IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
JUDICIAL REVIEW NO. 13 OF 2020

BETWEEN

THE STATE

-and-

THE PRESIDENT OF THE REPUBLIC OF MALAWI	**1ST RESPONDENT**
COUNCIL OF THE UNIVERSITY OF MALAWI	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

EXPARTE:

STEVEN MPONDA	**1ST APPLICANT**
YOUNG SOKO	**2ND APPLICANT**
LONJEZO NOEL BANDA	**3RD APPLICANT**
PRECIOUS KALULU	**4TH APPLICANT**

CORAM: **HON. JUSTICE ZIONE NTABA**
Applicants Unrepresented
Counsel for the Respondents Absent
Mr. D. Banda, Court Clerk

RULING

1.0 BACKGROUND

1.1 The Applicants on 23rd March, 2020 brought an *ex parte* application against the same Respondents under Miscellaneous Application. No. 12 of 2020 which this

Court refused to grant and ordered that it be brought *inter partes* on 27th March, 2020. The Applicants however on 26th March, 2020 took a notice of discontinuance but brought a new application for leave to apply for judicial review. The said application was brought *ex parte* as well. The Court again refused to grant the said leave and ordered that it be brought *inter partes* on 1st April, 2020.

1.2 The application for leave for judicial review brings out the following issues –

1.2.1 Section 32 of the Disaster Preparedness and Relief Act, Cap. 33:05 of the Laws of Malawi (hereinafter referred to as 'the DPRA') does not give the President power to issue directives and not to even take measures to address the disaster other than making a declaration of the state of disaster;

1.2.2 the directive issued by the President of the "Government" is unconstitutional to the extent that it is derogating their right to education without following derogation procedures under section 45 of the Constitution; and

1.2.3 the President does not have the authority under any law to direct the 2nd Respondent to close down Chancellor College of the University of Malawi.

1.3 The Applicants prayed for the following reliefs –

1.3.1 an order quashing the 1st Respondent's directives issued on 20th March, 2020;

1.3.2 an order quashing the 2nd Respondent's decision to close down Chancellor College in compliance with the 1st Respondent's decision;

1.3.3 a declaration that section 32 of the DPRA is unconstitutional to the extent that it empowers the President, minister and civil protection officers to derogate and limit rights and freedoms in contravention of section 45 of the Constitution;

1.3.4 a declaration that section 29(a) of the Public Health Act, Cap. 34:01 of the Laws of Malawi (hereinafter referred to as 'the PHA')is unconstitutional to the extent that it empowers the minister to derogate rights in contravention of section 45 of the Constitution; and

1.3.5 a declaration that only the national assembly has the power to derogate rights and freedoms in response to a disaster;

2.0 THE APPLICATION

2.1 The Applicants supported their application with a sworn statement in which they argued that they are law students at Chancellor College of the University of Malawi in their third year of study. They argued that their second semester was to last until 19th June, 2020. They further deposed that they are aware that there is a global outbreak of a fatal viral infection known as COVID-19 and which was

declared a pandemic by the World Health Organization on 11th March, 2020. They argued that the 20th March, 2020 state of disaster declared by the President which included closure of public and private schools and colleges was unreasonable because there was no reported case within Malawi. Therefore in such circumstances, the measures would have been reasonable if they were aimed at preventing the restricting entry into the Republic in order to ensure that the pandemic did not find itself into the country. They also argued that the declaration was unconstitutional and violated their right to education which was constitutionally guaranteed.

2.2 They argued that they had *locus standi* to seek the judicial review as they are students of a constituent college of the 2nd Respondent and victims of the closure. Further they argued that this Court has powers to hear this application as per Order 19 of the High Court (Civil Procedure) Rules, 2017 (hereinafter referred to as the 'CPR'). The Applicants further highlighted to the Court that they were seeking the court's leave because the decisions by the 1st and 2nd Respondent do not conform with the Constitution and that their case is arguable because according to the case of ***Hon. Dr. George Chaponda et al v State ex parte Kajoloweka et al,*** MSCA No. 5 of 2017 (Unrep), they have an issue fit for further investigation under a judicial review. They stated that this is so because –

2.2.1 the matter touches the very heart and life of our society - the Constitution; the Court has to determine if the 1st Respondent acted constitutionally considering that he made the declaration with no reference to any specific law. Further it was their inference that he probably did so under section 32 of the DPA, but it was their contention that he needed to have done so under Section 45 of the Constitution. It was their further argument that the rules of statutory interpretation require for the literal interpretation unless it produces absurdity as held in ***Malawi Law Society v Justice Banda*** 12 MLR 293 as such the nature and ordinary meaning of section 32 needs to be made as such it does not empower the President to issue directives;

2.2.2 secondly, they argued that his reference to 'my Government' in the directives did not mean himself issuing the directives especially since under the DPRA, it is the Minister or civil protection officers who can proceed to make orders and put measures in place to protect and relieve victims of the disaster. Therefore the President was not conferred with authority to issue orders as such the 2nd Respondent's issuance of the memorandum for closure in reaction to the directive was wrong;

2.2.3 they argued that the President or any other authority can derogate constitutional rights without a declaration of a state of emergency as long as there is a disaster posing a fatal risk to life like under section 29(a) of the PHA and the derogation is only permissible under section 45(4) of the Constitution;

2.2.4 Furthermore, in terms of General Comment No. 13 on the right to education, this right has four aspects which are availability, accessibility, acceptability and adaptability. It was their contention that the right rests on access to education institutions and facilities and closure of schools and colleges takes it away especially under a declared state of emergency;

2.2.5 they also argued that even if the Court declares section 29(a) of the PHA as constitutional, their contention was that it was not followed because no rules have been prescribed;

2.2.6 they also contended that in terms of limitation of rights, section 44(1) of the Constitution requires that a limitation must be prescribed by law as per ***Malawi Law Society et al v President of the Republic of Malawi*** [2002-2003] MLR 409 which held that a presidential order is not a law within the meaning of section 44 and as per ***Ralph Mhone v Attorney General,*** Misc. Civ. Cause No. 115 of 1993 which ruled that a directive is not law no matter how seriously it is made. They argued that a directive is not law even if made in times of a disaster. As such, they argued that the President cannot limit the rights using a presidential directive or order;

2.2.7 they also argued that Parliament has authority to delegate its legislative authority but they cannot do so if it substantially and significantly affect fundamental rights and freedoms under the Constitution. As such, they contended that sections 45(3)(b) and (5) of the Constitution give the power to declare a state of emergency to the National Assembly;

2.2.8 they cited ***The State (on application of Lin Xiaoxiao et al) v The Director General – Immigration and Citizenship Services et al,*** Judicial Review Cause No. 19 of 2020 (LL)(HC)(Unrep) which they argued supported their application in terms of the issue of constitutionality as well as interpretation of the DPRA and PHA as it relates to the declared state of disaster; and

2.2.9 they concluded that they should be granted leave because they have no alternative remedy as per the case of as per ***State v Commissioner General of the Malawi Revenue Authority ex parte Airtel Malawi Limited,*** Jud. Rev. Cause No. 33 of 2015 (LL)(HC)(Unrep) where Justice K. Nyirenda stated that it is trite law that the remedy of judicial review 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 because the proposition of the law is premised on the fact that judicial review is a remedy of last resort.

2.3 The Respondents did not appear on the date of hearing for the *inter partes* application for leave for judicial review nor had they filed a sworn statement because according to the email sent to the Assistant Registrar, Her Honour Kayira, the documents for the *inter partes* application were not brought to their attention by the person who accepted service from the Applicants. The Court must be quick

to point out that this kind of conduct is deplorable especially where matters of such significance as the present one are concerned. The rules are very clear that supervising Counsel must take responsibility for the acts or omissions of clerical officers in the legal house. This applies squarely to the Attorney General's Chambers as well. It is imperative that the Attorney General's Chambers should ensure that best practices are adopted to avert a scenario such as the present one recurring.

3.0 THE LAW AND COURT'S REASONED DETERMINATION

3.1 This Court before it goes into the law and its determination and thought it prudent that a chronology of events be highlighted in terms of the Malawi COVID-19 or corona virus timeline as well as relation to the world –

Date	**Event**
31st December, 2019	China discovers corona virus (SARS-CoV-2) in Wuhan
11th March, 2020	WHO declares COVID 19 a pandemic
20th March, 2020	State of Disaster declared in Malawi
23rd March, 2020	Applicants *ex parte* injunction application
26th March, 2020	Injunction application discontinued Application for leave for judicial review
1st April, 2020	*Inter partes* application for leave to apply
2nd April, 2020	First three cases of confirmed COVID-19 cases in Lilongwe
3rd April, 2020	Justice Kenyatta Nyirenda's COVID-19 Decision
4th April, 2020	New COVID-19 measures declared for Malawi
6th April, 2020	Fifth case of confirmed COVID-19 patient in Blantyre
7th April, 2020	Eighth case confirmed COVID-19 case in Blantyre and Chikwawa. One death in Blantyre

3.2 Secondly, let me deal with the legal principles regarding an application for leave to apply for judicial review as provided under Order 19 rule 20 of the CPR which states that no application for judicial review shall be made unless leave of the Court has been obtained. Secondly, leave is to be granted if arguable or triable issues arise and where leave has already been granted, it should only be set aside

where the respondent can show that the substantive application will clearly fail. Consequently, the law has also stated that an application for leave should be made promptly and within three (3) months of the decision being contested.

3.3 Accordingly, it is imperative that the technical issues are dealt with first. Notably, upon an examination of the documents in support of the application, this Court is satisfied that the requirement of the period within which they can move this court for leave to undertake judicial review. The decision being complained against was made on 20th March, 2020 and therefore within the prescribed time limits of three (3) months. The second issue is whether the subject matter is prescribed to be a judicial review matter. The said order states that as long as the matter pertains to a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is or are affected or threatened. Therefore, this Court at this juncture is turning to the issue whether the decision being questioned is amenable to judicial review. The concept of judicial review is that it is a remedy that lies against a public body or office and can be granted on a number of reasons like where there was want or excess of jurisdiction, failure to comply with rules of natural justice to mention a few. The Applicants have invited this Court to endorse the sentiments of the Court in ***Ex parte Chilumpha,*** Constitutional Cause No. 5 of 2006 where Justices Chipeta, Potani and Kamwambe held as follows -

> *"Judicial review, as currently understood and accepted, is a procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions. (See Practice note 53/1-14/1 under order 53 rules 1 to 14 of the Rules of Supreme Court). As aptly put by Lord Hailsham L.C. in Chief Constable of North Wales Police vs Evans (1982) I WLR 1155 at 1160, judicial review is concerned with reviewing, not the merits of the decision the application relates to, but rather the decision – making process. (See: note 53/1 – 14/6). In the application before us, to avoid reviewing what the law forbids us to so review, we should really be looking for proceedings and/or decisions, conducted or made by inferior courts or tribunals or by persons or bodies performing public duties or functions, and only when we find such should we check whether the decision-making process in them calls for the proposed review*

3.3 The Applicant argued that the 1st Respondent has not correctly appreciated and discharged its constitutional, statutory and administrative law duties in relation to the decision in question. They have argued that the decision although based on the DPRA, is in their view unconstitutional as such was done against section 45 of the Constitution. It should be stated that before delving deeper into the issue, on the face of whether the decision by the 1st Respondent is amenable to judicial review, the simple answer is yes. However, whether leave can be sustained on the grounds

and legal arguments submitted by the Applicants, that will be determined later in the proceeding paragraphs.

3.4 Lastly, this Court has to determine if the Applicants satisfy the sufficient interest aspect of Order 19 rule 20(2) of the CPR. The Applicants argued that the declaration by the 1st Respondent has directly affected their right to education. It is a fact that the Applicants are students who are undertaking studies at the 2nd Respondent's constituent college, Chancellor College which was closed on 23rd March, 2020 following the 1st Respondent's declaration of the 20th of March 2020. This Court is therefore satisfied that the Applicants have demonstrated that they have sufficient interest to bring these judicial review proceedings.

3.5 It is imperative to underscore that the Applicants are asking this Court to determine, in granting the leave sought, that the matter raises an issue which in this Court's opinion is of a constitutional nature; this issue being that certain fundamental rights under the Bill of Rights were affected by the conduct of the 1st and 2nd Respondents. Secondly, whether the decision the 1st Respondent to declare the state of disaster was constitutional. It therefore means that the Applicants are not seeking the ordinary judicial review which Justice Tembo (as he was then) in ***Kalumo v Attorney General*** [1995] 2 MLR 669 at 671-672 held as follows –

> *"Let me pause for a moment to consider to consider the law on the question of judicial review. Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or injunction or otherwise. See* ***O'Reilly v Mackan [1983] 2 AC 237****. If a public authority charged with a public duty acts without jurisdiction or exceeds his jurisdiction judicial review will lie. Thus, where a decision of an administrative authority is founded, wholly or partly on an error of law, the authority has acted outside its jurisdiction and accordingly its decision is liable to be quashed. See* ***Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.*** *Where the rules of natural justice apply and the decision has been reached in breach of those rules judicial review will lie. See* ***Ridge v Baldwin [1964] AC 40.*** *Broadly, the rules of natural justice embody a duty to act fairly. Whether those rules apply and the extent of the duty depends upon a particular type of case concerned. The rules of natural justice or fairness are not cut and dried. They vary infinitely. They will normally apply where the decision concerned affects a person's rights, for example, where the property is taken by compulsory purchase or he is dismissed from a public office. See* ***R v Home Secretary, ex parte Santillo [1981] QB 778; Ridge v Baldwin*** *(cited above).*
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> *Besides the foregoing, let me also note that judicial review is concerned with reviewing not the merits of the decision in respect in which the application is made, but the decision-making process itself. Indeed the purpose of the remedy of judicial review is to ensure that the plaintiff is given fair treatment by the Army Commander. I have no right to substitute my opinion on the matter for that of the Army Commander, otherwise the court would, under the guise of preventing the abuse of power, be itself guilty of usurping the power of the Army Commander. Thus, the court in judicial review will only interfere with the decision of a public authority,*

such as the Army Commander, where the authority; has acted without jurisdiction or failed to comply with rules of natural justice."

3.6 The Applicants herein are seeking a constitutional judicial review as pronounced in the case of case of ***Muluzi v Director of Anti-Corruption Bureau*** [2015] MWSC 442 where the court held that according to section 5 and 108 of the Constitution, the court has powers to review the law in question as well as the Act of Parliament and this is not judicial review under Order 53 of the RSC. Such are limited to review of administrative decisions but now extends to judicial review of Acts of Parliament. However, in determining the constitutionality issues herein, it is critical that this Court is guided by the prescripts of section 11 and 211 of the Constitution. Another is section 46(1) of the Constitution which states that –

"Save in so far as it may be authorized to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid."

3.7 Furthermore, Malawian courts, that is, the High Court and Supreme Court of Appeal have expounded the principles to be followed when interpreting the Constitution so that one can now safely say that there has developed some consensus on the proper approach to be used when interpreting the Constitution. For instance, in the Malawi Supreme Court of Appeal decision in ***The State and Malawi Electoral Commission ex parte Rigtone Mzima,*** MSCA Civ. Appeal No 17 of 2004 [see para 1 pages 5 to 6], Tembo JA said:

"to begin with, we must state the relevant and applicable principles on constitutional interpretation. In so doing, we note the fact that such a statement ought to commence with the express acknowledgement of section 11 of the Constitution. This Court in the case of ***The Attorney General vs Fred Nseula and Malawi Congress Party****, MSCA Civil Appeal No of 1997 made the following observations in that regard-*

"Section 11 of the Constitution expressly empowers this court to develop principles of interpretation to be applied in interpreting the constitution. The principles that we develop must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi constitution is the Supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution… There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society … Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for generous interpretation avoiding a strict legalistic interpretation. The

language of a constitution must be construed not in a narrow legalistic and pedantic way, but broadly and purposively."

The position taken by this court on constitutional interpretation is on all fours with that taken by the Privy Council in the case of ***Minister of Home Affairs and Another vs Fisher and Another*** *[1979] 3 All E.R. p. 21, 25-26, where the Privy Council observed, among other things that constitutional interpretation calls for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms, thus, to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.*

Besides, such position is on all fours with that taken and expressed by the Supreme Court of Ghana on the matter in the case of ***Tuffour vs Attorney General*** *[1980] G.L.R. 637, 647-648 where the court said-*

"*A written Constitution ….is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for a better and fuller life. The constitution has its letter of the law. Equally, the Constitution has its spirit … the language … must be considered as if it were a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."*

3.8 At this point, it is critical that section 45(3) of the Constitution which has heavily been relied upon to argue that section 31 of the DRPA as well as section 29(a) of the PHA are unconstitutional should be reproduced -

> The President may declare a state of emergency –
> (a) only to the extent that it is provided for in this section;
> (b) only with the approval of the Defence and Security Committee of the National Assembly
> (c) only in times of war, threat of war, civil war or **widespread natural disaster (my emphasis);**
> (d) only with regard to the specific location where the emergency exists, and that the declaration of a state of emergence shall be publicly announced; and
> (e) only after a the state of emergency has been publicly announced.

3.9 The Applicants have asked this Court to declare that the 1st Respondent's declaration of a state of national disaster as unconstitutional as it does not meet the prescriptions of section 45(3) of the Constitution and this Court is inclined to agree. Its agreement comes from taking a close review of the actual words provided for in the section. The section calls for declared state of emergency, which the 1st Respondent did not do. According to the Applicants as well as the court's notice of Government Gazette Number 4 of 2020 dated 3rd April, 2020, the 1st Respondent declared a state of disaster under section 32 of the DPRA and not state of emergency under section 45(3) of the Constitution. Secondly, as noted by Justice Nyirenda in the ***Xiaoxiao*** case, he highlighted that corona virus does not fall under the term natural disaster and this Court agrees with that assertion, that

natural disasters pertain to the catastrophic events with atmospheric, geological, and hydrological origins like .g., droughts, earthquakes, floods, hurricanes, landslides to mention a few which may and can cause fatalities, property damage and social environmental disruption. It is at this point, that my departure from Justice Nyirenda's interpretation as well as the Applicant's assertion of the 20th March, 2020 declaration starts. This Court should thank the Applicants for their insistence that this Court should ensure that it interprets the Acts of Parliament in contention herein including the Constitution in terms of their literal meaning.

3.10 The literal rule when applied states that words in a statute should be given their ordinary and natural meaning without any analysis but only when absurdity arises can it stop being used. The classic case of ***Whiteley v Chappell*** (1868) **LR 4 QB 147** noted that the application of the literal rule led to an absurd result where the defendant breached a section making it an "offence to impersonate any person entitled to vote". However the defendant impersonated a man who had died therefore rendering that person not entitled to vote and the defendant found not guilty. It should be added that English courts in developing statutory interpretation added another rule, that is, the golden rule which called for interpretation of words by giving them their literal meaning unless such produced an absurd result which is manifestly inconsistent. Lord Blackburn held in ***River Wear Commissioners v Anderson*** (1877) 2 AC 743 at 764-765 that -

> *"I believe that is it not disputed that what Lord Wensleydale used to call* the *golden rule* is *right, vis, that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, which though less proper, is one which the Court thinks the words will bear."*

3.11 Another rule in which this Court's considered view might become useful as this determination continues is the is the mischief rule which enjoins courts to be wider in their approach so that a statute can be interpreted more broadly in order to eliminate any gaps within the legislation, because otherwise it prevents parliament's original intention from being respected, the court should utilize, the mischief rule. In the ***Heydon's*** (1584) 76 ER 637 case which pronounced four (4) principles - examine the common law prior to the Act; locate the mischief or defect in the common law; identify the remedy parliament meant to propose to eliminate the mischief; and give effect to that remedy. Lord Denning in the case of ***Magor and St Melons v Newport Corporation*** 2 [1951] All ER 839 @ held that courts do not sit to pull the language of Parliament to pieces and make nonsense of it but they do so to find out the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

3.12 Furthermore, in determining this matter, this Court also had occasion to review the prescription of the General Interpretation Act which in section 2(4) states that where the interpretation of any word or expression is defined in this or any other written law, such definition shall extend, with the necessary modifications, to the

interpretation of the grammatical variations and cognate expressions of such word or expression. Additionally section 34 which provides that where any written law confers power upon any person to do or to enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

3.13 Notably, in order for the above position taken by the Court to be understood it is critical that the Court examines in detail the state of disaster declaration vis-a-vis the DPRA as it has already been determined that it was not a state of emergency under section 45(3) of the Constitution. The long title of the Act states that is enacted to make provision for the co-ordination and implementation of measures to alleviate effects to disasters, the establishment of the office of Commissioner for Disaster Preparedness and Relief, the establishment of a National Disaster Preparedness and Relief Committee of Malawi, and for matters incidental thereto or connected therewith. Section 2 defines disaster as -

> means an occurrence (whether natural, accidental or otherwise) on a large scale which has caused or is causing or is threatening to cause—
> (a) death or destruction of persons, animals or plants;
> (b) disruption, pollution or scarcity of essential supplies;
> (c) disruption of essential services;
> (d) influx of refugees into or out of Malawi;
> (e) plague or epidemic of disease that threatens the life or well-being of the community, and includes the likelihood of such occurrence;

3.14 Section 32 of the DPRA states that -

> (1) If at any time it appears to the President that any disaster is of such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected by the disaster in any area within Malawi or that circumstances are likely to arise making such measures necessary, the President may, in such manner as he considers fit, declare that, with effect from a date specified by him in the declaration, a state of disaster exists within an area defined by him in the declaration:
> Provided that where such declaration has been made in any manner other than by notice in the Gazette, the President shall, as soon as possible after making it, cause it to be published in the Gazette.

3.15 Therefore in determining whether the declaration made under the DPRA is unconstitutional as it did not follow the prescripts of section 45 of the Constitution, this Court finds that section 32 although encompassing natural disasters was not invoked because of such but on the issue of the plague or epidemic which the corona virus being declared worldwide by WHO is included. In terms of the term epidemic, the Oxford English Dictionary defines it as a widespread occurrence of an infectious disease in a community at a particular time whilst pandemic is defined as a disease prevalent over a whole country or the world or an outbreak of a pandemic disease, therefore taking into account all the above methods of interpretation, it is clear that this Court's opinion in the interpretation of section 32 of the DPRA vis-a-vis section 45(3) of the Constitution that COVID-19 is an

epidemic and not a natural disaster as a position is supported by the Indian case of ***A. K. Gopal v State*** [1950] S.C.R. 88 AT 120 (50) in an often cited passage OF Kania CJ -

> *"A court of law must gather the spirit of the Constitution from the language used and what one may believe to be the spirit of the constitution cannot prevail if not supported by the language which therefore must be construed according to well established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has not limited either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot limit them upon any notion of the spirit of the constitution."*

3.16 Additionally, it is this Court's considered opinion that section 32 of the DRPA remains constitutional as it does not take away the prescripts of section 45(3) of the Constitution which is restricted to natural disasters, war or threat of war. It has to be stressed that in this vein, both the text of the DPRA and its purpose remain relevant today despite being enacted in 1991. It is this Court's reading of the section, this Court's view is that there was no derogation of rights as guaranteed under the Constitution. The Court noted that the measures made under the March, 2020 considering section 45 of the Constitution which states that rights can only be derogated from in the event of a state of emergency. In other words, what limits does section 32 of the DPRA circumscribe. This Court is therefore realizing there will be need for Malawi at some point to have a comprehensive discussion on the important matter of the law on state of disasters vis-a-vis states of emergency.

3.17 At this point, this Court is therefore grateful to the sentiments of Kenyatta Nyirenda J in ***Nippon Corporation v Shire Construction***, Civ. Cause No. 372 of 2011 stated –

> *"In this regard, a word about rules of statutory interpretation may be in order. Courts are required to give meaning to all words used in the substantive part of a statute. There is danger in failure to do so in that the meaning construed by the court (which omits to take into consideration one or two words used the statute) may not coincide with the meaning intended by Parliament. Further, there is a presumption in statutory interpretation regarding consistency in use of terms. Parliament is enjoined to use the same term or expression if it means the same thing and it must use different words or expressions if it means a different thing. In the apt observation by Louis Phillippe Pigeon-*
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> *"In legislative drafting, if the same word or expression is not repeated, the courts will presume not that the writer intended to vary his word or expression, but rather that he intended to draw a distinction, or introduce a shade of meaning."* - ***(Pigeon, Drafting and Interpreting Legislation, Legislation, (2nd ed.,), p.47)***
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> *Blackburn, J. has made similar observations in* ***Hadley v Perks [1866] LR 1 QB 444, 457****-*
>
> *"It has been a general rule for drawing legal documents from the earliest times, one which one is taught when one first becomes a pupil to a*

> *conveyancer, never to change the form of words used unless you are going to change the meaning""*

3.18 Fundamentally, it should be emphasized that in ***Malawi Human Rights Commission v Attorney General,*** Miscellaneous Civil Cause No. 1119 of 2000 (HC)(LL)(Unrep) Justice Nyirenda (as he then was) illustrated a critical point that the starting point is that a Malawi Court must first recognize the character and nature of our Constitution before interpreting any of its provisions. The purpose of interpreting any legal document is to give full effect to what parliament intended and you cannot give full effect to that intention unless you first appreciated the character and nature of the document you are interpreting. This position is also buttressed by Lord Diplock in ***Duport Steels Ltd v Sirs*** (1980) 1 All ER 529 (HL) @ 541-2 such should not be allowed. The judge stated –

> *"… the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount."*

3.19 Therefore having examined the words in section 45 of the Constitution, this Court in all conscience cannot agree with the Applicants that what was declared on 20th March, 2020 was a state of emergency. The Court noted that the declaration was a state of disaster and even the literal meaning as well as legal meaning of the two in terms of the Constitution and DPRA are different as well as in terms of impact. Secondly, taking into account the restricted manner, the said section was framed, this Court cannot impute the corona pandemic into the two situations which the framers of the Constitution envisaged that is, war or natural disasters. It is this Court's considered opinion that would mean imputing into the text of section 45(3) of the Constitution words that were never envisaged but also change the purpose of the whole section.

3.20 At this point, it is therefore necessary to turn to the issue as to whether the state of disaster limited the right of education of the Applicants in terms of section 44 of the Constitution. It is a basic tenet of statutory as well as constitutional interpretation that a statute or the Constitution must be read as a whole. On this specific point, Section 44 of the Constitution must be read as a whole. For the purposes of this judgement, I now set out subsections (1) and (2) of that Section:

> (1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

> (2) **Laws prescribing restrictions or limitations** shall not negate the essential content of the right or freedom in question, and **shall be of general application**. (**my emphasis supplied**)

3.21 It is clear from Section 44(2) of the Constitution that a law prescribing a limitation or restriction of a constitutional right must be of general application and there are no grey areas to that. Interestingly, when one examines the DRPA including section 32 and any declaration made thereunder, it is clear that in terms of section 44 of the Constitution, that it is a law of general application. Firstly it does not contravene any legality principle. Additionally, the section itself is not vague in terms of what needs to be undertaken. It is therefore obvious that is would accordingly not fail a constitutional inquiry. The Canadian Supreme Court in ***Greater Vancouver Transportation Authority v Canadian Federation of Students-British Columbia Component*** [2009] 2 S.C.R. 295 at para. 53 held that "prescribed by law" requires that the provision was properly adopted, that it is of general application, and that it is sufficiently accessible and precise.

3.22 The Court having reviewed the state of disaster declaration noted that it was prescribed by law, that is, the DRPA. Furthermore, this Court does not find it unreasonable that where the world has declared a pandemic and cases continue to rise, a school shall consider closure so as to safeguard the lives of the students it caters for. Furthermore, this Court on examining the city of Zomba wishes to point out that apart from Chancellor College, Zomba has the highest number of institutions hosting large numbers of people, all within 10 to 20 km from Chancellor College like the two army barracks, police training school, Zomba Central Hospital, Zomba Maximum Prison, Zomba Mental Hospital, Zomba Market, Secondary schools like Mulunguzi, St Mary's, Masongola, Police and Zomba Catholic to name a few as well as numerous primary schools. The potential risk of spread if not considered would be catastrophic. Thirdly, the Court noted that the declaration was recognized by international human rights standards as neighbouring countries like Zambia, Mozambique and Tanzania had similarly done the same. Lastly, the limitation was necessary in a democratic and open society which was balancing the right to life versus the right to education.

3.23 Interestingly, the Applicants argued that the 1st Respondent should not have ordered closure of schools and colleges but rather only the borders to keep out the virus. At this point, the Applicants need to be reminded of the scientific evidence which is now general knowledge of how the virus spreads including issues of incubation period. Furthermore, Malawi like so many other African countries has porous borders as such their argument is absurd. This is evident by the fact that Article 12 of the International Covenant of Economic, Social and Cultural Rights on health which is not a constitutional right in Malawi but applies to Malawi as a State and has been expounded by the Committee on Economic, Social and Cultural Rights in General Comment No. 14. The Committee states that the right also includes the right to prevention, treatment and control of diseases.

3.24 To put into context the issues in this application, a look at the South African case of ***Moela et al v Habib et al,*** Case No. 9215 of 2020 (Gauteng HC) where the applicants who were students at the University of the Witwatersrand residing at

University residences. The Senior Executive Team ('SET') of the University, in conjunction with the Chairman of the University's Council, issued a directive on 16 March 2020 that all residences were to be closed students must vacate their residences within 72 hours. The applicants brought an application seeking relief that Adam Habibt the Vice-Chancellor of the University of the Witwatersrand and Jerome September, the Dean of Students for the University of the Witwatersrand must satisfy themselves that the students have been tested for SARS COV-19 and are safe to go home. Secondly that the respondents must 'extend' the evacuation notice 'until a mechanism is devised to limit the rapid spread of the virus'. The applicants contended that it is universally accepted that SARS COV-19 is a life threatening disease if it remains undetected and untreated. They alleged that the University's directive was a 'negligent and reckless response to this pandemic'. They further submitted that such action poses a serious threat to life which offends against their justiciable rights protected under s 11 and s 27 of the Constitution of the Republic of South Africa, 1996 which deal with the right to life and the right to access to health care. It was their contention that their right to health care compels the University to assume responsibility of having students tested for SARS COV19. They also argued that they have other rights protected by the Constitution and that there is a reasonable apprehension that those rights would be violated, as the University is not taking the correct precautionary measures. However, during the hearing, the applicants abandoned the above reliefs but under alternative prayed that they should be allowed to remain in their residences and self-isolate. Judge Weiner ruled that the majority of people in the South Africa (and globally) were in the same situation as the applicants. He further stated that the suggestions by the applicants that the way in which the University should deal with this by testing all students in residences before they are sent home, is simply not feasible. Furthermore, he noted that the applicants' founding affidavit failed to make out a case and o prove that they have any right to the relief they seek. They also failed to prove that any of their rights had been violated, or that they have a reasonable apprehension that those rights would be violated. On their alternative relief of remaining in residence and self isolate such would have to be extended to all students and not just the applicants would defeat the very object that the University and the country at large is trying to achieve. As set out above, this relief is also logistically impossible by virtue of the fact that the staff who are in charge of such residences, and who see to the cooking and cleaning at such residences, will not work. On the argument that the University had not taken precautionary measures to reach out to the 350 students who the GEMPI student had contact with, the respondent has shown measures including engaging its internal experts, as well as with the NICD and the relevant departments of government as well as issuing a press article from which it was clear that government has been in regular discussions with the tertiary institutions in the country and support the closure of the University and the residences. The judge considered that the University had followed precisely all protocols recommended by WHO, the NICD, the President and the renowned experts in this field. The judge dismissed the application and ordered no costs. For the case of the case herein, it is important to stress the judge's words –

> *"[58] The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the*

> *applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel' iAfrika"*

3.25 Arguably, the Applicants highlighted that the declaration which included directives went beyond the prescripts of section 32 of the DPRA as all it requires the President to do is declare the state of disaster period. This Court upon examining the provision tends to agree with the Applicants that directives were are not law and it is this Court's opinion that directives are not. Directives in their nature are instructions or recommendations to relevant institutions to either be implemented or not implemented by those to whom they are directed. In considering such position, an individual or institution so directed shall proceed with the said directive or not or seek further clarification. The 2nd Respondent proceeded to implement the said directive as they must have reviewed its impact.

3.26 Turning back to the issue of whether the Applicants right to education was limited by the declaration through the closure of Chancellor College, this Court turns to their arguments on what is entailed in the right to education. A look at their argument, the Applicants main concern is access because they are no longer at campus. However, they have rightly pointed out that the right has three other components. Incidentally, it is this Court's considered opinion that access in the 21st century cannot only be physical especially since the world has become digitally advanced. It is this Court's considered view that the limitation was not a limitation in the strictest sense of the law because there are so many other ways it can still be enjoyed even with the Applicants being at home.

3.27 Whilst, in the case of ***Charles Onyango-Obbo and Another v Attorney General*** [2004] UGSC 1, Mulenga SCJ stated –

> *"Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etre of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfillment and advancement, recognising the individual's rights and freedoms as inherent in humanity….*
> *Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance."*

3.28 It should be pointed out that Malawi like other jurisdictions shall continue to deal with such applications especially with regard to legislation that will curtail rights. For instance in South Africa in the case of ***ex parte: van Heerden,*** Case No. 1079 of 2020 where Acting Judge Roelofse dismissing an application for a man wanting to travel to the Eastern Cape to attend his grandfather's funeral was seeking an

exemption from the provisions of Regulation 11B(1)(a)(ii) of the final lock down Regulations. He argued that there would be no risk of him contaminating anyone with the virus during his trip and that he had not been in contact with any person from abroad or a person who had contracted the corona virus and that he did not display any of the known symptoms of the virus. Lastly that he took and would take all the necessary precautions to prevent contamination and/or the spread of the virus. He also argued that the regulations were drafted urgently and without factoring in all considerations like attending a funeral. The court noted that the Constitution of the Republic of South Africa, 1996 is the supreme law of our Country. Section 165 of the Constitution vested in it the authority and the bounds within which that authority must be exercised. The judge stated that –

> *"[16] I have extreme sympathy for the applicant but I must uphold the law. Unfortunately, presently, the law prohibits that which the applicant wants to do however urgent and deserving. The Executive, under enabling legislation, invoked the provisions of the Act by declaring the state of disaster in order to curb the spread of COVID-19. The Act and the final lock down Regulation applies to everyone within the borders of the Republic. I cannot accede to the relief the applicant seeks because in doing so, I will be authorizing the applicant to break the law under judicial decree – that no court can do. In addition, no matter how careful and diligent the applicant will conduct himself, not only the applicant but many others may be exposed to unnecessary risk, even death if I grant the applicant the relief he seeks*."

3.29 Dealing with the issue of whether this Court should grant leave on the basis that the 1st and 2nd Respondent's decision violated the Applicant's right to education and that the laws which the 1st Respondent based his decision was unconstitutional, this Court cannot in the circumstances raised above do so. Secondly, the Applicants cannot sustain their argument that they have no alternative remedy, as this Court has established that the right was not limited but that the Applicants could have sought from the 2nd Respondent clarification or a review that their education could proceed through other means other than physical presence of them or their teachers. Notably, it can be argued that these are issues would need further interrogation by the 2nd Respondent to ensure that the measures fit into the four parameters of the right of education.

3.30 Lastly, on the issue of section 29(a) of the PHA, it would be this Court's considered opinion that the same position taken on section 32 of the DPRA will apply *mutatis mutandis.*

4.0 ORDER

4.1 Taking all the above matters into consideration, the Applicants application for leave for judicial review is hereby denied.

4.2 This Court like Justice Nyirenda in the ***Xiaoxiao*** decision is of the same view that all other arms of Government including the Judiciary following the declaration of

the state of disaster should with speed undertake the next necessary steps under the various Acts of Parliament, These directions include -

4.2.1 the Executive including local authorities make a detailed legislative agenda in terms of the various laws like the DRPA, PHA, Education Act to mention a few and develop necessary principal and subsidiary legislation which is consistent with the Constitution to safeguard people's lives;

4.2.2 the 2nd Respondent to ensure that they find alternative means of continuing the Applicants as well as other students education as the right to education requires access as well as availability, acceptability and adaptability. Such measures to be reported by 30th April, 2020 in terms of roll out otherwise they shall be considered to be in contempt of court;

4.2.3 the Legislature to undertake the necessary steps to ensure that the proposed principal and subsidiary legislation is vetted and promulgated according to Malawian law so that they avoid further legal challenges especially in this time of COVID – 19 when all measures should be geared at safeguarding lives. Such pieces of legislation can look at social security for those with various vulnerabilities to the disease, types of lockdowns which can be ordered to mention a few .

4.3 Turning to the four (4) Applicants, let me say as follows, it is commendable that you are taking your future seriously including the right to ensure your rights are protected. However, it should be stated and underscored that it is a future that you are working to protect, the question is what future will it be if you are not there to see it or others in your college are not there to see it. It is therefore imperative that when we look at ourselves, we also do not forget others in the same boat as you who may have compromised immune systems who can easily catch COVID-19 and furthermore, the surrounding communities which Chancellor College has. The spirit of umunthu although not a legal one, has a major bearing on human rights especially where as Malawians and notably Africans as per the African Charter on Human and Peoples Rights, that we have underscored that human rights must be enjoyed with responsibilities. It is my hope that you all stay safe and healthy in your homes so that you appear in years to come as lawyers before my bench.

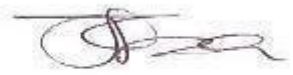
4.4 The Court hereby makes no order as to costs.

4.5 My final words are that the rule of law which is a tenet of the Malawian Constitutional law and indeed Malawian constitutional democracy, should always be upheld and should not be compromised merely in the name of public safety or preventing death but in this case, this is our new reality and the law envisaged such a scenario. As a Court, all we can hope is that as the laws are being implemented, we continue to maintain the legality because numerous reports from around the

world are showing how easy it is to turn to illegality in the name of safeguarding lives. Courts remain vigilant to promote and protect the rule of law. We also hope that we shall respond to the public health emergency (which is seeing our number of COVID-19 cases seemingly rising) in a manner that will build resilience but also innovate for delivery of justice to those who need it at this time. Human rights especially the right to life remains a priority for now which at this time Courts will continue to ensure is upheld by all involved public or private. It should be noted that in no way is this Court ranking the rights but in these circumstances, the right to life should be treated as a trump over other rights.

I order accordingly.

Made in Chambers on 7th day of April, 2020 at Zomba.



Z.J.V Ntaba
JUDGE