IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY

MISCELLANEOUS CIVIL CAUSE NO 14 OF 2010

BETWEEN:

THE STATE

AND

THE REGISTRAR GENERAL **RESPONDENT**

EX-PARTE MSENGA MULUNGU & 8 OTHERS **APPLICANT**

CORAM: THE HON. MR. JUSTICE L.P. CHIKOPA
V Gondwe of Counsel for the Applicant
E Chilemba Senior State Counsel for the Respondent
O Mogha [Mr.], Court Clerk
F Silavwe [Mrs.], Court Reporter

JUDGMENT

Chikopa, J.

BACKGROUND

The Applicants seek judicial review of the respondent's decision not to register the association or grouping called People's Development Movement [PDM] as a political party. Leave for judicial review was granted on July 20, 2010. We heard the application for judicial review on September 29, 2010. This is our judgment in respect thereof.

THE APPLICANTS

The Applicants are part of a grouping calling themselves People's Development Movement. They on May 1, 2010 submitted an application to the Respondent in his capacity as Registrar of Political Parties [the Registrar] asking him to register their grouping as a political party under Political Parties [Registration and Regulation] Act of 1993 [the Act].

THE CLAIM

By their amended notice of application for judicial review the applicants asked this Court to review the Respondent's 'failure, neglect or refusal' to register People's Development Movement as a political party in accordance with the Political Parties [Registration and Regulation] Act 1993.

GROUNDS ON WHICH RELIEF IS SOUGHT

In paragraph 4.4 of the statement the ground is stated as follows:

i. *That the Registrar General's decision or failure to decide is unconstitutional, unreasonable and ultra vires in that it violates the Applicants' right to fair administrative justice and the right to form, to join, to participate in the activities of, and to recruit members for a political party'. [**Sic**]*

In paragraphs 6.3 to 6.6 inclusive the grounds are stated as follows:

i. *That the Respondent's failure to give reasons in writing for their refusal to register the Applicants' association is contrary to section 43 of the Constitution;*

ii. *That the said failure is unreasonable and ultra vires especially since the Respondnent fails to provide reasons for it;*

iii. *That the Respondent's decision or failure to decide is not supported by any law and is inconsistent with an open and democratic society;*

iv. *That the said decision is contrary to current norms of international human rights law and practice'. [**Sic**]*

THE RELIEF SOUGHT

The Applicants seek an order of *mandamus* or an order in terms of section 46 of the Constitution of the Republic requiring the Respondents to forthwith register the Applicants' association as a political party or alternatively to hear and determine the Applicants' application for registration of the same in accordance with the law'.

THE FACTS

They are not substantially in dispute. The applicants applied for the registration of PDM as a political party under the Political Parties [Registration and Regulation] Act 1993. Without at this stage going into specifics it is clear that the Registrar was not overly impressed with some of the language used in the grouping's manifesto. The Applicants changed the wording and resubmitted the application on June 16, 2010. They did not receive any response from the Registrar. These proceedings were accordingly commenced on July 21, 2010. The grouping remains unregistered as a political party to date.

THE LAW

This is a civil matter. The burden of proof is on she who alleges to prove their allegation on a balance of probabilities. The law relating to Judicial Review is also not in dispute. We generally discussed it in **John Mwandenga v Secretary for Health & Population** Civil Cause Number 9 of 2003 High Court Mzuzu Registry [unreported]. The sum total of such discussion is that judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. In **Chief Constable of North Wales Police –vs- Evans** [1982] 1WLR 1155 at 1160 it was said that:

> '*it is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question'.*

Thus a decision of a public authority may be quashed where the authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable. The function of the courts, including this Court, therefore is not to act as an appellate tribunal in relation to decisions complained against. It is also not to interfere in any way with a public officer's/office's exercise of any power or discretion conferred on it. Unless of course the same has been exercised beyond the respondent's jurisdiction or unreasonably. In other words the Courts must not to do that which the public authority whose decision is the subject of review is by law mandated to do. If the Courts did that they would under the thin guise of preventing the abuse of power be themselves guilty of exercising powers they do not have. The court's function in judicial review proceedings therefore is merely to see to it that lawful authority is not abused by unfair treatment. See Chief Constable of North Wales v Evans above.

Coming back home sections 40 and 43 of the Constitution deserve special mention in the context of this case. We quote verbatim paragraph (a) of the former and the whole of the latter respectively:

> *'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'*. [**Sic**]

> *'Every person shall have the right to –*
>
> **(a)** *lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and*

(b) *Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known'*. [**Sic**]

As we understand the above sections therefore administrative actions/decisions must:

i. be lawful;
ii. be procedurally fair;
iii. be justifiable in relation to the grounds/reasons given; and
iv. have reasons therefor given in writing.

THE ISSUES

In our judgment the applicants raised two primary issues. Firstly that the respondent has 'failed, neglected or refused' to register the People's Development Movement as a political party. Secondly that such failure, neglect or refusal is on the one hand a threat to democracy, the rule of law and a violation of the Applicants' political rights as given under section 40 of the Constitution. On the other hand that the Respondent's conduct is *ultra vires*, arbitrary, unlawful, unreasonable and contrary to current norms of international human rights law and practice.

The respondent raised three issues. They were contained in what was titled 'notice of preliminary objections'. We may paraphrase them as follows:

i. That this matter was prematurely commenced because the defendant had not made any decision whether or not to register the People's Democratic Movement as a party;
ii. That these proceedings are irregular in that the Notice of Application to apply for leave for Judicial Review [Form 86A] does not contain the reliefs sought by the applicants; and
iii. That this matter is not justiciable and unarguable for judicial review on the basis of (i) and (ii) immediately above. [**sic**]

Our first reaction to the above was to ask [if the above are only preliminaries] where are the substantives? But as we say later hereinafter the matters in issue herein are so serious emphasis should be placed more on substance than form. It is fine with us therefore that the Respondent contests these proceedings and that we are able to sufficiently appreciate his case in that regard. It matters not that the Respondent did not explicitly and separately state what are preliminaries and what substantives are. Accordingly we do accept that apart from the above preliminary issues the Respondent had problems with *inter alia* the language used in the manifesto. We regard that as an issue worthy of debate. So is the Respondent's view that PDM's purpose and objective is unlawful. We deal with the issues not necessarily in the order in which they appear in the paperwork before us.

Are These Proceedings Irregular?

The Respondent's initial argument was that because Form 86A herein did not specify the reliefs sought these proceedings should be dismissed for irregularity. Form 86A has however with the consent of both sides since been amended and the reliefs sought included. The Respondent graciously withdrew his objection. It does seem however that the respondent has another objection. It was raised not in the written notice of preliminary objections but by the respondent's Counsel in his address to this Court. Basically the Respondent contends that these proceedings are irregular because the statement verifying the facts does not state the grounds on which the Respondent's decision is being challenged.
Whereas it might indeed be true that the said grounds are not where they are supposed to be it is not true that the statement does not contain the grounds on which the Applicants are challenging the Respondent's decision. Paragraph 4.4 which is clearly part of the statement says that the decision complained of is **'unconstitutional, unreasonable, and *ultra vires* in that it violates the Applicants' right to fair administrative justice and the right to form, to join, to participate in the activities of, and to recruit members, for a political party'**[**Sic**].

Much the same can be had in paragraphs 6.3 to 6.6 inclusive of the statement. Therein the Applicants contend that the Respondent's decision or failure to decide is 'contrary to section 43 of the Constitution, unreasonable, *ultra vires* in view of the Respondent's failure to provide reasons therefor, is not supported by law and is inconsistent with an open and democratic society and finally contrary to current norms of international human rights law and practice'. Unless the Respondent is unduly fascinated with aesthetics we think it matters not that the said grounds are in paragraphs 4 and 6 and not immediately after the words '**grounds on which relief is sought**' which is where they ought to be. For purposes of this proceeding we think that the grounds are available is more important than their location. The Respondent's is therefore untenable.

But much more than that [and even if it is only in passing] let us say that we have always had the view that rules of procedure should be interpreted in a way that facilitates rather than hampers litigation. Unless a party is thereby prejudiced or unable to appreciate the other's case parties should be able to get away with the odd infraction of procedure on payment for instance of costs. In **Aaron Longwe v Attorney General** the Attorney General objected to the manner of commencement. Tambala J [as he then was] cast aside such protestations. In his view the matters at stake were so serious [the rights to freedom of expression and association] a decision thereon could not be sidetracked by talk of procedure. We were in **Sochera & 5 Others v Council of the University of Mzuzu** Civil Cause Number 135 of 2005 High Court Mzuzu Registry [unreported] much of Justice Tambala's view. Forms and procedures are not, as we see things themselves the law and must therefore never be allowed to stultify proceedings. Applying such thinking to the instant case we think the question is firstly whether the respondent's case is in any way prejudiced by the grounds being elsewhere than where they are indicated to be and secondly

whether the mislocation is such as to hinder the Respondent from appreciating the nature of the Applicants' case. The answer is a negative in either case. This preliminary objection has no leg to stand on.

Prematurity

The Respondent contends that because he made no decision one way or the other regarding PDM's registration there is nothing for this Court to review. He thus prays that these proceedings be dismissed out of hand for prematurity. The Applicants of course hold the contrary view.

There are two ways of looking at this objection. First is to consider whether as a matter of general principle no judicial review should lie in every case where a public office or officer claims to have made no decision on the matter before him. The answer should be in the negative. There will be instances where a public office or officer decides not to make a decision. The complaint in that instance will be the public officer's or office's very inability or unwillingness to decide. We think that in those instances courts should allow sufficiently interested citizens to move for a review of the officer's or office's decision not to decide. If the Courts did not they would be party to allowing capricious public officers and/or offices to hide behind such inability/unwillingness and deny citizens what is otherwise their entitlement. We therefore refuse to throw out the Applicants' application merely because the Respondent claims to have made no decision on whether or not to register PDM as a political party. We would have been willing to go with the Respondent if he were able to show that the alleged absence of a decision is itself not a decision not to decide.

The other way is to ask the question whether or not the respondent has indeed made no decision herein. The answer is in the positive. In paragraph 12 of the affidavit by Geoffrey Nkhata the Deputy Registrar General on behalf of the Respondent it is clear that the Respondent found the Applicants' application not in conformity with the Act. He had reservations about the language used in the prospective party's manifesto. He for that reason made a decision not to register PDM as a party. For the doubting Thomases we reproduce the said paragraph in full:

*'On assessing the documentation submitted by the Applicants, the Respondent found that the application was not in conformity with the Act. The Respondent found problems with the language used in the manifesto of the yet to be registered political party. The Respondent also observed that the purpose or object of the political party was unlawful in that the said manifesto in paragraph 4 thereof provided "**PDM will work to ensure that the best opportunities are accessible to all students. Malawi is ONE country and allowing young women and men to be subjected to finding education based on district of origin or ethnicity is not only criminal but retrogressive**."* [**Sic**]

In paragraph 13 the Respondent deponed that paragraph 4 was:

'Against the equitable system of admitting students to public universities and other tertiary institutions, also popularly known as the Quota system. The Applicants in their manifesto branded the quota system as being criminal. The Respondent is aware that the High Court of Malawi [Principal Registry] in Miscellaneous Civil Cause Number 138 of 2009 sanctioned the implementation of the quota system. Hence the Respondent was of the view that the quota system can not lawfully be branded as being criminal. Hence the Respondent was of the view that the purpose and object of the association were contrary to section 7(1)(c) of the Act. In addition, the membership of the association as evidenced by the 100 members who appended their signatures to the application, is from the Northern Region of Malawi only. The Respondent looked at this fact in light of the association's act of branding of the quota system as being criminal and it considered that the association sought to indirectly or directly further ethnical or racial discrimination contrary to section 7(2) of the Act. The Respondent was also aware that the issue of the quota system is still in court as an appeal thereof is before the Malawi Supreme Court of Appeal. Hence the respondent was mindful of proceeding cautiously'. [**Sic**]

There cannot therefore be any doubt that the Respondent made a decision about registering PDM as a political party under the Act. He decided not to register PDM. He thought the language used in the manifesto inappropriate. Also inappropriate was the fact that PDM was being promoted by persons from the northern region of Malawi only. PDM's objectives and purposes were also found unlawful. Is the applicants' application premature? The answer is a resounding no.

Justiciability

The Respondent contended on the one hand that the decision whether to register or not is his by law. Such decision according to him should not be amenable to judicial review because the Courts can not order him any which way. On the other hand he says the law does not set the time within which he should decide whether to register or not. The Respondent thinks the applicants have no case if their only complaint is that he has not registered their party quickly enough. Yet on the other the Respondent contended that the Applicants were clearly bent on denying him a chance to exercise its discretion herein. All they wanted was a day in court. The application to register was lodged on May 1, 2010. The revised manifesto was lodged on June 16, 2010. On July 21, 2010 the Applicants went to law even though the paperwork shows that it was ready by June 18, 2010. The Respondent says the above sequence of events denied him a chance to, further to his memorandum, exhibit GN4, of June 3, 2010 to the Honorable Attorney General seeking her advice, discuss this matter with the said Attorney General.

The Respondent is catching at straws. That the court papers were ready on June 18th we think is irrelevant. What is wrong with one being ready in advance? It is of significance however that the court papers were filed a whole month after the manifesto had been revised and sent to the Respondent during which time the Respondent had not found it necessary to in any way respond to the Applicants. The Respondent should not now be permitted to abuse the Applicants' preparations as if there is anything wrong with one getting ready to do battle. We also think that the Respondent should not be allowed to manipulate to his advantage the memorandum of June 3, 2010. The memorandum in issue was not, as is claimed, sent to the Attorney General but to the Solicitor General. Further the Respondent was not in that memorandum seeking advice but directions. It is to say the very least disingenuous for the Respondent to tell this court that he had written a memorandum to the Honorable Attorney General seeking her advice and argue that the registration of PDM should therefore await the receipt of such advice when no such advice had been sought in the first place. It was going to be like waiting for the literary Godot. But more than that exhibit GN4 is indicative of the extent to which the Respondent misapprehended his role/function under the Act. His duty was to register once the criteria set by the Act had been met. He could, we want to believe, in the exercise of such function seek advice from whoever including [we also believe] the Honorable the Attorney General. But seeking advice is different from seeking directions. The former still leaves the discretion with the advice seeker. Seeking directions means one has abdicated their discretion and wishes some other person or institution to in effect tell them what to do. That, with respect, is what happened herein. The Respondent ceded his power to decide whether or not to register PDM as a political party to the Solicitor General. That is not what the Act envisaged. The Respondent should not now be allowed to put up as some kind of defence his own inability to decide or his decision to abdicate his functions under Act.
Regarding time limitations it might be true that the Respondent was not bound to make decisions within any given time. But that we are sure does not mean that the Respondent can sit on an application indefinitely just because the Act has not given time frames within which to register a party or not. If we interpreted the law thus we would in effect be allowing the law to be used as a tool to frustrate the very people whose rights it sought to protect and promote. In time honored legal fashion we think an application should be dealt with one way or the other within reasonable time with reasonableness varying from case to case depending on circumstances. It does not however seem reasonable to us for the Respondent to expect the Applicants to wait for advice from the Attorney General when none has in fact been sought from her. Or to wait while the Respondent in turn awaits instructions on how he should deal with an application from the Solicitor General which is clearly against the Act.

The Registrar's decision to register or not to register is therefore amenable to judicial review on the bases that include the time it has taken the Registrar to make the decision. Whatever order follow such review are in the discretion of the court. It is however not correct that such order will always be one requiring the

Registrar to register. It is also not true that the Applicants were bent on denying him the chance to exercise his discretion by using the courts to procure a registration of PDM as a political party. It is obvious that the Applicants only came to court after it became clear that the Registrar had taken them as far as he could.

The Language

The Respondent contends that the language used in the manifesto is inappropriate. The language in issue is that contained in paragraph 4 of the manifesto namely that 'PDM will work to ensure that the best opportunities are accessible to all students. Malawi is ONE country and allowing young women and men to be subjected to finding education based on district of origin or ethnicity is not only criminal but retrogressive'. The Respondent read these words to mean that PDM thinks the quota system is criminal and retrogressive. Are these words inappropriate? The way to answer this question is to ask and answer another question namely 'Does the Act specify what language should be used in the manifesto? The answer is an obvious no. The Act however proscribes an association from having unlawful objectives or purposes. We think that the Respondent would be within his rights if he regarded any words that portray unlawful objectives or purposes as problematic. Meaning that an applicant is free to use any words in their application as long as such words do not portray an illegal purpose or objective. Can the foregoing be said about the words quoted above? We do not think so. The objective or purpose of PDM in so far as education is concerned is to 'ensure that opportunities are accessible to all students'. That does not seem to us to be an unlawful purpose or objective. The words used can not therefore be inappropriate. They do not portray any unlawful objective or purpose. As to the Applicants saying the quota system is *inter alia* 'criminal and retrogressive' we think PDM was only expressing its view thereon. That is a view PDM, like many others, is entitled to hold notwithstanding the fact that it might be a minority or unpopular view with some sections of society. And the language employed to express such view should not be problematic merely because it is used to express a view that is unpopular or not universally held. The foregoing notwithstanding it should be noted that the language of the manifesto was changed. The Respondent thought that there was no meaningful change. He did not however say how it was inappropriate or against the Act. We have no way therefore of agreeing with him. See **H Mkandawire & Y Chihana v R** [supra]

The Respondent then cited the High Court's ruling in the Quota Case in support of his argument that the language used is inappropriate. As we understood him the Applicants can not call the quota system retrogressive or criminal when the High Court Principal Registry had in Miscellaneous Civil Case Number 138 of 2009 sanctioned it. With respect we think the Respondent is also catching at straws. The issue before the Court was not whether or not the quota system is criminal. The ruling can not therefore be on the criminality or otherwise of the quota system. In point of fact the ruling was not even about whether or not the quota system is legal. It was on whether or not an interlocutory injunction issued

against the quota system's implementation should be maintained. The Court thought not. We do not think it proper therefore that such ruling should now be used to masquerade the quota system as proper, not criminal or legal when it has not been decided on the merits. Neither, we think, should such ruling be used to stop persons or institutions from forming or expressing views about the quota system. But even if the Quota Case had been decided on the merits it is not, in our understanding of the law, that persons are precluded from holding a view that is different from that of the court [parties would not appeal if such were the case]. It is one thing to have a view different from that of the Court and quite another to disobey a court order. The most the Applicants have done herein is to hold a view different from that of the Court. They have not disobeyed a court order which sometimes amounts to contempt of court. See **John Z U Tembo & Kate Kainja v Attorney General**. The totality of it all is that there in fact is nothing problematic about the language used in the manifesto either in its original or amended format. The Applicants were only expressing their views. Sanctioning such language would most likely be unduly and unconstitutionally limiting the Applicants' freedom of expression.

Are the Objectives and Purposes of PDM unlawful?

The Respondent thinks that the 'purpose or object' of PDM are unlawful. It is a view he holds firstly because of PDM's stand that the quota system is 'criminal and retrogressive' and secondly because the membership of PDM is, 'as evidenced by the 100 members who appended their signatures to the application, from the northern region of Malawi only'. Regarding the quota system we think we have said enough. The PDM's object and purpose can not become unlawful merely because they hold the view that the quota system is criminal and retrogressive. One can not stop people/institutions from holding views on anything that tickles their fancy. Our constitution actually allows that very fact. Regarding the geographical origin of PDM's membership let us that we heard a similar argument in **R v Harry Mkandawire & Yeremiah Chihana** Criminal Case Number 5 of 2010 High Court Mzuzu Registry [unreported]. We dismissed it. We will do the same herein. Firstly it has not been suggested that non-northerners were precluded from signing the application. The conclusion has to be that they were free to or not to associate with northerners in relation to PDM. That non-northerners did not sign can not therefore be put against PDM or its promoters. Should it be an issue therefore that non-northerners did not sign on the application forms? If none came forward what were the promoters of PDM supposed to do? Force non-northerners to sign against their will? On the other hand should we really be worried about the geography of the initial 100 that sign a prospective party's application form and not the rest? Is it the law that an association's initial 100 members should be from all allover Malawi? Or that a grouping will only be registered as a political party if it has membership across Malawi, the three regions or tribes? The answer is of course in the negative. Has it been said that PDM's membership will only be restricted to northerners? Those non-northerners will be excluded? The answer is also in the negative. Clearly the Respondent's view that PDM sought directly or indirectly to further ethnical or

racial discrimination was a misapprehension of both the law and the facts applicable. It is an untenable conclusion. One that is also most likely inconsistent with the Constitution.

Did The Respondent Refuse, Neglect, or Fail to Register?

To refuse is to turn down, snub, rebuff, say no to, decline or reject. To neglect is to *inter alia* abandon, desert, overlook, disregard, forget or avoid. Failure has a lot to do with a lack of success and/or inability. In the context of this matter we have no doubt that the Respondent refused to register PDM as a political party. He thought the language used in the manifesto problematic. Similarly we think that the Respondent neglected and failed to register PDM as a political party. He had issues with the language used and the fact that the association was fronted by persons from the northern region of Malawi. When the language was redone the Respondent still did not register. In fact he did nothing in relation to the application. Instead the Respondent tried to give us the impression that he after the revision referred the matter to the Attorney General for advice. Of course the Respondent is not being entirely honest. Exhibit 'GN4' the loose minute is not as deponed in paragraph 17 to the Attorney General. It is to the Solicitor General. The Attorney General and the Minister of Justice were only copied. Secondly in the said minute the Respondent was not, again as suggested by paragraph 17, seeking legal advice. He was seeking directions. The actual words used are:

'I am seeking your directions on this matter in view of the fact that the manifesto in dealing with the education issue states that the system adopted by government is criminal and secondly that this matter is already in court'.

The Respondent was in other words asking the Solicitor General to tell him what to do. But more importantly [and sadly in our view] the Respondent was not being entirely honest when he deponed that he sought advice [from wherever] after noticing that the Applicants had not, as per his request, changed or improved the language of the manifesto. The redrafted manifesto went to the Respondent on June 16th, 2010 with a covering letter of the same date. The loose minute to the Solicitor General is dated June 3, 2010. Unless the Respondent is possessed of extraordinary powers we fail to see how he could have been seeking advice on the revised manifesto when he had not yet received it. In paragraph 16 of his affidavit the Respondent suggested that the Applicants were playing games and lacked seriousness. We think it is the Respondent who is playing games and showing disrespect to this Court. But maybe it does not matter. The conclusion is inescapable. The Respondent refused, neglected and failed to register PDM as a political party.

Was The Refusal Neglect And Failure To Register Unconstitutional, Unreasonable, *Ultra Vires*, And A Threat To Democracy?

We answer in the context of the reasons given by the Respondent for refusing to register the People's Democratic Movement as a political party and the Applicants' arguments against such reasons.

Is the Respondent's Decision Constitutional?

There are two aspects to this? Firstly the Applicants' right to fair administrative justice and secondly the Applicants' right to *inter alia* form political parties, to join political parties and to recruit members for a political party.
In the matter of fair administrative justice the Applicants contended that the Respondent was in breach of section 43 of the Constitution. In the Mwandenga case we said that a public officer's duty under section 43 is to give not just reasons in writing but reasons that justify the decision taken. Reasons that stand up to scrutiny. Is that the case herein? The answer has to be in the negative. To begin with strictly speaking no written reasons were given. But even if it were assumed that written reasons were given or that it was not in the circumstances necessary to give written reasons the reasons do not hold. They can not justify the decision made. We have shown above that PDM'S purpose or objective is not unlawful. The language too is not inappropriate any which way you look at it. Thirdly the Respondent was not being honest when he deponed that he was failing to decide because he was awaiting the Attorney General's advice on the edited version of the manifesto. He had not sought the Attorney General's advice. He could not therefore have been awaiting any. The Respondent's decision was thus unconstitutional for being in breach of administrative justice.

Coming to section 40 rights we have no doubt that if as the Respondent wants we were to hold that the language used was inappropriate merely because it was against the quota system or that PDM has unlawful purposes or objectives just because it is against the quota system or that its membership is potentially exclusively northern region we will in effect be unlawfully i.e. in breach of section 44(2) of the Constitution, limiting the Applicants' right to hold and impart opinions and also the right to form, join and recruit for political parties. So again the Respondent's decision does not pass constitutional muster under section 40(1)(a) especially.

Is the Respondent's Decision Unreasonable?

The unreasonableness referred to here is what is usually called Wednesbury Reasonableness. The most famous formulation of this rule is to be found in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223. Lord Green said a court can only interfere if the decision in issue is so unreasonable that no reasonable authority could ever come to it. Lord Diplock in **Council of Civil Service Unions v Ministry for the Civil Service** [1985] AC 374 said a decision could only be impugned if it so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.

The Respondent herein rejected the application because the applicants were opposed to the quota system and also because PDM was northern region based. It seems to us natural that when issues come for public discussion general consensus is rare. The norm is in fact diversity of views. We find it unreasonable in the extreme that one should be denied the right to hold or impart opinions just because he holds an opinion different from that of others. Similarly it also seems natural that there will be times when persons of a particular area will come together to discuss issues that concern them only. It will be unreasonable in the extreme for such people to be denied the formal registration of their association merely because the association is localized. Or merely because it does not include at the formative stage membership from the width and breadth of Malawi. We find the Respondent's decision unreasonable in the Wednesbury sense.

Is the Respondent's decision *ultra vires* him?

We approach this question by asking the question what is the Respondent entitled to do under the Act? Put simply we think it is to register as political parties those associations that meet the criteria set out in the Act. Corollary to such task is that the Respondent will not refuse to register associations that meet the said criteria. In the instant case the Respondent refused to register because he erroneously thought firstly that the language in the manifesto was improper and secondly because he thought the purpose and object of PDM unlawful. We have found both thoughts untenable. The conclusion in line with our above thinking is that the Respondent had no power to refuse to register PDM as a political party. His decision is clearly *ultra vires*.

Relief sought

The Applicants sought an order of *mandamus* or an order in terms of section 46 of the Constitution requiring the Respondent to forthwith register PDM as a political party or alternatively to hear and determine the Applicants' application for registration of PDM in accordance with the law.
We are aware that Courts must not under the thin disguise of judicial review do that which the public authority whose decision is the subject of review is mandated by law to do. In the instant case we should not take over the Respondent's function to register political parties. We are quick to remind ourselves though that the Respondent refused to register PDM because he thought the language used in the manifesto inappropriate and PDM's purpose and objective unlawful. We have found both reasons untenable under the enabling laws. The Respondent also wanted us to believe that he had referred the Applicants' application to the Attorney General for advice and was awaiting her advice before registering PDM as a political party. We have found the foregoing not to be true. He never wrote the Attorney General for advice. He instead wrote the Solicitor General for directions. The sum total of it all is that the Respondent should not in fact have refused to register PDM as a political party. There was no

valid reason for so doing. Should we in those circumstances grant an order requiring the prompt registration of PDM as a political party? We think if we did that we would most likely be accused of usurping the Respondent's powers to register political parties under the thin disguise of judicial review. On the other hand we will have indulged in an academic exercise if we do not make an order that effectively redresses the wrong suffered by the Applicants. Section 41(3) of the Constitution entitles a party to an effective remedy for acts violating its rights and freedoms. Under section 46(3) of the Constitution a Court is entitled to, where it feels that constitutionally protected rights have been violated, denied or threatened make an order that is necessary and appropriate to secure the enjoyment of such rights and freedoms or to prevent their being denied or violated. In the instant case the Respondent erroneously believed that there were impediments to the registration of PDM as a political party. We and the Respondent now know that there are no such impediments. PDM can and should be registered as a political party. Taking all of the above into consideration we think we will have done our duty if we granted an order obliging the Respondent to within fourteen days of this opinion take a fresh look at the Applicants' application in the light of the fact that there are now no valid impediments to its registration. He will then make an appropriate decision within the said fourteen [14] days. If within the stated time the Respondent does not register PDM as a political party or show cause to this Court why it should not be so registered PDM will be deemed to have been registered on the day following the expiration of the abovementioned fourteen days in which case the Registrar of this Court will be mandated to sign off such application.

CONCLUSION

The Respondent's decision is unconstitutional, unreasonable in the Wednesbury case, *ultra vires* the Respondent and a threat to democracy. It is untenable. It is hereby quashed. An order is also hereby granted requiring the Respondent to within fourteen [14] days of this date revisit its decision herein in the light of our conclusion above that there is no impediment to registering PDM as a political party. PDM will be deemed to have been registered on the fifteenth day if the Respondent does not register it or show cause to this Court why it should not be so registered.

COSTS

These are in the discretion of the court. The Applicant will have the costs of this application.

Delivered in Chambers this October 19, 2010 at Mzuzu.

L.P. Chikopa
JUDGE