IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICAL REVIEW CASE NUMBER 91 OF 2016

BETWEEN:

THE STATE

AND

DEPUTY GOVERNOR OF THE RESERVE

BANK OF MALAWI **RESPONDENT**

EX PARTE:

NBS BANK LIMITED **APPLICANT**

CORAM: JUSTICE M.A. TEMBO,

Mpaka, Counsel for the Applicant
Majamanda, Chakaka-Nyirenda and Mlambe, Counsel for the Respondent
Mtegha, Official Court Interpreter

JUDGMENT

This is this Court's order on the applicant's originating motion for judicial review of the decision contained in the respondent's letter dated 27th September 2016 directing the applicant to reinstate or replace real property title number Likabula 3024 formerly charged under loan agreements between the applicant and its customer Liviness Yadidi and directing such reinstatement or replacement on the basis of the

respondent's finding of the applicant's alleged negligence in the performance of its contractual relations with its said customer.

The applicant is a financial institution with its heads office at Ginnery Corner in Blantyre and duly registered to carry on banking business in Malawi. The applicant is subject to the regulatory and supervisory functions of the Registrar of Financial Institutions in accordance with the Financial Services Act or any financial services laws as provided in sections 2 and 3 of the Financial Services Act.

The respondent is the Deputy Governor of the Reserve Bank of Malawi an office created under section 12 (2) of the Reserve Bank of Malawi Act.

By the originating motion, the applicant seeks the following reliefs:

1. A declaration that the respondent is bound to strictly follow the dictates of the following statutes as read together, namely, the Financial Services Act, the Reserve Bank of Malawi Act, the Banking Act, the Registered Land Act and also the Constitution, in his dealings with the affairs concerning the regulation and supervision of the applicant as a financial institution.
2. A declaration that on the true construction of the Financial Services Act, the Reserve Bank of Malawi Act and the Banking Act:
   i. The Reserve Bank of Malawi has no supervisory and regulatory functions or authority over financial institutions except to support the regulation and supervision.
   ii. The supervisory and regulatory functions over financial institutions resides in the Registrar of Financial Institutions under the Financial Services Act.
   iii. The Deputy Governor of the Reserve Bank of Malawi is not the Registrar of Financial Institutions and that the office of the Registrar of Financial Institutions under the Financial Services Act is separate and distinct from that of the Governor or Deputy Governor of the Reserve Bank of Malawi under the Reserve Bank of Malawi Act.
3. A declaration that on the true construction of the Financial Services Act, the Reserve Bank of Malawi Act, and the Registered Land Act
   i. The Registrar of Financial Institutions has no authority to issue regulatory and supervisory directions against a financial institution

prior to giving the financial institution written notice of the proposed action and specifying the grounds and facts for the proposed action with a 21 day right to be heard on the proposed action.

ii. The Registrar of Financial Institutions has no authority to issue any direction which has the effect of terminating, repudiating, or cancelling a contract between a financial institution and its customer and/or closing out a transaction with the institution and/or to direct compensation under the contract or at all.

4. A declaration that it is unreasonable in the *Wednesbury* sense and *ultra vires* for the respondent to make the decision complained of herein.
5. An order akin to certiorari quashing the decision of the respondent.
6. An order for costs and all necessary and consequential directions.

The issue for determination in this matter is whether the respondent correctly discharged his statutory and administrative powers under the Constitution, the Reserve Bank of Malawi Act, the Banking Act, the Financial Services Act and the Registered Land Act in directing the applicant to reinstate or replace real property title number Likabula 3024 formerly charged under loan agreements between the applicant and its customer herein and directing such reinstatement or replacement on the basis that the respondent's finding that the applicant was negligent in the performance of its contractual relations with its customer in question.

The applicant contends that the respondent failed to correctly discharged his statutory and administrative powers under the Constitution, the Reserve Bank of Malawi Act, the Banking Act, the Financial Services Act and the Registered Land Act and that his decision is ultra vires under the law.

The applicant correctly asserts that it has standing in this matter given that it is directly affected by the decision under review.

The applicant sets out the background facts as follows. That the respondent is an office distinct from that of Governor of the Reserve Bank of Malawi under the Reserve Bank of Malawi Act.

The applicant pointed out that the principle objectives of the Reserve Bank of Malawi Act are set out in section 4 of the Reserve Bank of Malawi Act and they do not include regulation and supervision of financial institutions.

It pointed out further that, in relation to supervision and regulation of financial institutions, the closest the Reserve Bank of Malawi is assigned by law to do is in section 4 (1) (h) of the Reserve Bank of Malawi Act, namely, to support the regulation and supervision of financial institutions in accordance with financial services laws.

The applicant noted that, in fact, Part IX of the Reserve Bank of Malawi Act which hitherto provided for supervision of banks and other institutions by the Reserve Bank of Malawi was repealed by Act no. 5 of 2011.

The applicant noted further that the regulatory and supervisory authority for the financial services industry is the Registrar of Financial Institutions as per section 8 (1) of the Financial Services Act.

The applicant added that according to section 8 (2) of the Financial Services Act, the Registrar of Financial Institutions is the Governor of the Reserve Bank of Malawi. And further that the office of the Governor of the Reserve Bank of Malawi is created under section 12 (1) of the Reserve Bank of Malawi Act.

The applicant then pointed out that the office of Deputy Governor of the Reserve Bank of Malawi is created under section 12 (2) of the Reserve Bank of Malawi Act. It added that the Deputy Governor is neither the Governor nor the Registrar of Financial Institutions under the law.

The applicant then pointed out that while in section 13 (3) of the Reserve Bank of Malawi Act the duties and functions of the Governor can be carried out by the Deputy Governor, there is no corresponding authority under the Financial Services Act creating a Deputy Registrar of Financial Institutions or constituting the Deputy Governor as a Deputy Registrar of Financial Institutions or constituting the Deputy Governor as Registrar or delegating the duties and functions of the Registrar to the respondent or any other authority.

The applicant then stated that following a complaint by one of its customers, Ms Liviness Yadidi, concerning the realization of security over charged property title number Likabula 3024, the Registrar of Financial Institutions carried out investigations into the complaint and produced an interim report in or around May 2016. A copy of the report was exhibited and marked as VBM 1.

The applicant notes that investigations by the Registrar of Financial Institutions are carried out under sections 41 to 44 of the Financial Services Act and that directions by the said Registrar are given under section 39 to 49 of the Financial Services Act.

The applicant then stated that in July 2016, officers of the Registrar of Financial Institutions invited officers of the applicant to a meeting to discuss the Liviness Yadidi complaint in an earnest manner and to reach an amicable conclusion. The minutes of this meeting are exhibited and marked as VBM 2.

The applicant asserted that it was resolved at the end of the said meeting that the applicant should be free to bring forth any additional evidence to assist resolve the case.

The applicant further asserted that although it was resolved that the applicant brings forth any such information by 4th August, 2016 the applicant only managed to bring forth such information on 8th October, 2016 given the lapse of time since the transaction in issue took place. The applicant's letter and report containing the information in issue is exhibited as VBM 3.

The applicant then indicated that by the time it sourced information from its archives, the respondent had on 27th September, 2016 already issued his determination and directions complained of in these proceedings. A copy of the letter dated 27th September 2016 containing the impugned decision is exhibited as VBM 4.

The letter VBM 4, from the respondent and addressed to the applicant's Chief Executive Officer is in the following terms

> Complaint by Ms Liviness Yadidi against NBS Bank
>
> You will recall that the Registrar of Financial Institutions has been investigating on the matter filed by your customer, Ms Liviness Yadidi, against your bank.

Our investigations reveal that the three loan facilities which were debited to her loan account in amounts of K1.2 million, K1.5 million and K730, 000 on 4th April 2006, 18th May 2008 and 10th July 2009 respectively, are disputable. Our quest for the bank to produce documentation supporting the applications and granting of the loans to the customer bore no fruits raising doubts on the authenticity of the transactions. In the circumstances, we are left with no option but to direct as follows:

a. The bank must do a reconstruction of the complainant's loan account, leaving out the disputed loans, to establish the amount the customer owed the bank at the date of selling the house. In the event that there was outstanding amount to the bank, the client should be requested to repay at agreed terms of repayment. Should the reconstruction reveal that the client overpaid the bank, you should within 14 working days refund her; and
b. Notwithstanding the direction above, the bank must within 30 calendar days reinstate or replace the sold collateral. It is our considered view that the bank acted negligently by proceeding to foreclose the client's property amidst her justified objections and concerns.

Please note that this determination is final.

Yours faithfully

Dr Grant P. Kabango
Deputy Governor Supervision

The applicant indicated that although it requested the respondent to reconsider the decision above in light of VBM 3, the respondent maintained his decision in VBM 4. And further that the decision in VBM 4 is final and that any party dissatisfied with the decision was at liberty to seek redress elsewhere. A copy of the letter from the respondent to the applicant's Chief Executive Officer dated 16th November 2016 maintaining the decision in VBM 4 is exhibited as BVM 5 and is in the following terms

Appeal Against Registrar of Financial Institutions Resolutions on Ms Livines Yadidi Complaint

Reference is made to the above subject matter and our communication of 27th September 2016 to your institution.

Please be advised that although the Registrar of Financial Institutions had made a final determination on this matter, he still considered your appeal in the spirit of fairness. Nonetheless, having analysed the documentation, the Registrar concludes that there is no new evidence warranting a change of direction. Most importantly, the bank erred in proceeding to dispose of collateral fully aware of a genuine query on the loan account.

In this regard, the earlier decision of the Registrar of Financial Institutions still stands and we expect the bank to comply within 30 days of this letter. If either party is not satisfied with the determination, that party is at liberty to seek redress elsewhere. Otherwise, the Registrar considers this matter closed.

Yours Faithfully

Dr Grant P. Kabango
Deputy Governor Supervision

The applicant then asserted that although the respondent insists on his decision complained of herein, by the time the complaint was lodged and the respondent's decision was made, security constituted in title number Likabula 3024 had long been realized under the chargee-chargor contract between the applicant and its customer herein, and the property duly transferred to a purchaser and once again charged to the applicant under a totally different contractual arrangement with the new proprietor. The applicant exhibited as VBM 6 a certificate of official search at the Land Registry showing the current said status of the property.

The respondent asserted that the respondent's decision is significantly mistaken and is of no legal force and hence the applicant seeks the reliefs enumerated above for three reasons, namely, want of jurisdiction in that the Deputy Governor is not the Registrar of Financial Institutions, breach of mandatory statutory process resulting in procedural impropriety and want of jurisdiction due to excess of authority.

With regard to want of jurisdiction in that the Deputy Governor is not the Registrar of Financial Institutions, the applicant asserted that at no time did the Respondent have authority to issue the directions contained in the letter VBM 4.

The applicant posited that the respondent was not the Registrar of Financial Institutions and therefore had no supervisory and regulatory jurisdiction to issue directions which can otherwise issue under sections 39 and 40 of the Financial Services Act.

It added that, in fact, on 15th December, 2016 it inquired from the respondent, through counsel, by what authority the respondent made the decision in VBM 4. The applicant stated that it never got a response.

The applicant further asserted that to the extent that the respondent acted on 27th September 2016 without authority both directions in the letter of 27th September 2016 are ultra vires the respondent.

With regard to breach of mandatory statutory process resulting in serious procedural impropriety, the applicant asserted that even if the respondent had authority of the Registrar of Financial Institutions, the decision complained of remains ultra vires the respondent because the directions given were made without following the strict procedure under section 39 of the Financial Services Act.

The applicant pointed out that it is under section 39 of the Financial Services Act that the Registrar of Financial Institutions can issue directions to a financial institution to take action specified in the direction. Further, that the investigation process evidenced by VBM 1 and VBM 2 which was perhaps carried out under section 41 to 44 of the Financial Services Act cannot be transposed and/or be conflated with the Direction process borne out by sections 39-40 of the Financial Services Act. It added that these are distinct legal processes in bank supervision.

The applicant pointed out further that it is a mandatory legal procedure that if the Registrar of Financial Institutions wishes to issue directions under section 39 of the Financial Services Act, he or she must, before issuing the direction

a. Give the financial institution concerned written notice of the proposed action.
b. Specify the grounds for the proposed action.
c. Specify the facts supporting such grounds for the proposed action.

d. Allow for a hearing of the matter within 21 days of the notice of the proposed action.

The applicant observed that before issuing the letter of 27th September 2016, the respondent took no steps compliant with any of the procedural steps set out above.

With regard to want of jurisdiction due to excess of authority, the applicant asserted that even if the respondent had the authority and had complied with the strict statutory procedure prior to issuing the directions on 27th September 2016, the impugned decision herein would still be and remains ultra vires the respondent.

The applicant elaborated that under sections 39 and 40 of the Financial Services Act as read with sections 71, 139 and 140 of the Registered Land Act, the authority to cancel or to repudiate a contract and/or direct rectification of a transaction affecting registered land and/or order compensation on grounds of negligence lies with the High Court.

The applicant asserted that the decision of the respondent directing the applicant to reinstate or replace real property title number Likabula 3024 in effect directs rectification of the land register to reinstate the property or directs compensation to replace property. And further that the decision in effect cancels or repudiates the contract between the applicant and its customer and closes out the transaction from the parameters of the parties' agreement.

The applicant added that the impugned decision arrogates into the respondent the power to micro manage financial institutions when the financial services laws generally locate the Registrar of Financial Institutions at macro management level unless strict and specified procedure is exhausted. And so that the impugned decision is in excess of the authority of the Registrar of Financial Institutions and far in excess of the authority of the respondent.

The applicant then asserted that the respondent's decision if implemented has significant legal consequences, namely, severe punishment with administrative fines under section39 (9) of the Financial Services Act and exposure to frivolous claims from its customer on the back of the said decision.

The applicant also asserted that it has no alternative remedy. It added that by sections 78 and 82 of the Financial Services Act there is an Appeals Committee which cannot attend to the applicant's concerns because

i. The power of the Appeals Committee established under section 78 of the Financial Services Act is to review decisions made by the Registrar in accordance with financial services law.
ii. The respondent is not the Registrar of Financial Institutions and his impugned decision is not a decision made by the Registrar.
iii. Even if the respondent was Registrar of Financial Institutions, the impugned decision is not made in accordance with financial services laws. But rather the decision was made outside the financial services laws hence the applicant's claim that the respondent has suffered serious want of jurisdiction, exceeded jurisdiction and overstepped the legal process and that the impugned decision could not have been made in accordance with the financial services law.

On its part, the respondent filed an affidavit in opposition to the applicants originating motion for judicial review. The affidavit is sworn by Mr Thabo Chakaka-Nyirenda a Legal Services Manager at the Reserve Bank of Malawi who deponed to facts based on information known to him personally and also based on information that was passed on to him by the retained lawyers of the Reserve Bank of Malawi which he believed to be true to the best of his knowledge and belief.

Mr Chakaka-Nyirenda confirmed that the Registrar of Financial Institutions received a complaint against the applicant and indeed proceeded to investigate the same and held a series of meetings with the applicant. And that, this culminated in the findings of negligent handling of customer affairs herein against the applicant. And that the last meeting was held on 28th July, 2016 in Blantyre where it was agreed that the applicant should provide a report on the matter by 4th August, 2016.

He added that the applicant failed to submit its report as agreed but only did so more than two months later, on 8th October, 2016. And that in view of this, the Registrar

of Financial Institutions deemed it to be in the interest of justice to make a determination rather than wait indefinitely at the mercy of the applicant.

He confirmed that the determination and directions made by the Registrar of Financial Institutions was communicated to the applicant by a letter dated 27th September 2016.

Further, that the applicant was informed that if it was not satisfied with the directions it could seek redress elsewhere.

He then stated that the applicant lodged an appeal against the Registrar of Financial Institutions' directions of 27th September 2016 despite the clear indication that he had made that the decision was final. And that in the spirit of fairness, the Registrar of Financial Institutions considered the appeal and maintained his directions because the applicant did not bring any new evidence. He also confirmed that the decision maintaining the directions is contained in the letter dated 16th November 2016.

He then stated that the directions under review in this matter were made by the Registrar of Financial Institutions as is made clear by the letter dated 16th November 2016. And that the Deputy Governor of the Reserve Bank of Malawi was only requested to communicate the said directions.

He then stated that it is not true that the impugned directions herein were made by the Deputy Governor of the Reserve Bank of Malawi.

He then asserted that the Registrar of Financial Institutions handled the matter herein in a completely fair manner by holding a series of meetings with the applicant to give it an opportunity to explain its case and giving sufficient time to collect and submit evidence and accepting to reconsider the matter on appeal.

He added that the Registrar of Financial Institutions dealt with the applicant in an administratively just and fair manner and that it is not true that he failed to comply with section 43 of the Constitution.

He then stated that the applicant is not coming to court with clean hands pleading that it was not treated fairly when the applicant sold its customer's property before

establishing conclusively that the customer applied for and obtained the loans in dispute.

He then asserted that the applicant had a right to appeal against the impugned directions before the Financial Services Appeal Committee but for unknown reasons did not do so.

He concluded that on the facts, the Registrar of Financial Institutions acted within his lawful authority and in a procedurally fair manner in this matter. He therefore asked this Court to dismiss the applicant's application for judicial review with costs.

Having laid out the factual basis of their respective contentions, the parties made submissions on the relevant law in relation to the facts.

This Court wishes to state that as far as the applicant's application is concerned there are three grounds for the judicial review, namely, that the respondent made the impugned directions when he has no authority since he is not the Registrar of Financial Institutions, that the impugned directions were made in breach of the mandatory statutory procedure under the Financial Services Act and lastly, that the authority to cancel or to repudiate a contract and/or direct rectification of a transaction affecting registered land and/or to order compensation on grounds of negligence or for any ground at all lies with the High Court and so the directions were made in excess of the authority under the Financial Services Act.

This Court will deal with the submissions on each of the three grounds for judicial review in turn.

Before dealing with the submissions on the three substantive questions herein, this Court will deal with a few preliminary matters raised by the applicant concerning the affidavit of the respondent.

The applicant submitted that the affidavit sworn by Mr Thabo Chakaka Nyirenda, the Legal Services Manager for the Reserve Bank of Malawi, raises only 4 points of opposition, namely:

(i) That Mr Nyirenda explains that the respondent's decision of 27th September, 2016 complained of herein was merited because, according to Mr Nyirenda, the applicant conducted its affairs with Ms Yadidi "*in an unprofessional, unethical and suspicious manner*" and "*in gross disregard of the interests of Ms Yadidi*" such that "*the Registrar deemed it to be in the interest of justice*" to make the determination complained of;

(ii) That the decision and direction of 27th September, 2016 complained of herein was made by the Registrar of Financial Institutions not the Deputy Governor of Reserve Bank of Malawi;

(iii) That the Registrar of Financial Institutions dealt with the applicant in an administratively just and fair manner; and

(iv) That the applicant has an alternative remedy by way of appeal to the Financial Services Appeals Committee.

The applicant then observed that, in this review, there is thus a joinder of issues only on these three main points because, the respondent's objection concerning the merits and demerits of the respondent's decision has no place in a judicial review.

The applicant then made the following further observations concerning the contents of Mr Nyirenda's affidavit, namely:

(i) That the affidavit is not based on instructions or information from the respondent. And that paragraph 2 shows that the source of Mr Nyirenda's information is his personal knowledge and Mbendera & Nkhono Associates, the respondent's lawyers. The applicant opined that the information given by Mr Nyirenda thus should be of limited relevance as one would expect that Mr Nyirenda should have, at least, consulted the officer sued in this matter.

(ii) That at paragraphs 3-7, Mr Nyirenda confirms that the Registrar of Financial Institutions instituted an investigation into the complaint against the bank as lodged by its customer, Ms Liviness Yadidi. The applicant stated that the Registrar of Financial Institutions is entitled under sections 41-44 of the Financial Services Act to investigate or examine the affairs of the applicant. And that it is a non-issue that Registrar of Financial Institutions investigated the complaint.

(iii) That the merits or demerits of the respondent's decision is not the business of this Court in a judicial review now before the Court. And that, the justification for the respondent's decision as advanced by Mr Nyirenda, being the conduct of the applicant, is of no real value in this review.

(iv) Besides, the applicant observed that the grounds for the merits of the respondent's decision as identified by Mr Nyirenda (i.e. alleged "*unprofessional, unethical and suspicious conduct and gross disregard of complainant's interests*") are different from the grounds justifying the decision as stated in the respondent's letter of 27th September, 2016 (i.e. alleged "*negligence in proceeding to foreclose amidst objections and concerns*"). The applicant then observed that to this extent, Mr Nyirenda may not be addressing the exact same complaint taken out by the bank in the Form 86A. And that, yet, it is always important and imperative to appreciate the Applicants case in a Judicial Review.

(v) That apart from the 4 points noted at clause 4 above, Mr Nyirenda's affidavit is conspicuously silent on the rest of the factual and legal points forming the basis of the complaint in this review. For example, to date, and even in these proceedings, the respondent has not explained with what authority he issued the decision of 27th September 2016 complained of herein-even in the

wake of an inquiry in by the applicant pertaining to the said authority as contained in the letter marked as VBM 7.

The respondent replied as follows on the preliminary matters.

That it may be appropriate at this point to express the difficulty it has had in dealing with the applicant's originating motion. That this is a judicial review application and that there are well known and settled grounds of judicial review.
And that in these kinds of applications, it is normally expected of an applicant to identify the grounds of judicial review on the basis of which he is making the application and to simply apply the grounds to the facts which he alleges.

That in the present case, the application was framed in a way that made it difficult to identify some of the grounds of judicial review raised. The respondent felt entitled to make this comment since the applicant seems to suggest that the respondent did not respond in the best of ways in its affidavit in opposition as it can be seen from the applicant's submissions.

The respondent added that he can only suggest that the applicant should not present mixed and confused factual and legal background as was the case herein. And that if that is avoided, it makes it easier to follow the application, not only for the respondent who is answering the application, but also the Court, to identify the well-known grounds of judicial review and apply them to the facts. And that these are sentiments that the respondent tried to abstain from expressing during the oral submissions, but now feels it is appropriate to state.

The respondent noted that the applicant alleges that the respondent's affidavit in opposition is conspicuously silent on the rest of the factual and legal points forming the basis of the complaint in this review. The respondent wonders what grounds of judicial review this application raises that the respondent has not addressed.

The respondent noted further that the applicant raised a lot of issues in its skeleton arguments and submissions which one can plausibly say, have no place in judicial review proceedings. He repeated that this is a judicial review application with well-known grounds. And that in dealing with the same, the respondent had dealt with

the judicial review grounds raised in this application because those are the only ones that the court shall deal with since it has been moved under Order 53 Rules of Supreme Court.

The respondent submitted that it is beyond the applicant's right to raise anything outside the known grounds of judicial review when it elected to proceed under this procedure. And that the accusation that the respondent has not dealt with any factual and legal points forming the basis of the complaint is therefore not only unfair, but also legally incorrect.

Having said the above, the respondent, correctly in the view of this Court, stated that the matters which it deems to be in issue are as follows.

(i) Whether Mr Thabo Chakaka Nyirenda is competent to swear the affidavit in opposition to the originating motion.

(ii) Whether the respondent is going to the merits of the complaint in his response.

(iii) Whether the Deputy Governor of the Reserve Bank of Malawi made the direction in question.

(iv) Whether the direction in question was made in excess of lawful authority

(v) Whether the direction was made in breach of mandatory procedure and, if so, what are the consequences?

Matters (i) and (ii) are the preliminary issues that this Court will deal with first whereas the rest are substantive matters to be dealt with after the preliminary issues.

On whether Mr Thabo Chakaka Nyirenda was competent to swear the affidavit in opposition to the originating motion the respondent submitted as follows.

The respondent observed that, in paragraph 1 of the affidavit in opposition, Mr Thabo Chakaka Nyirenda depones that he is the Legal Services Manager at Reserve Bank of Malawi and that therefore he was duly authorised to swear that affidavit.

The respondent noted that there is no doubt that the affidavit is a legal document that had to be filed with the court and that therefore there is an apparent connection between it and Mr Thabo Chakaka Nyirenda's office as Legal Services Manager.

Further, that Mr Thabo Chakaka Nyirenda is authorised to work in coordination with other offices of the Reserve Bank of Malawi, including the Governor and Deputy Governor thereof, as well as the Registrar's is clear from Section 14 of the Reserve Bank of Malawi Act and Section 9 of the Financial Services Act.

The respondent observed further that the ability of Mr Thabo Chakaka Nyirenda to have personal knowledge of legal matters affecting the bank and its officers as well as the Registrar of Financial Institutions cannot be doubted by any serious person. And that Mr Chakaka Nyirenda may acquire personal knowledge of those matters by being told verbally, being shown some written documents containing any information or indeed by any other way.

The respondent added that whichever way the matter is looked at, those are purely internal arrangements within the Reserve Bank, and it cannot be seriously contended that his capacity to depone to facts known by him on any legal issues affecting the Registrar of Financial Institutions, the respondent or indeed any officer of the Bank is questionable simply because he does not specify how he perceived those facts in his affidavit or because he did not expressly depone that he obtained the information contained in the affidavit from the Deputy Governor of the Reserve Bank.

The respondent argued that the contention by the applicant that the affidavit is not based on instruction or information from the respondent is merely an attempt to derail the court from the main issues in this review. The respondent therefore submitted that on the basis of his position at the Reserve Bank of Malawi, Mr Thabo Chakaka Nyirenda is duly authorised and competent to swear the affidavit in

opposition on behalf of the respondent herein and has sufficient means of acquiring knowledge and information contained in his affidavit.

The respondent also pointed out that Mr Thabo Chakaka Nyirenda has said in his affidavit that the information he depones is also within his personal knowledge which is in tandem with Order 41 rule 5 (1) Rules of Supreme Court. And that the applicant cannot fault this possibility.

The respondent added that, if there was doubt on such personal knowledge, the applicant should have exercised its right to cross examine Mr Chakaka Nyirenda in order to impeach such assertion by him.

This Court entirely agrees with the respondent that Mr Thabo Chakaka Nyirenda has stated sufficient grounds for his personal knowledge of the matter herein being that he is in-house counsel at the Reserve Bank of Malawi whose Governor is the Registrar of Financial Institutions. He also works with other officers of the Reserve Bank including the respondent.

In the circumstances, the applicant's assertion that Mr Chakaka Nyirenda did not state that he interviewed the respondent is not a plausible basis for the applicant to cast doubt on Mr Thabo Chakaka's ability to have personal knowledge of the matters herein.

On whether the respondent dealt with the merits or demerits of its decision in his response the respondent submitted as follows.

The respondent noted that the applicant contends under paragraph 6(ii) of its submissions that the respondent is dealing with the merits of the Registrar of Financial Institutions' decision by addressing the justification for the direction in question.

The respondent submitted that it is not correct to suggest that. He argued that he has been prompted by the applicant to respond to the substantive issues raised by the applicant and in doing so, he is under a duty to bring to the attention of the court sufficient and all material facts leading to the decision in question.

The respondent submitted further that he denies acting outside the law as the applicant alleges in this review, and in doing so, not only does he have to demonstrate the existence of facts entitling the Registrar of Financial Institutions to make the direction in question, but also to demonstrate that whatever he did, it was done with lawful authority. And that, this can only be done by laying before this Court all material facts leading to the direction in question.

The respondent concluded that it is therefore not correct that the respondent is dealing with the justification for the Registrar's decision as the applicant wishes this Court to believe.

This Court has considered the circumstances of the matter and notes that, contrary to the applicant's assertion, at no point does the respondent try to raise the issue of the merit of the impugned decision. As correctly stated, the respondent is simply putting the matter in proper perspective in so far as the facts surrounding the impugned decision are concerned.

The preliminary observations made by the applicant were therefore an unnecessary distraction from the main issues in these proceedings as is correctly submitted by the respondent.

This Court is aware of the law on judicial review as stated by the parties. As correctly submitted by the applicant, there have been developed very well-known key legal principles in a judicial review. These are to be found in many local cases and have been best captured in State *v. Malawi Energy Regulatory Authority ex parte Malawi Housing Corporation,* Judicial Review Cause No. 37 of 2013 (High Court) (unreported) where it was stated at pages 8 and 12 that

> (i) The remedy of 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.
>
> (ii) The court in judicial review proceedings does not act as a court of appeal. If the court were to attempt itself the task entrusted to that authority by law, the court would, under the guise of preventing the abuse of power,

be guilty itself of usurping power. Judicial review looks at the procedure in the decision-making process of the public body.

(iii) The remedy of judicial is not available in cases where other remedies exist and have not been used, such as an appeal to the superior court or statutory appellate tribunal or recourse to another forum.

(iv) It is, therefore, important that the judicial review process should not be clogged with unnecessary cases, that is, cases which are perfectly capable of being dealt with by other tribunals.

(v) The all-important question is whether or not the existence of appeal mechanisms is in all cases fatal to an application for judicial review.

(vi) The appropriate mechanism to attack a nullity is not an appeal but judicial review.

And in *Mchawi v. Minister of Education, Science and Technology* MLR [1999] 172-173 where it was also stated that

> This development or evolution in legal thinking has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law on its action, as for example purporting to exercise a power which in law it does not possess – that is acting ultra vires its jurisdiction. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyer's shorthand the Wednesbury principles (See Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680). The third is where it has acted contrary to what are often called "the principles of natural justice". This phrase has since been replaced and we now speak of a duty to act fairly. There is a caution that this latter phrase of a duty to act fairly must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decision taken in fulfillment of that policy is fair. The courts are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case. Lord Diplock in the said case of **Council of Civil Service Union** devised

> a nomenclature for each of these three grounds, calling them respectively "illegality," "irrationality," and "procedural impropriety."

And in *State and Another v. Malawi Electoral Commission* [2004] MLR 374, 379 where it was also stated that

> Irrationality is multifaceted and is reflected in any of the following conduct by the a public authority: acting in bad faith...,improperly, delegating functions, reaching a conclusion that nobody properly directing itself on the relevant law and acting reasonably could have reached...abuse of power.

The applicant also stated that the *delegatus non potest delegare* principle listed in the *Malawi Electoral Commission* case entails that when a power has been conferred to a person he must exercise that power personally unless he has been expressly empowered to delegate it to another. See The Rt Hon The Lord Woolf, et-al(eds.), De Smiths Judicial Review. London: Sweet & Maxwell (2007) at 297-316.

This Court now deals with the three grounds for the judicial review, namely, that the respondent made the impugned directions when he has no authority since he is not the Registrar of Financial Institutions, that the impugned directions were made in breach of the mandatory statutory procedure under the Financial Services Act and lastly, that the authority to cancel or to repudiate a contract and/or direct rectification of a transaction affecting registered land and/or to order compensation on grounds of negligence or for any ground at all lies with the High Court and so the directions were made in excess of the authority under the Financial Services Act.

On the first ground for judicial review, namely, that the respondent made the impugned directions when he has no authority since he is not the Registrar of Financial Institutions, the applicant submitted as follows.

The applicant submitted that at no time did the respondent have authority to issue the directions contained in the letter marked VBM 4 above. And that at all material times, the respondent was not the Registrar of Financial Institutions and therefore had no supervisory and regulatory jurisdiction to issue these directions. Further that, if at all, these directions, can be issued by the Registrar of Financial Institutions under sections 39 and 40 of the Financial Services Act.

The applicant submitted that, in fact, on 15th December 2016, the applicant, by counsel, inquired of the respondent the authority with which the respondent made the decision in VBM 4. It noted that to the date and even in these proceedings, the respondent has not provided any basis for his decision. The applicant noted that the exhibit marked as VBM 7 is the inquiry duly issued and delivered to the respondent.

The applicant then submitted that, in seeking to cloak the respondent with some sort of authority to issue the decision complained of as contained in VBM 4, the respondent at the hearing relied on sections 8(3), 8(4) and 9(1) of the Financial Services Act. It reproduced these provisions for easy reference and comment.

Section 8(3) of the Financial Services Act provides that the Registrar shall be supported by adequate structures and employees with appropriate skills to enable him perform the duties of the Registrar.

Section 8(4) of the Financial Services Act provides that

> Without limiting the Registrar's power to create structures, the Registrar shall establish departments to supervise the operations of banking, insurance, pension benefit fund schemes, securities market entities, and any other area deemed necessary by the Registrar for the better carrying out of the requirements of this Act.

Section 9(1) of the Financial Services Act provides that in addition to the functions it has under the Reserve Bank of Malawi Act, the Reserve Bank has the function of supporting the Registrar in carrying out his functions under this Act and other financial services laws.

The applicant then submitted that this Court will recall and observe that it is a basic cannon of statutory interpretation that the Court must look no further than the statute itself to decipher the meaning of statutory words unless there is lack of clarity in the statute. And that, where the words are clear, the court should hold that the intention of the legislature is best declared by the words themselves. See *Royal International Holdings Ltd v. Gemini Holdings Limited and Another* [1998] MLR 318

It submitted further that the words of any statutory provision must be read in the context provided by the statute as a whole. See *Black-Clawson Limited v. Papierwerke A.G.* [1975] UKHL 2; [1975] AC 591, 613. Further, that every clause is to be construed with reference to other clauses of the Act and its context. See *Jmaiff v. The Grand Forks Rural Fire Protection District* [1990] CanLII 242.

The applicant then submitted that, in their plain language the provisions in sections 8(3), 8(4) and 9(1) of the Financial Services Act cited do not make the Deputy Governor of Reserve Bank of Malawi an authority in bank supervision and regulation. And that the provisions do not make him an employee of the Registrar of Financial Institutions. Further, that they do not create a structure or department under which the Deputy Governor can carry out bank supervision. The applicant added that under the Financial Services Act there is no such a thing as Deputy Governor for Supervision.

The applicant submitted that the legal context of the Financial Services Act is that it comes at a time when the Reserve Bank of Malawi is being divested of supervisory and regulatory powers over financial institutions and that power is being bestowed upon the Registrar of Financial Institutions.

And that, in that legal context, the provisions in sections 8(3) and (4) anticipate that the office of Registrar of Financial Institutions, which is taking over formerly Reserve Bank of Malawi Act Part IX powers and functions of the central bank, will have "adequate structures" and "employees" and that the Registrar of Financial Institutions will "establish departments"

The applicant pointed out that the legal history also shows that the Financial Services Act is passed, and therefore the office of Registrar of Financial Institutions is created by Act No. 26 in July 2010, and then Part XI of the Reserve Bank of Malawi Act is repealed by Act 5 of 2011.

It pointed out further that one would expect that Parliament anticipated that the Registrar of Financial Institutions established in 2010 to have created the structures and departments under sections 8(3) and (4) sections 8(3), 8(4) and 9(1) of the

Financial Services Act and identified his employees under section 8(3) sections 8(3), 8(4) and 9(1) of the Financial Services Act by the time the Reserve Bank of Malawi was being completely divested of Part XI powers under its enabling law.

The applicant then submitted that this Court will notice that the only authority concerning bank supervision and regulation left with the Reserve Bank of Malawi is power "to support the regulation and supervision". And that the regulation and supervision itself no longer was left with Reserve Bank of Malawi. And that this is what the plain reading of section 9(1) sections 8(3), 8(4) and 9(1) of the Financial Services Act and section 4(1)(h) of the Reserve Bank of Malawi Act jointly or separately means.

The applicant submitted further that, while the Reserve Bank of Malawi can support it, the office of Registrar of Financial Institutions is, independent of the Reserve Bank of Malawi under the legal framework. And that it must have its structures, employees and departments adequate to carry out the functions of a regulatory and supervisory authority for financial institutions.

The applicant then submitted that when the question in exhibit VBM 7 is posed to the Deputy Governor of the Reserve Bank of Malawi to say *"with what authority have you delivered the decisions which seems to fall under the jurisdiction of Registrar of Financial Institutions"*, it was for the respondent to say either he is an employee of the Registrar of Financial Institutions under section 8(3) sections 8(3), 8(4) and 9(1) of the Financial Services Act, or he fall within or under such and such a structure or department set up at such and such a time by Registrar of Financial Institutions under section 8(3) and(4) sections 8(3), 8(4) and 9(1) of the Financial Services Act, or his writing of VBM 4 is what we call supporting the Registrar of Financial Institutions under sections 4(1)(h) of the Reserve Bank of Malawi Act and section 9(1) sections 8(3), 8(4) and 9(1) of the Financial Services Act, or he had been delegated by the Registrar of Financial Institutions or whoever to deliver this' and here is the instrument of delegation under section 20 sections 8(3), 8(4) and 9(1) of the Financial Services Act or that he was delivering this because he is the Deputy Governor of the Reserve Bank of Malawi etc.

The applicant submitted that without the respondent delivering any response in or out of Court to the question posed, this Court is unable to tell and evaluate for legal compliance the authority with which a Deputy Governor of the Reserve Bank of Malawi Supervision would deliver a decision on investigations carried out by the Registrar of Financial Institutions.

The applicant noted that, in addition to relying on sections 8(3) and (4) and s.9(1) sections 8(3), 8(4) and 9(1) of the Financial Services Act the respondent suggested at paragraph 3.7 of its skeleton arguments that in VBM 4 the respondent Deputy Governor of Reserve Bank of Malawi was "merely communicating the Registrar's decision" because "the Registrar was entitled both under section13(3) Reserve Bank of Malawi Act and section 20(1) Financial Services Act to direct the respondent to communicate the decision on his behalf to the applicant".

To this the applicant had the following say. That it is a nice proposition for the respondent to make. But however, that it is not supported by any evidence on the face of exhibit VBM 4 to suggest that the Registrar of Financial Institutions directed the respondent.

Further, that section 13 (3) of the Reserve Bank of Malawi Act does not enable the Deputy Governor to carry out any function of the Registrar of Financial Institutions. Rather, that it enables him on specified conditions to carry out the "functions of the Governor".

The applicant added that section 13 (3) of the Reserve Bank of Malawi Act presupposes direction from the Governor, or absence or vacancy in the office of Governor. And that it relates to functions under the Reserve Bank of Malawi Act.

The applicant added further that apart from section 13(3) of the Reserve Bank of Malawi Act being irrelevant, there is no evidence before this Court disclosing absence of Governor or vacancy in the office of Governor or direction from Governor at the issuance of VBM 4 on 27th September 2016.

The applicant then submitted that, on its part, section 20 of the Financial Services Act which entitles the Registrar of Financial Institutions to delegate his functions not only makes the distinction between Reserve Bank of Malawi and Registrar of Financial Institutions more emphatic but also supports the conclusion that the Deputy Governor of RBM did not have authority to make the pronouncement in VBM 4 because of the following reasons.

Firstly, that section 20(1) of the Financial Services Act excludes the Deputy Governor from the list of 4 entities to whom the Registrar of Financial Institutions can delegate. The personnel to whom the Registrar of Financial Institutions can delegate are clearly listed. They do not include the Deputy Governor of the Reserve Bank of Malawi.

Secondly, that at all times, the respondent was neither an examiner nor an investigator nor director or employee of Reserve Bank of Malawi nor a self-regulatory organisation. He was a Deputy Governor appointed under statute, namely, section12 (2) of the Reserve Bank of Malawi Act. If this Court reads section 20(1) of the Financial Services Act as against, sections 12(4) and 14 and 15A Reserve Bank of Malawi Act it will become clear that a Deputy Governor is not an employee. He is a Presidential appointee whose terms and conditions are set out in the instrument of appointment.

Thirdly, that section 20(2) of the Financial Services Act expects that there will be an instrument of delegation if the Registrar of Financial Institutions were to delegate any of his functions. The applicant observes that there is no such instrument to date in spite of inquiry in VBM 4 where it specifically inquired "*...with what authority you have delivered the decision..... In case there is any instrument in writing conferring the expressed role we would appreciate receiving relevant copies*".

Fourthly, that there is a specific provision saying Registrar of Financial Institutions can "*delegate to a director or employee of Reserve Bank of Malawi*" and that such delegation must be in "*an instrument specifying conditions of delegation*" which shows that Reserve Bank of Malawi employees or Directors let alone the Deputy

Governor cannot willy-nilly engage in Registrar of Financial Institutions' work. And that this buttresses the distinction between the two institutions.

The applicant contended that it looks like while the legal history and the ensuing legal framework meant to draw a distinction between the Reserve Bank of Malawi and the Registrar of Financial Institutions, officials at the Reserve Bank of Malawi and indeed within the financial industry are yet to see or implement that distinction.

And further that it looks like the Registrar of Financial Institutions is being treated just as a department within the Reserve Bank of Malawi. For example, in VBM 1 we see the office of Registrar of Financial Institutions issuing an investigation report on Liviness Yadidi complaint-suggesting that the Registrar of Financial Institutions was carrying out investigations as authorised by sections 41-42 of the Financial Services Act.

And in VBM 2 we see Reserve Bank of Malawi officials conducting a meeting and delivering *"Minutes of Meeting Held on 28th July 2016 between NBS Bank and Reserve Bank of Malawi on the Matter of Liviness Yadidi..."*.

And then we see in VBM 4 the office of the Deputy Governor of Reserve Bank Malawi delivering a decision on: "*our investigations*....in which '*our quest for the bank to*....and so "*we are left with no option but to direct.....*". And then sign off as *Deputy Governor: Supervision*.

The applicant asserted that the foregoing examples raise the question: whose investigation, is it? Is it of the Registrar of Financial Institutions or Reserve Bank of Malawi or both?

The applicant added that after and even when signing off as such the respondent came back two months later and said the Registrar of Financial Institutions considers this matter closed.

Further, that when a query is raised in Court, the Legal Services for Reserve Bank of Malawi came forth and said 'my Deputy Governor's decision you are complaining

about was made by the Registrar of Financial Institutions. I know this personally and after consulting our lawyers'. The applicant wondered if the Legal Services Manager is also the Legal Services Manager for the Registrar of Financial Institutions?

The applicant then contended that surely, it cannot be that such a lot has come to terms with the distinction set by law, and that unless this Court makes that distinction clear and emphatic, Parliament would have drawn it in vain.

The applicant submitted further that the tendency to conflate the institution of the Registrar of Financial Institutions with that of the central bank is carried on through the respondent's argument. It noted that at para.3.3, it is contended by the respondent that by inserting section 8(2) in the Financial Services Act, "*the legislature deliberately did not intend to create a separate office of the Registrar but chose to confer the authority on an office that was already existing to be acting as the Registrar, to wit, the office of the Governor*". The applicant opines that nothing could be further from the truth.

The applicant contended that it is one thing to create an office. And that it is another to confer authority on an official. It added that the legislative history we have looked at creates a distinct office of the Registrar of Financial Institutions which should have staff, structures and departments under sections 8(3) and (4) of the Financial Services Act.

It added further that if, as is suggested, Parliament did not intend to create a separate office, it would not have directed the creation of Registrar of Financial Institution's departments, structures and employees. And it would have simply said something like 'the Registrar of Financial Institutions shall operate within the structures, departments and with employees of the Reserve Bank of Malawi'.

The applicant then contended that the fact that there is failure to draw the distinction drawn by law explains why when asked on what basis he delivered the decision complained of, the respondent is unable, in or out of Court, to identify the authority on which he acted.

The applicant lamented that seven years after Parliament drew the distinction, one would have expected a ready answer from an institution which used to have powers of supervision and regulation. But that our Deputy Governor of the central bank does not seem to have such an answer.

The applicant then submitted that to the extent that the respondent acted on 27th September 2016 without any identified authority, the directions in the letter of 27th September 2016 are *ultra vires* the office of Deputy Governor of Reserve Bank of Malawi. Further that the said directions are null and void because of lack of authority on the part of the respondent to communicate let alone make the decision in VBM 4.

In reply on to the foregoing submission, the respondent submitted as follows.

The respondent noted that the applicant essentially contends that the Deputy Governor made the direction and that since he is not the Registrar, he acted ultra vires and accordingly, the direction is invalid. He then responded as follows.

He referred to section 8 of the of the Financial Services Act which provides as follows:

(1) There is hereby appointed a Registrar of Financial Institutions for the purpose of this Act and all financial services laws, who shall be the regulatory and supervisory authority for the financial services industry.

(2) The Governor of the Reserve Bank shall be the Registrar.

(3) The Registrar shall be supported by adequate structures and employees with appropriate skills to enable him perform the duties of the Registrar.

(4) Without limiting the Registrar's power to create appropriate structures, the Registrar shall establish departments to supervise the operations of banking, insurance, pension benefit fund schemes, security mal*et entities, and any other area deemed necessary by the Registrar for the better carrying out of the requirements of this Act.

He also referred to section 9 (1) of the of the Financial Services Act which provides that:

> In addition to the functions it has under the Reserve Bank of Malawi Act, the Reserve Bank has the function of supporting the Registrar in carrying out his functions under this Act and other financial services laws.

The respondent then submitted that, in the clearest of terms, the Registrar is the regulatory and supervisory authority for the financial services industry. And that the Governor of the Reserve Bank is the Registrar. And further that, therefore, by authority of section 8(2) of the Financial Services Act the Governor of the Reserve Bank is authorized to exercise all the powers and authority conferred by the law on the Registrar.

The respondent next submitted that the law is clear that the Governor of the Reserve Bank shall be Registrar. And that the said Registrar shall be supported by adequate structures and employees with appropriate skills to enable him perform the duties of the Registrar under Section 8(3) of the Financial Services Act.

The respondent further submitted that the Registrar has the power to create the said structures is clear from section 8 (4) of the Financial Services Act which begins with "without limiting the Registrar's power to create appropriate structures". And that having conferred upon the Registrar the powers to create appropriate structures to support him, the of the Financial Services Act goes ahead and gives the Reserve Bank, the function of supporting the Registrar in carrying out his functions under the of the Financial Services Act and other financial services laws.

The respondent then submitted on what this means. He submitted that it means that the Registrar is to be supported by the structures created by him under Section 8(3) of the of the Financial Services Act and the Reserve Bank, under Section 9(1) of the of the Financial Services Act.

And that it is therefore clear that there are two alternative sources of support that the Registrar has at his disposal in the performance of his functions and duties. The respondent wondered why the applicant is unable to appreciate these clear and straight forward provisions of the of the Financial Services Act.

The respondent pointed out that the applicant's misunderstanding is well captured in paragraph 9.1(iv)(3) of its submissions which, with reference to sections 8 and 9 of the Financial Services Act, reads:

> In their plain language, these provisions do not make Deputy Governor of Reserve Bank of Malawi an authority in bank supervision and regulation. They do not make him an employee of the Registrar of Financial Institutions. They do not create a structure or department under which the Deputy Governor can carry out bank supervision. Under the Financial Services Act, there is no such a thing as Deputy Governor: Supervision.

The respondent then submitted that the law confers upon the Reserve Bank the function of supporting the Registrar in carrying out his functions under the Financial Services Act. And that, clearly, the law here refers to the officers/employees of the Reserve Bank as the persons authorized to render support to the Registrar.

He submitted further, that the respondent is an officer of the Reserve Bank and is appointed under Section 12 of the Reserve Bank of Malawi Act. And therefore, that the respondent is one of the officers of the Reserve Bank whose support the Registrar may call upon in carrying out his functions of the Financial Services Act.

The respondent then submitted that it is not the respondent's submission that he is an employee of the Registrar as the applicant purports to suggest or allege. Nor is the respondent submitting that he acted in this matter under any structure created by the Registrar to carry out bank supervision as the same applicant alleges. On the contrary, the respondent's asserts that his authority to support the Registrar emanates directly from Section 9(1) of the of the Financial Services Act, which, as he has already submitted provides a second source of officers or persons who may support the Registrar in carrying out his functions under the Act, because the respondent is an officer/employee of the Reserve Bank.

It is therefore the respondent's submission that he is competent and lawfully authorised to support the Registrar in carrying out his functions under the Financial Services Act.

The respondent then submitted on who, then, made the direction in question? He noted that it is the applicant's contention that he made the direction in question.

He however contended that he thinks the terms of the letters containing the direction themselves answer that question exhaustively. He pointed out that the direction was communicated in a letter dated 27 th September, 2016 and that the relevant part in the first paragraph reads

> You recall that the Registrar of Financial Institutions has been investigating a matter filed by your customer Ms Liviness Yadidi, against your bank. Our investigations reveal that the three loan facilities are disputable.

He submitted that the introduction makes clear who was responsible for the investigations leading to the direction in question. And that it was the Registrar.

He reiterated his oral submission, that investigations carried out by the Registrar cannot be referred to an officer of the Reserve Bank for direction. And that the only reasonable order of events is to have another officer of the Reserve Bank, who certainly would be junior to the Registrar of Financial Institutions, to carry out investigations for the Registrar of Financial Institutions to make directions.

The respondent contended that, it having been made clear that it is the Registrar of Financial Institutions who conducted the investigations, as the applicant itself concedes, it is therefore very absurd to deny that the Registrar of Financial Institutions made the direction on the basis of the findings of the investigation conducted by himself.

The respondent then commented on the second paragraph of the letter referred to above which refers to "our" investigation. He submitted that the simple and straight forward answer is that in carrying out the investigation, the Registrar was assisted

and supported by other officers/employees of the Reserve Bank. And that since the Registrar and the other officer or officers who assisted him together constitute more than one person, it is natural that the direction ought to use the words "our investigations".

The respondent submitted that he was very aware that it was not himself, but the Registrar of Financial Institutions, who had carried out the investigations, with the support of other officers of the Reserve Bank. Further, that he was fully aware that the letter containing the direction was conveying a communication from the Registrar of Financial Institutions' office and not his own. And that if we allow the letter to speak for itself, what the Applicant is insisting on, that the letter was communicating a direction made by the respondent would have no basis.

The respondent then pointed out that the applicant duly received this letter. And that upon receipt of the same, two things are noteworthy, namely, it did not express any doubt on the fact that the direction was coming from the office of the Registrar notwithstanding that the letter was apparently prepared by the office of the Deputy Governor as it appears on top. And that no appeal to the Financial Services Appeals Committee was lodged, but an "appeal" to the Registrar of Financial Institutions himself, which was essentially a re-hearing and re-consideration of the case on the basis of what the applicant claimed would be new evidence..

The respondent pointed out that, in a letter dated 16th November, 2016, the Registrar of Financial Institutions communicated his determination of the "appeal". And that the said letter makes it abundantly clear that the Registrar, and no other officer, had made the direction. He noted that the relevant part of the letter reads:

> 'Dear Madam,
>
> APPEAL AGAINST REGISTRAR OF FINANCIAL INSTITUTION'S RESOLUTION ON MS LIVINESS YADIDI COMPLAINT
>
> Reference is made to the above subject matter and our communication of 27th September, 2016 to your institution.

> Please be advised that although the Registrar of Financial Institutions had made a final determination on this matter, he still considered your appeal in the spirit of fairness. Nonetheless, having analysed the documentation, the Registrar concludes that there is no new evidence warranting a change of direction....
>
> In this regard, the earlier decision of the Registrar of Financial Institutions still stands if either party is not satisfied with the determination that party is at liberty to seek redress elsewhere. Otherwise, the Registrar considers this matter closed.„

The respondent then wondered whether, it can, in view of the terms of this communication be seriously debated as to where the direction came from, that is, as to who made the direction? He submitted that it is very clear that the direction was made by the Registrar of Financial Institutions.

He then argued that, consistently, this letter makes reference to the Registrar as the one who made "the earlier determination" meaning the direction contained in the letter of 27th September, 2016. He then noted that the applicant is ready and willing to accept the letter and use it in this review but at the same time denies its terms. The respondent repeated, what he had said above with respect to the first letter that if we allow the letter to speak for itself, the applicant's allegation that the direction was made by the respondent is baseless.

The respondent submitted that he was clearly well aware that the direction was not his. And that this is why he consistently referred to "the Registrar of Financial Institutions " as the maker of the direction.

The respondent then observed that the applicant, having noted that the direction had been made by the Registrar himself, and having lodged an unsuccessful "appeal" with the Registrar of Financial Institutions, decided to change the story and begin to characterise the direction as the Deputy Governor's direction, in an attempt to create 'a ground" for challenging the same.

He stated that he can only express his concern and state that he believes the same amounts to an abuse of the powers of the courts with frivolous applications. He added that, surely and seriously the applicant would not have appealed against the

Registrar's own decision if it thought the direction had been made by the respondent. He added that this was not even one of the grounds for the said appeal.

Then respondent then stated that he did not act 'ultra vires' because he did not make the direction in question. He stated further that the direction was made by the Registrar of Financial Institutions who is mandated to do so under sections 39 and 40 of the Financial Services Act.

Secondly, that he and other officers of the Reserve Bank are authorised under section 9 of the of the Financial Services Act to support the Registrar of Financial Institutions in carrying out his functions. And further that supporting the Registrar certainly includes communicating the Registrar of Financial Institutions 's direction to third parties. And accordingly, that the Registrar's direction was not made ultra vires and remains valid in law.

The respondent observed that the applicant argues that when the question was put to him with what authority he delivered the decision he should have responded in one of a number of ways suggested by the applicant in its submissions. He then responded that the applicants question ought not to have even arisen in view of the two communications of 27th September and 16th November, 2016 which make it clear that the respondent was communicating the Registrar of Financial Institutions 's decision.

The respondent then submitted that since he did not make the direction, the question of authority should not have arisen. Secondly, that failure to answer the question does not matter at all because what the court should be concerned with in view of the circumstances is, who made the decision, not why there was no reply to a clearly vexatious question when the two communications had already addressed it. He added that if the direction was made by the Registrar of Financial Institutions, whether or not the applicant's question was answered is completely irrelevant.

The respondent then observed that the applicant argues in its submissions that there is no evidence that the Registrar delegated his authority to communicate the decision to the applicant. And that the applicant proceeds and states that section 13(3) of

Reserve Bank of Malawi Act does not enable the respondent to carry out any function of the Registrar of Financial Institutions. Further, it is contended that Section 20(1) of the Financial Services Act excludes the Deputy Governor from the list of four entities to whom the Registrar of Financial Institutions can delegate.

The respondent submits that in making reference to section 13(3) of the Reserve Bank of Malawi Act and section 20(1) of the Financial Services Act in the skeleton arguments, he intended to emphasise the Registrar of Financial Institutions' entitlement to delegate his duties as a matter of law. But that however, as a matter of fact, the Registrar of Financial Institutions did not exercise his authority to delegate in this matter.

The respondent observed that the applicant's argument above demonstrates a failure to distinguish what the Registrar of Financial Institutions needs and does not need to delegate. He observed further that the Registrar of Financial Institutions ought to delegate the powers that by law are to be exercised only by him/his office

He contended that there are, however, some other tasks that the Registrar of Financial Institutions needs not as a matter of legal requirement to perform himself such as communicating his decisions through letters. And these are the matters on which the Registrar of Financial Institutions can be assisted by other officers.

And that the Registrar of Financial Institutions is entitled to call upon other officers of the Reserve Bank to do that on his behalf as a way of supporting him in carrying out his functions under Section 9 of Financial Institutions.

And that it is therefore, not necessary, as the applicant argues, that he must show an instrument of delegation from the Registrar of Financial Institutions delegating upon him the act of communicating his decision to the applicant.

The respondent then submitted that to expect the Registrar of Financial Institutions to be writing an instrument of delegation for each and every act done on his behalf, no matter how simple it may be, would be reading too much into section 20 of the Financial Services Act and would lead to absurdity.

The respondent further submitted that the Registrar of Financial Institutions is required to delegate only when certain powers conferred by the law on him are to

be exercised by another person, not such tasks as sending letters communicating his decisions to third parties. And that, therefore, in conclusion, the respondent answered that the Registrar of Financial Institutions did not delegate any powers to him, but the latter supported the Registrar of Financial Institutions by sending his direction to the applicant. And that no instrument of delegation was therefore required.

The respondent then noted that the applicant argues that the Deputy Governor is excluded from the category of entities to whom the Registrar of Financial Institutions may delegate. He completely disagrees.

He stated that, as Deputy Governor, he is an officer or employee of the Reserve Bank and is covered under Section 20 (1)(a) of the Financial Services Act. He stated further that if he were not an employee of the Reserve Bank, Section 12(4) of the Reserve Bank of Malawi Act would not have barred him from occupying any other office or any other employment. He added that he is not allowed to occupy any other employment because he already has an employment with the Reserve Bank. And that he is therefore an employee of the Reserve Bark. And that, therefore, the Registrar of Financial Institutions can delegate to the Deputy Governor of the Reserve Bank as an employee of the bank.

The respondent then noted that the applicant seems to attach some materiality to the fact that he assumes office by Presidential appointment. He submitted that, that fact only goes to the respondent's mode of recruitment, but has no effect on his status as an employee of the Reserve Bank.

The respondent then submitted that the applicant would like to create the impression that the respondent, the Registrar of Financial Institutions and other officers of the Reserve Bank do not appreciate the distinction between the office of the Registrar of Financial Institutions and the Governor of the Reserve Bank.
And then it goes on to call upon this Court to make that distinction 'clear and emphatic'.

The respondent submitted that, the truth of the matter is that the applicant would like to procure an amendment of the law through the back door by urging this Court to adopt an interpretation that effectively amends the Financial Services Act and the

Reserve Bank of Malawi Act. He submitted further that the Financial Services Act designates the Governor of the Reserve Bank of Malawi as the Registrar of Financial Institutions. And that it authorises the Reserve Bank of Malawi to support the Registrar of Financial Institutions in carrying out his duties. He added that this coordination between the Registrar of Financial Institutions and the Reserve Bank is clearly intended and not accidental.

He further stated that we can debate as to whether that status quo should be maintained in this jurisdiction, but that as the law stands, the Governor of the Reserve Bank is the Registrar of Financial Institutions and the Reserve Bank is authorised to assist him in carrying out his functions.

The respondent submitted that if the applicant would like to have any of this changed, they are at liberty to approach Parliament through available constitutional means to reconsider these statutes. But that it should not accuse the Registrar of Financial Institutions and the Reserve Bank of misunderstanding the laws. He insisted that the Registrar of Financial Institutions and officers of the Reserve Bank know the laws. And that they are very learned. And further, that they understand the distinctions and co-ordinations that the Financial Services Act creates.

The respondent noted that the applicant argues that the fact that the Financial Services Act directs the creation of departments to supervise various operations emphasises the distinction between the office of the Registrar of Financial Institutions and the Governor of Reserve Bank. His answer is that the creation of departments has been necessitated by the fact that under the of Financial Services Act some functions cannot be properly exercised through the structures/departments existing in the Reserve Bank. And additional departments were required, hence Section 8(4) of Financial Services Act.

In conclusion, the respondent submitted that the impugned direction was not made by him, but by the Registrar of Financial Institutions himself in the exercise of his lawful authority. And that the respondent was authorized and entitled to support the Registrar of Financial Institutions in carrying out his functions and in fact supported

him in communicating the direction in question. And that the direction was, therefore, not made ultra vires.

This Court notes that judicial review is a proceeding in the area of civil as opposed to criminal law. The burden of proof is therefore on he who asserts the affirmative. See *Sawerengera v Pride Malawi Limited* [2008] MLR 301.

The applicant alleges that the impugned direction was made by the respondent. And so, the applicant bears the burden of proving that such is indeed the case.

The applicant has relied on the two letters communicating the impugned direction as evidence that the respondent made the impugned directions in this matter.

This Court has carefully examined the two letters and comes to the conclusion, in agreement with the respondent, that the letters are quite clear that the respondent was in fact communicating the directions of the Registrar of Financial Institutions.

If the letter of 27th September 2016 seems to equivocate on who made the decision as unsuccessfully suggested by the applicant, then the letter of 16th November 2016 puts the matter to rest. There is reference to the Registrar of Financial Institutions making a final determination in the matter. Then, that the same Registrar has analysed the applicant's documentation and finds that there is no new evidence. And consequently, that the earlier decision of the Registrar of Financial Institutions still stands.

There is no way these two letters can be read to import that the respondent made the impugned directions.

In the circumstances, this Court agrees with respondent that the decision herein was made by the Registrar of Financial Institutions but was only communicated by the Deputy Governor Supervision.

Since it is clear that the decision was made by the Registrar of Financial Institutions it is not necessary to discuss the matters about delegation of the decision-making process as raised by the applicant.

However, with regard to the investigation itself, the interim report on the investigation makes it clear that the investigation was being carried out by the

Registrar of Financial Institutions. It can be safely assumed that the examiners who were carrying out the investigation were duly authorized by the Registrar of Financial Institutions. In any event, the investigation by the Registrar of Financial Institutions itself is not being challenged in this judicial review. It is the communication of the decision after investigations that is being challenged.

This Court however agrees with the respondent that writing letters by the Deputy Governor on behalf of the Registrar of Financial Institutions might indeed fall within the section 9 (1) of the Financial Services Act and section 4 (1) (h) of the Reserve Bank of Malawi Act which allows the Reserve Bank of Malawi to support the Registrar of Financial Institutions in supervisory and regulatory work. That is the response to the applicant's query as to under what authority the respondent communicated the Registrar of Financial Institution's decision to the applicant.

As correctly argued by the respondent, he belongs to the Reserve Bank of Malawi and the Registrar of Financial Institutions can get support from the respondent to communicate decisions of the Registrar of Financial Institutions as provided in section 9 (1) of the Financial Services Act and section 4 (1) (h) of the Reserve Bank of Malawi Act.

This Court however agrees with the applicant that the respondent cannot justify his communication of the impugned direction herein under section 13 (3) of the Reserve Bank of Malawi Act which has to do with delegation of functions within the Reserve Bank of Malawi and not under the Financial Services Act.

This Court further agrees with the applicant that the respondent cannot also justify his communication of the impugned decision herein under section 20 (1) of the Financial Services Act because as the respondent himself submitted that he only referred to the said provision to show that the Registrar of Financial Institutions can delegate his functions but that in fact no such delegation took place in this matter.

In conclusion, this Court agrees with the respondent's submission that the impugned direction was not made by him, but by the Registrar of Financial Institutions himself in the exercise of his lawful authority. And that the respondent was authorized and entitled to support the Registrar of Financial Institutions in carrying out his

functions and in fact supported him in communicating the direction in question. And that the direction was, therefore, not made ultra vires the respondent.

This court would like to state, however, that this is a wake-up call for the Registrar of Financial Institutions to ensure that when his directions are being communicated to affected third parties there should not be the kind of equivocation that was displayed in the first letter herein wherein the Deputy Governor states that 'we are left with no option but to direct' as if now the Deputy Governor is party to the making of the decision in issue when at the same time he communicated clearly that the direction in issue was made by the Registrar of Financial Institutions.

This Court agrees with the applicant that it must also be noted that under the Financial Services Act there is no Deputy Governor Supervision and this Court takes it that the respondent has not assumed a position of Deputy Governor Supervision under the Financial Services Act but that this has to do with his mandate under the Reserve Bank of Malawi Act.

Again, the officers delegated the function of investigating on behalf of the Registrar of Financial Institutions must always proceed under the banner of the Registrar of Financial Institutions so that there is no confusion of matters in terms of which institution is doing what as was pointed out by the applicant with regard to the minutes of the meeting between the officers of the Reserve Bank of Malawi who were delegated by the Registrar of Financial Institutions to meet the applicant and look into the matter herein. Those minutes should have clearly shown that they were about the business of the Registrar of Financial Institutions and not the Reserve Bank of Malawi as was the case so that the minutes should reflect what the interim report in the investigation shows, namely, that the investigation was being done by the Registrar of Financial Institutions.

As the applicant noted, this is very important to ensure that the two institutions of Registrar of Financial Institutions and the Reserve Bank of Malawi are seen to carry out their separate statutory mandates as Parliament intended without blurring the lines as to their separate statutory mandates.

And correctly submitted by the applicant, Parliament created an institution of Registrar of Financial Institutions which shall have structures, departments as per

section 8 (3) and (4) Financial Services Act and so the respondent cannot be heard to say Parliament did not intend to create a separate office of Registrar of Financial Institutions.

This Court now deals with the second ground of judicial review herein, namely, that the impugned directions were made in breach of the mandatory statutory procedure under the Financial Services Act.

On this ground, the applicant submitted as follows.

That even if the respondent had authority of the Registrar of Financial Institutions, the decision complained of remains *ultra vires* the respondent because the directions given were made without following the strict procedure under section 39 of the Financial Services Act.

The applicant observed that it is under section 39 that the Registrar of Financial Institutions can issue directions to a financial institution to take action specified in the direction.

The applicant added that it is a mandatory legal procedure that if the Registrar of Financial Institutions wishes to issue directions under section 39 of the Financial Services Act, he must, before issuing the direction:

a) give the financial institution concerned written notice of the proposed action
b) specify the grounds for the proposed action
c) specify the facts supporting such grounds for the proposed action
d) Allow for a hearing of the matter within 21 days of the notice of the proposed action

The applicant observed that before issuing the letter of 27th September 2016, the respondent took no steps compliant with any of the procedural steps set out in (a)-(d) above. It added that exhibit VBM 1 and VBM 2 demonstrate all that was done

before the letter marked VBM 4. And further, that nothing suggests that section 39(5) of the Financial Services Act passed through the mind of the officers for Registrar of Financial Institutions, let alone the respondent.

The applicant submitted that the respondent could not have directed his mind properly on matters of law without demonstrating that section 39(5) of the Financial Services Act passed through his mind.

The applicant then noted that the respondent suggested at the hearing that on the basis of *R v. Soneji* [2005] 4 All ER 321 and on the basis of the *Press Trust Case* [1997] 2 MLR 181-224, this Court must find that failure to comply with procedure under section 39(5) Financial Services Act at the issuance of VBM 4 does not invalidate the decision and must be excused. The applicant commented as follows on the respondent's suggestion.

That both the *Soneji* (2005) and the *Press Trust* (1997) cases predate the Financial Services Act, 2010. Further, that in 2010, when Parliament enacted section 39(5) of the Financial Services Act and recorded it in mandatory terms, it was aware of these past common law decisions and still crafted its legislation in mandatory language.

The applicant pointed out that in the *Press Trust* case, the Minister of Finance presented in Parliament the Press Trust (Reconstruction) Bill after moving a motion under Standing Order 114(4) to dispense with prescribed procedure as to publication of bills before debate in Parliament. The motion was carried; and only then was bill presented and passed amid protests and walk-out from a section of members of Parliament. And that the Supreme Court dealt with validity of the Press Trust (Reconstruction) Act in that context.

The applicant pointed out that in the *Soneji* case, the Court dealt with the process of making confiscation orders after conviction. The question was whether under the English law confiscation regime emerging from section 72A(3) Criminal Justice Act, 1988, the Court could adjourn for over six months for purposes of obtaining further information without demonstration of exceptional circumstances before making a confiscation order.

The applicant contended that in both cases the context had nothing to do with the context in which section 39(5) of the Financial Services Act is brought into question here. The applicant contended further that, here, there is no attempt on the part of respondent to comply with clearly set down statutory procedure before issuing VBM 4.

Then applicant then submitted that in the *Soneji* case Carswell LJ found at page 343 that "there was a small departure from the prescribed time and no prejudice was created or injustice done by regarding the confiscation order as valid".

The applicant then submitted that in the *Press Trust* case, there was, in fact, compliance with the relevant standing orders and so the resultant Act could not be invalidated before the Supreme Court.

The applicant contended that Parliament intended in section 39(5) of the Financial Services Act that the debate which we are having now should have been had between the parties before issuing VBM 4. And that at that point the applicant and the Registrar of Financial Institutions would have discussed under section 39(5)(a) and (b) of the Financial Services Act whether any of the directions in VBM 4 issued could issue at all from the office of Registrar of Financial Institutions let alone the office of a Deputy RBM Governor. The applicant observed that that legal process will never be possible. And that that cannot be described as small departure; but rather that it is complete departure from and a disregard of the prescribed process. The applicant contended that a complete forfeiture of the legal right to make representations prior to the issuance of the direction cannot be described as of no prejudice or injustice to the party given that right by law.

The applicant stated that this Court must acknowledge that it is a fact that according to VBM 4 itself the Registrar of Financial Institutions was *"investigating on the matter filed by Liviness Yadidi"*. But that, of course, in the respondent's apparent usual casual approach to legal issues, contrary to sections 41(1) and 42(1) of the Financial Services Act we do not have in this Court any *"instrument in writing"* appointing any one to carry out any investigation.

The applicant then contended that accepting that there was an investigation, however, it would fall under sections 41-42 of the Financial Services Act. And that that process cannot then suddenly turn into directions because on the plain text of the statute the process for directions under sections 39-40 of the Financial Services Act is not the same as the investigation process.

The applicant noted that it is suggested at para. 3.11 of the respondent's skeleton arguments and was maintained at the hearing that the applicant waived the right to insist on the 21 days within which to ask for a hearing under section 39(5)(b) of the Financial Services Act. To this the applicant responded as follows.

That this submission proceeds from premise that VBM 4 was a notice of proposed action. But that to the contrary, VBM 4 is plainly the action itself.

That this submission assumes that VBM 4 specifies the grounds of proposed action and the facts supporting those grounds. But however, that in the absence of a proposed action we cannot see the grounds for a proposed action.

Further, that this submission assumes that VBM 4 outlines the rights of the applicant to ask for a hearing to be held in private on the matter within 21 days. But, however that, plainly, VBM 4 is not a notice indicating any right to be heard. And that to the contrary, VBM 4 tells the applicant what to do in 14 days and in 30 days and none of which concerns the right to be heard within 21 days.

Further, that this submission connotes that a statute can be ignored. And that perhaps, in practice it can, but that in a court of law nothing of that sort is acceptable. The applicant pointed out that *Raiply Malawi Limited v. Commissioner General of Malawi Revenue Authority*, MSCA Civil Appeal No. 29 of 2011 settled the position saying

> Ultimately, it is about the correct interpretation of relevant statutes that must be upheld. It is quite possible...that the two institutions have been misguided in their application of the statutes. That cannot compel [the Court] to ignore the correct interpretation of the statutes

> and uphold a misdirection...estoppel has no role to play where questions of interpretation of the law are involved, because estoppel cannot override the law.

The applicant further submitted that the fact that the applicant wrote VBM 3 does not impair the framework of section 39(5) of the Financial Services Act which binds the Registrar of Financial Institutions to take prescribed steps.

It added that, in the first place, the applicant does not, in VBM 3, make any comment about its statute given rights under section 39(5) of the Financial Services Act. And that even if it did and forfeited those rights, that would not change the statutory framework. And further that it would not be an effective waiver, since the Supreme Court said in the *Raiply* case, it is about correct interpretation of statute, and, in *NICO v. Ngwira* [1993] 16 (1) MLR 381, 388 the same Supreme Court said that "no man can effectively withdraw himself from the protection of the courts of law any more than he can deprive himself of his personal freedoms". And so, it cannot be that the applicant could ever waive its rights under s. 39(5) of the Financial Services Act.

In conclusion, the applicant submitted that, really, if the respondent felt that he is the Registrar of Financial Institutions or if he had some sort of authority to issue directions, there is no excuse why he did not feel bound to follow the dictates of section 39(5) of the Financial Services Act. And that he failed to appreciate his duties and in the end made a decision in VBM 4 which is *ultra vires* his office, and is null and void.

On his part, the respondent submitted as follows.

That the applicant contends that the direction was made in breach of section 39 of the Financial Services Act and that it is accordingly invalid. And that reference is made to section 39 (5) of the Financial Services Act which provides that

> Prior to giving direction under subsection (1), the Registrar shall give the financial institution concerned written notice of the proposed action-
>
> (a) Specifying the grounds for it and the facts supporting those grounds; and

(b) Allowing for the financial institution and the person to ask for a hearing, to be held in private, on the matter within twenty-one days of the notice.

The respondent further noted that the applicant's contention is that because the Registrar of Financial Institutions did not issue a notice of the proposed action and only communicated the direction there was non- compliance and therefore the direction is invalid.

Firstly, the respondent submitted that even if there was the alleged non-compliance, the circumstances of the present case render it unjust to invalidate the direction on the basis of the alleged non-compliance.

The respondent submitted that the direction of the Registrar of Financial Institutions was communicated to the applicant on 27th September, 2016. And that at that point, the applicant was therefore fully aware of the decision of the Registrar of Financial Institutions and the grounds and facts thereof as clearly spelt out in the letter.

He added that when the applicant lodged its appeal, fully aware of the contents of the direction of 27th September, it had every opportunity not only to remedy the situation with its customer, but it was actually given a second hearing upon its request which it called the "appeal". And that within 21 days from 27th September, the Registrar of Financial Institutions received the applicant's new evidence for consideration which was submitted on or around 8th October, 2016. And that about two months later on 16th November 2016, the Registrar of Financial Institutions made his determination after the second hearing.

The respondent wondered whether it can it be seriously said that there was non-compliance with the of the Financial Services Act with the effect that there was any injustice or prejudice occasioned on the applicant and thereby totally rendering the direction invalid? The respondent submitted that the answer is in the negative.

He submitted that any procedural safeguards granted by section 39(5) of the of the Financial Services Act to the applicant were observed and given to the applicant in fact.

The respondent submitted further that, admittedly, his letter of 27th September 2016 was not called "notice of a proposed action. But, however, that when the circumstances are considered there was in fact compliance with section 39(5) of the Financial Services Act in essence and, if there was any non-compliance by not labelling the letter of 27th September "notice of proposed action", the effect of such non-compliance would not be as to render the direction invalid..

The respondent submitted further that his letter of 27th September amounted in fact to a notice of the proposed action since it stated clearly what the Registrar of Financial Institutions wanted the applicant to do and indeed it was on the basis of the said notice that the applicant requested a hearing which it called an appeal and made its representation in the exercise of its right under section 39(5)(b) of the Financial Services Act.

The respondent argued that the Registrar of Financial Institutions having in essence and in fact complied with the prescriptions of section 39(5) of the Financial Services Act and, if there was any non-compliance, the same not having caused any injustice or prejudice to the applicant, the respondent unhesitatingly submitted that, by authority of the cases which he discusses in detail below, the Registrar of Financial Institutions' direction was and remains legally valid and he prayed that this Court holds and finds that there is nothing to render the Registrar of Financial Institutions' direction invalid

The respondent submitted that, during the hearing, he cited two cases which are authorities of the principle that breach of prescribed procedure does not necessarily render a decision invalid. These are the cases of *R v Soneji* [2005] 4 All ER 321 and *Attorney General v Malawi Congress Party and 2 others* [1997] 2 MLR 181 (*Press Trust Case*).

The respondent noted that the applicant attempted to render the two cases inapplicable by stating that the cases predate the Financial Services Act. He

submitted that the fact that the cases pre-date the Financial Services Act is irrelevant. And that what is a relevant consideration is whether the principle laid down in those cases regarding the consequences of breach of statutory procedure was abolished by the of the Financial Services Act or whether the Financial Services Act excludes its applicability, not that it was enacted after they were decided.

With respect to the two cases, the respondent submitted as follows.

That in *R v Soneji*, the relevant issue in the case was whether the court's common law jurisdiction to adjourn confiscation proceedings was subject to a mandatory time limit of six months 'save where exceptional circumstances' were present. The court of appeal had held that since the six-month period provided by the relevant statutory provision (Section 72A (3) of the Criminal Justice Act 1988) had elapsed, the confiscation orders could not be made. The Court of Appeal held that the statutory six-month period had to be strictly complied with and there was no jurisdiction on the part of the court to make the confiscation orders beyond the prescribed six-month. The House of Lords reversed this decision and held that the fact that the statutory period of six-month had elapsed by the time the court had made the confiscation orders did not necessarily render the confiscation orders invalid.

In the course of the judgment, Lord Steyn quoted from the case of *London & Clydeside Estate Ltd v Aberdeen* [1979] 3, All ER 87 at 883 where it is stated that

> When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts ad a continuing chain of events.
>
> At one end of the spectrum, there may be cases in which a fundamental obligation may have been so outrageously or fragrantly ignored or denied or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the detailing authority seeks to rely on its action it may be that the subject is entitled to

> use the defect on procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect procedure mav be so nugatory or trivial that the authority can safely proceed without remedial action confident that, if the subject is so misguided as on the fault the court will decline to listen to his complaint. But in a very great number of cases, it may be a majority of them, it may be necessary for a subject, in order to safeguard himself to go for a declaration of his rights, the grant of which may be discretionary and by the like token it may be wise for an authority to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases though language like" mandatory" "directory", "void" "voidable" "nullifv and so forth may be helpful in argument and may be helpful in effect if relied on to show that the fault in deciding the consequences of a defect in the exercise of power, are necessary bound to fit the facts of a particular case and developing chain of events into rigid legal categories or to stretch or cramp them on a bed of procrusters invented by lawyers for the purpose of convenient exposition.

The respondent submitted that there are three salient observations he wished to make on the above statement. Firstly, that this is not a new case he is citing in submissions. That it is a case that was quoted and applied in the case of *R v Soneji* which he cited already in his skeleton arguments and oral submissions. And that the quotation appears on pages 329-330 of lord Styn's judgment in the *R v Soneji* case.

Secondly, that the case was presented by lord Steyn as containing a new perspective on the court's treatment of non-compliance with mandatory statutory procedures. Indeed, that Lord Steyn remarked after quoting from the above dictum that " it led to the adoption of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether parliament intended total invalidity (page 330).

Thirdly, that the above quotation from the *Aberden DC* case makes clear that even where such words as 'nullify' or ' mandatory' are used the court is not necessarily bound by them. And that the case is even stronger against the application of such terms and total invalidity in the case such as the present where such words are not used at all in the relevant statute.

The respondent further submitted that having considered the approach of courts of various jurisdictions on the issue, lord Steyn concluded that

> I regard the development in Canada as very similar to those in New Zealand and Australia. Having reviewed the issue in some detail I am in tespectful agreement with the Australian High Court that the rigid mandatory and directory distinction and its many artificial refinements, have outlined their usefulness. Instead, as held in AG's Ref (No. 3 of 1999), the emphasis ought to be the consequences of non-compliance, and posing the question whether parliament can be taken to have intended total invalidity. This is how I would approach what is ultimately a question of statutory construction. In my view, it follows that the approach of the Court of Appeal was incorrect." (at page 333-334).

The applicant then submitted that it must be noted here that reference to the approach of the Court of Appeal was reference to its holding that the confiscation orders were invalidated by the elapsing of the prescribed statutory period beyond which they should not been made. The Court of Appeal thought that total invalidity resulted from the same. The House of Lords held that it did not and reversed that decision

On the *Press Trust Case* the respondent submitted that there are a number of issues raised for determination in this case, but that the relevant one was dealt with as follows by Megha JA, writing for a unanimous court

> It was submitted on behalf of the respondents, that any breach of the constitution would render the Press Trust (Reconstruction) Act unconstitutional and, therefore, would be null and void. We do not think so, for the reasons we have given earlier on, that is, that some provisions in the constitution are related to capacity and others are related to procedure. Breach of Constitutional provision as to capacity is normally fatal, but not necessarily so in relation to procedural breaches. If this were not so we would have extraordinary consequences with regard to implementing our constitutional provisions. We would also like to point out that compliance with Section 96(2) is not a condition precedent to the validity of enacting, so that the Press Trust "(Reconstruction) Act cannot, therefore, be invalid because of failure to comply with Section 96(2) of the Constitution.

The respondent then submitted that he also wished to make a few comments on this case concerned the interpretation of the provisions of the Constitution, which is the supreme law of the land.

Firstly, he stated that it is clear that the court was able to hold that the procedural provisions of the supreme law itself may till not render an act of Government invalid if they relate not to capacity, but procedure.

He added that if procedural breaches of the supreme law may still not render acts of Government invalid, what more, the procedural breaches of a law that is subject to the same Constitution, namely, an Act of Parliament, in this case the Financial Services Act.

Secondly, that this principle has not been separated from or in any way modified by the Malawi Supreme Court of Appeal or otherwise. And that there is no case authority, as far as he knows, to the contrary. And therefore that, not only does it still stand as good law, but it is clearly binding on the High Court.

Thirdly, that the fact that the *Press Trust case* involved constitutional provisions whereas here we are concerned with statutory provisions does not render it distinguishable because the court simply applied a well-known principle in a case involving constitutional provisions which was already recognized in other countries in the interpretation of statutory provisions. And that accordingly, the *Press Trust case* represents the recognition of the principle applied in other countries as demonstrated in the *Soneji case* in Malawi.

On the basis of the principles clearly articulated in the cases above, the respondent submitted that the Registrar of Financial Institutions, having in essence and in fact complied with the prescriptions of section 39(5) of the Financial Services Act and, if there was any non-compliance, the same not having caused any injustice or prejudice to the applicant, the Registrar of Financial Institutions' direction was and remains legally valid and he prays that this Court holds and finds that there is nothing to render the Registrar of Financial Institutions' direction invalid.

The respondent submitted in the alternative, that if the applicant had chosen to benefit from the provision of "a written notice of a proposed action" it would have objected to the direction of 27th September 2016 on that basis rather than requesting for an 'appeal'. And that by not protesting the decision on that basis at that point in time, justice requires that they should be regarded as having waived that right. And that a statutory right is capable of being waived was settled by our own local case of *Afrasia Kingdom Zimbabwe Ltd v The Registrar of Financial Institutions and two others* Commercial case number 153 of 2013 (High Court) (unreported).

The respondent argued that applying the principle of estoppel stated therein, the applicant, having not raised the issue of notice to the Registrar of Financial Institutions on receipt of his determination, it is now estopped from raising the same.

He added that it is important to note that the applicant, upon receiving the direction of 27th September, 2016, it did not remain silent, but actually decided to approach the Registrar of Financial Institutions again for it to be heard on the 'appeal'. And that this makes it clear that the applicant considered the letter of 27th September and all issues it may have had with it certainly occurred to its mind. But that the applicant made a decision, namely, not to go for any other remedy (including challenging the direction because it was not called or preceded by "notice"), but to 'appeal 'against the direction.

The respondent submitted wondered if, in all fairness, the applicant is not estopped from now raising the issue of the notice. He submitted that in the circumstances of the present case the applicant is estopped and he prayed that this Court should so find and hold..

The respondent observed that the applicant appears to suggest that there is no instrument of delegation for the investigators and that therefore, the investigation lacks lawful authority. This appears from paragraph 9.2(xi)(g) of the submissions.

The respondent's straightforward answer to the same is that the Registrar did not delegate the investigation powers to anyone. That he carried out the investigation himself. And that he was only supported or assisted by officers of the Reserve Bank

as he is lawfully entitled under Section 9 of the of the Financial Services Act as already referred to above. And that the question of the instrument of delegation should, accordingly, not even arise.

And that in fact, he is not bound to appoint investigators. The law only empowers him to do so but it does not require him to. And that section 42(1) of the Financial Services Act is clear that when certain things are satisfied the Registrar may by instrument in writing, appoint a person to be an investigator in relation to the matter. Further that he may therefore decide not to appoint any investigator and carry out the investigation himself, which is what he did in the present case, with the support of Reserve Bank officers. And that therefore, the issue of delegation, as already stated, should not arise.

The respondent added that although he has responded to this aspect of alleged non-delegation on the part of the Registrar as particularised in the applicant's submissions in paragraph 9.2(xi)(g), the same should not be taken as a waiver of the respondent's right to object to that being raised during submissions.

He noted that under Order 53 r. 6(1), Rules of Supreme Court the applicant is not supposed to rely on grounds that are not set out in the statement and affidavits that were filed with the court in the judicial review application. And that this ground is new and both the statement and the affidavit do not contain it, hence he urged this Court to disregard it.

This Court wishes to quickly agree with the respondent that the applicant's submission that there is no instrument of delegation for the investigators and that therefore, the investigation lacks lawful authority which appears from paragraph 9.2(xi)(g) of the applicant's submissions is not supported by the originating process and is therefore a new issue which this Court cannot entertain.

The issue here is whether the Registrar of Financial Institutions complied with the preliminary requirements for issuing directions under section 39 (5) Financial Services Act.

The respondent then noted that in paragraph 9.2(xi)(h) the applicant argues that an investigation under sections 41 to 42 of the Financial Services Act "cannot then

suddenly turn into directions because in the plain next of the statute the process of the directions under sections 39-40 of the Financial Services Act is not the same as the investigation process".

The respondent wondered how the applicant is interpreting section 39(1) of the Financial Services Act which gives the Registrar of Financial Institutions the power to give a written direction "if it appears to the Registrar that a direction is necessary to protect the interest of clients or a licenced or registered financial institution".

The respondent observed that the key words above are "if it appears to the Registrar". And that the question is how does it appear to the Registrar that a direction is necessary? The respondent opined that the Financial Services Act does not provide any closed answer to that. And that it is open to the Registrar to receive information in various ways which may make it appear to him that a direction is necessary.

Further that, certainly, one of the means by which information may reach the Registrar for it to appear to him that a direction is necessary is through the findings of investigations which he conducts. And that it is therefore incorrect, as the applicant suggests, that an investigation may not lead to the making of a direction by the Registrar. Rather that it may, if the findings thereof, make it appear to the Registrar that a direction is necessary, subject to meeting the other requirements specified in section 39. of the Financial Services Act.

The respondent then turned to the case of *Raiply Malawi Limited v Commissioner General of Malawi Revenue Authority*, which counsel for the applicant relies on in arguing that estoppel has no role to play where questions of interpretation of the law are involved.

The respondent submitted that the *Raiply* case is clearly distinguishable. In that, unlike in the present case, the question in that case was whether the public institutions in question could completely disregard the provisions of statute in their exercise of authority and whether they may be regarded as estopped from subsequently adopting the correct approach or interpretation of the statute.

And that the Malawi Supreme Court of Appeal held, and correctly in the respondent's view, that they could not because to do so would clearly be contrary

to the rule of law. And that, in fact, the statutory provisions in questions did not confer any rights on the institutions, but obligations which they were obliged to discharge. The respondent added that one cannot be estopped from discharging obligations conferred by the law.

The respondent submitted that, however, in the present case, the question is whether a subject, not the public authority such as the respondent, but a subject such as the applicant, can waive its right to be afforded certain procedural steps.

The respondent submitted that he is not contending that the Registrar is estopped from changing any course of action. If that were so, the *Railply* case would have been applicable against the Registrar. But that he is submitting that the applicant as a subject can waive its rights under the law, statutory or otherwise. The estopped waiver in this case is that of the applicant, a subject. In the *Raiply* case, it was that of the public institution itself, not the subject Raiply Malawi Limited. He added that the *Raiply* case, therefore has no application in the present matter and that legal rights can be subjected to the principle of estoppel but not legal obligations.

This Court agrees with the applicant that the Registrar of Financial Institutions ought to have followed the dictates of section 39 (5) of the Financial Services Act by making sure that, prior to giving his direction, he gave the applicant herein written notice of the proposed action- specifying the grounds for it and the facts supporting those grounds and allowing the applicant to ask for a hearing, to be held in private, on the matter within twenty-one days of the notice.

Nothing of the sort required in section 39 (5) of the Financial Services Act was done by the Registrar of Financial Institutions. This Court also agrees that these steps are mandatory as the wording there is that the Registrar shall do what is specified in section 39 (5) of the Financial Services Act. The respondent cannot therefore argue, as it attempted to, that the nature of the provision in issue is not mandatory.

The respondent would like this Court to believe that the consequences of non-compliance in this matter are not such as to render the directions invalid. He argues that there is in effect compliance by the Registrar by reason of the fact that after the directions were made then the applicant was heard on an appeal against the direction.

This Court agrees with the applicant that the Registrar was under a clear mandatory obligation not to jump to making directions after investigations but to firstly give the applicant herein written notice of the proposed action- specifying the grounds for it and the facts supporting those grounds and allowing the applicant to ask for a hearing, to be held in private, on the matter within twenty-one days of the notice.

This Court is not convinced that the Registrar complied with the mandatory process by first issuing directions and later on hearing the applicant on its dissatisfaction with the directions because the impugned directions herein were made without first proposing the action to the applicant and allowing the applicant to ask for a hearing on the proposed action.

In the end, this Court is not convinced by the respondent's contention that the Registrar in essence complied with the mandatory process for issuing directions with regard to the impugned directions issued to applicant.

This Court now considers the effect of the non-compliance. This Court agrees with the respondent that whether the non-compliance is fatal to the proceedings must depend on the effects of such non-compliance including whether prejudice has been suffered by the applicant. See *Soneji* case and the *Press Trust case.*

This Court is however not convinced by the respondent's argument that the applicant herein never suffered prejudice as a result of the Registrar's failure to first notify the applicant of the proposed action under the intended direction and allowing for a hearing within 21 days before making the directions.

The effect of non-compliance is that the applicant lost a chance to interrogate the proposed action in the intended direction before they crystallised into the direction. It is not known whether the direction would have remained the same if a hearing on the proposed action was undertaken as required in section 39 (5) of the Financial Services Act. The effect of the non-compliance cannot therefore be said to be trivial in the circumstances of the present case.

After all, section 43 of the Constitution requires that everyone must be afforded a right to be heard before being condemned. The applicant was condemned unheard with regard to the nature of the proposed action contrary to the dictates of section 39 (5) of the Financial Services Act.

In the alternative, the respondent argued that the applicant waived its right to be informed of the proposed action and to have a 21-day period within which it was to be heard on the proposed action in the directions. This Court, just like the applicant, cannot understand how this could be the case.

It is quite correct, as submitted by the respondent, that a party may in certain circumstances waive his statutory right. See *Afrasia Kingdom Zimbabwe Ltd v The Registrar of Financial Institutions and two others* Commercial case number 153 of 2013 (High Court) (unreported). But that is a general rule and it all depends on the wording or policy of the statute in question.

It is only fair that for a waiver to be effective a person must be afforded the opportunity to consider the right in question. As persuasively held by Eve J in *Chapman v Michaelson* [1908] 2 Ch 612 at 622, a party renouncing the right in question must have been in a position 'to appreciate what his true legal rights were'.

The applicant in this matter must have first been informed of the proposed action under the direction and that the applicant had a 21-day period within which to ask for a hearing on the proposed action. That is not what happened in this case. As correctly submitted by the applicant, all the applicant was informed was that these are the directions and action to be taken within specified periods.

Section 39 (5) Financial Services Act is quite clear on the point that the Registrar must give written notice specifying the grounds and allowing for the financial institution to ask for a hearing on the matter within 21 days of the notice. This is very plain. There must be a written notice not only of the proposed action but also allowing or notifying that a hearing can be asked for by the affected financial institution within 21 days of the written notice.

There was no opportunity given to the applicant to consider whether to engage the Registrar on the proposed action within 21 days of the notice of proposed action since there was no proposed action and no written notice allowing for such a hearing to be asked for as required by section 39 (5) Financial Services Act.

In the circumstances of the present case, the respondent cannot even start talking about a waiver of a right to ask for a hearing within 21 days of a written notice on the part of the applicant when the opportunity to consider the issue was not afforded by the Registrar of Financial Institutions to the applicant. And it follows that the question of estoppel cannot arise in such circumstances as correctly submitted by the applicant.

Consequently, this Court concludes that the decision of the Registrar of Financial Institutions to issue the impugned directions herein was ultra vires for failure to comply with the mandatory procedural dictates of section 39 (5) of the Financial Services Act.

Lastly, but not least, this Court deals with the third ground of judicial review, namely, that the authority to cancel or to repudiate a contract and/or direct rectification of a transaction affecting registered land and/or to order compensation on grounds of negligence or for any ground at all lies with the High Court and so the directions were made in excess of the authority under the Financial Services Act.

On this ground, the applicant submitted as follows.

It submitted that even if the respondent had the authority and had complied with the strict statutory procedure prior to issuing the letter of 27th September 2016, the decision complained of would still be and remains *ultra vires* the respondent.

It pointed out that a reading of sections 39 and 40(1), (2) and (3) of the Financial Services Act and sections 71, 139 and 140 of the Registered Land Act, shows that the authority to cancel or to repudiate a contract and/or direct rectification of a transaction affecting registered land and/or to order compensation on grounds of negligence or for any ground at all lies with the High Court.

The applicant noted that the respondent suggested at the hearing and at paragraph 3.16 of his arguments that section 39(1)(b) of the Financial Services Act entitles the Registrar of Financial Institutions to give directions "in the interest of the client of a financial institution", and that under section 39(7) of the Financial Services Act such a financial institution is bound to comply "despite anything in any contract or arrangement to which it is party".

The applicant asked this Court to observe that section 39(1) (b) of the Financial Services Act is not phrased in the way it is said to have been quoted at paragraph 3.16 of the respondent's arguments. It added that, in the statute book, the provision talks about a general position not a specific position of a particular client. Further, that the provision refers to "*the clients*" as a body accessing financial services that may be affected by the conduct for which the Registrar of Financial Institutions will issue a direction.

The applicant added that section 39(1) of the Financial Services Act then does not open the gate to turn the Registrar of Financial Institutions into a dispute resolution centre where any given bank customer can kind of apply for a direction.

The applicant contended that the limits of section 39 (7) of the Financial Services Act and indeed any part of section 39 of the Financial Services Act are set and trimmed by section 40 of the Financial Services Act when it says that a direction under section 39 of the Financial Services Act shall not be a basis for repudiation, termination, or cancellation of a contract. And that this brings forth the authority of the Courts under sections 40(2) and (3) of the Financial Services Act to, for instance, determine whether compensation is payable under section 40(3)(b) of the Financial Services Act.

The applicant contended further that, in the case of a transaction concerning registered land the limits of section 39 of the Financial Services Act as set by section 40(1) of the Financial Services Act bring forth the authority of the Court to investigate and determine whether under sections 139, or 140 Registered Land Act rectification or compensation by way of indemnity is due under a given contract.

The applicant then contended that it cannot be then that because of section 39 of the Financial Services Act the Registrar of Financial Institutions has any authority to order rectification or re-instatement or compensation in respect of registered land. Further, that that power remains with the Court under both the of the Financial Services Act and the Registered Land Act.

The applicant pointed out that in relation to the question of the power of supervisory and regulatory authority to order re-instatement/compensation this case is on all fours with *State v. Malawi Energy Regulatory Authority ex. parte Malawi Housing Corporation* Judicial review number 37 of 2013 (High Court) (unreported) where the Energy Regulatory Authority purported to order compensation to reinstate property damaged by fire.

The applicant then contended that the decision of the respondent directing the applicant to reinstate or replace real property title number Likabula 3024 in effect directs rectification of the land register to reinstate the property or directs compensation to replace the property. And that it in effect cancels or repudiates the contract between the applicant and its customer and closes out the transaction from the parameters of the parties' contract.

Further, that the decision arrogates into the respondent the power to micro-manage financial institutions when the financial services laws generally locate the Registrar of Financial Institutions at macro-management level setting industry standards as opposed to micro-dispute resolution between financial institutions and their individual customers.

The applicant concluded that the decision herein is therefore in excess of the authority of the Registrar of Financial Institutions. And that it is far in excess of the authority for Deputy Governor of the Reserve Bank of Malawi. It added that this is therefore an appropriate case to repeat that clarion which our Courts have been making to say all public officials "to act legally within our powers where they exist and not to act where there are no such powers". *State v. Malawi Energy Regulatory Authority ex. parte Malawi Housing Corporation* at p. 24.

The applicant then moved this Court to find that the decision in issue herein falls completely within the jurisdiction of a review Court, and that on the authority of *State v. Registrar of Financial Institutions ex. parte Prime Insurance Company Limited and Another* Judicial Review No. 44 of 2016 (High Court) (unreported) there is no alternative remedy. And that the decision under review is *ultra vires* the respondent within the statutory setting and fails to pass the *Wednesbury* test in all the three senses of that test.
On his part, the respondent argued as follows.

He noted that in paragraph 9.3 of the submissions, the applicant argues that the direction was invalid essentially because the authority to cancel or repudiate a contact and/or direct rectification of a transaction affecting registered land and/or to order compensation on grounds of negligence or for any grounds at all lies with the High Court.

And that, in essence, the argument is that the direction to reinstate real property to the applicant's customer in effect directs rectification of the land register, and that it in effect cancels or repudiates the contract between the applicant and its customer.

The respondent contended that this argument is fundamentally misplaced and should not have been raised at all. And that before he states his submissions on the provisions the applicant has relied on this argument, he wishes to comment as follows.

He submitted that the essence of the direction of the Registrar of Financial Institutions is that the applicant was required to rectify/remedy the wrong conduct it had done as a financial institution.

And further that, by raising this argument, what essentially the applicant is saying is this: we submit that we were wrong, but look, even if you ask us to remedy the situation, you will not achieve anything because we already sold the property in question to another person. You should just let us go with it.

The respondent noted that then the applicant rushed to court and asked this Court to invoke its powers to nullify the direction, so that there should not be an obligation on the applicant's part to correct its mistakes.

The respondent submitted that the court cannot and should not allow itself to be so abused. And that this is what the applicant is aiming at is clear from paragraph 3.1 (xvi) of the grounds on which relief is sought in the originating motion where the applicant states :"Although the respondent insists on his decision made, security constituted in title Number Likabula 3024 had long been realized under the chargee-chargor contract between the bank and its customer, and the property duly transferred to a purchaser and once again charged to the bank under a totally different contractual arrangement with the new proprietor.

The respondent then posited that the question for the applicant is, "Does it matter whether or not security was already realised"? The respondent then submitted that the fact that the said security was already realised and the property already sold does not affect the validity of the direction. And that this is why the respondent submits that the applicant is asking the court to help it to get away with its infractions of financial services laws and other laws which the direction aims at correcting.

The respondent turned to the provisions of the Registered Land Act cited by the applicant, and he submitted that they do not support the argument made by the applicant.

The respondent submitted that, firstly, as he already stated during oral submissions, section 71 of the Registered Land Act prescribes on the power of sale by a chargee and that indeed nowhere under it is it stated that the exercise of the chargee's power of sale has any effect on the power of the Registrar of Financial Institutions under the Financial Services Act.

The respondent noted that, in fact, section 71 (1) of the Registered Land Act imposes on the chargee the duty to act in good faith and have regard to the interest of the chargor. And that it can only be wondered if the applicant can confidently claim to have acted in good faith and with regard to the interests of the applicant by

proceeding to sell her property when they had not established whether she had even applied for, not to talk about receiving, the disputed loans.

The respondent added that if section 71(1) is to be considered and applied in this case, therefore, it only goes against the applicant and does not assist it in any way.

The respondent submitted that, however, section 71 of the Registered Land Act is simply irrelevant in this judicial review. He submitted further that, though not relevant, the applicant is wrong in suggesting that the power to rectify the registry of land lies with the High Court only. He noted that he already referred to section 138 of the Registered Land Act which also confers the powers to rectify a register in certain cases on the Land Registrar.

The respondent then submitted that even if it is the case that the Registrar of Financial Institution's direction affects the bank's contract with its customers, the Financial Services Act addresses that concern in sections 39 and 40..

He referred to section 39 (7) of the Financial Services Act which provides that

> A financial institution that has been given direction under this section shall comply with the direction despite anything in its memorandum or articles of association or regulations, and despite any contract or arrangement to which it is a party.

He further referred to section 40(1) of the Financial Services Act which provides that

> A direction under Section 39 shall not be a ground on which a person may terminate, repudiate or cancel a contract with the financial institution, accelerate a debt under such contract, or close out a transaction with the institution, despite any provision to the contrary in any document.

The respondent then observed that, on these provisions, the applicant argues that Section 39(7) is limited by Section 40 of the Financial Services Act..

The respondent contended that, first of all, the applicant misunderstands the two provisions. He submitted further that section 39 (7) of the Financial Services Act

requires a financial institution that has been given a direction to comply with the same... despite any contract or arrangement to which it is a party. And that the law is clear again.

Further, that the existence of the alleged contract between the applicant and anyone else, including the alleged buyer of the complainant's property, does not afford any shield against the requirement to comply with the direction. And that, in fact, the legislature was avoiding this very argument made by the applicant, and that is why Section 39(7) of the Financial Services Act was enacted. The respondent contended that, therefore, the contracts between the applicant and anyone else are irrelevant and the applicant must comply with the direction

The respondent contended that, secondly, Section 40(1) of the Financial Services Act does not, as the applicant claims, limit Section 39 (7) of the Financial Services Act.

He pointed out that section 40 of the Financial Services Act is directed not to a financial institution like the applicant, but a person who enters into a contract with a financial institution. And that, it is directed at that person, where it provides that a direction shall not be a ground on which that person may terminate, repudiate or cancel a contract with the financial institution.

And that, therefore the applicant, being a financial institution, cannot place reliance on Section 39 of the Financial Services Act as if there is any person who has come to repudiate or cancel any contract with it on the basis of the direction.

The respondent asked whether the applicant saying the Registrar of Financial Institutions is such a person trying to repudiate any contract with it? He stated that the answer is clearly in the negative.

The respondent then argued that the Registrar of Financial Institutions has exercised his authority under the Financial Services Act as the regulatory and supervisory authority for the financial services industry. And that the Registrar of Financial Institutions is not concerned with any financial institution's contracts with their customers. But that the said Registrar is only concerned with the exercise of his powers under the Financial Services Act and other laws.

He added that whether or not the financial institutions are affected, that is not what is relevant in making sure that financial services laws are complied with. But that if, however, any contracts between financial institutions and other parties are affected, then Section 39 (7) of the Financial Services Act settles the matter once and for all.

This Court agrees with both parties that, essentially, the key to understanding the limits of the statutory powers of the Registrar of Financial Institutions when making directions is section 39 (1) of the Financial Services Act.

What must be noted, as correctly submitted by the applicant, is that section 39 (1) (b) of the Financial Services Act provides that if it appears that a direction is necessary to protect the interests of clients of a licensed or registered financial institution the Registrar may give the financial institution a written direction to take an action specified in the direction about the way in which the affairs of the institution are to be conducted, being an action the Registrar considers desirable to deal with the case in the interests of the institution, the clients of the financial institution or the financial system.

It is clear here that as correctly submitted by the applicant, the direction is aimed at a class, being clients of the financial institution, and not a single client.

The directions are supposed to be supervisory and regulatory in nature. They cannot be adjudicative as was the case in this matter.

The point is that, as submitted by the applicant, if a direction is adjudicative on case by case basis as is the case with impugned directive, then the Registrar of Financial Institutions will indeed become a complaints centre for adjudication which does not appear to be the express or implied purpose of the scheme under the Financial Services Act.

The Registrar has power to issue directions to protect the interests of clients of a licenced financial institution. And the directions pertain to how the affairs of the financial institution are to be conducted. This is clearly supervisory and regulatory as opposed to adjudicative.

If Parliament had intended that the Registrar of Financial Institutions should play an adjudicative role that he has assumed in this matter surely the Financial Services Act should have clearly provided for a dispute resolution mechanism relating to complaints by customers against their financial services providers.

It may indeed be argued in section 39 (2) (j)(iv) Financial Services Act provides for the adjudicative function of the Registrar of Financial Institutions because it says that without limiting what a direction may contain, a direction may require a financial institution to initiate a cease and desist order, of either temporary or indefinite duration requiring the prudentially regulated financial institution and its management to correct or remedy the impact of any impermissible action.

This does not at all give the Registrar of Financial Institutions power to adjudicate on complaints on case by case basis but to again play a supervisory and regulatory role by directing that the financial institution in question stops illegal activity (cease) and not to restart it (desist) with a view to correct or remedy the impact of impermissible action.

This state of affairs does not detract from the provisions of section 39 (7) of the Financial Services Act which provides that a financial institution that has been given direction under this section shall comply with the direction despite anything in its memorandum or articles of association or regulations, and despite any contract or arrangement to which it is a party. The only obvious qualification being that the direction must be one that the Registrar of Financial Institutions has statutory power to issue.

Section 39 (2) of the Financial Services Act also spells out a lot of specific things that the Registrar can order a financial institution to do and those things are all supervisory and there is nothing adjudicative there. In that case, section 39 (2) (p) of the Financial Services Act does not import an adjudicative power when it says that the Registrar of Financial Institutions may impose any other sanction as he may deem appropriate in the circumstances. It all has to be supervisory and regulatory.

There is nothing in the Financial Services Act giving the Registrar of Financial Institutions a power to then adjudicate on individual complaints and start directing

that the applicant financial institution must replace or reinstate collateral negligently sold under the charge herein.

The Registrar of Financial Institutions can only deal with matters that go to the root cause of the subject of the complaint. For instance, in this case the Registrar could have issued directions to the applicant to safeguard the interests of the clients of the applicant so that the facts established in the present matter are everted, that is, the sale of a collateral negligently due to poor record keeping etc.

In that connection, the argument by the respondent that the applicant wants to get away with its wrongful conduct is not relevant here. The relevant issue is that the Registrar of Financial Institutions is not the proper forum for adjudicating on the alleged wrong because it does not have the statutory power to adjudicate as it purported to.

The applicant's client should have had recourse to an appropriate forum with powers to adjudicate her claim. But her resort to the Registrar of Financial Institutions should result in necessary supervisory and regulatory action being taken against the applicant.

In that connection, this Court entirely agrees with the submission by the applicant that the direction herein was ultra vires the Registrar of Financial Institutions for want of jurisdiction due to excess of jurisdiction.

Having found that the Registrar of Financial Institutions has no adjudicative power that it assumed in this matter, this Court does not find it necessary to consider in greater detail the arguments raised on the issue of the relationship between the impugned direction and the power of this Court under the Registered Land Act to rectify the land register or the implication of section 40 of the Financial Services Act on the question already decided.

This is so because with the notorious and persistent power cuts, which have severely slowed down the writing of judgments which we normally do mostly outside office hours when we now have no power, it is in the interest of judicial economy that this Court spare its time to attend to other matters that also require this Court's time for judgment writing.

Suffice to say that, as correctly submitted by the applicant, the Registrar of Financial Institutions has no power to give a direction that effectively results in rectification of the Land Register and that indeed it is this Court that has such power to order rectification of the Register under the Registered Land Act.

In conclusion, this Court finds that the impugned direction of the Registrar of Financial Institutions is of no legal force on the basis of the last two grounds for the judicial review herein, namely, procedural impropriety and want of jurisdiction.

Consequently, this Court grants the declarations and orders sought by the applicant in paragraph 1, 2, 3, 5 and 6 in the originating motion for judicial review.

That means the impugned direction by the Registrar of Financial Institutions is quashed. The Registrar if minded will have to take fresh steps in this matter by following the statutory procedure prior to giving directions and then issue proper supervisory and regulatory directions as opposed to adjudicative directions.

There was an argument that the applicant ought to have appealed the Registrar of Financial Institution's decision to the Appeals Committee under the Financial Services Act and that this was an alternative remedy that precluded the applicant from seeking judicial review.

The point was made, in *State v. Registrar of Financial Institutions ex. parte Prime Insurance Company Limited and Another* Judicial Review No. 44 of 2016 (High Court) (unreported), to which this Court entirely agrees, that where a public authority's decision is attacked for being a nullity then availability of an appeals procedure under a statutory scheme, such as the Financial Services Act, does not preclude judicial review. That is an exception to the important general rule that an appeal must be exhausted first before judicial review.

The impugned decision herein was successfully attacked as a nullity and so the applicant properly commenced these judicial review proceedings.

Costs normally follow the event in that a successful party gets them and so are for the applicant in these proceedings.

Except that the respondent gets costs for responding to the applicant's submission dated 25th May 2017.

This is so, because the only issue that the applicant was supposed to deal with after the hearing was to provide some authorities as directed by this Court but the applicant ended up filing written submissions after a lengthy oral hearing and thereby compelled the respondent to file his own written submissions in response on 16th June 2017.

Made in open Court at Blantyre this 25th January 2018. 31/01/18

M.A. Tembo

JUDGE