in the National Assembly, other than by the member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly.
>
> 2. **WHEREAS** a number of developments have taken place in Parliament in trying to amend the said Section 65 on the question of who crosses the floor and attempts have been made to invoke the section to declare seats of members of the National Assembly vacant.

As we understand it, the questions for determination have been set by the Referral Authority through the Attorney General as Counsel. Indeed, the parameters of what this Court should adjudicate upon have been enumerated in the Amended Notice of a Presidential Reference of 12th September 2006 and are as follows:-

a) Whether or not Section 65 of the Constitution is inconsistent with Sections 32, 33, 35, and 40 of the Constitution and is, therefore, invalid.

3. **WHEREAS** the said Section 65 has been a source of controversy and has attracted diverse opinions to its interpretation on the concept and applicability of crossing the floor; including its seeming inconsistencies with other entrenched provisions contained in the Constitution's Bill of Rights.

4. **AND WHEREAS** provision is made in Section 89(1)(h) of the Constitution for the President to refer to the High Court a dispute of a constitutional nature and such reference has been made by the President pursuant to the provisions aforesaid.

5. **TAKE NOTICE** that this reference to the High Court has been made by the Referral Authority based on the following facts:

(i) In June 2005, Hon. J.Z.U. Tembo, M.P., the Leader of the opposition in Parliament, promulgated a Private Members Bill that sought to empower the Speaker of the National Assembly to declare vacant the seat of any Member of Parliament who after being elected under a particular political status chooses to alter his or her political status during the life of the Parliament to which he was elected.

(ii) The said Private Members Bill was presented in Parliament but it failed to obtain the requisite vote for it to pass.

(iii) Thereafter the UDF party wrote a letter to the Speaker dated 2nd October 2005 requesting him to declare some Members of Parliament's seats vacant following their change of political status.

(iv) In pursuant of that letter the Speaker gave notice that he will make his ruling on the matter on Monday, October 31st, 2005.

(v) A stay was obtained from the High Court estopping the Speaker from making his ruling.

(vi) There has arisen a constitutional dispute as to the question of crossing the floor, the interpretation and constitutionality of Section 65.

TAKE FURTHER NOTICE that I have noticed the controversy and dispute surrounding Section 65. I have examined Section 65 and, I have perceived that the said Section 65 is not in conformity with fundamental entrenched provisions of the Constitution. The Section seems to be inconsistent with Sections 32, 33, 35 and 40 of the Constitution. The Section 65 does not seem clear as to whether it applies to Members of Parliament who were elected at a general election or at a by-

b) In the alternative, if the said Section 65 is valid what meaning should be attached to the words “any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly” regard being had to the non-existence of the National Assembly at the time of a general election.

In the further alternative

c) Whether a Member of Parliament (MP) who at the time of election stood as an independent MP whilst in the National Assembly joins a political party:

1.1 that already has MPs in the National Assembly elected on that party’s ticket is deemed to have crossed the flour under Section 65 of the Constitution; or

1.2 that has no MP in the National Assembly elected on that party’s ticket is deemed to have crossed the floor under Section 65 of the Constitution

d) Whether an MP who was elected under a party’s ticket

election in view of the words “a member who was at the time of his or her election a member of a political party represented in the National Assembly”, considering that at the time of general elections no political party is represented in the National Assembly.

7. **RATIONALE FOR THE REFERENCE**

It is observed that since the adoption of the 1994 Constitution, Section 65 has been amended, and there have been attempts to amend it to suit particular situations; thereby engendering controversy and disputes that have affected negatively the country’s political and social economic development.

Furthermore, it does not appear that when Section 65 was drafted the question of its seeming inconsistency with the entrenched Sections 32, 33, 35 and 40 of the Constitution were considered neither was the meaning of the words ‘any member of the National Assembly who was, at the time of his or her election was a member of a political party represented in the National Assembly’, was examined and/or interpreted.

Dated the 12th Day of September 2006

(signed)

Dr. Bingu wa Mutharika
PRESIDENT OF THE REPUBLIC OF MALAWI”

decides to resign from that party and becomes independent and later joins another party that has no MP represented in Parliament elected on the party's ticket is deemed to have crossed the floor under Section 65 of the Constitution.

e) Whether an MP elected on a party's ticket accepts a ministerial appointment from a President elected on another party's ticket but does not resign from his/her party is deemed to have crossed the floor under Section 65 of the Constitution.

The above captures the issues for determination by this Court. The Court will now proceed, as requested, to give an opinion and interpretation on the matters raised by the Referral Authority.

Law

As stated earlier, the President has referred the above questions in exercise of the powers given to him under Section 89(1) (h) of the Constitution so that we give an opinion, interpretation and determination of the said questions pursuant to Section 108 of the Constitution. Actually, this whole matter has come to be famously known as the Section 65 case or crossing the floor case. It is therefore important that the Constitutional provisions that have a bearing on the said Section 65, as purportedly pointed out by the Referral Authority, be set out.

The Impugned Constitutional Provisions

As pointed out above, it is necessary that the Constitutional provisions the President has taken issue with be set out. This will assist us in understanding what we shall be looking at herein. Indeed, we are mindful that principally the President would like this court to determine whether or not Section 65 of the Constitution is inconsistent with Sections 32, 33, 35 and 40 of the Constitution. For this reason the contents of the said Sections 32, 33, 35 and 40 and 65 of the Constitution must be spelt out.

Section 32 of the Constitution provides that:-

"(1) Every person shall have the right to freedom of association, which shall include the freedom to forum associations.

(2) No person may be compelled to belong to an association."

As has been said elsewhere, the right to freedom of association

includes the right not to belong to an association. Further, it is well to observe that if one elects to belong to an association then that person accepts to be bound by the rules of the association he/she has joined. The person will enjoy the benefits of the association and must also be visited by a punishment agreed upon by the club if the person breaks any of its rules.

Section 33 of the Constitution states that:-

> "Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom."

The enjoyment of this right can be together with other rights or freedoms or alone.

Further, Section 35 of the Constitution states that:-

> "Every person shall have the right to freedom of expression."

As has been said elsewhere this right complements the other rights mentioned above.

Additionally, Section 40 of the Constitution is in the following manner:-

> "(1) Subject to this Constitution, every person shall have the right –
>
> a) to form, to join, to participate in the activities of, and to recruit members for, a political party;
> b) to campaign for a political party or cause;
> c) to participate in peaceful political activity intended to influence the composition and policies of the Government; and
> d) freely to make political choices
>
> (2) The State shall provide funds so as to ensure that during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections has sufficient funds to continue to represent its constituency
>
> (3) Save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for public office." (underlining and emphasis supplied by us)

The sections stated above are under the Chapter on human rights. Further, there is one common thread that runs through all these provisions. It is that these provisions confer political rights and freedoms on individuals or a group of people. Moreover, as we understand it, these rights or freedoms are not covered by the stipulation in Section 44(1) of the Constitution. Put in

another way, the rights and/or freedoms provided for in Sections 32, 33, 35 and 40 are amenable to derogation, restriction or limitation. The rights or freedoms provided in the said sections are not absolute. Indeed, the rights and/or freedoms are in that category that can only be enjoyed within certain parameters. Accordingly, it would not be strange to have them limited by either a statute or the Constitution itself if the limitation is within the ambit of Section 44(2) and (3) of the Constitution.[2]

Finally, Section 65 on the other hand is provided for under a chapter on the legislature. The said Section 65 states:-

> "65. –(1) The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly, or has joined any other political party, or association or organization whose objectives or activities are political in nature.
>
> (2) Notwithstanding subsection (1), all members of all parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of a political party, represented in the National Assembly, of which he or she is a member."

If it be said, there is no denying of the fact that Section 65 of the Constitution has been litigate on in so many forums. The Section was recently a subject of a court

2 Section 44(2) and (3) provide inter alia that:-

> "(2) 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".

action where the Public Affairs Committee took issue with the previous administration when the latter amended the provision in 2001. This is clearly manifested in the case of **The Registered Trustees of the Public Affairs Committee vs. The Attorney General and Speaker of National Assembly**.[3] Honourable Justice Chipeta had the following to say which is instructive in so far as some of the issues for determination appear to be repeated in this Reference:-

> "---I think I should next move to an interesting tug of war which I witnessed between the parties for and parties against the declaration sought in this matter. Those for, i.e. the Plaintiff and ***amicus curae*** [The Malawi Human Rights Commission] argued that as amended S. 65(1) has eroded or abridged the rights of Malawians, and in particular, the rights of Members of Parliament ***vis-à-vis*** their enjoyment of the freedom of association under Section 32 and of political rights as guaranteed under Section 40 of the Constitution--- I now finally come to the main issues in this originating summons. The all encompassing question to be answered following my hearing of all the lucid arguments of learned Counsel as presented on before the parties in this case is whether as alleged by the Plaintiff, as coincidentally supported by ***Amicus curae***, the amendment of Section 65(1) of the Constitution can really be said to be unconstitutional and invalid." (underlining and emphasis supplied by us)

It is therefore important to observe that this is not the first time that Section 65, as read with Sections 32 and 40, of the Constitution has been brought before this Court. In point of fact, it is abundantly clear that the High Court was asked to decide on the validity of Section 65 of the said Republic of Malawi Constitution.

As a concluding observation, on what this Court has said about Section 65, we wish to isolate the following illuminating statement of Chipeta, J. which is self explanatory and should inform us in this determination:-

> "Despite my above finding, however, I am enjoined both by the Constitution under Section 5 and Section 11(3) not to throw out the baby, or at any rate entire baby, with the bath water…As I see it the amendment as proposed by the Law Commission and as backed by the observations that accompanied the recommendation, geared as it was at respecting the voice of the electorate in the defined circumstances the recommendation was applicable to, was quite sound and democratic for the Malawian society. The extensions, however, which were apparently added just to ride on the back of this professional recommendation, as seen above, are the ones that have abridged the fundamental rights and freedoms now standing affected at Sections 32 and 40 of the Constitution. Accordingly it is only these extra extensions, that stretch the floor to outside the National Assembly, by extending the concept of crossing the floor to the joining of political parties not represented in the National Assembly or to the joining of organizations or Associations with objectives or activities that are political in nature, that I ought to strike out of the amendment.
>
> On authority of Sections 5 and 11(3) of the Constitution therefore the amendment capturing the voluntary resignation by a Member of Parliament from a party represented in the National Assembly and/or the joining of a political party represented in the National Assembly by a Member of Parliament who belonged to another political party also so represented in the said Assembly at the time of his election must be saved and it therefore survive." (underlining supplied by us)

3 Civil Cause No. 1861 of 2003 High Court [unreported] decision of 6th October 2003.

shall soon be seen, I hold the opinion that there is a floor to cross even where one joins a party not represented in the National Assembly.

Principles on interpretation of the Constitution

We observe that in the reference before this Court the Referral Authority wants, inter alia, an interpretation of the stated Constitutional provisions. The Republic of Malawi Constitution itself in Section 11 provides, inter alia, that:-

> "Appropriate principles of interpretation of this Constitution 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 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 [fundamental principles] and Chapter IV [Human Rights], and
> c) where applicable, have regard to current norms of public international law and comparable foreign case law
>
> (3) Where a Court of law declares an executive act or a law to be invalid, that Court may apply such interpretation of that act or law as is consistent with this Constitution---" (underlining and brackets supplied by us)

As shall be seen shortly, the comparable foreign case law that I found informative and persuasive is the one from Zambia.

Further, we are alive to the fact that the Malawi Supreme Court of Appeal made the following observation on the said Section 11 which is very instructive:-

> "… 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 and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution---"[4] [underlining and emphasis by us]

We will, therefore, not only look at selected Sections of the Constitution if we are to find the true meaning of Sections 65 of the Constitution. Additionally, this Court is mindful of this illuminating dictum by the Malawi Supreme Court of Appeal:-

> "Constitutions are drafted in broad and general terms which lay down broad

4 *Gwanda Chakuamba, Kamlepo Kalua, Bishop Kamfosi Mnkhumbwe vs Attorney General, The Malawi Electoral Commission and the United Democratic Front* MSCA Civil Appeal No. 20 of 2000 [unreported]

principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. It is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution."[5]

This is what is popularly known as a purposive approach to the interpretation of the Constitution which has also been adopted in Zambia.[6] Indeed, the case of **Fred Nseula vs. Attorney General and Malawi Congress Party** is for the proposition that when a Court is interpreting any provision of the Constitution it is unacceptable for the Court to use one constitutional provision to destroy another constitutional provision or to make another constitutional stipulation irrelevant. Accordingly, whatever is contained in Sections 32, 33, 35 and 40 must be read so that there is harmony with the said Section 65 of the Constitution. Section 65 will not, therefore, be treated by this Court as if it is not part of the Constitution of the Republic of Malawi.

Having illustrated the approach we intend to take allow us to make the determinations that this Court has been called upon to do.

Determination

I have already observed that the Referral Authority has given us the questions he wants determined and/or interpreted. It is not necessary to reproduce the said questions but it will suffice to flag out the essential content of the issues that the President wants an opinion on. I will now proceed to do that as follows:

Is Section 65 inconsistent with Sections 32, 33, 35 and 40 and, therefore, invalid?

As a starting point, and pursuant to the principle of interpreting our Constitution, we can not say that Section 65 is inconsistent with any constitutional provision or invalid. We must always remember that we cannot use some constitutional provisions to render any other stipulation within the Constitution invalid. Hence Sections 32, 33, 35 and 40 of the Constitution can not be used to invalidate Section 65 of the Constitution. The Malawi Supreme Court has implored us to read all the provisions on a particular subject and interpret the stipulations in such a way that they must appear to be working in harmony and that the interpretation we arrive at must always be aimed at achieving the purpose for which

5 *Fred Nseula vs Attorney General and Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997 [unreported] decision of 15th March 1999

6 *Attorney General and Another vs Kasonde and Others* [1994]3 LRC 144

a particular section was enacted. Thus, the purposive approach to interpretation being advocated above and adopted by this court.

Secondly, we have found it necessary to repeat what we observed in our earlier ruling on an interlocutory application that was before us in this reference. It will be recalled that we noted, and wish to repeat here, that the question of the validity of Section 65 was already dealt with by this Court. For the avoidance of any doubt we find that the following statement by our learned brother Justice Chipeta in the **Registered Trustees of PAC vs. The Attorney General and Speaker of National Assembly**[7] clearly bears testimony to what we said earlier on:-

> "---As can be seen the Plaintiff has challenged the constitutionality of the amended Section 65 at two levels--- The second level has been that attacking the content of the new Section 65(1), which content is said to directly abridge the freedom of association under Section 32 and the exercise of political rights under Section 40 of the Constitution. In regard to the impact the amended Section 65(1) has on the enjoyment of these fundamental rights, it has been contended by on behalf of the Plaintiff that the original S. 65(1) was much more in keeping with the functioning of a multiparty democracy that the present one is---
>
> In the light of the case before the Court Amicus Curiae, through learned Mr Tembenu, called upon this Court to decide for clarity's sake whether the amendment to Section 65(1) of the Constitution is inconsistent with and in violation of the freedom of association provided for under Section 32 of the Constitution and of the rights especially at Section 40(b) and (c) of the Constitution to respectively campaign for a political party or cause or to participate in peaceful political activity intended to influence the composition and policies of the Government--- Reference was at this point made to the decisions of the European Court of Human Rights in **Chassagnon and Others vs France** 7 BHR C 151 and in **Sidiropoulos and Others vs Greece** 57/1997/841/1047 to demonstrate the value of the freedom of association and how its curtailment also affects the enjoyment of other related freedoms such as the freedoms of opinion, conscience and of expression [Section 35 of Republic of Malawi Constitution]---" (the words in brackets supplied by me)

If what we have quoted above is not a clear manifestation of the fact

7 Civil Cause No. 1861 of 2003 unreported

that the High Court dealt with the validity of the said Section 65 of the Constitution then we do not know what proof to offer to the President. We find that Section 65 of the Constitution is valid as was declared by Chipeta, J. It must be pointed out that Government was party to the proceedings before Justice Chipeta. The judgment of this Court in those proceedings was appealed against by the Government but it later withdrew the appeal. The office of the Attorney General must therefore learn to live with the decision it took to withdraw the appeal.

Is our Section 65 a universally acceptable phenomenon?

The question posed above was also answered by this very Court in **Registered Trustees of Public Affairs Committee vs. Attorney General and Speaker of National Assembly**. Actually, it was determined in the affirmative when the Court indicated that:-

> "…Admittedly crossing the floor is almost a universal concept. It of course differs to some extent from country to country. While it is true as claimed by the Defendant that Tanzania, Ghana, Uganda, Zambia, and India, among other countries have provisions covering this concept in their Constitutions, and this I have verified from the portions of their Constitutions which the Defendants supplied to the Court, and while I accept that these countries so have these provisions alongside bills of rights in the same Constitutions encompassing freedom of association and political rights, among others, upon dining another comparative analysis of these Constitutions and one own I do find that while it would be true that our original Section 65(1) was either just like these other provisions or milder than them I honestly can not say the same about our amended Section 65(1). Much as the Indian Constitution on the whole sounds a bit more harsh in extending the concept of crossing the floor to a member failing to vote according to the party line, at least the little merit in that is that it touches and refers to the conduct of a Member of Parliament within the house where I apprehend crossing the floor primarily applies to.
>
> In general, from among the constitutional provisions proffered offer comparison, a uniform thread that transcends all of them is that at least crossing the floor has been confirmed to movement of elected Members of Parliament between political parties, especially those with representation in Parliament---it incidentally strikes me that so stretching the floor anywhere and everywhere outside the House does not just amount to an expansion of the principle of crossing the floor. It almost amounts to a complete

abandonment of the original principle and to an adoption of a completely new concept. Now whereas it might possibly make some sense that when one joins another political party it can be understood as some forum of crossing, but where on has not resigned from his party, has not joined another political party--- how that should amount to a crossing of the floor I sincerely fail to understand----

There was argument that the limitation, if any, achieved by the amended Section 65(1) as regards the freedoms and rights under Sections 32 and 40 passed the standards set for such limitations as provided for under Section 44(2) of the Constitution. To begin with I apprehend that what Parliament set out to do when it embarked on the exercise of amending Section 65 was to address whatever mischief it perceived need rectification under the original Section 65(1). Now assuming the mischief aimed at was the one reflected in the report of the Law Commission, then most likely upon accommodating that recommendation and achieved that objective…"

The above quote clearly demonstrates that this Court does not see our provision as being out of the ordinary. It emphasizes the point that in other open and democratic societies there are laws that proscribe the crossing of the floor by Members of Parliament. Indeed, Malawi is not an exception when it regulates the conduct of those who are elected to represent the electorate in the National Assembly.

It is well to observe that, except those parts that went overboard, Justice Chipeta found Section 65 to be valid. We can not agree more with his finding as they have been no compelling argument advanced by counsel for the Referral Authority to persuade us to change the view of the High Court. This Court therefore finds, as it did earlier, that Section 65 is not inconsistent with Sections 32, 33, 35, and 40 or invalid in any way.

Is floor crossing, in whatever form, allowed under our Constitution?

The Referral Authority has raised other questions should we find that Section 65 is valid. In point of fact, the Referral Authority has posed the questions in the alternative. As we understand it, the issues put as alternative questions may

conveniently be synthesized into one **viz.**whether or not floor crossing, in whatever form, is allowed under our Constitution.

I will start addressing my mind to the point raised in the first alternative i.e. the meaning that must be attached to the words *"any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly."* It must be observed that in interpreting our Constitution the Courts will avoid being pedantic or legalistic. In our view the words should be understood to mean that a person crosses the floor if at the time of election into the National Assembly he was a member of a particular political party he/she but then changes allegiance after the election when the voters have put that person into the Public Office of a Member of Parliament. Further, it is our opinion that Section 65(1), as permitted by Justice Chipeta in **Public Affairs Committee vs. Attorney General and Speaker**, should be read purposively. If that approach is taken it will be easily seen that the purpose of this provision is to prohibit "floor – crossing" in whatever form notwithstanding the fact that at the time of general elections there is no National Assembly in existence in strict sense. This Court is alive to the fact that at the time of general elections there is no National Assembly but that should not make us lose focus of the bigger picture **viz.**that crossing the floor is what is prohibited by Section 65.

We must always remember that Malawi adopted a multiparty system of government whereby parties compete at the polls for seats in the National Assembly. Indeed, we should not be blind to the obvious fact that, when competing, political party candidates use party symbols. Further, this Court is aware that most candidates who go into the National Assembly go there because of party colours and party sponsorship. It is for these reasons that the founders and framers of our Constitutions, with a view to promoting multiparty democracy, decided to enact Section 65. This provision definitely had a purpose. It was to discourage the disappearance of party politics. I hasten to add that the section was put in the Constitution so as to promote multiparty democracy. This is also implicit in Section 40(2) of the Constitution which obliges the State to fund political parties that win a particular proportion of the seats in the National Assembly. For lack of brevity the said subsection 2 of Section 40 says that:-

> "The State shall provide funds so as to ensure that during the life of any Parliament, any political party which has secured more than one-tenth of the National vote in elections to that Parliament has sufficient funds to continue to represent its constituency."

Therefore, Section 65 becomes handy in that it discourages crossing of the floor so that respective political parties continue to represent particular constituencies which voted those particular political party candidates into the National Assembly. It also goes without saying that a particular parties' manifesto, which is reflected in the votes cast in a particular constituency, would continue to be promoted if crossing the floor is proscribed.

Additionally, in our view Section 65 of the Constitution does not negate the

essential rights or freedoms in Sections 32, 33, 35 and 40 of the Constitution. What Section 65 of the Constitution does is to say that if you are a Member of Parliament, elected in a particular manner to represent a particular constituency, you can only move or join another party at the expense of losing your seat in the National Assembly. Further, sight should not be lost of the point that when most Malawians go to vote for a party candidate they do so with a view to expressing their wish that a particular party should form government and that the manifesto of a particular political party should inform and influence the policies of the Government as allowed by Section 40(1)(c) of the Constitution which states that:-

> "Subject to this Constitution, every person shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government."

Indeed, what I have said above applies ***mutatis mutandis*** to an independent candidate.

This right in Section 40(1)(c) can only be meaningfully achieved if the choice of the electorate is respected and an MP is not allowed to move from one political position to another. Hence Section 65 of the Constitution was enacted to further promote this right. The voter's right, as expressed in a vote, to influence the composition and policies of Government would be rendered meaningless if Members of Parliament were allowed to abandon the electorate after the polls. We must see to it that indeed every vote counts if our Parliamentarians are not allowed to abandon the voter by crossing the floor alone without seeking a fresh mandate.

As shall soon be demonstrated, all the questions put in the alternative under paragraph 3 have been answered in the affirmative. This is more so if we use the lens of a voter and read through the stipulation in Section 62 of the Constitution which states that:

> "(1) The National Assembly shall consist of such number of seats, representing every constituency in Malawi as shall be determined by the Electoral Commission.
>
> (2) Each constituency shall freely elect any person, subject to this Constitution and an Act of Parliament, to represent it as a member of the National Assembly in such manner as may be prescribed by this Constitution or an Act

of Parliament"

The view that we take is that at any particular time it is envisaged that after an election there shall be three divides in the house **viz.**Government, Opposition and Independent side of the house. This is first determined by the Electoral Commission when announcing the results. For this reason, a Member of Parliament crosses the floor if he/she moves from any of these sides to any other side. Indeed, the electoral law is such that it is clear that at the time the results are announced the electorate is made aware as to what number of seats there are, the party that has the most seats including those who have been elected as independents. If we therefore use the purposive approach to interpretation of the Constitution then the following emerges in the eyes of the law and those of the electorate:-

A Member of Parliament crosses the floor if, after being elected on a party ticket, if he/she accepts a Ministerial appointment from a President elected on another party's ticket. It does not matter that he does not resign from the party on whose ticket he/she was elected. If your party's blessing is not given or sought then surely that MP should be deemed to have crossed the floor. Further, a Member of Parliament elected under a party's ticket crosses the floor if he/she decides to resign from that party and becomes independent then later joins another party regardless of whether that party has MPs in the National Assembly or not.

Indeed, a person elected as an independent MP will also be deemed to have crossed the floor if that MP decides to join a political party whether or not the latter has MPs in the National Assembly. The Zambian case is instructive on this regard.

Conclusion

The long and short of it is that Section 65 is valid notwithstanding the provisions of Sections 32, 33, 35 and 40 of the Constitution. Further, all the issues raised by the Referral Authority have been answered in the affirmative. Consequently, the injunctive relief that was obtained must be and is hereby set aside.

DETERMINATION

TWEA, J.

On 16th November, 2005, the Attorney General filed by way of originating summons a referral by the President, pursuant to the powers vested in him by Section 89(1)(h) of the Constitution. The referral raised three issues pertaining to Section 65 of the Constitution and of Crossing the Floor by Members of Parliament.

On 12th September, 2006, the referral was amended. The referral raised one issue and, in the alternative, raised two other issues. The original issue was, after the amendment, the second alternative.

The referral requested this Court to give its opinion, interpretation and determination in respect of:-

> "1. Whether or not the said Section 65 is consistent with Sections 32,33, 35 and 40 of the Constitution and is, therefore invalid:
>
> 2. In the alternative, if Section 65 is valid, what meaning can be attached to the words "any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly" regard being had to the non-existence of the National Assembly at the time of the general elections.
>
> 3. In the further alternative:
>
> ; Whether a Member of Parliament (MP) who at the time of election stood as an independent MP whilst in the National Assembly joins a political party:
>
> ; that already has Members of Parliaments in the National Assembly elected on that party's ticket is deemed to have crossed the floor under Section 65 of the Constitution; or
>
> ; that has no Members of Parliament in the National Assembly elected on that party's ticket is deemed to have crossed the floor under Section 65 of the Constitution.
>
> ; Whether an Member of Parliament who was elected under a party ticket decides to resign from that party and becomes independent and later on joins another party that has no Member of Parliament represented in Parliament elected on the party's ticket is deemed to have crossed the floor under Section 65 of the Constitution.

; Whether an MP elected on a party's ticket accepts a ministerial appointment from a President elected on another party's ticket but does not resign from his party is deemed to have crossed the floor under Section 65 of the Constitution."

This Court heard arguments from the Attorney General on behalf of the Referror and the Government and the friends of the Court representing political parties, the Faculty of Law of the University of Malawi, the Malawi Law Society and the Public Affairs Committee and Civil Liberties Committee representing the Civil Society. It should be noted that two political parties the **Democratic Progressive Party (DPP)** and **Peoples Progressive Movement (PPM)** declined to be heard notwithstanding that they caused an appearance. This Court also wishes to note that the Attorney General had objected to the appearance of Mr. Kasambara of Counsel, who is the immediate part Attorney General and had previously appeared in this case, appearing on behalf of the Public Affairs Committee. Further, the Court was requested to expunge the submission made by Mr. Kasambara on behalf of the Public Affairs Committee. This Court stood over the matter to allow Mr. Kasambara to be heard. He never appeared again. It is on record however, that the Attorney General, in the supplementary arguments, referred to the submissions by the Public Affairs Committee in favour of or against issues raised. It should also be noted, for the record, that the incumbent Attorney General was a member of this Court immediately before her appointment. With these facts in mind, we are of the view that the objections raised have been waived.

I now come back to the issues raised.

On the validity of Section 65 of the Constitution in the light of Sections 32, 33, 35 and 40, thereof, I will defer the arguments by my brother Judge Kapanda. I concur with his approach to the Constitutional interpretation. However, I wish to add a different perspective to the argument. It is important to note that the freedoms of association, conscience and expression are, largely, all embodied in the political rights under Section 40 in respect of Members of Parliament who are members of a political party. This is borne out by the fact that when one decides to join a political party one exercises his right to associate. The consequencies of joining any association is that one becomes subject to the rules and regulations of that association. One will exercise ones freedom of conscience and expression in respect of matter pertaining to the objectives of the said association within the scope of the rules and regulations of that association. If one is not happy with the rules thereof one is free to exercise his or her right not to belong to that association any more in accordance with Section

32(2) of the Constitution. It cannot be heard to say that members of the National Assembly who are members of political parties are denied their freedoms of association conscience and expression. The fact of the matter is that as members of political parties, which is a right exercise under Section 40, they have acquiesced to have the freedoms and rights limited. This notwithstanding, as submitted the rights and freedoms have not been removed. The rules and regulations of their political parties provide and limit the legitimate avenues of expression and association. It is for these reasons that, the restriction of the right of Members of Parliament in this respect has been held to be reasonable and recognized by international human rights standards and necessary in an open and democratic society: **Ex-Parte Chairperson of Constitutions Assembly: In Re Certification of Constitutions of the Republic of South Africa – 1996(4)SA. 744(1)(2).** With this in mind, I further take into account the findings of Justice Chipeta in the **Registered Trustees of The Public Affairs Committee –vs- The Attorney General Civil Cause No. 1831 of 2003** that save for the offending provisions which he struck down, Section 65 in Constitutionally valid.

I now come to the first alternative.

To begin with the gist of Section 65(1) of the Constitution is that the Speaker shall declare vacant the seat of any Member of the National Assembly who voluntarily ceases to be a member of his party or joins another political party in the National Assembly. I will look at the qualifications later.

It must be recognized that this derives from Section 40(1)(d) of the Constitution: the right of every person to make political choices. This right must be read together with Section 62(2) of the Constitution. This reads:

> (2) Each Constituency shall freely elect any person, subject to this Constitution and an Act of Parliament, to represent it as a member of the National Assembly in such manner as may be prescribed by this Constitution or an Act of Parliament.

The right of Constituents to **freely elect any person,** as I said, derives from Section 40(1)(d). However, any one who exercises his or her right to vote under Section 40(3) will have done so by his or her rights in respect of Section 40(1)(a)(b) and (c) of the Constitution and in this regard, taken into account Section 32(2) of the Parliamentary and Presidential elections Act; that is to choose a candidate that represents a political party or is independent.

When the voting has been completed and votes counted, the Electoral Commission will declare the composition of the National Assembly. The National Assembly consists of such members as the Electoral Commission shall determine in accordance with Section 62(1) of the Constitution and the Parliamentary and Presidential election Acts. The membership of the National Assembly consists, elected members who are members of political parties or independents. Our laws do not permit any other categories, notably nominated members. The composition of the National Assembly therefore determined by the Parliamentary elections.

As has been pointed out by my brother judges, the Constitution further, in Section 40(2), provided that:

> "(2) The State shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its Constituency."

The financial protection of political parties that secure more than one-tenth of the national vote during elections guarantees political pluralism of any Parliament. This relates directly to the protection of the membership of political parties in the National Assembly under Section 65(1) of the Constitution. It is in the interest of democracy that the Constitution protects and provides for financial funding for political party pluralism in the National Assembly. This insulates smaller parties against poaching from bigger and political prostitution by their members.

Further to this, it is clear that voters will exercise their right to vote depending on the election manifesto of the independent candidate or the political party of their choice. Where a candidate secures a Parliamentary seat, it is signified that the majority of the Constituents prefer his or her election manifesto. That manifesto has to be pursued and achieved during the life of that Parliament. A member of the National Assembly therefore is accountable to the electorate to fulfill the manifesto on which he or she was elected.

Once the Constituents have made a choice it would be a betrayal by the member of the National Assembly to unilaterally abandon the manifesto, upon which he or she was elected: whether as a member of a political party or an independent. I agree with the submission of the friends of the Court representing the Malawi Congress Party, United Democratic Front and Alliance for Democracy, that allowing a Member of Parliament to freely change from one political party to another would

render the freedom of political choice of the electorate meaningless. The Member of Parliament would, in effect, be representing himself and not the electorate.

Lastly, on this issue, let me consider the **free-mandate** provided for in Section 65(2) of the Constitution. Section 65(2) reads:

> "(2) Notwithstanding Subsection(1), all members of all parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendation of a political party, represented in the National Assembly, of which he or she is a member."

I am aware that the Attorney General has attacked this provision as contradictory and irreconcilable amounting to irrationality on that part of Parliament. Unfortunately, I do not share that view. This section is consistent and rational.

To begin with, I adopt the views expressed by the Attorney General when quoting the **Halsbury's Laws of England: Constitutional Law and Human Rights**, more so when expressing the views of Burke:

> "Parliament is not a congress of ambassadors with different and hostile interests; which interests each must maintain, as an agent and advocate but Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a Member of Parliament."

Section 65(2) of the Constitution reflects this view. Parliament is a deliberative assembly of the Nation and not an extension of political parties. Unlike the other Constitutions that we have been referred to, our Constitution respects political party integrity and accountability of the members of the National Assembly to their political parties, but frees them from political party bondage. They are free to follow their conscience when voting and not to toe party line to the detriment of their constituencies and the Nation. The Constitution has freed the business of the National Assembly from being transacted on basis on numerical numbers. It has allowed members of the National Assembly to transact business in basis of National interest and good conscious. If one appreciates the value of this freedom of the members of the National Assembly in the House, one will appreciate why a Member of

Parliament who involuntarily ceases or is expelled from a political party cannot be deemed to have crossed the floor under Section 65(1) of the Constitution. The position of members of the National Assembly who belong to political parties is therefore fortified and protected. This subsection enjoins political parties to proceed with greatest caution when dealing with their members who are members of the National Assembly. It also prescribes political parties from using expulsion from the party as a means of forcing their views on the National Assembly. This is invaluable regard being had to our experience during the one party state when the party was mightier than the Government. It is also important to point out, as was pointed out during submissions, that this provision enables a minority Government to push policies in national interest, in the National Assembly. It is important to note however, that the Attorney General may have viewed this provision negatively because, ever since the advert of the multiparty, all Governments have been obsessed with numerical members in the National assembly. This is also a contributing factor to this referral.

I now come to the qualifier

Clearly, the issue before the Speaker will be a member of the National Assembly voluntarily ceasing to be a member of a political party, or joining another political party that is represented in the National Assembly. This will trigger the qualifier; to discover the status of that member at the time that he or she was elected. This will apply whether the elections were general or by elections. It is clear that crossing the floor is subsequent to the election and not simultaneous. It is only after one has been elected to the National Assembly that change of loyalty becomes an issue. It is therefore difficult to appreciate the interpretation of the said section by the Attorney General.

In my view if the qualifier were taken out the provision, it would read as follows:-

> "The Speaker shall declare vacant the seat of any member of the National Assembly who was a member of one political party represented in the National assembly but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Party."

On the literal reading of this provision as paraphrased, it would apply to a member of a National Assembly who is a member of one political party represented in the National Assembly, who has ceased to be a member of that party or has joined another political party represented in the National Assembly. However, when we read in the qualifier, it

would only apply to one who was also a member of the political party at the time of election. The question is, is it possible to be a member of one political party represented in the National Assembly and not to have been a member of that political party at the time of elections? The answer is "yes" and the only possibility is that of an independent member. An independent member of the National Assembly cannot cease to be a member of a political party because he does not belong to any, but is capable of joining a political party during the life time of that Parliament.

The second qualifier is where one was a member of one political party represented in the National Assembly, that is represented by him or her alone. Such a member may cease to be a member of that political party or may join another party represented in the National Assembly.

The net result is that one who was elected into the National Assembly as an independent candidate or a sole Parliamentary member of a political party may join another political party represented in the National Assembly during the life time of a Parliament and not "vice versa."

This however, is not the end of the matter. It is clear that members of the electorate who vote in independents or a sole member of a political party are not protected from defection of their representative. This, clearly, is discriminatory and I agree with the submissions by the Attorney General and my Brother Judge Kapanda on this. However, I totally disagree with the Attorney General that this should licence an interpretation that would allow members of the National Assembly who were members of a political party at the time of elections to equally change political parties. Again, I disagree with my Brother Judge Kapanda, that applying the principle in the Zambian case of **Attorney General and Others vs Kasonde and Others 1994 LRC 144**, this provision must be read to extend to members of the National Assembly elected as Independents or sole representatives of political parties.

In view of the clear provisions, of the Constitution, I would be slow to import into the provision the equality of treatment. I agree and accept the views submitted by *amicus curiae* from the Law Faculty, that this provision should be amended. In order to promote integrity accountability of members of the National Assembly and to protect the wishes of electorate and democratic values, once elected members should not be allowed change political parties or abandon the manifestoes on which they were elected. Those who wish to do so must submit to re-elections.

I will now look at this last alternative, as I said earlier, this is what was before us, the amendment.

On the first part, which is in respect of a member of the National Assembly elected as an independent candidate. I have already alluded to it. I only wish to add, in view of the arguments on record, that in this case, an independent candidate means one who presented his or her own manifesto on which he/she sought to be elected. Reference, has been made to "independent" candidate who, after loosing primaries in their own political parties go it alone while still members of their political parties and without an independent manifesto. This is an abuse and undemocratic, and is not, in my view, what the Constitution seeks to protect.

The other two issues will depend on the interpretation of "voluntarily ceasing to be a member of that party, or joining another political party."

In the case of **Fred Nseula vs The Attorney General and Malawi Congress Party Civil Cause No. 63 of 1996** Mwaungulu, J. differentiated vacancies occurring as a result of the operation of the law under Section 63(1) of the Constitution, which fall under the jurisdiction of the National Assembly, and declaration of vacancy by the Speaker under Section 65(1) of the Constitution, which are within the jurisdiction of the Speaker.

On the latter case, firstly the Speaker has to decide whether one has voluntarily ceased to be a member of "that political party." How does one voluntarily cease to be a member of a political party. Obviously if one resigns, one ceases to be a member of a political party. Howerver, one can also cease to be a member of a political party by conduct. If one abandons his political party, or conducts oneself in a manner that is inconsistent and incompatible with being a member of that political party; for example joining another political party, one will be deemed to have ceased or resigned from the party. Numerous cases have been cited in the submissions by the friends of the Court to illustrate this**: Thomas L. Fekete, JR –vs- The City of East St. Louis Supreme Court of Illinois 315 Ill.58:** where one accepted a new office which was incompatible with the one that he occupied it was held to be constructive resignation or abandonment. **The people ex. rel. mm. Stephen –vs- Thomas Hamifan 1880 WI 10 125 (ILL)** where one consistently failed to attend meetings and became hostile to the Government plat form on which he was elected, it was held that he had abandoned his office and hence resigned by implication. Clearly, all this will depend on the evidence. This was

recognized by Mwaungulu, J. in the Fred Nseula's case (Supra), when he said –

> "This leads to the consideration of the evidence that was before the Speaker that formed the basis of the decision. I think there was none. The onus was upon The Attorney General to satisfy the Court that the decision of the speaker was justified on the material which the Speaker had before him."

The Speaker therefore will have to decide whether on the facts before him one has ceased to be a member of ones party and then make the declaration. Once one voluntarily ceases to be a member, he cannot constitute himself, from within the National Assembly, an independent member.

The second limb requires the Speaker to decide whether, one has "joined another party represented in the National Assembly." How does one join another party? Obviously if one registers or declares membership of another political party one will be deemed to have joined that other political party. Again, it is possible for one to be deemed to have joined another political party by conduct. By conduct, explicit or implicit, that is inconsistent and incompatible with being or remaining a member of a party one would be deemed to have constructively joined the other party. It will be a matter of evidence, whether one explicitly or implicitly joined another political party. The duty of the Speaker will be to decide on the facts before whether or not one has joined another political party. The arguments in respect of one ceasing to be a member of a political party would apply equally in this respect. I must also mention here, that joining another party is evidence of ceasing to be a member of ones former party. Thus, if by conduct explicit or implied one subscribes to the other party one will be deemed to have joined that party.

On the issue before this Court therefore, it is clear that a member of the National Assembly who resigns from a party which is represented in the National assembly will have ceased to be a member of that party and will be subject to provision of Section 65(1) of the Constitution. There is no room for one to cease being a member of a party and become independent in the National Assembly.

The last point is on ministerial appointments.

It has been acknowledged that the President, in our system of Government, is elected directly by popular vote. It is also accepted that it is the President and not the political party with majority in the National Assembly that forms Government: the political side of the

Executive Arm of Government. This is, and remains the position whether the President is a member of a political party or not, or whether his political party has majority or not.

Consequently, the President has the power to appoint Ministers. The President may appoint Ministers from among the membership of the National assembly or without. If, however, the President decides to appoint Ministers from within the National Assembly, he or she must have regard to the application of Section 65(1) of the Constitution.

As I stated earlier, Section 65(2) gives a **free-mandate** to members of the National Assembly. Be, this as it may the free-mandate is only exercisable in the National Assembly in respect of voting other than that inter political party relations would be subject to the rules, regulations, agreements or alliances, made between them and the political party to which the President, if any, belongs. The ministerial appointee will therefore subject to such rules, regulations, agreements or alliances. He or she is not free to accept appointments as he or she pleases. The determinant therefore, is whether the ministerial appointee has voluntarily ceased to be a member of his political party or has joined another political party represented in the National Assembly, if any: regard must still be had to the fact that joining another political party is evidence of ceasing to be a member of ones former party. In this regard therefore the position of a ministerial appointee is no different form that of any other member of the National Assembly. In both respect therefore the Court will observe the maxim ***animus ad se omne jus ducit***: law always regards the intention.

It is my finding therefore, that Section 65(1) of the Constitution, as saved by Justice Chipeta, is in tandem with other provisions of the Constitution and therefore valid. Further, that there is no contradiction in terms in Section 65(1) so as to justify the reading imported by the Referror. I also find that the said, Section as it now stands, only applies to members of the National Assembly who were members of a political party represented in the National Assembly who voluntarily cease to be a member of that party or join another political party represented in the National Assembly. Further, I endorse the view that the section as it stand does not apply to a member of the National Assembly who was elected as independents or is a sole representative of a political party in the National Assembly. I agree with my Brother Judge Kapanda and the friends of the Court that this is discriminatory and consequently, does not protect the interest of the electorate in respect of such members of the National Assembly. I call the Attorney General and the Law Commission to amend it accordingly. Finally, I find that ministerial appointments, in respect of members of the National Assembly, can only be made within the confines of the

application of Section 65(1) of the Constitution.

POTANI, J:

DETERMINATION

My brother Judge, the Honourable Justice Kapanda has extensively and adequately dealt with the question whether or not section 65 of the Constitution is inconsistent with sections 32, 33, 35 and 40 of the Constitution and therefore valid or invalid. He has come to the conclusion that the said section 65(1) is not in conflict with sections 32, 33, 35 and 40 and is therefore valid. Let me state that I unreservedly concur with his finding and the reasons thereof.

Again, I concur with my brother judge in his determination of the alternative question as to the meaning to be attached to the words ***"any member of the National Assembly who was, at the time of his or her election a member of one political party represented in the National Assembly"*** as contained in section 65(1) regard being had to the non existence of the National Assembly at the time of a general election.

The Honourable Justice Kapanda has also dealt with the question in the further alternative as set out in paragraph 3 of the Referral Authority's notice of September 12, 2006. It is necessary to set out the questions in full.

3.1 ***Whether a member of Parliament (MP) who at the time of the election stood as an independent MP whilst in the National Assembly joins a political party:***

3.1.1. ***That already has MPs in the National Assembly elected on that party's ticket is deemed to have crossed the floor under section 65(1) of the Constitution.***

3.1.2. ***That has no MPs in the National Assembly elected on that party's ticket is deemed to have crossed the floor under section 65(1) of the Constitution***

3.2 ***Whether an MP who was elected under a party's ticket decides to resign from that party and becomes independent and later on joins another***

party that has no MP represented in Parliament elected on the party's ticket is deemed to have crossed the floor under section 65 of the Constitution.

3.3 ***Whether an MP elected on a party's ticket accepts ministerial appointment from a President elected on another party's ticket but does not resign from his party is deemed to have crossed the floor under section 65(1) of the Constitution.***

In dealing with the above questions on the issue of crossing the floor, my brother Judge has approached the matter by way of tackling a single and all encompassing question namely: Is crossing the floor, in whatever manner and circumstances, allowed under the Constitution?

In dealing with the above question, my brother Judge has employed the purposive approach in the interpretation of section 65(1) and has particularly been guided by the Zambian case of ***Attorney General v Kasonde and Others*** (1994) 3 LRC 144. The judge has further taken cognisance of sections 40 and 62 of the Constitution as having significant bearing to the interpretation of section 65(1). I have no problems with the approach taken in the interpretation of the Constitution. Indeed it was held in ***Nseula v Attorney General and Malawi Congress Party*** MSCA Civil Appeal No 32 of 1997 that:

> "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." (Emphasis added)***

It was also held in ***Supreme Court Reference by the Western Highlands Provincial Executive*** (1995) PG SC 6; SC 486 (20th September 1995) cited by counsel for the Referral Authority that:

> ***"In any question relating to the interpretation or application of any provision of a Constitutional law, the primary aids to interpretation must be found in the Constitution itself."***

It is therefore the view of my brother judge, the Honourable Justice Kapanda, that applying the purposive approach to constitutional interpretation and taking into account the general spirit of the

Constitution especially sections 40 and 62, the Constitution should be regarded to have intended, through section 65(1), to bar any mode or type of defection by an elected member of the National Assembly hence there can be no crossing of the floor, in any manner or circumstance, without losing one's seat. The reasoning being that the spirit of the Constitution and therefore the purpose of section 65(1) is to promote multiparty democracy by maintaining the political composition of the National Assembly which can not be achieved if defections are allowed. This view is largely shared by my other brother judge, Honourable Justice Twea. I largely agree with the approach and reasoning taken by my brother Judges in their determination of the question of crossing the floor. I, however, have immense difficult with the sweeping conclusion they have arrived at bearing in mind that the views of the court on the question of crossing the flour are being sought with reference to specific circumstances. I am of the conviction that there could be instances where a member of the National Assembly can leave his party or join another party without necessarily crossing the floor. In other words, it is not in every case that a member leaves his party or joins another party that he would be caught by section 65(1) as I shall demonstrate.

In my considered view, in dealing with the question of crossing the floor under section 65(1) of the Constitution, much as the court is enjoined to read the Constitution as a whole so as to achieve a purposive interpretation of section 65(1), the wording of section 65(1) itself needs the attention it deserves otherwise one may end up destroying section 65(1) by using other constitutional provisions which the court must guard against as was held in the Nseula case that:

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

Thus as section 65(1) is being interpreted in the light of other relevant constitutional provisions, I consider it imperative that certain key words and phrases in it must be given the attention they deserve as they were deliberately incorporated in it in order to achieve the desired intention. Section 65(1) as it legally stands presently following the 2001 amendment is as follows:

> ***The speaker shall declare vacant the seat of any member of the National Assembly <u>who was, at the time of his or her election, a member of one political party</u> represented in the National Assembly, other than by that member alone but <u>who has voluntary ceased to be a member of that party or has joined another political party in the National Assembly.</u>***

(Emphasis added)

The key and operative words in section 65(1) in my view are: firstly ***"who was at the time of his or her election a member of one political party," secondly who has voluntarily ceased to be a member of that party and thirdly "who has joined another party represented in the National Assembly."***

I shall then proceed to answer the four questions put by the Referral Authority by giving accord to the Constitution as a whole but without destroying section 65(1), particularly the key or operative words therein.

(1) Whether a member of parliament MP who at the time election stood as an independent MP whilst in the National Assembly joins a political party that already has MPs in the National Assembly elected on that party's ticket is deemed to have crossed the floor.

As can easily be appreciated from a reading to section 65(1), for one to be amenable to the section**,** he or she must have been a member of a political party at the time of his or her election. Clearly, therefore, the section does not extend to those who did not belong to a political party at the time they were elected into office. The matter, however, becomes somehow tricky when one considers that in reality, most of the so called independent candidates would normally be members of some political party but they contest in elections as independent candidates mainly because they failed to make it during the party's primary elections. For this type of MPs, if they contested before renouncing membership to any political party, then they are amenable to section 65(1) because strictly speaking, they were members of a political party during their election. I would want to believe that this is the category in which most of our so called independently elected MPs would fall into. It is however, a matter of proof or evidence as to whether though they stood as independent candidates, they still belonged to some party. In the case of those candidates who contested after renouncing membership to any party and were completely detached from any party, they would not be deemed to have crossed the floor if they joined a political party represented in the National Assembly after their election.

2) ***Whether a Member of Parliament (MP) who at the time of the election stood as an independent MP whilst in the National Assembly joins a political party that has no MP in the National Assembly elected on that party's ticket is deemed to have***

crossed the floor.

In answering this question, I consider it imperative to note that crossing the floor as envisaged in section 65(1) is restricted to parties represented in the National Assembly. It does not apply to political parties outside the National Assembly. An attempt was made through the 2001 amendment to section 65(1) to include the joining of political parties and other organisations with objectives that are political in nature as a catch under the section but the amendment in so far as it went to that extent was quashed for being in conflict with the Constitution by Chipeta J. in ***The Registered Trustees of PAC v the Attorney General and Others*** Civil Cause NO. 1861 of 2003. Thus an independent MP, so long he was not a member of any party at the time of election, which as already noted is a matter of evidence, would not be caught by section 65(1) if he joins a party that is not represented in Parliament. This I hold because firstly he would not have resigned, voluntarily or otherwise from the party he belonged to the time of his election as he never belonged to any. Secondly he would not have joined a party represented in the National Assembly. In such a scenario, there would, in fact, be no floor to which he would be deemed to have crossed. The question should therefore be answered in the negative.

(3) Whether an MP who was elected under a ticket decides to resign from that party and becomes independent and later on joins another party that has no MP represented in the National Assembly elected on the party's ticket is deemed to have crossed the floor.

Perhaps this is the most straightforward scenario and simplest question to answer. Just by resigning from the party to whom he belonged during his election, that member voluntarily ceases to be a member of that party and therefore must undoubtedly be deemed to have crossed the floor even if he does not join another party whether represented in Parliament or not. He cannot even resign from his party and pretend to be an independent member. The operative act in terms of section 65(1), is the act of resigning from the party or voluntarily ceasing to be a member of the party.

(4) Whether an MP elected on a party's ticket who accepts a Ministerial appointment from a President elected on another party's ticket but does not resign from his party is deemed to have crossed the floor.

On this question, I find the arguments of the Malawi Law Society to be very persuasive. To begin with, as rightly observed elsewhere by counsel appearing for the Malawi Law Society, crossing the floor can be expressed or implied from conduct. It is appreciated that there is nothing in the Constitution that restricts the President as to who he can appoint to a ministerial position. On the face of it therefore one may say that it is perfectly in order for one to accept a ministerial appointment by a President elected on another party's ticket other than that of the appointee. Indeed this was the holding in ***Mponda Mkandawire and Others v Attorney General Civil Cause No. 49 of 1996***. However, if it is accepted that section 65(1) is there to protect party allegiance, one would say by accepting such an appointment, the appointee's allegiance to his party is compromised. It is compromised because the policies and agenda of the appointing President's party are bound to be different from those of the appointee's party and by being part of cabinet he would have to support the policies and agenda of the party forming government which effectively means abandoning those of his party in which case he must be deemed to have crossed the floor even if he does not expressly resign from his party. The matter, however, does not end there. Flowing from the argument that section 65(1) is aimed at protecting party allegiance, if the ministerial appointment has the endorsement of the appointee's party, then there can be no crossing of the floor. The answer to the question should therefore be that whether not the appointee would be deemed to have crossed the floor would depend on whether or not his appointment was made with the approval of his party.

It is in the light of the sentiments I have expressed regarding the specific questions on crossing the floor under section 65(1) of the Constitution raised in paragraph 3 of the notice of the referral that I do not entirely agree with my brother judges that in all the instances referred to in those questions an MP would outright be deemed to have crossed the floor.

Pronounced in open Court this 7th day of November 2007 at the Principal Registry, Blantyre.

E.B. Twea
JUDGE

F.E. Kapanda

JUDGE

H.S.B. Potani
JUDGE