



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

ELECTION PETITION NUMBER 2 OF 2019

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY
ELECTIONS ACT**

BETWEEN:

TIKONZE PEOPLES MOVEMENT

PETITIONER

AND

THE ELECTORAL COMMISSION

1st RESPONDENT

DR CASSIM CHILUMPHA SC

2nd RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

Sauti-Phiri, Counsel for the Petitioner
Banda, Counsel for the 1st Respondent
Kumichongwe, For the Attorney General
Mankhambera, Official Court Interpreter

JUDGMENT

This is this court's judgment on a petition brought by the petitioner, Tikonze Peoples Movement (TPM) which is a political party registered under the Political Parties (Registration and Regulation) Act.

The petition is brought under section 114 (1) of the Parliamentary and Presidential Elections Act appealing against the decision of the 1st respondent that there was no irregularity disclosed by the petitioner in relation to the nomination of Dr Cassim Chilumpha SC as a presidential candidate elected or sponsored by the petitioner.

The petition asserts that on 7th February 2019 Dr Cassim Chilumpha SC lodged his nomination papers purportedly to stand for, and being sponsored by, the petitioner.

And that on 12th February 2019, the petitioner lodged a complaint with the 1st respondent claiming irregularities with the nomination papers lodged by the said Dr Cassim Chilumpha SC as follows, namely, that the said Dr Cassim Chilumpha SC has not been elected and approved by the petitioner as its presidential candidate in the forthcoming presidential election. And that Mr Grant Chimanya, Deputy Secretary General of the petitioner, was not authorized by the petitioner to countersign Dr Chilumpha's nomination papers.

And that by its letter dated 22nd February 2019 the 1st respondent informed the petitioner that the petitioner's complaint that there were irregularities with Dr Cassim Chilumpha's nomination was rejected.

Aggrieved by the decision of the 1st respondent, the petitioner appeals against the decision of the 1st respondent rejecting the existence of irregularities, on the grounds, inter alia, firstly, that the 1st respondent has been non responsive on the first complaint that Dr Cassim Chilumpha SC was not elected as the petitioner's presidential candidate.

That with regard to the second complaint, the 1st respondent only considered whether Grant Chimanya was an office bearer, but failed or ignored to also consider the second aspect, namely, whether Grant Chimanya, as an office bearer, was in fact authorized to certify that Dr Chilumpha SC is a candidate for or is being sponsored by the petitioner.

Thirdly, that when confronted with the two complaints stated above, the 1st respondent erred by failing to place the burden of proof on Dr Cassim Chilumpha SC, namely, to show that he was duly elected as candidate for the petitioner and also that Grant Chimanya was an office bearer with authority to certify that Dr Chilumpha SC is a candidate for or is being sponsored by the petitioner.

The petitioner seeks the following orders. Firstly, an order that Dr Cassim Chilumpha SC, the 2nd respondent, was not elected as presidential candidate for the petitioner and is not being sponsored as such by the petitioner in the forthcoming Presidential election.

Secondly, an order that Grant Chimenya, as an office bearer of the petitioner, was not authorized to certify that Dr Cassim Chilumpha SC is a candidate for or sponsored by the petitioner for the forthcoming Presidential election.

Thirdly, an order that by virtue of an electoral alliance concluded by the petitioner and other political parties, these political parties that form the alliance have agreed to support one presidential candidate, namely, Dr Saulos Chilima, not two or more.

Fourthly, such orders as this Court thinks just and costs on an indemnity basis.

The petitioner filed a sworn statement in support of the petition and skeleton arguments on the relevant law and evidence.

The 1st respondent also filed its own sworn statement in opposition to the petition as well skeleton arguments on the relevant law and evidence.

The 2nd respondent though duly served with all the court processes herein, upon being joined to the petition herein, did not appear at the hearing or make any appearance in this matter at all.

This Court considered the urgency of this matter in relation to the election calendar and printing of ballot papers and therefore decided to proceed in the absence of the 2nd respondent.

The question for the decision of this Court is whether decision of the 1st respondent rejecting the existence of irregularities in Dr Chilumpha's nomination as presidential candidate was erroneous on the grounds, firstly, that the 1st respondent has been non responsive on the first complaint that Dr Cassim Chilumpha SC was not elected or sponsored as the petitioner's presidential candidate.

That with regard to the second complaint, the 1st respondent only considered whether Grant Chimenya was an office bearer, but failed or ignored to also consider the second aspect, namely, whether Grant Chimenya, as an office bearer, was in fact

authorized to certify that Dr Chilumpha SC is a candidate for or is being sponsored by the petitioner.

Thirdly, that when confronted with the two complaints stated above, the 1st respondent erred by failing to place the burden of proof on Dr Cassim Chilumpha SC, namely, to show that he was duly elected as a candidate for the petitioner and also that Grant Chimanya was an office bearer with authority to certify that Dr Chilumpha SC is a candidate for or is being sponsored by the petitioner.

The petitioner's case, as disclosed in its Secretary General's sworn statement, is as follows.

The petitioner is a political party having been registered as such on 14th November 2018.

That on 1st February 2019, the petitioner entered into an electoral alliance with other political parties, in terms of which it was agreed that the petitioner would support the presidential candidature of Dr Saulos Chilima.

There were attached minutes of a National Conference of the petitioner held on 27th January 2019 and minutes of a meeting of the petitioner held on 31st January 2019 and marked as exhibit RA2 and RA 3 respectively.

These minutes show that Dr Cassim Chilumpha SC was elected Interim President of the petitioner on standby capacity. The minutes also show that the people present at the meetings, including Dr Chilumpha SC, agreed that if the electoral alliance fell through, a meeting of the petitioner's executive would be convened to approve its presidential candidate for the forthcoming presidential election.

That the electoral alliance between UTM, AFORD and the petitioner remains intact. And that it was therefore not necessary or desirable that the petitioner should sponsor its own presidential candidate in the forthcoming presidential election.

And that when Dr Chilumpha SC presented his nomination papers as a candidate for the petitioner, the petitioner, through its Secretary General, wrote a letter of complaint to the 1st respondent. A copy of that letter is exhibited as RA4.

The petitioner asserted that the 1st respondent responded to the letter of complaint by letter dated 22nd February 2019 rejecting the existence of any irregularity in the

nomination of Dr Chilumpha SC as presidential candidate for the petitioner in the forthcoming presidential election.

The petitioner asserted further that it is aggrieved by the decision of the 1st respondent because the petitioner did not elect or sponsor Dr Chilumpha SC as its presidential candidate for the forthcoming presidential election and therefore appeals to this Court to reverse the decision of the 1st respondent because, firstly, it is irregular for Dr Chilumpha SC to contest under a political party that has not elected him or authorized him and secondly, that it is irregular for Grant Chimunya, although an office bearer, to countersign Dr Chilumpha's nomination papers without being authorized by the petitioner.

The petitioner attached its constitution.

On the other hand, having noted the appeal by the petitioner, the 1st respondent's case is as follows.

That through a press release, the 1st respondent advertised and released to the public a schedule for receiving nomination papers. And that the schedule indicated the date, time, name of candidate and affiliation of the candidate. And that it was therefore known to the general public including the petitioner that the 1st respondent would be receiving the nomination papers from Dr Chilumpha SC who would be contesting under the sponsorship of the petitioner. A copy of the press released was exhibited as DMB1.

That having read or seen the press release, the petitioner did not, at least to the knowledge of the 1st respondent, try to stop Dr Chilumpha SC from presenting his nomination on behalf of the petitioner.

That on 7th February 2019, the 1st respondent received nomination papers from Dr Chilumpha SC. And that on page 33 of those papers, Grant Chimunya of the petitioner signed as a person authorized and certified that Dr Chilumpha's candidature was under the sponsorship of the petitioner. A copy of that page is exhibited as DMB 2.

The 1st respondent asserted that, after closure of the nomination period on 8th February 2019, it received a letter from the petitioner on 12th February 2019 requesting that the 1st respondent should complete processing the presidential

nomination papers submitted by Dr Chilumpha SC on behalf of the petitioner. A copy of the letter is exhibited as DMB 3.

The 1st respondent stated that, briefly, the petitioner's letter of 12th February 2019 alleged that the petitioner had entered into a formal alliance with AFORD and UTM to support one presidential candidate and that the said candidate was not Dr Chilumpha SC. And that the letter also alleged that Dr Chilumpha SC, had, at the time of presentation of his nomination papers, resigned from the party and that the petitioner's Secretary General did not sign or delegate anyone to countersign the nomination papers in question.

The 1st respondent stated that, on receipt of the petitioner's letter dated 12th February 2019, it requested Dr Chilumpha SC to respond to the allegations that were being made against his nomination papers and candidature. And that the letter was copied to the petitioner. The letter is exhibited as DMB 4.

The 1st respondent then stated that, by a letter dated 15th February 2019, Dr Chilumpha SC submitted his response to the 1st respondent and stated that: he was the president of the petitioner and was elected the petitioner's presidential candidate for the 21st May 2019 general election by the petitioner's special congress held on 27th January 2019 at Grace Bandawe in Blantyre. And that his nomination papers were counter-signed by Grant Chimenya who is Deputy Secretary General of the petitioner.

The 1st respondent stated that Dr Chilumpha SC further stated the 'under the petitioner's constitution, the Deputy Secretary General has authority to perform the petitioner's Secretary General's functions whenever the Secretary General is unable or otherwise unable to perform those functions and does not require prior delegation by the Secretary General to be able to so'.

A copy of the letter from Dr Chilumpha SC to the 1st respondent dated 15th February 2019 is exhibited as DMB 5.

The 1st respondent asserted that it considered the matter and by a letter dated 22nd February 2019 to the petitioner and copied to Dr Chilumpha SC, determined that the nomination of Dr Chilumpha SC satisfied the requirements of the law. And that the

nomination papers were duly signed by a person who is an undisputed Interim Deputy Secretary General of the petitioner. The said letter is exhibited as DMB 6.

The 1st respondent lamented that even after receiving the letter containing the determination of the 1st respondent the petitioner has taken over a month to present this appeal to this Court. And that this delay should be considered to be inordinate and inexcusable.

The 1st respondent stated that it has already commenced printing of ballot papers and it is therefore out of bad faith that the present petition is being lodged now.

The 1st respondent asserted that it is not correct that it abdicated its duty or any duty at all. And that the petition has no merit and ought to be dismissed.

For the sake of making sure that issues are dealt with systematically this Court will deal with two preliminary matters raised by the respondent in resisting this petition, namely, that the petition was brought late and ought to be dismissed on that ground and that the matter herein is political in nature and should not be adjudicated upon by this Court.

Depending on how these first two questions are determined, this Court will or will not deal with the two substantive issues raised on the petition.

On the issue of delay, in its arguments in opposition to the instant petition, the 1st respondent strongly argued that the petition has been brought after inordinate and inexcusable delay on the petitioner's part and ought not to be entertained because the 1st respondent has strict schedules and has already commenced printing of ballots.

In response, the petitioner contended that appeals against determinations of the 1st respondent by way of petition under section 114 (1) of the Parliamentary and Presidential Elections Act are not time bound. And that this is in contrast to petitions pertaining to a return of election results under section 100 (1) of the Parliamentary and Presidential Elections Act that have a strict time limit.

The petitioner however appreciated that extreme delays in filing a petition may indeed cause serious problems in relation to the administration of the election but insisted that in the present case it was not guilty of inordinate and inexcusable delay.

This Court notes, in agreement, the concern of the 1st respondent relating to the deleterious effects to the administration of the election that may be occasioned by delayed election petitions in the run up to an election.

This Court has considered the sequence of events in this matter and concludes that the manner in which the petitioner proceeded on this petition is neither inexcusable nor inordinate.

As explained by the petitioner it registered its complaint with the 1st respondent four days after the 1st respondent received the nomination papers of Dr Chilumpha SC.

The 1st respondent made its determination on 22nd February 2019. And then, the petitioner filed its appeal by this petition with this Court's registry on 7th March 2019.

This Court understands that due to some procedural irregularities on the petition, the petition was sent back for corrections and could only be accepted and assigned to this Court on 15th March 2019.

It is clear that there was no intention on the part of the petitioner to delay in dealing with the appeal if it were not for the corrections on the petition.

It is regrettable that printing of ballots is likely to be affected. This Court does not take that aspect lightly. The magnitude of the effects of the decision of this Court are not known but this Court is of the view that there is still time for the effects of this decision to be factored onto the ballot if necessary.

This Court is also of the view that the issues raised by the petition are of significance that they ought to be determined at this stage. If it was too late in the day this court would not have hesitated to refuse to entertain the petition.

In the circumstances, this Court does not find inexcusable or inordinate delay in presenting the petition. This Court therefore is unable to refuse to hear the petition on the ground of inordinate or inexcusable delay in presentation of the petition.

On the issue that the matter herein is political in nature and should not be adjudicated upon by this Court the 1st respondent submitted as follows.

The 1st respondent contended that in as far as the orders being sought by the petitioner are concerned, this Court is being required to address political questions that ought to be resolved within the petitioner's party structure.

In that connection, the 1st respondent submitted that the petitioner should have proceeded against Dr Chilumpha in an ordinary civil matter without involving the 1st respondent. For instance, by obtaining an order of injunction against Dr Chilumpha SC to prevent him for presenting his nomination.

The 1st respondent observed that the petitioner would like the Court to make an order that Dr. Chilumpha, SC., was not elected as a Candidate or was not being sponsored by the petitioner. It submitted that this is a political issue that must be referred to the petitioner for resolution by the party in accordance with its dispute resolution rules.

The 1st respondent observed that courts have laid down principles to be considered when matters of this nature are presented for adjudication.

The 1st respondent submitted that, in making his order on whether the dispute was properly before the Court, Justice Kenyatta Nyirenda in *Bandawe v Malawi Congress Party*, Civil Cause No. 1010 of 2018 (High Court) (unreported), discussed a number pronouncement which read together, lay down principles which must be considered in matters that relates to intra-party political disputes.

The 1st respondent submitted that Kenyatta Nyirenda J referred to the discussion by Chikopa J, as he then was, in the case of *Ajinga v United Democratic Front*, Civil Cause Number 39 of 2007 (High Court) (unreported), Chikopa J stated that:

Political parties are no more than clubs. Membership is voluntary. Members are free to leave in much the same way they are free to join. The members conduct however is regulated by the clubs' rules/constitution which acts like some contract between the members and the club and between the members themselves. The clubs (in this case the party's activities are regulated by the clubs rules/constitution...If there are disputes they should be resolved in accordance with the party's rules/constitution. The courts should be slow, again very slow, to intervene in a party's internal dynamics. It should instead allow the party and its membership to deal with the matters in dispute using their own internal dispute resolution mechanisms. Where a member is not happy either with the party's conduct or a fellow member's conduct he is free to leave the club/party and join one that accords with his ideals. Or be without a club or party. The only time a court should

intervene in a club's or party's activities is where the club/party fails to comply with its own rules/constitution, where it acts in breach of the rules of natural justice or when it or its members conduct themselves in breach of the laws of the country.

And that Chikopa J, continued as follows:

In the case of *Chiume & Others v Aford, Chakufwa Chihana & Another* Civil cause number 108 of 2005 (Mzuzu Registry, unreported) we, borrowing a leaf from the Constitutional Court in South Africa and the House of Lords in England, opined that judicial officers are not best placed to decide on matters inter alia of politics. The considerations operating in politics are different to those obtaining in the courts. The courts are preoccupied with the law, facts, evidence and ensuring that their decisions are in accordance with legal, factual and evidential merit. Politics on the other hand deals primarily in numbers with emotions and egos taking a not too distant second. In politics he who has the numbers carries the day. Merit in whatever respect is not a primary consideration. We talk of the foregoing not because we have some particular distaste for politics but to drive home our view that as much as possible the courts should be slow, very slow in our humble view, to adjudicate on matters that though dressed up as legal are really political disputes. In fact our position is that the more political a dispute is the more amenable it should be to a political solution. The less political it is or becomes the more amenable it is or becomes to juridical intervention.

The 1st respondent submitted that in *Hon. Chakuamba v Dr. Chiona* Civil cause number 2563 of 2000, the court had this to say:

I have just referred to a constitutional provision and I have to state that MCP has a constitution which regulates the affairs of the party. I am very grateful to Mr Bazuka Mhango for his clear submission on the position in law of a political party and its members. He has cited several cases including the dictum of Lord Romilly MR in *Hopkinson v Marquis of Exeter* (1867) LR 5 Eq 63 at Page 67 where he said: - "In order to secure the principal object of the club, the members generally enter into a written contract in the form of rules ... It is clear that every member has contracted to abide by that rule ... must not be capricious or arbitrary."

This squarely puts membership of unincorporated bodies on contractual basis. I agree with it and I may slightly add that reference to a member to abide by the rules and not to be capricious or arbitrary extends not only to members but even those holding or being elected to hold leadership positions. They too should not be capricious or arbitrary. Mr. Mhango also submitted relying on the dictum of Fletcher-Moulton LJ in *Osborne vs Amalgamated Society of Railways Servants* (1911) 1 Ch. 540 that Court will concern

itself to protect contractual rights but that in doing so the Court must be careful that it does not enlarge those rights. The Court must ensure that the parties should abide by the express or implied agreements which they made and observe the set rules. I would give my qualified support for this position to the extent that as long as such rules are in conformity with superior laws of the land.

The 1st respondent then submitted that when the preceding case went for appeal as *Dr. Chiona v Hon. Chakuamba* MSCA Civil Appeal number 40 of 2000 (unreported) Chief Justice Richard Banda (as he then was) stated that:

The issue of who is the legitimate leader of Malawi Congress Party is a political question which must be resolved by the generality of the membership of the party. This Court cannot be the proper forum for it....

The 1st respondent then submitted that, having considered all the above cases, Kenyatta J, made the following summation in *Bandawe v Malawi Congress Party*:

Having carefully considered the respective submissions and the cases referred to therein, I have been able to distil therefrom the following principles. Firstly, disputes between a political party and its members should be resolved in accordance with the party's constitutive document and rules made thereunder. Secondly, the mere provision in a political party's constitutive document for internal resolutions of disputes, without prohibiting an aggrieved party that has exhausted internal remedies from seeking the intervention of courts of law, does not amount to ouster of the jurisdiction of the courts.

The point being made is that an attempt to have the matter resolved internally as provided by the political party's constitutive document should first be made: a political party or its members should not rush to court. Thirdly, a political party or its members will be allowed to have recourse to a court of law regarding disputes relating to activities of the political party where (a) the political party is in breach of its constitutive document or rules made thereunder, (b) the political party acts in breach of the rules of natural justice, (c) the political party or its members act in breach of the laws of Malawi, (d) the political party or its members conduct themselves in a capricious or arbitrary way. Fifthly, and perhaps more importantly, it is not uninteresting to note that the language used in the cited cases is cautious and well measured such as "... the courts should be slow ...", "... parties should not rush to court..", "...the present case is premature...", etc. That courts have used such language and not framed their respective holdings in absolute terms is not surprising: there is no denying that courts have jurisdiction over "political disputes" that raise issues of judicial nature: see sections 10(1) and 103(2) of the Constitution.

To my mind, the question whether or not a court should exercise its jurisdiction over a “political dispute” is not one that can be decided in abstract, without paying special attention to the facts of the particular case.

In the premises, it seems to me, in my not-so-fanciful thinking, that the developing trend of the wholesome bracket categorization of “political disputes” as being non-justiciable is not only wrong in principle but might also unwittingly give the impression that the judiciary is ingeniously hiding behind “political disputes” to shirk the duty imposed upon it by section 103(2) of the Constitution to determine issues of judicial nature, whether or not such issues touch upon politics.

I will add this much. Once a court has determined that a matter falls within its jurisdiction, it must not hesitate to deal with the matter to its logical conclusion in accordance, of course, with the applicable law and procedures, including exhaustion of alternative remedies, where the same is required by law. Needless to say, this is jurisdiction that must be guided jealously by the judiciary – not to be relinquished anyhow.

Having applied the foregoing principles to the present case, I am satisfied that the present application is rightly before the Court in that it falls within the categories of cases that are an exception to the general rule that “political disputes” are not amenable to juridical intervention.

The 1st respondent then submitted that it is not within the court’s parameter to decide that Dr Chilumpha SC was not elected to be the petitioner’s president or candidate. And that this issue can best be resolved within the party.

On its part the petitioner submitted as follows.

That the 1st respondent has power to deal with complaints alleging irregularities as provided for in the Constitution and the Parliamentary and Presidential Elections Act.

That the 1st respondent has powers to deal with complaints related to the conduct of elections. See section 76 (2) (c) of the Constitution.

Further, that any person aggrieved by the decision of the 1st respondent under section 76 (2) (c) of the Constitution has a right to appeal to this Court. See section 76 (3) of the Constitution.

The petition submitted that 1st respondent has power to determine complaints alleging an irregularity at any stage and where the irregularity is confirmed the 1st

respondent shall take necessary action to correct the irregularity. See Section 113 of the Parliamentary and Presidential Elections Act.

And that an appeal lies to this Court by way of petition against a decision of the 1st respondent confirming or rejecting the existence of an irregularity. See section 114 (1) of the Parliamentary and Presidential Elections Act.

The petitioner contended that it raised an irregularity concerning the fact that Dr Chilumpha SC was not elected or sponsored as presidential candidate for the petitioner although he represented himself as such to the 1st respondent.

And that in that case, the 1st respondent ought to have investigated the alleged irregularity and arrived at a conclusion. However that the 1st respondent did not respond on the issue whether Dr Chilumpha was elected or sponsored as a presidential candidate for the petitioner herein.

The petitioner agreed with the 1st respondent that this Court must not entertain matters that relate to purely intra-party political disputes but insisted that this was not a political question. It insisted that the matter at hand concerns interpretation of the law namely whether there was an irregularity in the nomination of Dr Chilumpha SC who was actually not sponsored by the petitioner.

This Court entirely agrees with the line of authorities cited by the 1st respondent and as agreed to by the petitioner to the effect that this Court should not entertain matters that involve purely political questions on intra party disputes.

This Court has however observed that indeed the petitioner raised an issue of irregularity in the nomination of Dr Chilumpha SC in that he was allegedly not elected or sponsored as a presidential candidate for the petitioner.

This issue is not being raised in a vacuum. It is being raised at the stage of nomination for the forthcoming presidential election and the legal question is whether Dr Chilumpha SC was indeed sponsored by the petitioner as was endorsed on his nomination papers.

The petitioner was entitled to raise such an irregularity at the nominations stage as it did in line with section 113 of the Parliamentary and Presidential Elections Act.

It must be remembered that under section 113 of the Parliamentary and Presidential Elections Act a complaint can be about any irregularity at any stage of the election and this must, in this Court's view, include at the nomination stage.

An irregularity is defined in section 3 of the Parliamentary and Presidential Elections Act to mean, in relation to the conduct of an election, noncompliance with the requirements of the Parliamentary and Presidential Elections Act.

One of the requirements of the Parliamentary and Presidential Elections Act is that on a presidential nomination a presidential candidate, if sponsored by a political party, must state the name of that sponsoring party. See section 49 (1) (c) of the Parliamentary and Presidential Elections Act

The evidence of the irregularity was presented to the 1st respondent. The evidence was in the form of minutes of the highest organ of the petitioner, namely, its National Conference.

The clear evidence which was presented by the Petitioner, in response to the nomination in issue, was that an agreement was entered into by the petitioner, Dr Chilumpha SC included, to the effect that no presidential nomination papers were to be presented unless the petitioner's executive approved of the same and only in the event that the coalition between the petitioner and other parties fell through.

Dr Chilumpha's claim that he was sponsored for the forthcoming election was thereby questioned. And the heart of the matter was that breach of an agreement reached by the petitioner is alleged to have led to an irregularity in presentation of nomination papers by Dr Chilumpha SC.

The fact that there was an agreement entitles this Court to intervene where that agreement is alleged to have been breached by presentation of the nomination papers. The parties to the agreement ought to be held to the agreement. That is a legal issue and not political issue. See generally *Evangelou & Ors v McNicol* [2016] EWCA Civ 817.

Again, to use the reasoning distilled by Kenyatta Nyirenda J in *Bandawe v Malawi Congress Party* a political party or its members will be allowed to have recourse to a court of law regarding disputes relating to activities of the political party where a political party or its members conduct themselves in a capricious or arbitrary way.

An allegation, as was made in the complaint to the 1st respondent that an interim president went ahead to present nomination papers behind the party's agreed scheme should surely qualify the conduct of such an interim president as capricious or arbitrary and to be treated as a legal question.

It is also instructive that section 114 (5) of the Parliamentary and Presidential Elections Act provides that

At the conclusion of the trial of an election petition the court shall determinewhat person was duly nominated....., and shall report such determination to the Commission. Upon such report being given such determination shall be final.

It is clear that one of the mandates of this Court is that it must determine, upon an appeal by petition, what person was duly nominated if that is the question in dispute.

The firm view of this Court is therefore that this Court and the 1st respondent ought therefore to address the question whether the nomination of Dr Chilumpha SC was marred by irregularity. And that this is a legal question.

Consequently, this Court does not find that the question raised in the present petition, on nomination of Dr Chilumpha SC, is purely political in nature and determines that this Court can deal with the same and that the 1st respondent was duty bound to deal with the same when raised with the accompanying evidence showing the petitioner's agreement that Dr Chilumpha SC could only present papers on approval of the petitioner as directed by the petitioner's highest organ.

With regard to the first complaint presented on the petition that Dr Chilumpha SC was not elected or sponsored as presidential candidate for the petitioner for the forthcoming presidential election, it is clear from the evidence presented to the 1st respondent by the petitioner, that the agreement of the petitioner was that he was indeed elected on standby basis in view of the electoral alliance between the petitioner and other political parties.

The evidence presented to the 1st respondent also clearly shows that the highest organ of the petitioner agreed that should it become necessary for Dr Chilumpha SC to present nomination papers upon sponsorship of the petitioner then the petitioner has to approve that.

The evidence before the 1st respondent is clear that no evidence of approval to present nomination papers was presented by Dr Chilumpha to the 1st respondent following the complaint by the petitioner.

In the foregoing circumstances, this Court finds that the 1st respondent erred in law in not finding that Dr Chilumpha's nomination on the basis of being sponsored by the petitioner was an irregularity.

Consequently, this Court grants an order that Dr Cassim Chilumpha SC, the 2nd respondent, was not elected as presidential candidate for the petitioner and is not being sponsored as such by the petitioner in the forthcoming Presidential election.

The 1st respondent shall ensure that Dr Cassim Chilumpha's name shall not appear on the ballot for the forthcoming presidential election as being sponsored by the petitioner.

With regard to the second alleged irregularity concerning the alleged unauthorized countersignature of Dr Chilumpha's nomination by Grant Chimenya who is Deputy Secretary General of the petitioner this Court notes as follows.

That the 1st respondent submitted that there is no basis for the petitioner to make such an allegation.

It is indeed correctly observed by both parties that in terms of section 49 (2) of the Parliamentary and Presidential Elections Act

Where a nomination paper specifies the matters referred to in paragraph (c) of subsection (1) (namely, that a candidate is to stand for or to be sponsored by a political party, specify that fact, together with the name of the political party), the nomination paper shall be countersigned by another person who is an office-bearer of the political party concerned and who has authority to certify that the candidate is to stand for or to be sponsored by that political party.

As correctly submitted by the 1st respondent, the constitution of the petitioner has no provision on the powers of the Secretary General of the petitioner and her Deputy. It does not specify what functions the Deputy Secretary General Grant Chimenya can perform only with the approval of the Secretary General.

However, this Court notes that the petitioner correctly contended that an aspect of the law, often overlooked, is to be found in section 37 of the Political Parties Act. Section 37 of the Political Parties Act, states, in part that-

Where a written law prohibits the doing of anything except by, or restricts the doing of anything to, a political party, the onus of proving that-

A person is an office bearer or member of, or has been authorised by, the political party in respect of which he claims to be acting shall be on the person who claims to be an office bearer or member of or to be authorised by, the party.

The statement of the law is clear in section 37 of the Political Parties Act that the onus of proving that someone is acting with the authority of a political party is on the person making the claim.

In this case, Dr Chilumpha SC was supposed to prove that Grant Chimenya, apart from being an office bearer of the petitioner, also had authority from the petitioner to countersign the nomination of Dr Chilumpha SC given the complaint by the petitioner that Grant Chimenya, though an authorized officer had no authority to countersign the nomination papers herein.

This is especially the case given the first complaint presented by the petitioner to the 1st respondent that Dr Chilumpha SC presented his nomination papers in breach of the agreement of the petitioner that nomination papers would not be presented unless the coalition falls through and the petitioner approved such presentation.

As such, the 1st respondent erred by not putting the burden of proof on Dr Chilumpha's on his claim that in the absence of the Secretary General her Deputy was entitled to act as he did on behalf of the petitioner.

This Court therefore finds that there is an error on the part of the 1st respondent in its determination that Grant Chimenya duly countersigned Dr Chilumpha's nomination papers as an office bearer of the petitioner and as authorized by the petitioner in the circumstances of this case. As it turns out, on the evidence, Grant Chimenya had no authority to do what he did.

In the final analysis, this Court finds that the decision of the 1st respondent rejecting the existence of irregularities in Dr Chilumpha's nomination as presidential

candidate was erroneous on the grounds, firstly, that the 1st respondent has been non responsive on the first complaint that Dr Cassim Chilumpha SC was not elected or sponsored as the petitioner's presidential candidate.

Secondly, that with regard to the second complaint, that the 1st respondent only considered whether Grant Chimenya was an office bearer, but failed or ignored to also consider the second aspect, namely, whether Grant Chimenya, as an office bearer, was in fact authorized to certify that Dr Chilumpha SC is a candidate for or is being sponsored by the petitioner.

Thirdly, that when confronted with the two complaints stated above, the 1st respondent erred by failing to place the burden of proof on Dr Cassim Chilumpha SC, namely, to show that he was duly elected as candidate for the petitioner and also that Grant Chimenya was an office bearer with authority to certify that Dr Chilumpha SC is a candidate for or is being sponsored by the petitioner.

This Court therefore grants the orders sought by the petitioner. Firstly, that Dr Cassim Chilumpha SC, the 2nd respondent, was not elected as presidential candidate for the petitioner and is not being sponsored as such by the petitioner in the forthcoming Presidential election.

Secondly, that Grant Chimenya, as an office bearer of the petitioner, was not authorized to certify that Dr Cassim Chilumpha SC is a candidate for or sponsored by the petitioner for the forthcoming Presidential election.

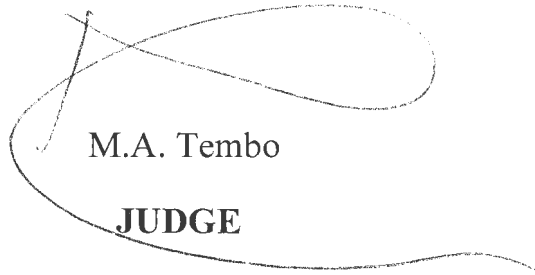
This Court is unable to grant the third order sought, namely, that by virtue of an electoral alliance concluded by the petitioner and other political parties, these political parties that form the alliance have agreed to support one presidential candidate, namely, Dr Saulos Chilima, not two or more. That is not really an issue that was in dispute before the 1st respondent which required the adjudication by the 1st respondent and cannot properly be subject of this appeal.

The petition is successful and the decision of the 1st respondent that Dr Cassim Chilumpha's nomination was duly accepted is reversed. He cannot be on the ballot as a candidate sponsored by the petitioner.

The petitioner asked for costs.

This Court has carefully considered the matter and notes that costs are in this Court's discretion. In the end this Court determines that Dr Cassim Chilumpha SC be condemned to pay the costs of these proceedings since it is his actions in breaching the agreement he had with the petitioner that has led to these proceedings.

Made in open Court at Blantyre this 11th April 2019.



M.A. Tembo
JUDGE