



JUDICIARY

**CHILIMA AND ANOTHER V MUTHARIKA AND ANOTHER**

HIGH COURT OF MALAWI

(Sitting as Constitutional Court)

POTANI, KAMANGA, MADISE, TEMBO AND KAPINDU JJ

Date of Judgment: 3 February 2020 Const. Ref.: Number: 1 of 2019

**Editor's Notes:**

- (i) **The Supreme Court of Appeal (SCA), in its judgment delivered at 15.50 in the afternoon on 8 May 2020 at Lilongwe, Upheld this decision and Dismissed the appeal by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in its entirety.**
- (ii) **The Law Reporting Unit of the Malawi Law Reports shall publish the summary of the SCA judgment as soon as it gets the sealed version of the Court's decision from the SCA Registry.**

*[1] President- Election of the President- Ballot- Irregularities and anomalies- Irregularity in relation to the conduct of an election, means non-compliance with the requirements of the Parliamentary and Presidential Elections Act- Considering the enormity of the activities involved in the electoral process, it is almost impossible to have an election that is completely free of any irregularities or anomalies*

*[2] President- Authority to govern- Derives from the people of Malawi- Will of voters in election of President- Ballot- Irregularities and anomalies- Widespread, systematic and grave irregularities and anomalies seriously compromise integrity of results, not trusted as a true reflection of the will of voters as expressed through their votes duly cast during an election*

*[3] Election petition- Complaint alleging an undue return or an undue election- Must be based on irregularity or any other cause whatsoever- Undue return is an improper declaration of a person as a winner of an election*

*[4] Electoral petition- Complaint alleging an undue return or an undue election- Undue election- Is one in which the set processes for the election as set out in prescribed law and other set electoral procedures have not been complied with*

*[5] Election petition- Complaint alleging an undue return or an undue election- Must be based on irregularity or any other cause whatsoever- Any other cause whatsoever means that a petition may allege an undue return or an undue election for any other reason*

*[6] Election petition- Votes- Null and void votes- Statutory definition- The Commission ought to have strictly applied the statutory definition of null and void votes and then extended the other forms of "rejected ballots" category in the definition provided for under the Polling Procedures Manual*

*[7] Civil procedure- Pleadings- Petition is not a pleading as was previously known under the relevant old rules of procedure- And is not a statement of case, as a pleading is, now known under the current rules of procedure*

*[8] Civil procedure – Courts (High Court)(Civil Procedure)Rules, 2017- Overriding objective- To deal with proceedings justly- Would be defeated if the old civil procedure rules mentality of strict adherence to pleadings or grounds of the petition was implemented in cases where the opposing parties were not surprised and had a chance to deal with all the issues as raised in the petition and sworn statements*

*[9] Civil procedure – Courts (High Court)(Civil Procedure)Rules, 2017- Overriding objective- To further the overriding objective to deal with matters justly, the Court should deal with issues pertaining to irregularities as raised in the consolidated petitions and*

*the sworn statements by the Petitioners and the constitutional questions answered or responded to, by the Respondents*

*[10] Civil procedure- Pleadings- Response to petition- Failure to file response to grounds raised in petition- Court accepted Respondents' comprehensive sworn statements representing the evidence in response to the evidence in support of petition*

*[11] Civil procedure- Courts (High Court)(Civil Procedure) Rules, 2017- Order 2 rule 4- Non-compliance with Court direction- Application alleging a failure to comply with an order of the Court shall be made within reasonable time and before the party making the application takes a fresh step in the proceeding after becoming aware of the failure to comply with the order of the Court*

*[12] Evidence- Proof- Burden- Legal burden of proof in respect of allegations in petition lies on the Petitioners- Whilst the evidential burden primarily lies with the Petitioners, it shifts to the Respondents whenever the Petitioners have made out a prima facie case on any issue in the matter- The evidential burden then shifts to the Respondents to rebut the Petitioners' allegations on a balance of probabilities*

*[13] Evidence- Proof- Standard- Electoral petition- Section 100 of the Parliamentary and Presidential Elections Act- On a balance of probabilities is the appropriate standard of proof to apply in electoral petitions*

*[14] Evidence-Quantitative and qualitative tests- Quantitative test- Where the number of votes involved, are used in determining whether the election was affected when determining the result*

*[15] Evidence-Quantitative and qualitative tests- Qualitative test- Where the difference in votes is not established at the trial, but the irregularities or other causes are such that any reasonable tribunal would question the result, the Court may, using a qualitative test, order nullification of the election*

*[16] Evidence -Quantitative and qualitative tests- Petitioners' complaints made out, both qualitatively and quantitatively even taking the qualitative and quantitative irregularities and anomalies severally, each of them provides sufficient warrant for the Court to find that there was an undue return and undue election*

*[17] Electoral Commission- Powers and Functions -Manage and administer elections- Conduct of elections- Violations of sections 40(3), 76 (2)(d) and 77(5) of the Constitution- In view of the gravity of the said violations and breaches, the conduct of the Electoral Commission in managing elections clearly demonstrated incompetence for failing, in multiple dimensions, to follow clearly laid out legal processes for conduct of such elections*

*[18] President- Election-Constitution- Section 80(2)- Majority- Interpretation- The true meaning to be ascribed to section 80 (2) of the Constitution on the meaning of the term "shall be elected by a majority of the electorate" is that for any candidate to be declared to be duly elected to the office of the President of the Republic, such person must secure a minimum of fifty percent (50%) plus one vote of the total valid votes cast during the presidential election*

*[19] Remedies – Constitution- Section 41 (3) of the Constitution grants all persons in the jurisdiction the right to an effective remedy by a court of law*

*[20] Courts- Power to make orders- Constitution- Section 46(3) of the Constitution gives the Court power to make any orders that are necessary and appropriate to secure the enjoyment of the rights and freedoms which the Court finds to have been violated*

*[21] President and Vice President- Status of the presidency and vice presidency- Nullification of result- On nullification of result the status in the presidency, including the status of the office of the Vice President, reverts to what it was prior to the declaration of the presidential results*

*[22] President and Vice President- Acts of- Validity of acts done by President and Vice President before declaration of invalidity of result- As per section 100(5) of the Parliamentary and Presidential Elections Act, the declaration does not invalidate anything done by the President or Vice President before the declaration of invalidity*

*[23] Elections- Parliamentary and presidential elections- Concurrency- Constitution- Under section 80 (1) of the Constitution, a presidential election has to take place concurrently with the general election for members of the National Assembly as prescribed by section 67 (1) of the Constitution*

*[24] National Assembly- Dissolution of the National Assembly- Section 67(1) of the Constitution- Date of general elections- Significance of certainty in democratic process brought about by fixing of the date of the general election- Parliament to take appropriate legislative measures to ensure that such certainty is preserved whilst at the same time ensuring that whoever is elected President of the Republic during the fresh elections is allowed to serve the constitutionally prescribed five-year term- Parliament might consider extending the term of the incumbent members of Parliament and shift the election date from May to July in order to ensure the preservation of such electoral concurrency*

*[25] Elections- Date- Fresh elections shall be held within one hundred fifty (150) days including Sundays, Saturdays, and public holidays, from the date of the judgment*

*[26] Electoral Commission- Member- Removal from office- Public Appointments Committee of the National Assembly should in terms of section 75(4) of the Constitution, and in order to ensure that the fresh elections are conducted smoothly and competently, inquire into the capacity and competence of the Electoral Commission's current Commissioners to oversee the conduct of the fresh elections.*

*[27] Electoral Commission- Chairman- Appointment- Parliament should take necessary amendment action in respect of section 75(1) of the Constitution so that the provision, which does not mention the appointing authority of the Electoral Commission's Chairperson- only mentioning the nominating authority, is clear on the appointing authority*

*[28] President- Election-Majority- Constitution- Section 80(2)- For purposes of fresh elections to be held and all future presidential elections, Parliament must, within 21 days from the date of the judgment, including Sundays, Saturdays and public holidays, make appropriate provision for the holding of presidential run-off elections in the event that no single candidate secures the constitutional majority under section 80 (2) of the Constitution*

*[29] Attorney General-Principle legal adviser to Government under section 98 (1) of the Constitution- Position imposes a huge responsibility on the Attorney General to provide impartial legal advice to the three branches of the Government*

*[30] Attorney General- Removal from office- Section 98(6) of the Constitution provides that one of the grounds upon which the Attorney General may be removed from office, is that his or her ability to give impartial legal advice is seriously in question*

*[31] Attorney General- Role in a Constitutional matter- Impartiality- Section 98 of the Constitution- Wherever a constitutional matter emerges and the Attorney General's office is not a party to those proceedings, he must still take a position as a defender of the Constitution- It is only where he is cited as a party that he should take a partisan role in the proceedings*

*[32] Attorney General- Role in electoral proceeding- Electoral Commission Act- Section 20- Attorney General's role in the proceeding should have been limited to providing*

*general legal advice to the Electoral Commission, which advice the Constitution envisages should have been impartial*

*[33] Electoral Commission- Body corporate- Legal representation- Section 20 Electoral Commission Act- As a body corporate Electoral Commission at liberty to engage its own legal practitioners other than the Attorney General*

*[34] Attorney General- Role under the Constitution- Section 98 of the Constitution- Partisan- Conflicted- Compromised- Attorney General should not have taken a partisan role but provide legal advice to various public bodies affected by this judgment*

*[35] Attorney General - Role of the office of the Attorney General under the Constitution- Partisan- Conflict- With the partisan role he assumed, the role of the Attorney General in this regard is conflicted, thus compromising the discharge of his constitutional mandate under section 98 of the Constitution*

*[36] Civil procedure – Costs- Costs are the exclusive preserve of the Court and are awarded at the discretion of the Court- In a public interest litigation, costs should not be used to hinder litigants from accessing justice*

*[37] Civil procedure – Costs- Duty bearer and Rights holder- Electoral Commission is a duty bearer and not a holder of rights seeking to vindicate legal rights- Electoral Commission to pay the Petitioners costs for the litigation*

### **Editor's Summary**

The people of Malawi went to the polls in Presidential, Parliamentary and Local Government elections (the tripartite elections) that were held throughout the country. Two of the presidential candidates, the Right Honorable Dr. *Saulos Klaus Chilima* and the Honourable *Dr. Lazarus McCarthy Chakwera*, being the first and second petitioners respectively, took out this petition seeking the Court to nullify the results of the presidential elections on allegations of irregularities and anomalies.

The petition was a consolidation of two separate petitions filed individually by the two petitioners under section 100 of the Presidential and Parliamentary Elections Act (PPEA) which makes provision for the conduct of elections. The petitioners challenged the declaration by the 2<sup>nd</sup> Respondent of the 1<sup>st</sup> Respondent as the duly elected President of Malawi.

While presenting their legal arguments, the parties raised the following preliminary issues for Court's determination: (1) Whether the Court should deal only with issues that were specifically and explicitly pleaded in the petitions; (2) whether the Respondents were bound to specifically file responses to the petitions in addition to filing sworn statements in response to the petitions; (3) what is the standard of proof in the determination of the electoral petitions filed under section 100 of the PPEA; (4) whether, in the determination of electoral petitions under section 100 of the PPEA the Court applies a quantitative test, a qualitative test, or both; and (5) what is the effect of the use the following terms: (a) undue election, (b) undue return, (c) any other cause whatsoever as provided for under section 100 of the PPEA; in the present proceeding?

The issues for the Court's determination that emanated from the petition are as follows: (1) Whether, in the presidential elections of the 21<sup>st</sup> of May, 2019, the count, audit, transmission, tallying, aggregation of results was replete with (a) intimidation; (b) bribing monitors; (c) presiding officers and other polling staff influencing voters; (d) presiding officers and other staff of the 2<sup>nd</sup> Respondent tampering with tally sheets to alter the result of the vote at a particular polling station or tally centre; (e) unauthorized persons being found with ballot papers and ballot boxes; (f) arrest of persons at various places for offences relating to breach of the country's electoral law; and (g) failure to deliver the ballot papers under conditions of absolute security.

(2) Whether the 21<sup>st</sup> of May, 2019 presidential elections were generally marred by blatant and a plethora of irregularities in all the 28 districts of the country.



(3) Whether the 2<sup>nd</sup> Respondent failed to conduct the electoral process in accordance with the Constitution and electoral laws in that: (a) it used duplicate tally sheets as a primary record of the votes polled instead of original tally sheets without plausible justification and in breach of its own procedures as well as international accounting standards; (b) it accepted the use of tally sheets defaced with a substance known as tippex as a record of the polled votes in place of the original results tally sheets with no tippex on them without plausible justification and in disregard of acceptable set standards and international accounting standards; (c) it accepted the use of results recorded on fake tally sheets without paying any particular regard to such anomalies as signatures of election monitors, barcodes and centre numbers; (d) it altered, varied and transmitted results as submitted in clear disregard of the altered figures recorded on the results tally sheets; (e) it failed to detect alterations and variations in terms of the votes recorded in the system and the corresponding results tally sheets, or that it did not mind the same; (f) it disregarded or transferred missing votes into null and void votes without any verification whatsoever as to which presidential candidate the votes belonged to; (g) it adopted, accepted and used results from a stream as representing the total results for a polling centre; (h) it accepted and used results tally sheets from centres where total number of votes cast exceeded the total number of registered voters; (i) it accepted and used results tally sheets from centres where the total number of the votes of the candidates was not balancing with the total number of the valid votes cast; (j) it accepted and used results tally sheets from centres where the total sum of used and unused ballot papers was lower than the ballot papers issued; (k) it delayed in transmitting results from particular areas in Salima, Dowa, Mchinji and Lilongwe and uploading the same after alterations; (l) it announced the final Presidential Election results before results from some Polling Centres, particularly from the Central Region, had been uploaded into its system; (m) it did not observe processes set by law, for example, by allowing delivery of ballot papers and other election materials without security contrary to the requirements of the law, which demands that such material should be delivered under conditions of absolute security against loss, tampering or interference; and (n) its Presiding Officers failed to prepare a brief summary of the final result Record of the polling process and to furnish a

copy of the duly signed summary of the final result at each polling station to each political party representative as provided for in the PPEA.

(4). Whether, further to the above enumerated irregularities, the conduct of the 2<sup>nd</sup> Respondent in managing the elections was utterly unjust and unconscionable on account that: (a) the 2<sup>nd</sup> Respondent's presiding officer for Mpatsa Tally Centre in Nsanje District was caught with three ballot boxes stuffed with already marked ballots in favour of the 1<sup>st</sup> Respondent and whether he was arrested by the Police in this regard; (b) the 2<sup>nd</sup> Respondent's Chief Returning Officer for Nsanje Central Constituency, Mr Fred N Thomas, was on 23<sup>rd</sup> May 2019 found tapering with Results Sheets, and this was still within the period for transmission of results; (c) the 2<sup>nd</sup> Respondent's presiding officers at some of the polling centres refused to furnish the petitioners' monitors with copies of the tally sheets contrary to the 2<sup>nd</sup> Respondent's Polling Station Voting Procedure Manure, and Results Management System Processes outlined by the 2<sup>nd</sup> Respondent; (d) the 2<sup>nd</sup> Respondent proceeded to announce the contaminated results without taking heed to appreciate the guidelines and the validity of the said results; and (e) the 2<sup>nd</sup> Respondent proceeded to announce the said results without conducting a thorough audit and verification of the results and in disregard of the several complaints lodged by the 2<sup>nd</sup> Petitioner through Malawi Congress Party.

(5) Whether the 2<sup>nd</sup> Respondent committed the following wrongs in the conduct, control and administration of the elections which amounted to a gross and unjustifiable dereliction of its constitutional duty under section 76 of the Constitution to ensure that the elections were carried out in accordance with the provisions of the Constitution, the ECA (Electoral Commission Act) and the PPEA: (a) being generally negligent in its control and administration of the elections by failing to electronically collate, tally and transmit results accurately as required by law; failing to ensure that the relay of the results from the polling stations was secure, accountable, accurate and verifiable; and failing to ensure that the result sheets were originals signed by the candidates' agents or monitors and if not that they indicated the reason for refusal to sign; (b) there has been massive tampering and irregularities in connection with the recording, counting, transmission and

tabulation of votes during the said election which the 2<sup>nd</sup> Respondent was aware or ought to have been aware of if it had exercised reasonable care and professional diligence commensurate with its constitutional and statutory powers and duties. Despite the existence of the said tampering, the 2<sup>nd</sup> Respondent went ahead to announce the results of the elections, including that the 1<sup>st</sup> Respondent had been duly re-elected into the position of the President of the Republic of Malawi, without holding any or any sufficient audit to verify the election result; (c) the 2<sup>nd</sup> Respondent has acted and omitted to act in a manner which grossly and unjustifiably infringes on the 2<sup>nd</sup> Petitioner's and the citizen's political rights under Section 40 of the Constitution and breaches the 2<sup>nd</sup> Respondent's constitutional duties under Section 76 and 77 of the Constitution; (d) further instead of responding to the 2<sup>nd</sup> Petitioner's complaints and before addressing the problems highlighted by the 2<sup>nd</sup> Petitioner and without waiting for the remaining results from the polling centres whose results had not yet been uploaded into its system, the 2<sup>nd</sup> Respondent proceeded to announce the final Presidential results; (e) the 2<sup>nd</sup> Respondent declared the 1<sup>st</sup> Respondent as duly elected President of the Republic of Malawi with 1, 940, 709 votes representing 38.57% of the votes cast while the 2<sup>nd</sup> Petitioner was declared to have polled 1, 781, 740 votes representing 35.41 of the total votes cast; (f) the 2<sup>nd</sup> Respondent failed and neglected to act with due diligence in the control, management and administration of the 21<sup>st</sup> May, 2019 elections and failed to properly respond to the written communication urging it to address the complaints lodged and conduct an audit of the election which amounted to biased conduct and gross and unjustifiable dereliction of its constitutional duties under Sections 76 and 77 of the Constitution; (g) all is all, the 2<sup>nd</sup> Respondent showed great bias for the 1<sup>st</sup> Respondent and against the 2<sup>nd</sup> Petitioner thereby failing in its duty to act impartially as its position requires in the administration of an election.

(6) Whether, from the analysis of the results from 78 constituencies as at the date of filing the 2<sup>nd</sup> Petitioner's petition (3<sup>rd</sup> of June 2019), the irregularities mentioned herein affected in excess of 1, 412, 105 votes as follows: (a) duplicate tally sheets in excess of 523; (b) tippexed tally sheets in excess of 176; (c) counterfeit or fake tally sheets in excess of 70 and (d) tally sheets altered in excess of 634.

(7) Whether from the time that the 2<sup>nd</sup> Petitioner was seen to be leading, votes that were cast for him were not being added to the tally of votes by officers of the 2<sup>nd</sup> Respondent; and that the effect of this was that his total result was not rising significantly whilst that of the 1<sup>st</sup> Respondent, who was lagging behind, was rising.

(8) Whether the 1<sup>st</sup> Respondent could not have been declared as duly elected as President had the 2<sup>nd</sup> Respondent acted with due diligence in the control, management and administration of the said elections.

(9) Whether the 2<sup>nd</sup> Respondent was in fact party to the rigging or tampering with the results of the election in that it acquiesced in the acts of its employees, servants or agents of altering and tippexing results recorded on tally sheets by accepting them as official results; and

(10) Whether the 2<sup>nd</sup> Respondent unduly and unlawfully declared the 1<sup>st</sup> Respondent as having been elected as President notwithstanding that the results from some Polling Centres in the Central Region including results from Lilongwe South Constituency had not yet been tallied.

After outlining the issues for the Court's determination above, the Petitioners sought the following reliefs:

1. Declaration that the election was null and *void an initio*;
2. Declaration that the failure by the 2<sup>nd</sup> Respondent to remedy the noncompliance, irregularities and improprieties in the conduct of the election amounts to a grave violation of sections 76, 77 and 40 of the Constitution;
3. A declaration that the 1<sup>st</sup> Respondent was not duly elected President as he did not obtain a true majority of the votes polled;
4. A consequential order for a fresh election;
5. Any other order that the Court may deem fit and just; and
6. An order for costs.

**Held-** Allowing the petition and Ordering a nullification of the presidential election and Ordering a fresh election to the office of the President:

- (1) That considering the enormity of the activities involved in the electoral process, it is almost impossible to have an election that is completely free of any irregularities or anomalies. The irregularities and anomalies have been so widespread, systematic and grave such that the integrity of the results has been seriously compromised. The results declared by the 2<sup>nd</sup> Respondent cannot be trusted as a true reflection of the will of the voters as expressed through their votes duly cast during the 21<sup>st</sup> of May 2019.
- (2) That the Petitioners' complaints in their Petitions, alleging an undue return and undue election during the said elections, have been made out both qualitatively and quantitatively. That based on the evidence led, even taking the qualitative and quantitative irregularities and anomalies severally, each of them provides sufficient warrant for the Court to find that there was an undue return and undue election during the said elections. That this finding is based on a balance of probabilities which is the appropriate standard of proof to apply in electoral petitions brought under section 100 of the PPEA. Even if the higher intermediate standard were applicable, the magnitude of the irregularities and anomalies are such that the complaints would still have been made out.
- (3) That in terms of section 100(4) of the PPEA, the 1<sup>st</sup> Respondent was not duly elected as President of the Republic of Malawi during the 21<sup>st</sup> of May 2019 elections.
- (4) That the 2<sup>nd</sup> Respondent violated sections 40(3), 76 (2)(d) and 77(5) of the Constitution. That in view of the gravity of the said violations and breaches, the conduct of the 2<sup>nd</sup> Respondent in managing the said elections clearly

demonstrated incompetence for failing, in multiple dimensions, to follow clearly laid out legal processes for conduct of such elections.

- (5) That the true meaning to be ascribed to section 80 (2) of the Constitution on the meaning of the term “shall be elected by a majority of the electorate” is that for any candidate to be declared to be duly elected to the office of the President of the Republic, such person must secure a minimum of fifty percent (50%) plus one vote of the total valid votes cast during the presidential election.
- (6) That section 41 (3) of the Constitution grants all persons in the jurisdiction the right to an effective remedy by a court of law and section 46(3) of the Constitution gives the Court power to make any orders that are necessary and appropriate to secure the enjoyment of the rights and freedoms which the Court finds to have been violated.
- (7) That the status in the presidency, including the status of the office of the Vice President, reverts to what it was prior to the declaration of the presidential results. That as per section 100(5) of the PPEA, the declaration in the judgment does not invalidate anything done by the President or Vice President before the declaration of invalidity.
- (8) That under section 80 (1) of the Constitution, a presidential election has to take place concurrently with the general election for members of the National Assembly as prescribed by section 67 (1) of the Constitution. That the Court appreciates the significance of the certainty in democratic process which is brought about by the fixing of the date of the general election under section 67(1) of the Constitution. That it is appropriate that such certainty be preserved. That Parliament should take appropriate legislative measures to ensure that such certainty is preserved whilst at the same time ensuring that whoever is elected President of the Republic during the fresh elections is allowed to serve the constitutionally prescribed five-year term. That Parliament might consider

extending the term of the incumbent Members of Parliament and shift the election date from May to July in order to ensure the preservation of such electoral concurrency.

- (9) That fresh elections shall be held within one hundred fifty (150) days including Sundays, Saturdays and public holidays, from the date of this judgment.
- (10) That the Public Appointments Committee of the National Assembly, should in terms of section 75(4) of the Constitution, and in order to ensure that the fresh elections are conducted smoothly and competently, inquire into the capacity and competence of the 2<sup>nd</sup> Respondent's current Commissioners to oversee the conduct of the fresh elections.
- (11) That Parliament should take necessary amendment action in respect of section 75(1) of the Constitution so that the provision, which does not mention the appointing authority of the 2<sup>nd</sup> Respondent's Chairperson- only mentioning the nominating authority, is clear on the appointing authority.
- (12) That for purposes of fresh elections to be held and all future presidential elections, Parliament must, within 21 days from the date of the judgment, including Sundays, Saturdays and public holidays, make appropriate provision for the holding of presidential run-off elections in the event that no single candidate secures the constitutional majority under section 80 (2) of the Constitution.
- (13) That the Attorney General, under section 98 (1) of the Constitution, is the principle legal adviser to the Government. This is a very high position that imposes a huge responsibility on the Attorney General to provide impartial legal advice to the three branches of the Government. The fact that the Attorney General is expected to provide impartial legal advice to Government emerges very clearly from section 98(6) of the Constitution which provides that one of the

grounds upon which the Attorney General may be removed from office, is that his or her ability to give impartial legal advice is seriously in question.

- (14) That wherever a constitutional matter emerges, and the Attorney General's office is not a party to those proceedings, he must still take a position as a defender of the Constitution. It is only where he is cited as a party that he should take a partisan role in the proceedings. That this interpretation brings life to the spirit behind the Attorney General's impartiality as envisaged under section 98 of the Constitution.
- (15) That in so far as section 20 of the Electoral Commission Act (ECA) would entail that the Attorney General may end up taking a partisan role in constitutional proceedings, even where his office is not a party to such proceedings, the same is inconsistent with section 98 of the Constitution. In terms of section 20 of the ECA, the Attorney General's role should have been limited to providing general legal advice to the 2<sup>nd</sup> Respondent, which advice the Constitution envisages should have been impartial.
- (16) That the 2<sup>nd</sup> Respondent, as a body corporate under the ECA, was at liberty to engage its own legal practitioners other than the Attorney General. That is in fact clearly stated in section 20 of the ECA. That the Attorney General should not have taken a partisan role because the Attorney General should be providing legal advice to various public bodies affected by this judgment. That the role of the office of the Attorney General is conflicted, thus compromising the discharge of his constitutional mandate under section 98 of the Constitution.
- (17) That costs are the exclusive preserve of the Court and are awarded at the discretion of the Court. That this being a public interest litigation, costs should not be used to hinder litigants from accessing justice. That the 1<sup>st</sup> Respondent should bear own costs. That in the circumstances of the matter, the 2<sup>nd</sup> Respondent is a



duty bearer and not a holder of rights seeking to vindicate legal rights. That the 2<sup>nd</sup> Respondent to pay the Petitioners costs for the litigation.

For the 1<sup>st</sup> Petitioner:

*Chilenga and four others*

For the 2<sup>nd</sup> Petitioner:

*Msisha SC, and seven others*

For the 1<sup>st</sup> Respondent:

*Tembenu SC, and six others*

For the 2<sup>nd</sup> Respondent:

*Attorney General, Kaphale SC and three other officers from his office*

*Chokocho and another*

*Amicus Curiae*

*Msowoya and another from Malawi Law Society*

*Malunga and another from Women Lawyers Association*

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**8 May 2020, at Blantyre**