JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL REGISTRY)
JUDICIAL REVIEW CAUSE NO. 34 OF 2020

BETWEEN:

MALAWI CONGRESS PARTY …… CLAIMANT

AND

PRESIDENT OF THE REPUBLIC OF MALAWI …..…… DEFENDANT

DR. JEAN MATHANGA ……..…..……. 1ST INTERESTED PARTY

MS. LINDA KUNJE ……..…..……. 2ND INTERESTED PARTY

MR. STEVE DUWA ……..…..……...……. 3RD INTERESTED PARTY

MR. ARTHUR NANTHURU ……..…...……. 4TH INTERESTED PARTY

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Likongwe, Chitukula, Mhone and Ndalama, Counsel for the Claimant
Mr. Chakaka Nyirenda, Counsel for the Defendant
Mr. Nkhutabasa, Counsel for the 1st and 2nd Interested Parties
Mr. Chembezi, Counsel for the 3rd and 4th Interested Parties
Mrs. D. Mtaya, Court Reporter
Mr. Henry Kachingwe, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

1. This is my judgement on an application for judicial review brought by the Claimant under Order 19, rules 20(1) and 23, of the Courts (High Court) (Civil

Procedure) Rules [Hereinafter referred to as the "CPR"].

2. The Claimant is a political party. The Defendant is the President of the Republic of Malawi. This is a constitutional office established by section 78 of the Constitution. It has to be mentioned that the holders of the office of the Defendant have changed in the course of this case being prosecuted in this Court. All the Interested Parties are currently serving as members of the Electoral Commission (Commission). The Commission is a creature of section 75 of the Commission.

3. The Defendant is not opposed to the application as such but he is against the relief that is being sought. The Interested Parties are challenging the application.

4. It is important to state at the outset that at the time the present action was being commenced on 16th June 2020 there were two Claimants. Malawi Congress Party was the 1st Claimant and Dr. Lazarus McCarthy Chakwera was the 2nd Claimant. On 19th March 2021, Dr. Lazarus McCarthy Chakwera applied for an order removing himself as a party to these proceedings. The reasons for his removal are to be found in the sworn statement in support of the application for his removal:

> *"6. … the 2nd Claimant has no intention of continuing to be part of these proceedings as a Claimant. In any event, the 2nd Claimant is now the President of the Republic of Malawi, the Defendant herein. The Claimant can thus not sue himself.*
>
> *7. I repeat the foregoing paragraphs and aver that it is not necessary for the 2nd Claimant to continue appearing as a party in these proceedings since 1) permission to revive the proceedings herein was not granted to him and he did not seek the same; and 2) being the incumbent in the office cited as a Defendant in these proceedings, the 2nd Claimant cannot lawfully sue himself."*

5. The genesis of this case can be traced to the appointment by the former President, Professor Peter Mutharika, of new members of the Commission on 7th June 2020. The appointments were communicated through a statement signed by the then Chief Secretary to the Government, Justice Lloyd Muhara, on 7th June 2020. Below is the said statement:

> *"His Excellency the President, Professor Arthur Peter Mutharika <u>in exercise of the powers conferred upon him by Section 75 of the Constitution; as read with Section</u>*

4 of the Electoral Commission (Amendment Act of 2018) has appointed new Commissioners of the Malawi Electoral Commission (MEC) as follows;

1. Justice Dr. Chifundo Kachale – Chairperson

2. Mr. Arthur Nanthuru – Commissioner

3. Mr. Steve Duwa – Commissioner

4. Dr. Jean Mathanga – Commissioner

5. Ms.Linda Kunje – Commissioner

6. Dr. Anthony Mukumbwa- Commissioner

7. Mrs. Olivia Liwewe – Commissioner" – Emphasis by underlining supplied

6. Section 75 of the Constitution makes provision regarding the Commission and it states thus:

"*(1) There shall be an Electoral Commission which shall consist of a Chairman who shall be a Judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may be appointed in accordance with an Act of Parliament.*

(2) A person shall not be qualified to hold the office of a member of the Electoral Commission if that person is a Minister, Deputy Minister, a member of Parliament or a person holding public office.

(3) Subject to this section, a person shall cease to be a member of the Electoral Commission—

(a) at the expiration of four years from the date of his or her appointment, unless re-appointed to a new four-year term; or

(b) if any circumstances arise that, if that person were not a member of the Electoral Commission, he or she would be disqualified for appointment as such.

(4) A member of the Electoral Commission may be removed from office by the President on the recommendation of the Public Appointments Committee on the grounds of incapacity or incompetence in the performance of the duties of that office."

7. The statement about the appointments shows that section 4 of the Electoral Commission Act (Act) was amended in 2018. We will, therefore, look at the way the text of section 4 of the Act stood both pre and post the amendment in 2018.

8. Section 4 of the Act deals with appointment of members of the Commission. Before it was amended in 2018, the section provided as follows:

> *"(1) The President shall, subject to the Constitution and in consultation with the leaders of the political parties represented in the National Assembly, appoint suitably qualified persons to be members of the Commission on such terms and conditions as the Public Appointments Committee of Parliament shall determine.*
>
> *(2) The remuneration and any allowance of a member of the Commission may not be reduced during his period of office without his consent, and may be increased at such intervals as the Public Appointments Committee of Parliament may determine.*
>
> *(3) A member of the Commission may resign from his office at any time by notice in writing to the President."*

9. Following the amendments in 2018, the text of section 4 of the Act is as reproduced below:

> "(1) *The President shall, subject to section 75 of Constitution and subject to subsections (2), (3) and (4), appoint suitably qualified persons to be members of the Commission on such terms and conditions as the Public Appointments Committee of Parliament shall determine.*
>
> *(2)* *Leaders of political parties represented in the National Assembly which secured more than one tenth of the national vote in election to that Parliament, shall submit to the President a maximum of three names as the political parties' nominees as members of the Commission:*
>
> *Provided that where the President notes that all nominees used for such adequate number as is required under subsection 3 are not qualified under the Constitution or this Act to hold office as Commissioner, the President shall return the names to nominating political parties within a reasonable time and in any event before appointing the members of the Commission and the nominating political party shall resubmit a final list of nominees within seven days of receipt of such nomination.*
>
> *(3) Upon receipt of the nominees, as provided under subsection 2, the President shall appoint members of the Commission from the nominees in proportion*

to the nominating political parties' representation in the National Assembly as determined by the previous General Elections.

(4) In the event of a vacancy in the membership of the Commission before the expiry of the term of the commissioner, the President shall notify the political party that nominated the commissioner whose office has fallen vacant to submit a minimum of three names within 14 days of the notification and the President shall appoint a commissioner from those names within a reasonable time provided that the proviso to subsection 2 shall apply to this subsection mutatis mutandis.

(5) The remuneration and any allowance of a member of the Commission may not be reduced during his period of office, without his consent, and maybe increased at such intervals as the Public Appointments Committee of Parliament may determine.

(6) Subject to the Constitution, a member of the Commission may be removed from office on the following grounds—

(a) incompetence;

(b) incapacity;

(c) bankruptcy; and

(d) where the member is so compromised to the extent that his or her ability to impartially exercise the duties of his or her office is seriously in question."- Emphasis by underlining supplied

Notice of Application for Permission to Apply for Judicial Review

10. On 16th June 2020, the Claimant filed an application for permission to commence judicial review proceedings. The decisions which the Claimant seeks to be judicially reviewed "the challenged decisions" are stated as follows:

"1. The decision of the Respondent not to appoint all the three persons nominated by the 1st Applicant for appointment as commissioners of the Electoral Commission by appointing only two when the 1st Applicant is entitled to a representation of three commissioners which it duly submitted.

2. The decision by the Respondent to appoint four persons as commissioners representing Democratic Progressive Party (DPP) in the Electoral Commission which is beyond the maximum of three to which DPP is entitled.

3. The decision by the Respondent to appoint the 3rd and 4th Interested Parties as Commissioners of the Electoral Commission when both or one of them was incompetently nominated."

11. The application stated that the Claimant was seeking the following reliefs:

(a) an order compelling the Defendant to appoint the third person nominated by the Claimant as a member of the Commission or that he be deemed so appointed;

(b) an order removing the 3rd and 4th Interested Parties or one of them as members of the Commission for having been incompetently nominated;

(c) an order limiting the number of members of the Commission representing the Democratic Progressive Party (DPP) in the Commission to three as prescribed by law; and

(d) costs of the action.

12. The Claimant also filed with the Court grounds for making the application. Acting pursuant to Order 19, rule 23, of the CPR and Order 12, rule 44, of the CPR, the grounds were amended and the amended text will be quoted in full. It states as follows:

*"**THE PARTIES AND THE RELEVANT FACTS***

1. The Claimant is a Political Party duly registered under the relevant law and sues as such.

2. The Defendant is the President of the Republic of Malawi who has the constitutional and legal duty and power to appoint members of the Electoral Commission in accordance with the relevant law and is cited as such.

3. In the 21 May 2019 Parliamentary Election only the Democratic Progressive Party (DPP) and Malawi Congress Party (MCP), as political parties represented in the National Assembly, secured more than one-tenth of the national vote in election to that Parliament, and as such only leaders of these political parties were legally entitled to submit to the President a maximum of three persons as the respective political parties' nominees as members of the Electoral Commission. The Commission itself is supposed to be composed of not less than six commissioners and a Chairperson.

4. The leader of MCP duly submitted the required maximum of three persons as MCP's nominees as members of the Electoral Commission upon request by the Defendant.

5. *As a qualifying political party, especially where only two political parties qualified, MCP was entitled to have all its three nominees appointed, but instead the Defendant appointed only two of MCP's nominees without any reason given for rejecting the other nominee and, in contrast, appointed four nominees for the DPP as members of the Electoral Commission, namely the Interested Parties herein, which was beyond the statutory maximum of three nominees per qualifying political party*

6. *If all the four Interested Parties were not nominated by DPP as Commissioners, then it raises the question of who nominated the fourth apart from the three who DPP could nominate as a maximum, because no other political party apart from DPP and MCP qualified to nominate persons as Commissioners of the Electoral Commission*

7. *The interested parties are individuals who have been appointed as members of the Electoral Commission by the Defendant without having been duly nominated for appointment as such.*

8. *In the circumstances, unless it can be proved, the burden being on the Defendant, that another political party represented in the National Assembly qualified to nominate persons as members of the Electoral Commission and did so, the implication is that DPP submitted more than the maximum number of nominees allowable for a party*

9. *The interested parties are individuals who have been appointed by the Defendant as members for the Electoral Commission without being duly nominated as such and in excess of the prescribed list of nominees.*

GROUNDS FOR REVIEW

10. *Applicants refer to the foregoing and plead that:*

    a. *The Defendant's refusal or failure to appoint the third nominee by the Claimant is inconsistent with section 4(3) of the Electoral Commission Amendment Act, 2017 and therefore illegal.*

    b. *The Defendant's appointment of the interested parties is irrational/unreasonable, ultra vires and inconsistent with s.75(1) of the Constitution as read together with s. 4(1) of the Electoral Commission Amendment Act, 2017 and therefore unconstitutional, illegal and invalid.*

    c. *In appointing a fourth nominee for the Democratic Progressive Party, who should be one of the interested parties herein, the Defendant misdirected himself, misconstrued section 4(2) and (3) of the Electoral Commission Act 2017 and committed an error of law.*

d. The Defendant's appointment of the interested parties in the foregoing manner and circumstances was in bad faith and an abuse of his powers of appointment.

RELIEFS SOUGHT

11. And the Claimant prays for:

a) An order compelling the Defendant to appoint members of the Electoral Commission as duly nominated by qualified political parties within 2 days of the order of the Court and in accordance with the relevant law.

b) A declaration that in the circumstances the Defendant is legally obliged to appoint the third nominee and thus all the three nominees of the Claimant.

c) An order compelling the Defendant to appoint the third nominee of the Claimant within two days from the date of the order, in default of which the third nominee shall automatically be deemed to have been duly appointed as a member of the Electoral Commission.

d) A declaration that the Defendant's appointment of the four interested parties or one of them is ultra vires and inconsistent with section 4(2) and (3) of the Electoral Commission Amendment Act 2017 and therefore illegal.

e) An order quashing the appointment of the interested parties or one of them.

f) An order for costs of this proceeding."

13. The Amended Statement of Grounds for Judicial Review is supported by a statement sworn by Honourable Eisenhower Mkaka wherein he confirms the matters of fact stated in the Amended Statement of Grounds for Review. Three documents are attached to the sworn statement and these are:

(a) Exhibit "MCP-1" which shows total votes polled by all the candidates in the 21 May 2021 parliamentary elections by (party) affiliation;

(b) Exhibit "MCP-2" being a copy of the letter from the Defendant to the Claimant requesting for submission of nominees to be appointed as members of the Commission; and

(c) Exhibit "MCP-3" being a copy of the letter from the Claimant to the Defendant in response to Exhibit "MCP-2"

14. Exhibit MCP 3 is dated 28th May and the body thereof states as follows:

> *"Dear Sir*
>
> ***RE: CONSULTATION ON APPOINTMENT OF COMMISSIONERS FOR THE ELECTORAL COMMISSION***
>
> *The above subject refers as per your letter dated 22nd May, 2020.*
>
> *In consultations with the leadership of Malawi Congress Party and in accordance with the new Section 4 of the Electoral Commission (Amendment) Act, 2017, which came into effect in 2018, under Section 75(1) of the Constitution of the Republic of Malawi (the Constitution), the following names are hereby submitted for the position of MCP Commissioners at the Electoral Commission effective immediately after June 5, 2020:*
>
> 1. *Dr. Anthony John Mukumbwa*
> 2. *Ms. Olivia Mchaju Liwewe*
> 3. *Mr. Richard Chapweteka.*
>
> *Enclosed are the Curriculum Vitae of the MCP officials deemed qualified to serve as Electoral Commissioners.*
>
> *Hon. Eisenhower Mkaka, MP*
>
> ***SECRETARY GENERAL"***

15. The Court granted the Claimant permission to commence an application for judicial review on 16th June 2020. The Defendant and the Interested Parties were served on 19th June 2020. By its Notice of Hearing dated 9th July 2020, the Court scheduled the hearing of the application for judicial review for 29th July 2020. I pause to observe that as of 28th July 2020, neither the Defendant nor any of the Interested Parties had filed a defence to the application for judicial review as is required by Order 19, rule 24, of the CPR.

Discontinuance of the Application for Judicial Review

16. On 28th July 2020, the Claimant filed with the Court a notice of discontinuance of the application for judicial review. The notice was brought under Order 12, rule 46, of the CPR.

Revival of the Application for Judicial Review

17. On 19th March 2021, the Claimant filed with the Court an application for permission to revive proceedings. The application was supported by a sworn statement by Honourable Eisenhower Mkaka and skeleton arguments. Order 12, rule 53, of the CPR is relevant:

> *"Where a claimant discontinues a claim—*
>
> *(a) he may not revive the proceeding without the permission of the Court;*
>
> *(b) a counter-claim by a defendant continues in force; and*
>
> *(c) the party against whom the claimant discontinued the claim may apply to the Court for costs against the claimant."* – Emphasis by underlining supplied

18. Having considered the sworn statement and the skeleton arguments in support of the application, the Court was satisfied that a good case had been made out for the revival of the application for judicial review. Accordingly, the Court on 22nd March 2021 granted the Claimant permission to revive the application for judicial review.

Application for a Consequential Order

19. By 8th April 2021, the Defendant and all the Interested Parties had been duly served with the order reviving the application for judicial review. Despite being served, more than 14 days elapsed without the Defendant and the Interested Parties filing any defence, as required by Order 19, rule 24, of the CPR. This prompted the Claimant to apply for an order declaring the failure by the Defendant and the Interested Parties to file a defence supported by a sworn statement within the time prescribed by the rules a non-compliance and entering judgement in favour of the Claimant [Hereinafter referred to an "application for a consequential order"].

20. The application for a consequential order was brought before me on 26th April 2021 without notice and I directed that it should come by way of notice on 30th April 2021.

21. There is proof that the Defendant and all the Interested parties were served with the application for a consequential order but it was only the 1st and 2nd Interested Parties that filed a sworn statement in response. The Defendant, the 3rd Interested Party and 4th Interested Parties did not to respond to the application for a consequential order.

22. On the set hearing date for the hearing of the application for a consequential order, Counsel Chakaka Nyirenda sought an adjournment on the ground that he had just been engaged by the Defendant but he encountered difficulties to get further instructions from the Defendant due to the busy schedule of the Defendant.

23. On his part, Counsel Chembezi explained that the 3rd and 4th Interested Parties did not file any documents in response to the application for a consequential order because following discussion he had with Counsel Chitukula it was agreed that (a) the application for a consequential order should not be proceeded with and (b) the application for judicial review should be determined on its merits. Counsel Chitukula confirmed the agreement and both Counsel Chakaka Nyirenda and Counsel Nkhutabasa stated that they had no objection to the matter being dealt with as agreed between Counsel Chembezi and Counsel Chitukula.

24. The Court took note of the agreement reached by the parties and ordered that the application for judicial review would be decided on its merit. The Court also ordered the Defendant and the Interested Parties to file their respective defences not later than 6th May, 2021.

The position of the Defendant

25. The Defendant admits that the legal requirements governing the appointment of members of the Commission were flouted. The admission is contained in a sworn statement, filed on behalf of the Defendant, by Mr. Zangazanga Chikhosi, the Secretary to the President and Cabinet. The relevant part of the sworn statement will be set out in full:

> *"4. I refer to the Claimant's application for Judicial Review and state that considering that the Defendant took oath to defend the Constitution and the law, the Defendant makes concession to the Claimant's allegations that his office failed to comply with the law when his office accepted the nomination of five Democratic Progressive Party candidates to be appointed into the Electoral Commission instead of three candidates as prescribed by law.*
>
> *5. At paragraph 5.5 of the sworn statement in support of the application for leave for Judicial Review it has been speculated that the fourth commissioner might have been nominated by the United Democratic Front (UDF). However, according to a letter dated 4th June 2020 from the Democratic Progressive Party (DPP) exhibited hereto and marked **'JCB1'**, DPP submitted five nominees to the Defendant's office. It is, therefore, clear that UDF never submitted any names to be considered for the position of*

Electoral Commission commissioner. Nonetheless, the Defendant concedes that it was a mere oversight and not a deliberate action for his office to accept the nomination of five candidates when the law allows only three nominees.

6. *I note that the reliefs sought by the Claimant at paragraph 11 of the amended statement of the grounds for Judicial Review include an order compelling the Defendant to appoint members of the Electoral Commission as duly nominated by qualified political parties within 2 days of the order of the Court and in accordance with the relevant law. The Claimant further seeks the court's order compelling the Defendant to appoint the third nominee of the Claimant within two days from the date of the order, in default of which the third nominee shall automatically be deemed to have been duly appointed as a member of the Electoral Commission. The Claimant furthermore seeks the court to declare that the Defendant's appointment of the four interested parties or one of them is ultra vires and inconsistent with section 4(2) and (3) of the Electoral Commission Amendment Act 2017 and therefore illegal. In addition, the Claimant prays for an order quashing the appointment of the interested parties or one of them. Considering that the Defendant swore to defend the law and the Constitution, it may be impossible to remove a commissioner and appoint another without violating the provisions of the Electoral Commission Act. The appropriate course of action ought, therefore, be to quash the appointments of all the commissioners except the Chairperson and request the eligible parties to submit fresh nominations within the period prescribed by the Electoral Commission Act.*

7. *Notwithstanding the above, I verily believe that the decisions of the Commissioners who were irregularly or unlawfully appointed cannot be invalidated since any irregularity or validity of the appointment of the commissioners of the Electoral Commission is inconsequential by operation of law in so far as their past decisions are concerned."*

26. The letter referred to in paragraph 5 of the sworn statement by Mr. Zangazanga Chikhosi is actually a Memorandum originating from the office of the Secretary General of the DPP to the Defendant. It states thus:

"Date: 4th June 2020

***SUBJECT*: Proposed names of people to be appointed as members of the Malawi Electoral Commission**

YOUR EXCELLENCY

I have the honour to submit the CV's for the following people as communicated yesterday

1. David Kanyenda

2. Steve Duwa

3. Arthur Vincent Nanthuru

4. Jean Mathanga

5. Linda Kunje

Your Excellency's Most Obedient Servant,

Francis Mphepo, OGDS

Administrative Secretary"

The position of the 1st and 2nd Interested Parties

27. As already stated, the 1st and 2nd Interested Parties are opposed to the application for judicial review and they, to this end, filed a Defence dated 6th May 2021. The Defence is couched in the following terms:

> *"1. The 1st interested party and 2nd interested party refer to the application for judicial review and the amended grounds for review and state that the same should be dismissed on the basis that having been withdrawn on the 6th August, 2020, the same was revived on the 22nd March, 2021 which was after the limitation period for commenced of judicial review proceedings, namely three months from the date the decision under review was made, had expired.*
>
> *2. The 1st interested party and 2nd interested party refer to the application for judicial review and the amended grounds for review and state that the same should be dismissed for being vexatious and oppressive and therefore, an abuse of the court process due to the fact that the Claimant withdrew the proceedings thereby facilitating the continuation of discharge of duties by the Commissioners such as managing elections in which the Claimant participated without raising the any irregularity as to the appointment of the interested parties, only to revive the action after the Claimant had derived benefits from the said discharge of duties by the interested parties.*
>
> *3. The 1st interested party and 2nd interested refer to the application for judicial review, the amended grounds for review as well as the sworn statement in support of the amended grounds for review and state that the application for judicial review should be dismissed as the sworn statement in support of the amended grounds for review is fatally defective as it is not paginated and the maker thereof has not stated the place where the statement was made after the body of the sworn statement.*
>
> *4. The 1st interested party and the 2nd interested party refer to the application for judicial review and the amended grounds for review and state that the*

same should be dismissed for violating their right to fair labour practice on account of the fact revived application for judicial review seeks to push for their removal after they have performed their duties as Commissioners such as managing elections for a considerable period of time from which the discharge the Claimant and the holder of the Defendant office have derived benefits.

5. *In the event that the application for judicial review herein is upheld and the appointments of all the interested parties or one of them are found to be ultra vires and are quashed are prayed by the Claimant, the 1st interested party and the 2nd interested party pray that the Court should make the following consequential declarations and orders:*

    a. *A declaration that from the time interested parties were appointed there was not electoral commission as the number of commissioners did not meet the threshold provided for by **Section 75(1) of the Constitution**; and*

    b. *A declaration that all the acts carried out by the electoral commission from the time the interested parties were appointed including the Fresh Presidential Elections held on the 23rd June, 2020 and all subsequent by elections which were managed by the electoral commission that included the interested parties are invalid as the electoral commission did not meet the threshold provided for in **Section 75(1) of the Constitution**.*

6. *In the alternative, the 1st interested party and 2nd interested party, pray that the Court should certify the questions*

    a. *Whether the conduct of the Claimant in seeking the quashing of the appointments of the interested parties as Commissioner amounts to a violation of the interested parties' constitutional right to fair labour practices; and*

    b. *Whether , if the application for judicial review herein succeeds, there existed a legally and constitutionally constituted electoral commission from the time the interested parties were appointed as commissioners and whether the acts carried out by the electoral commission from the time the interested parties were appointed as commissioners are invalid in terms of **Section 75(1) of the Constitution***

    *for determination by the High Court, sitting as the Constitutional Court in terms of **Section 9 of the Courts Act**.*

7. ***SAVE AS** hereinbefore specifically admitted, the 1st interested party and 2nd interested deny each and every allegation of fact contained in the application for judicial review and the amended grounds for review as if the same was herein set out and traversed seriatim."*

The position of the 3rd and 4th Interested Parties

28. The 3rd and 4th Interested Parties also filed their joint Defence on 6th May 2021. The Defence states as follows:

> *"1. The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state that it should be dismissed as the judicial review application was made out of time. The 3rd and 4th Interested Parties state that while the permission to commence judicial review proceedings was granted on 17th June 2020, the proceedings against them were terminated on 6th August 2020 by an order of discontinuance. The Order reviving the matter was made nine months after the decision sought to be impugned was made and therefore outside the three months' limitation period for commencing judicial review proceedings, thereby subjecting the 3rd and 4th Interested parties to the prejudice of instability and unpredictability in the performance of their duties as Commissioners.*
>
> *2. The 3rd and 4th Interested Parties further contend that the claimant does not have sufficient interest (locus standi) in the matter. The 3rd and 4th Interested Parties state that the legal right to submit nominees for appointment as Commissioners clearly rests with leaders of political parties, who in this case was DR. LAZARUS McCARTHY CHAKWERA, who has not complained about the appointment of the 3rd and 4th Interested Parties as he is not a party to these proceedings. The claimant has therefore failed to show any legal right or substantial interest which has been adversely affected by the appointment of the 3rd and 4th Interested Parties as Commissioners.*
>
> *3. The 3rd and 4th Interested Parties further refer to paragraph 2 above and state that the claimant has no interest or cause of action to pursue in this matter since after appointment, Commissioners no longer represent the interests of any political party or candidate but have a constitutional obligation to exercise their powers, functions and duties independent of any direction or interference by other authority or any person. The claimant has failed to show any prejudice suffered due to the 3rd and 4th Interested Parties' exercise of their duties as Commissioners.*
>
> *4. The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state the claimant has suppressed the material fact that since their appointment, it has worked with them and accepted the results of all elections they have presided over in which the claimant has actually been a majority winner. The claimant has therefore not shown any prejudice which it has suffered by the appointment of the 3rd and 4th Interested Parties as Commissioners.*
>
> *5. The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state that if they were*

irregularly appointed as Commissioners (which is denied), such irregularity was waived by the claimant by allowing them to preside over the 2020 re-run of the presidential elections in which the claimant's presidential candidate won as well as 15 by-elections in which the claimant's candidates won 40% of all contested seats and specifically 50% of the contested parliamentary seats.

6. *The 3rd and 4th Interested Parties refer to the whole of the amended statement of grounds for judicial review and state the claimant cannot maintain this action when Dr. LAZURUS MacCARTHY CHAWERA, its leader, who was mandated to submit individuals for appointment as Commissioners, actually waived any irregularities, if any to the 3rd and 4th Interested Parties' nomination and appointment by formally appointing them as Commissioners and formally recognizing them as such in the two meetings he had with them after becoming president of the Republic of Malawi.*

7. *The 3rd and 4th Interested Parties refer to paragraphs 4 to 6 herein and contend that having acquiesced in their appointment as Commissioners, and having actually worked with them for a period of nine months in which their conduct has never been faulted, the present action is not only tainted with laches but is also an abuse of the court process merely aimed at oppressing the 3rd and 4th Interested Parties.*

8. *The 3rd and 4th interested parties further state that they cannot be answerable to their nomination as they did not nominate themselves.*

***WHEREFORE** the 3rd and 4th Interested parties pray that the claimant's application for judicial review together with the reliefs sought in the amended statement of grounds for judicial review be dismissed with costs."*

Issues for Determination

29. There are basically nine issues for determination of the Court, namely, whether or not:

(a) the application for judicial review is barred by the limitation period?

(b) the Claimant does not have sufficient interest (*locus standi*) in the matter?

(c) the Claimant has suppressed material facts?

(d) if the Interested Parties' appointment as members of the Commission were irregular, the Claimant waived and has been complicit to such irregularity?

(e) the application for judicial review is an abuse of the court process aimed at oppressing the Interested Parties?

(f) there has been violation of the Interested Parties' constitutional right to fair labour practices

(g) the Interested Parties herein were duly appointed?

(h) the Defendant deliberately flouted the law?

(i) the Claimant's is entitled to the reliefs being sought?

30. For the record, it has to be stated that 1st and 2nd Interested Parties initially took issue with the sworn statement by Honourable Eisenhower Mkaka in support of the amended grounds for review. They said that the sworn statement was in breach of the CPR in that it is not paginated and in that it does not state at the end of the body of the sworn statement the place where the statement was made. This issue was resolved by the Claimant applying to the Court that the sworn statement be allowed under Order 18 of the CPR. The Court asked the views of the other parties on the application and none raised an objection thereto. The Court, accordingly, allowed the application. The same holds true for the sworn statement by Mr. Zangazanga Chikhosi.

Whether or not the application for judicial review is barred by the limitation period?

31. It is the case of the 3rd and 4th Interested Parties that the application for judicial review should be dismissed for being commenced outside the limitation period. They rely on Order 19, rule 20 (5), of the CPR which provides that an application for judicial review shall be filed promptly and shall be made not later than three months of the decision. The point is covered in paragraphs 2.1.4 and 2.1.5 of the skeleton arguments:

> *"2.1.4 In the present case, while the initial application for permission to commence judicial review proceedings was made on 17th June 2020, the said proceedings were eventually terminated as against the 3rd and 4th Interested Parties by an order of discontinuance dated 6th August 2020. It will be noted that the Order reviving the matter was made in March 2021, nine months after the decision complained of and therefore outside the three months' limitation period for commencing judicial review proceedings.*
>
> *2.1.5 It is therefore clear that at the time of the revival of the matter, the three months' limitation period for commencing judicial review proceedings had expired. This cannot be cured as there is no Court Order extending the*

> *period of commencing judicial review proceedings as prescribed under sub rule 6. The 3rd and 4th Interested Parties have outlined the sort of prejudice suffered by the revival of the matter outside the limitation period, being the unpredictability and instability in the performance of their duties as Commissioners of the Electoral Commission."*

32. In seeking to buttress their submissions, the 3rd and 4th Interested Parties have cited the case of the **State and Council of the University of Malawi ex-parte Innocent Longwe and Another [2010] MWHC 1** [hereinafter referred to as the **"Longwe Case"]**. In **Longwe Case**, the High Court dismissed a judicial review application which had been revived after discontinuance on the ground that at the time of the revival of the judicial review application, the three months' limitation period for commencing judicial review proceedings had expired. The Court's special attention was drawn to the following statements, at page 58, in the **Longwe Case**:

> *"Although the discontinuance of an action to (sic) the withdrawal of part of a claim without leave is **prima a facie** no bar to subsequent action for the same cause of action see **The Kronprinz** where a distinction between discontinuous and dismissal is pointed out at p259, discontinuous](sic), may however be a bar to a further action if the relevant limitation period has expired on the date a party seeks to revive the discontinued matter. In the instant case, as I have already found, the time frame for lodgement of an application for leave long expired. The applicants are thus therefore, in my considered view, precluded from commencing the present proceedings.*" – Emphasis by underlining supplied

33. In his response on behalf of the Claimant, Counsel Likongwe submitted that the **Longwe Case** is distinguishable on a number of fronts. Firstly, the **Longwe Case** was concerned with an application for discharge of leave. In the present case, at no time did the Defendant or the Interested Parties seek to discharge the permission that was granted to the Claimant to commence the application for judicial review. On a related note, none of the parties to this case challenged the order by the Court reviving the application for judicial review.

34. Secondly, the **Longwe Case** was not concerned with revival of an action, as is the case in the present proceedings, because the Applicants in the **Longwe Case** had wholly withdrawn the initial case, namely, **The State and Council of the University of Malawi ex-p Wilfred Mkochi and Ulunji Banda, Miscellaneous Civil Cause Number 142 of 2008.**

35. Thirdly, the **Longwe Case** did not take into account the concept of continuing breach. One of the leading authorities on the subject is **R v. Secretary of State for Foreign & Commonwealth Affairs Ex-parte Ross-Chunis [1991] 2**

A.C. 439. In this case, the court allowed judicial review to proceed eight years after the date that the applicant should have been given the United Kingdom citizenship. The court held that there was continuing failure on the part of the Secretary of State and for that reason one could not point to any particular date when the time for commencing judicial review proceedings started to run.

36. I have considered the submissions by the parties and I agree with the Claimant that the present case is not caught by the limitation period laid down in Order 19, rule 20 (5), of the CPR for the reasons given by the Claimant and the following additional grounds.

37. The **Longwe Case** is a judgement of a High Court Judge, Being such a judgement, it is not binding on me but may be merely persuasive if shown to be relevant to this case. I have taken time to read the 64 paged judgment in the **Longwe Case** and nowhere does the Court give reasons for its holding that a party seeking to revive proceedings cannot do so after the relevant limitation period has expired. The Court in the **Longwe Case** did not discuss the issue at all but merely referred to the case of **The Owners of the Cargo of the Kronprinz v. The Owner of the Kronprinz [1887] 12 App Case 256** [hereinafter referred to as "**The Kronprinz"**] as being the authority on the matter.

38. I have perused **The Kronprinz** and its facts can be summaarised as follows. A collision occurred between two ships, namely, Kronprinz and Ardandlvu. The owners of the Kronprinz brought an action for damage in the Admiralty Division against the owners of the Ardandhvu. No proceedings having been taken beyond the issuance of the writ and appearance, on the 1st May 1883 an agreement, headed in that action and signed by the solicitors for both parties, was drawn up as follows:

> *"We Lowless & Co. for the defendants hereby consent to this action "being discontinued without costs on the ground of inevitable accident."* "

39. On the 2nd May 1883, an order was made in the Admiralty Registry as follows:

> *"Upon consent of both 1887 solicitors, it is ordered that this action be discontinued, without OWNERS costs, on the ground of inevitable accident."*

40. The issue for determination in **The Kronprinz** was whether the order discontinuing the action by the owners of the Kronprinz was a bar to any action by them or other mode of enforcing their claim against the Ardandhu.

The House of Lords (Lord Halsbury L. C., Lord Bramwell, Lord Herschell and Lord Macnaghten) affirmed the decision of the Court of Appeal that the agreement and order for discontinuance (upon their true construction) did not amount to release of all claims, and that the owners of Kronprinz were not precluded from claiming against the fund.

41. It is only the judgement of Lord Herschell that touched upon the effect of discontinuance. This is to be found at page 262 of the judgement:

> *"…that the parties have adopted a means of carrying out the object in view which prima facie imports, whether you look at the terms of the agreement or at the order itself, that there shall not be a bar; because not merely does the fact of the plaintiff discontinuing not operate in any way as a bar, but the judge's order to discontinue – unless it were made a condition of the discontinuance that no other action should be brought – would not operate as a bar."* – Emphasis by underlining supplied

42. Needless to say, commencement of proceedings is not the same thing as revival of proceedings. There is nowhere in **The Kronprinz** where the House of Lords discusses revival of proceedings after the expiry of the limitation period. As such, **The Kronprinz** cannot be authority for the holding in the **Longwe Case** that a party seeking to revive proceedings cannot do so after the relevant limitation period has expired. To the contrary, the case of **The Kronprinz**, is for the proposition that discontinuance of an action does not constitute a bar to subsequent action for the same cause of action.

43. In the circumstances, the **Longwe Case** has no value as precedent regarding the issue presently before the Court. Here lies a great lesson to lawyers and law students alike: it is no use relying on a decision which is not supported by reasons. As already stated, its value is zero. This explains why CPR now expressly requires a judgement to *"contain a point or points for determination, the decision on the point or points and the reasons for the decision*": see Order 23, rule 1 (2)(b), of the CPR.

44. Further, as discussed at paragraph 35 above, time is still running in the present case by reason of the concept of continuing breach. Furthermore, it will be recalled that one of the orders that the Court made in respect of the application for a consequential order was to the effect that the application for judicial review would be decided on its merit: see paragraphs 23 and 24 above. Clearly, the issue raised by the 3rd and 4th Interested Parties does not relate to the merits of the case.

45. In any case, if the Court were to be strict regarding time lines as fixed by the CPR, the application for judicial review would have gone undefended. As already stated hereinbefore, the application for judicial review was served on the Defendant and the Interested Parties on 19th June 2020. Neither the Defendant nor any of the Interested Parties had filed a defence to the application for judicial review by the time the Claimant filed with the Court a notice of discontinuance of the application for judicial review on 28th July 2020. The same thing happened after the application for judicial review had been revived. Despite the Defendant and all the Interested Parties being served, none of them filed any defence. This is what led the Claimant to file with the Court the application for a consequential order. In the circumstances, I do not understand how the Interested Parties can now turn around and start blaming the Claimant for not acting within the stipulated time periods.

46. Based on the foregoing, it is my finding and holding that the application for judicial review is barred by the limitation period.

Whether or not the Claimant does not have sufficient interest (locus standi) in the matter?

47. On this issue, the Interested Parties espouse the view that the Claimant does not have sufficient interest (locus standi) in the matter since it does not have a legal right to protect under section 75 of the Constitution as read with section 4 (2) of the Act. It is also argued that since, members of the Commission are under an obligation, under section 76 (4) of the Constitution, to exercise their powers, functions and duties independent of any direction or interference by any other authority or any person, it follows that once members of the Commission have been appointed and sworn in, they no longer represent interests of any political party or candidate but have a constitutional obligation to exercise their duties independently and impartially. In this regard, it is further argued that (a) the Claimant cannot rightly refer to a particular member of the Commission as *"its commissioner or a commissioner for the Democratic Progressive Party"*. Lastly on this issue, the Interested Parties submit that the Claimant has no interest or cause of action to pursue in this matter since it has failed to show that since their appointment, the Interested Parties have failed in their constitutional duties as members of the Commission or that the Claimant has suffered any prejudice in the exercise of their powers and duties as members of the Commission.

48. The Interested Parties have buttressed their submission by citing:

(a) Order 19, rule 20 (2), of the CPR which requires a person making an application for judicial review to have sufficient interest in the matter to which the application relates;

(b) the cases of **The President of Malawi and Another v. Kachere and Others, MSCA Civil Appeal No. 20 of 1995** and **Attorney General v. The Malawi Congress Party and Others [1997] MWSC 1** which have basically defined sufficient interest as a "legal right" or a "substantial interest" in the matter complained of, as opposed to a general interest, which forms a basis for seeking protection of that right;

(c) the case of **The President of Malawi and Another v. Kachere and Others**, supra, which is for the proposition that a person who does not have sufficient interest in the matter has no right to ask a court of law to give him a declaratory judgment: he or she must have a legal right or substantial interest in the matter in which he seeks a declaration;

(d) the case of **Attorney General v. The Malawi Congress Party and Others** for the following statement:

> *"The Constitution expressly provides tests of **locus standi** so as to identify those persons who can, and who cannot, institute proceedings for breaches of the Constitution. The relevant sections are ss.15(2), 41(3) and 46(2). Locus standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in a sufficient close relation to it so as to give him a right which requires protection or infringement of which he brings the action.";*

(e) the case of **UDF v. Attorney General, Civil Cause No. 11 of 1994** on the importance of locus standi;

(f) the case of **Attorney General v. The Malawi Congress Party and Others** for its holding that a person cannot establish a locus standi by merely referring to or relying on sections 15 (2) and 46 (2) of the Constitution as doing so would be tantamount to seeking to establish locus standi based on a general interest;

(g) the case of **Civil Liberties Committee v. Minister of Justice and Another M.S.C.A Civil Appeal No. 12 of 1999 [2004] MWSC 1** for its statement, at page 8 of its judgment, that a strong belief or conviction that the law generally or a particular law should be observed, or that conduct of a particular kind should be prevented is not sufficient to ground standing.

49. It is also the case of the Interested Parties that a distinction must be drawn between the Claimant, as a political party, and the leadership of the Claimant. Paragraphs 2.2.6 to 2.2.13 of the Interested Parties Skeleton Arguments are relevant and they will be quoted in full:

> *"2.2.6 In the instant case, it is important to note that under **section 75 of the Constitution as read with section 4 (2) of the Electoral Commission (Amendment) Act** the legal right to submit names of nominees to be considered for appointment as Commissioners vests in the "leader of a political party" and not the party itself.*
>
> *2.2.7 **Section 4 (2) of the Electoral Commission (Amendment) Act** provides as follows:*
>
> *... [text as already set out above]*
>
> *2.2.8 It is clear that **Section 4 (2) of the Electoral Commission (Amendment) Act** does not regulate intra-party selection or choice of nominees. The law only starts regulating the process of appointment of Commissioners at the point the leader of the party is mandated to submit names of the nominees for consideration. As already noted, the legal right to submit names of nominees vests in the leader and not the party. It therefore follows that under the law, the claimant had no legal right to submit names of nominees for appointment as Commissioners, but its leader. It is therefore, DR. LAZARUS MCCARTHY CHAKWERA in his capacity as leader of the claimant who has sufficient interest to challenge the manner of appointment of Commissioners; this interest emanates from the legal right which he has to submit names of nominees under the Constitution and the Electoral Commission (Amendment) Act.*
>
> *2.2.9 In **Attorney General v. The Malawi Congress Party and Others**, the Court at Page 34 said:*
>
> > *"A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the shareholders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the shareholders have been affected by the impugned statute.... In the instant matter, as I see it, if Lawrence can allege and show an infringement in relation to him, then he gains **locus standi** and he becomes entitled thereby to raise the constitutionality of*

the entire law…"

2.2.10 In the present case, the right which is alleged to be affected is the right to submit names of nominees for consideration of appointment as Commissioners which vests in the leader of the claimant, and not necessarily the claimant itself. In other words, there is no right of the claimant which has been infringed upon in as far section 75 of the Constitution and section 4 (2) of the Electoral (Amendment) Act are concerned. The claimant therefore does not have a locus standi in the matter.

2.2.12 Likewise, the claimant cannot rely on sections 15(2) and 46(2) of the Constitution in order to establish locus standi as doing so would be using a general interest to establish locus standi. The claimant could have sufficient interest if it had established that it has a legal right to submit names of people to be considered for appointment as Commissioners. Sadly, the claimant does not have such right under section 75 of the Constitution and section 4 (2) of the Electoral (Amendment) Act.

2.2.13 The claimant has attempted to establish the basis of its interest in the matter, being (i) its position as the party which sponsored the candidature of DR. LAZARUS McCARTHY CHAKWERA and (ii) what it calls its statutory right to submit a maximum of three names of persons as members of the Electoral Commission. However, the claimant unfortunately does not have the claimed statutory right as it vests in its leader and further, the issue of sponsoring a candidate has no legal consequence. It is therefore clear that the claimant does not have an enforceable right under section 75 of the Constitution and section 4 (2) of the Electoral (Amendment) Act. The claimant therefore does not have a locus standi in this matter.

50. The issue raised by the Interested Parties that the Claimant lack locus standi (sufficient interest) has to be summarily dismissed. It is important at this juncture to backtrack and remember some of the matters that must obtain for an applicant to be granted permission to commence an application for judicial review include the applicant establishing that he or she has sufficient interest in the matter to which the application relates: see Order 19, rule 20(2), of the CPR. It thus goes without saying that the Court granted the Claimant permission to commence the application for judicial review after being satisfied that Claimant has sufficient in this case.

51. It is also commonplace that an application to set aside, vacate or discharge permission to commence an application for judicial review must be made promptly after the person concerned has discovered the grant of the permission: See **R v. Eurotunnel Developments Ex-parte Stephen [1995] 73 PRCR1.** The application to set aside, vacate or discharge the permission

has to be made timeously because, as explained in the **Longwe Case** at page 28:

> *"If it is not made before the substantive hearing it has been held that there is no point in making the application at all, since it saves no costs and is to no one's advantage."*

52. In the present case, at no time did the Defendant or the Interested Parties seek to set aside, vacate or discharge the permission that was granted to the Claimant to commence the application for judicial review. They only sought to do this more than 11 months after the case had been commenced. Clearly, it is too late for the Interested Parties to be raising the issue of the Claimant lacking locus standi (sufficient interest) at this stage of the case. They should have done so immediately after they were served with the application for judicial review. The Interested Parties did not do so over and above their failure to file any defence or any other process against the application for judicial review until 6th May 2021. On a related note, none of the parties to this case challenged the order by the Court reviving the application for judicial review.

53. I also which to mention that the matters discussed at paragraphs 23 and 24 above apply to the present issue with equal force. It will be recalled that one of the orders that the Court made in respect of the application for a consequential order was to the effect that the application for judicial review would be decided on its merit. Clearly, the issue whether or not the Claimant does not have sufficient interest does not pertain to the merits of the case regarding the challenged decisions.

54. In any case, I fail to understand how it can be argued that the Claimant lacks sufficient interest (locus standi) in the present matter when one has regard to the provisions of section 4 of the Act which is replete with such phrases as *"nominating political party*", *"the President shall return the names to nominating political parties"*, *"the nominating political party shall resubmit"* and *"the President shall notify the political party that nominated the commissioner …*".

55. In view of the foregoing, the Court holds that the Claimant has sufficient interest (locus standi) in the present matter.

Whether or not the Claimant has suppressed material facts?

56. The 3rd and 4th Interested Parties assert that the Claimant has suppressed a material fact, namely, that since the appointment of the Interested Parties as members of the Commission, the Claimant has worked with them and accepted the results of all elections they have presided over in which the Claimant has actually been a majority winner. It was thus submitted that the Claimant does not have clean hands to pursue this application for judicial review.

57. The 3rd and 4th Interested Parties have placed reliance of the cases of **R v. Leeds City Council ex-parte Hendry [1994] 6 Admin LR 439** and **R v. Kensington Income Tax Commissioners ex-parte Princes Edmond de Polignac [1917] I KB 486**. These cases stand for the proposition that an ex-parte applicant for permission to move for judicial review is under an important duty to disclose to the Court all material facts and matters and these include even matters pointing against the grant of permission or relief.

58. In responding to this issue, Counsel Likongwe submitted that the fact that the Claimant won the majority of elections conducted by the Commission whose membership included the Interested Parties is neither here nor there.

59. This issue can be easily be disposed of. It is trite that the question whether or not a fact complained of is of sufficient materiality depends on, among other matters, the importance of the fact to the issues in the case: see **Brink's Mat Ltd v. Elcombe and Others [1988] 1 WLR 1350**, at 1356F. In this regard, the grounds given by the Interested Parties on suppression of material facts stand or fall on whether the alleged non-disclosed material are relevant to the challenged decisions.

60. In this regard, the question to ask is this: what is the relevancy of the alleged non-disclosure of the fact that since the appointment of the Interested Parties as members of the Commission, the Claimant has worked with them and accepted the results of all elections they have presided over in which the Claimant has actually been a majority winner. I have great difficulties in appreciating its relevancy. The main question in the present case is whether or not the Interested Parties were duly nominated and appointed as members of the Commission? The fact that the Interested Parties carried out their functions in an excellent or bad way is irrelevant.

61. All in all, I am inclined to agree with the Claimant that it revealed all facts that were relevant and essential to the decision of the application which came before the Court. I have no difficult in concluding that the permission to move for judicial review was granted on the basis of documents that candidly and fairly stated the facts in so far as the issues for determination in this case are concerned.

62. In the circumstances, I am very much persuaded and it is my decision that the Claimant is not guilty of suppression of any material facts.

Whether or not if the Interested Parties' appointment as members of the Commission were irregular, the Claimant waived and has been complicit to such irregularity?

63. It is the case of the Interested Parties that if the appointment of the 3rd and 4th Interested Parties were unlawful, the Claimant has slept upon its rights and acquiesced in the said unlawfulness for a great length of time and actually benefited from the same. It is thus submitted that these judicial review proceedings are nothing but a stale demand which this Court should not dignify.

64. I believe the case for the Interested Parties on this issue can be best put by quoting the relevant parts of their respective Skeleton Arguments. The skeleton arguments of the 1st and 2nd Interested put the issue thus:

> *"2.5.1 In **Ian Kanyuka (suing on his own behalf and on behalf of all National Executive Members of National Democratic Alliance (NDA)) v. Thom Chiumia and Others [2003] MWHC 10,** the Court held that the law gives help to those who are watchful and not to those who sleep (Vigilantibus, non dormientibus, jura subveniunt. Laches). Courts have always refused its aid to stale demands, where a party has slept upon his rights and acquiesced for a great length of time.*
>
> *2.5.2 In the present case, even if it were correct that the claimant had an enforceable right, it would not be enforced because of the doctrine of laches. It is clear that for a period of nine months, the claimant has actually been working with the 3rd and 4th Interested Parties and actually been accepting electoral results of elections presided over by them. For a period of over nine months the claimant has been benefiting from the powers and duties of the 3rd and 4th Interested Parties, winning the majority of all elections they conducted."*

65. On the other hand, the skeleton arguments of the 3rd and 4th Interested Parties on this issue were couched in the following terms:

> *"2.4.1 We submit that if the 3rd and 4th Interested Parties appointment as Commissioners were irregular, the claimant waived and has been complicit to such irregularity. It is in evidence that for nine months before reviving the matter, the claimant had been working with the 3rd and 4th Interested Parties in their capacity as Commissioners and accepted results of all elections they presided over in which the claimant was a majority winner.*
>
> *2.4.2 It is also in evidence that the claimant's leader has also waived any irregularities, if any to the 3rd and 4th Interested Parties' nomination and appointment by formally appointing them as Commissioners and formally recognizing them as such in the two meetings he has had with them after becoming president of the Republic of Malawi.*
>
> *2.4.3 On the totality of the circumstances of this case, the claimant has failed to show any prejudice suffered due to the 3rd and 4th Interested Parties' appointment execution of their duties as Commissioners. This application is therefore just an abuse of the court process as it is not meant to serve the interests of justice but merely to oppress the 3rd and 4th Interested Parties."*

66. In his response, Counsel Likongwe argued that there was no acquiescence on the part of the Claimant in that when Dr. Chakwera met the members of the Commission, he did so in his capacity as the head of State and Government of Malawi and not in his capacity as the leader (president) of the Claimant. Counsel Likongwe also contended that in so far as the requirements of section 4 of the Act are concerned, any agreement contrary to the prescriptions of section 4 of the Act would be illegal.

67. To buttress his submissions, Counsel Likongwe cited the case of **The State (On application of Lin Xiaoxiao & 9 Others v. The Director General – Immigration and Citizenship Services & The Attorney General, HC/Lilongwe District Registry Judicial Review Cause No. 19 of 2020** otherwise popularly known as *"The law is the law"* judgement. The relevant part of the judgement is to be found at paragraph 8.25 thereof:

> *"The law is the law. Unfortunately, it is not just the Immigration Department that believes that an outdated law must not be obeyed even though it is still on the statute book. This line of reasoning is familiar and it getting louder and louder. It is a recurring refrain that you usually get from the authorities whenever they have chosen not to act in accordance with the prescriptions of the law. A classic example is to be found in the judgement of the Constitutional Court in the case of **Dr. Saulos Klaus Chilima and Dr. Lazarus Mccarthy Chakwera v. Professor Arthur Peter Mutharika and Electoral Commission, Constitutional Reference No. 1 of 2019 (unreported)**, regarding the issue of constituency tally centres. The relevant passage is to be found at paragraph 834 and in paragraphs (i) and (j) of that part of the judgement containing findings and holdings:*

> *"834. Mr. Munkhondya stated that in 2019 elections the 2nd Respondent introduced Constituency Tally Centres, There were no such centres in prior elections. The Constituency Tally Centres were introduced as a result of interaction between the 2nd Respondent and political parties. …. This introduction of Constituency Tally Centres was an innovation that was in reaction to the lessons learnt. Consequently, the 2nd Respondent decentralized the elections' administration to constituency level.*
>
> *…*
>
> *(i) We must emphasise at this stage that the Court finds no provision anywhere in the law establishing constituency tally centres. Section 96 of the PPEA does not state anywhere that the 2nd Respondent will determine the national result based on records from constituency tally centres. The 2nd Respondent is required by law, in the determination of the national result (at the National Tally Centre) to look at the full records from the polling stations and the district centres. The Constituency Tally Centre is unknown to the law. The Court was told by both the Respondents as well as the Petitioners that stakeholders agreed that the Constituency Tally Centre was a necessary step, apparently to address some concerns that arose out of the 2014 general elections. If the 2nd Respondent and the stakeholders thought that it was imperative to introduce the Constituency Tally Centres as a step in the process of determination of the elections under Chapter VIII of the PPPE, they should have moved Parliament to amend the law to introduce that step. This was such a major introduction in the electoral process that could not even be introduced under subsidiary legislation, let alone by stakeholders' resolution.*
>
> *(j) The 2nd Respondent was the body that was under a constitutional duty under Section 76(2) (d) of the Constitution to ensure compliance with the provisions of Chapter VIII of the PPPE. The unlawful introduction of the constituency tally centre was such a flagrant and blatant breach of the 2nd Respondent's duty under section 76 (2)(d) of the Constitution. It was also an ultra vires act and an unconstitutional usurpation of the powers of the legislature."*
> – Emphasis by underlining supplied

68. I believe this issue can be best determined by first understanding the doctrine of waiver. Waiver is the voluntary or intentional abandonment of a known legal right: see **Mahata v. Malawi Housing Corporation, HC/PR Civil Cause 628 of 2005.** The doctrine of waiver is based on the understanding that a person is the best judge of his or her own interest and when given full knowledge, the person should be allowed to decide for himself or herself.

69. It is important to note that intention and knowledge are key to waiver of a right. Intention is an essential element: it must be shown that the person

concerned must have intended the waiver in question. A right can be waived only when done expressly or impliedly. Express waiver is done by writing or giving a statement of waiver. In contrast, implied waiver is inferred from act or conduct of a person. There must be an intended act, by the person asserting his right, relied upon by another person, which will negate such assertion equitable anymore.

70. As regards knowledge, the person waiving his or her right must know the nature of the right and the consequences of the waiver. By knowledge, it is not meant that the party waiving should know the intricacies of the right. It is not necessary that a person waiving a right must have an absolute understanding of the exact scope of the right but a virtual and general understanding.

71. In the present case, the Interested Parties have adduced no evidence to establish intention and knowledge on the part of the Claimant regarding the alleged waiver. The Interested Parties simply rely on the fact that (a) *"the Claimant has actually been working with the 3rd and 4th Interested Parties and actually been accepting electoral results of elections presided over by them"* for over nine months and (b) the Claimant's leader formally appointed the 3rd and 4th Interested Parties as members of the Commission and formally recognized them as such in the two meetings he has had with them after becoming President of the Republic of Malawi. Clearly, this falls far short of establishing waiver in so far as the requirements regarding intention and knowledge are concerned

72. There is another important reason why the plea of waiver cannot succeed in the present case. As already noted hereinbefore, the application for judicial review has to do with section 4 of the Act with particular focus on nomination of members of the Commission by leaders of political parties represented in the National Assembly which secured more than one tenth of the national vote in election to that Parliament and appointment by the President of members of the Commission. Clearly, we are in the realm of political rights as enshrined in section 40 of the Constitution. Section 40 of the Constitution falls under Chapter IV of the Constitution. This is the Chapter that deals with human rights.

73. While there is no doubt that a person in Malawi can waive rights arising out of a contract, the same does not hold true for constitutional rights or rights guaranteed by the Constitution itself. The reason is not difficult to fathom.

The fundamental rights in the Constitution do not exist merely for an individual's benefit, but are a matter of public policy. Rights which are part of public policy cannot be waived.

74. Additionally, the Constitution imposes an obligation on all organs and agencies of the Government and all persons in Malawi to protect all human rights and freedoms enshrined in Chapter IV of the Constitution: see section 15 of the Constitution. Neither the State nor any person can do away with this obligation by saying that the individual wanted it that way. The Indian case of **Basheshar Nath v. The Commissioner of Income Tax, Delhi & Others [1959] AIR 148** is illuminating on the subject under consideration. The Supreme Court of India held that a person cannot waive his fundamental rights.

75. I hasten to add that other jurisdictions, such as the United States of America, provide their citizens with an option to waive off some (not all) of their fundamental rights. I leave for another day the discussion of the reasons for why the position in United States of America is different from that obtaining in Malawi, India, etc.

76. In conclusion, I fully agree with the Claimant that the doctrine of waiver is not applicable to the present case.

Whether or not the application for judicial review is an abuse of the court process aimed at oppressing the Interested Parties?

77. It is the case of the Interested Parties that the conduct of the Claimant in commencing this action, withdrawing it and then reviving it is vexatious and oppressive and, therefore, amounting to abuse of the Court process. The arguments in the skeleton arguments of the 1st and 2nd Interested Parties were put thus:

> *"The manner in which the Claimant has conducted itself in the present litigation is clearly vexatious, oppressive and confusing towards the interested parties. On being appointed Commissioners, the Claimant commenced the present action challenging the appointments. Thereafter the Claimant withdrew the action. In light of this, the interested parties went on discharging their constitutional and statutory duties. Such duties included managing elections in which the Claimant participated and benefited from, without raising any issues as to the irregularity of the appointments of the interested parties. After deriving benefits from the discharge of duties by the interested parties, the Claimant have conveniently revived the application."*

78. I fail to appreciate how the application for judicial review before the Court in the present case can be said to be an abuse of court process. Firstly, as already pointed out at paragraph 15 above and discussed at paragraph 52 above, the Court granted permission to the Claimant to commence its application for judicial review after the Court was satisfied that, among other things, the issues raised in the application show a case fit for further investigations at the substantive judicial review proceedings.

79. Secondly, it will be recalled that one of the orders that the Court made in respect of the application for a consequential order was to the effect that the application for judicial review would be decided on its merit: see paragraphs 23 and 24 above. Clearly, the issue whether or not the conduct of the Claimant in commencing this action, withdrawing it and then reviving it does not pertain to the merits of the case regarding the challenged decisions.

80. Thirdly, the provisions of paragraphs 72 to 76 above apply to the to issue under consideration with equal force. The Claimant cannot be enstopped from enforcing political rights enshrined under section 40 of the Constitution.

81. In the circumstances, the answer to the question whether the application for judicial review is an abuse of the court process aimed at oppressing the Interested Parties has to be in the negative. The Claimant is perfectly within its right to pursue this action.

Whether or not there has been violation of the Interested parties' constitutional right to fair labour practices?

82. I believe the case for the Interested Parties on this issue can be best put by quoting the relevant parts of the Skeleton Arguments filed by the 1st and 2nd Interested Parties:

> *"The interested parties were appointed and have since their appointments, discharged their constitutional and statutory duties that include managing elections such the elections that put His Excellency Dr. Lazarus McCarthy Chakwera, a candidate of the Claimant party, to the office of president of the country. The Claimant quietly and conveniently watched the interested parties discharge the said duties. As noted above, the Claimant actually did withdraw the present action thereby facilitating the continuation of the discharge of duties on the part of the interested parties. Having discharged their duties all this while, pushing for the interested parties removal as Commissioners clearly does not sit well with the interested parties' constitutional right to fair labor practices. Such conduct cannot be said to be fair and even handed towards the interested parties.*
>
> *We respectfully invite the Court that when considering this issue it must consider the fact that the Defendant who is the direct duty bearer in respect of the right in issue has conveniently chosen not to contest the application and is therefore clearly*

> *complicit in the violation of the interested parties' constitutional right to fair labour practices.*
>
> *In light of the foregoing we humbly move the Court to find that the Claimant's conduct in seeking the setting aside of the appointments of the interested parties through this action despite the fact that the interested parties have since their appointments performed their duties for a considerable period of time while the Claimant conveniently watched and benefited from such performance of duty by the interested parties, amounts to a violation of the interested parties' right to fair labour practices."*

83. In his submissions on behalf of the Claimant, Counsel Likongwe wondered how the right to fair labour practices arises in the present case when it is commonplace that members of the Commission are not employees of the Commission.

84. I have considered the respective submissions. To my mind, this issue has in a way already been dealt with under paragraphs 23 and 24 above. In the first place, the issue here does not go the merits of the case. That being the case, the issue is caught by one of the orders that the Court made in respect of the application for a consequential order to the effect that the application for judicial review would be decided on its merit.

85. Secondly, the fact that the Interested Parties have performed their duties for at least ten months does not per se amount to waiver by the Claimant of its right under section 4 of the Act to ensure that nominations and appointment of members of the Commission under that provision are duly made as required by the law: see paragraphs 72, 73, 74, 75, 76 and 80 above. As already held, the Claimant cannot be enstopped from enforcing political rights enshrined under section 40 of the Constitution.

86. In view of the foregoing, it is my holding that the commencement of the present action by the Claimant does not violate the Interested parties' constitutional right, if any, to fair labour practices.

Whether or not the interested parties herein were duly appointed?

87. The Claimant holds the view that the Defendant acted ultra vires the Act in appointing the four Interested Parties. The issue is dealt with in paragraphs 3.4 to 3.8 of the Claimant's Skeleton Arguments:

*"**ARGUENDO***

3.4 Firstly, the Claimant will argue that only political parties represented in the National Assembly which secured more than one tenth of the national vote in election to that Parliament were entitled to nominate names to be appointed by the President as members of the Electoral Commission. In that regard, only the Claimant and the Democratic Progressive Party qualified.

3.5 Further the Claimant will argue that the term "national vote in election to the Parliament" as used under section 4(2) of the Electoral Commission Act, as amended, should be interpreted to mean the total number of votes garnered by all the candidates who the Electoral Commission declares to be winners for the respective constituencies in the tripartite elections. We contend that this "national vote" does not include the votes of candidates who lost their parliamentary elections since the operative phrase used is "to that Parliament". This interpretation excludes political parties which may secure the "one tenth" of the votes without having any of their candidates winning any seats in Parliament since these political parties are supposed to be "represented in the National Assembly".

*3.6 Secondly, the Claimant will argue that under the above provision, political parties qualified to nominate individuals to the commission, can only nominate "**a maximum of three names as the political parties' nominees as members of the Commission". It was illegal for the Democratic Progressive Party to nominate five (5) individuals and that illegality was further perpetuated by the Defendant who accepted the said nominations without urging the Democratic Progressive Party to comply with the Electoral Commission Act. See, Oil and Protein Company Ltd v AHL Commodities Exchange Ltd (374 of 2015) [2016] MWHC 435 (19 January 2016).***

3.7 Thirdly, the Claimant will argue that by appointing four (4) Commissioners from the Democratic Progressive Party, the Defendant acted ultra vires the Electoral Commission Amendment Act of 2017.

3.8 Lastly, the Claimant will argue that the decisions that the Commissioners who were unlawfully appointed cannot be rendered invalid since the unlawfulness of the appointment is inconsequential by operation of law."

88. As already mentioned at paragraph 25 above, the Defendant concedes that the appointments of the members of the Commission as made by the Defendant were in breach of section 4 of the Act. The concession in the sworn statement by Mr. Zangazanga Chikhosi is complemented by the following paragraph in the Defendant's skeleton arguments:

"3.10 Since the Defendant swore to defend the Constitution and all laws in terms of section 81(1) of the Republic of Malawi Constitution and considering that the Executive is constitutionally obliged to implement laws pursuant to section 7 of the Constitution and further considering that 'serious violation of the Constitution or serious breach of the written laws of the Republic' is an impeachable offence under

> *section 86(2)(a) of the Constitution, it is imperative that this court makes necessary orders that the Constitution and provisions of the Electoral Commission Act are upheld or implemented and to correct the mistakes made in the appointment of the Electoral Commissioners. This will also serve to promote democratic governance, good administration and adherence to the rule of law."* – Emphasis by underlying supplied

89. The 1st and 2nd Interested Parties did not directly address the issue whether or not they were duly appointed. There is a mention of section 4(2) of the Act in paragraph 9.4 of their skeleton arguments. They acknowledge in that paragraph that section 4(2) of the Act entitles leaders of political parties represented in the National Assembly which secured more than one tenth of the national vote of the Parliamentary elections vote to nominate a maximum of three persons to the President for consideration for appointment as members of the Commission.

90. The 3rd and 4th Interested Parties do not touch upon this issue at all,

91. The concession by the Defendant that section 4 of the Act was not followed in making the appointments and the fact that the Interested Persons have dodged tackling this issue does not come as a surprise to the Court. I have learnt during the last eight years of my sitting on the bench as a High Court Judge, what I already knew, that while it is possible in political circles for politicians and their supporters to try to put a spin on impunity it is very difficult to defend impunity in a court of law.

92. The answer to the question whether the Interested Parties were duly appointed has to be categorically in the negative. There is no running away from this inescapable conclusion in the present case. All the challenged decisions were made contrary to the dictates of section 4 of the Act.

93. The starting point in considering the issue whether or not the Interested Parties were duly appointed has to be section 75 (1) of the Constitution. It provides that apart from the Chairperson, there shall be not less than six members of the Commission and that their appointment shall be in accordance with an Act of Parliament. The Act of Parliament envisaged under section 75(1) of the Constitution is the Act: see **Ex Parte Muluzi & Another (99 of 2007) [2008] MWHC 207 (16 January 2008).**

94. According to section 4(2) of the Act, the Defendant is required to appoint members of the Commission from nominees of the political parties which

secured more than one tenth of the national vote in election to that Parliament. It is commonplace that it is only the Claimant and the DPP that achieved this threshold. Thus, in terms of the same provision, it is only Leaders of the Claimant and the DPP that had to submit to the Defendant *"a maximum of three names"* each. While the Claimant submitted three names (see the letter by Hon. Eisenhower Mkaka quoted above at paragraph 14 above, the DPP submitted five names: see the letter by Mr. Mphepo quoted above at paragraph 26. Clearly, the submission of five nominees by the DPP was in breach of section 4 of the Act. To put it in legal jargon, the submission was ultra vires section 4 of the Act. Consequently, the nomination made by the DPP was void.

95. In view of the conclusion in paragraph 94, the all-important question becomes can you have a valid appointment out of an invalid nomination. It does not take much wit (or indeed rocket science) to know that the answer to the question has to be an emphatic no! This then means that the Interested Parties were not duly appointed.

96. I hasten to state that there are other equally compelling reasons for holding that the Interested Parties were not duly appointed. Section 4(3) of the Act provides what the President has to do upon receipt of the names of the nominees from the qualifying parties as provided under section 4(2) of the Act. The Defendant is enjoned to appoint members of the Commission from the nominees in proportion to the nominating political parties' representation in the National Assembly as determined by the previous General Elections. Here again, there is no dispute that, based on the requirements of section 4(2) of the Act, the Defendant and the DPP were respectively entitled to have three nominees appointed.

97. Despite the fact that the Claimant had submitted three names (Dr. Anthony John Mukumbwa, Ms. Olivia Mchaju Liwewe and Mr. Richard Chapweteka) as it was entitled to, the Defendant decided to appoint only two of the Claimant's nominees (Dr. Anthony John Mukumbwa and Ms. Olivia Mchaju Liwewe). The Defendant did this without giving any reason for not appointing the Claimant's third nominee (Mr. Richard Chapweteka). Clearly, what the Defendant did was in contravention of section 4(3) of the Act.

98 In contrast, the Defendant appointed four persons (The Interested Parties, namely, Mr. Arthur Nanthuru, Mr. Steve Duwa, Dr. Jean Mathanga and Ms. Linda Kunje) out of the five nominees by the DPP (Mr. David Kanyenda, Mr. Steve Duwa, Arthur Vincent Nanthuru, Dr. Jean Mathanga and Ms. Linda

Kunje) as members of the Commission. This appointment was done contrary to section 4(3) of the Act: the appointment of four instead of three nominees of the DPP exceeded the statutory maximum of three nominees per each qualifying political party.

99. If the Defendant was not satisfied with the qualifications of the Claimant's third nominee (Mr. Richard Chapweteka), the answer did not lie in picking a name from the list of nominees submitted by the DPP. The provisio to section 4(2) of the Act was meant to address such an issue. It makes provision as regards what the Defendant should do if he or she *"notes that all nominees used for such adequate number as is required"* under section 4(3) of the Act are not qualified under the Constitution or the Act to hold office as a member of the Commission. Whenever such a situation arises, the Defendant is required to return the names of the nominees to the nominating political party within a reasonable time and in any event before appointing the members of the Commission and the nominating political party shall resubmit a final list of nominees within seven days of receipt of such nomination. Here again, the Defendant erred in not following the dictates of the law as set out in the provisio to section 4(2) of the Act.

100. In conclusion on this issue, I have said sufficient, I think, to make it clear that both the nomination process and the appointment process were botched up in very serious ways. Firstly, the Defendant allowed the DPP to submit five names instead of three names. Secondly, the Defendant appointed four members of the Commission from the list that the DPP submitted instead of three members of the Commission. Thirdly, the Defendant appointed only two members of the Commission from the list of nominees by the Claimant instead of three members of the Commission. Fourthly, the Defendant erred in rejecting the third nominee of the Claimant (Mr. Richard Chapweteka) without following the process laid down in section 4(3) of the Act.

101. In light of the foregoing, I have no hesitation in holding that the Interested Parties were not duly appointed.

Whether or not the Defendant deliberately flouted the law?

102. This marks a convenient time to deal with the claim by Counsel Chakaka Nyirenda that the Defendant did not intentionally flout the law set out in section 4 of the Act. The claim is contained in the Defendant's skeleton arguments at pages 5 and 6 thereof:

> *"3.7 ... the anomalous appointments or transgression of section 4 of the Electoral Commission Act was an honest mistake and not deliberate. It was also not made in bad faith: The amendment to the Electoral Commission only came about in 2018. Before the amendment, the Defendant could appoint the Electoral Commissioners in consultation with the eligible political parties but he was not legally bound by the views of the said political parties (**Ex Parte Muluzi & Another** (99 of 2007) [2008] MWHC 207 (16 January 2008)).*
>
> *3.8 Since no one knows all the laws per **Chika Building Contractors v Gondwe** [1990] 13 MLR 104 (HC), despite the fact that ignorance of the law is no defence, the Defendant should be absolved for the transgression of the law innocently done. In the wisdom of Lord Atkin in **Evans v. Bartlam** [1937] AC 47 at 479:*
>
> > ***'There is here no evidence that the defendant at the time be asked for and received time had any knowledge of his right to apply to set the judgment aside. I cannot think that there is any presumption that he knew of this remedy either sufficiently for the purposes of the doctrine as to election or at all. For my part I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is no and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.'*** [Emphasis supplied by Counsel for the Defendant]

103. While it may be difficult to argue against the statements in the **Chika Building Contractors v. Gondwe** and **Evans v. Bartlam**, the fact remains that those statements are not applicable in the present case for the following reasons.

104 In the first place, there has to be evidence adduced before the Court on the basis of which the Court can reach the conclusion that the complained act was innocently done or not. For example, in **Evans v. Bartlam**, the court made a finding of fact regarding the defendant's knowledge of his right to apply to set aside the judgement. In the present case, no evidence whatsoever has been led by the Defendant, or any other party for that matter, to explain why the Defendant did what he did. Clearly, Counsel Chakaka Nyirenda is speculating as to why the Defendant chose not to follow the provisions of section 4 of the Act. Unfortunately for the Defendant, the Court cannot make decisions based on speculations: see section 9 of the Constitution which enjoins courts to make decisions *"with regard only to legally relevant facts and the prescriptions of law"*.

105. Secondly, the Electoral Commission (Amendment) Act [Act No. 32 of 2018] was assented to by the President (Professor Arthur Peter Mutharika) on 24th October 2018. This is a very short Act (4 pages). I am not prepared to accept that the Defendant assented to this law without reading its provisions. In short, the Defendant had full knowledge of the applicable law at the time he was making the appointments.

106. Thirdly, the appointments of the members of the Commission were made on 7th June 2020. By this date, more than one year and eight months had elapsed since the enactment of Electoral (Amendment) Act. I, therefore, do not understand the significance of the statement in paragraph 3.7 of the Defendant's skeleton arguments that *"The amendment to the Electoral Commission only came about in 2018"*.

107. Fourthly, it will be recalled that the statement by Justice Muhara clearly states that the President was appointing the members of the Commission *"in exercise of powers conferred upon him by Section 75 of the Constitution; as read with Section 4 of the Electoral Commission (Amendment Act of 2018)"*. The reference to the Electoral Commission (Amendment) Act is striking. Surely, the Defendant must have taken time to read these provisions. Alternatively, the Defendant's advisors must have made a summary of these provisions for the Defendant's perusal. Otherwise, I have great difficulties to accept that a whole President can proceed to exercise powers conferred upon his or her office under a statutory provision without first ascertaining what the provision says.

108. Fifthly, there is Exhibit MCP 3 (quoted above at paragraph 14) which also expressly refers to the Electoral Commission (Amendment) Act, 2018, as being the applicable law. It will be recalled that Exhibit MCP 3 was addressed to the Defendant pursuant to section 4 of the Act.

109. The sixth reason has to do with what happened in the National Assembly during the passage of the Electoral Commission (Amendment) Bill 2017. This Bill was presented to the National Assembly as a Government Bill (Bill No. 23 of 2017). The relevant part of the text of section 4 of the Act, as proposed by the Government (the term is used in its loose sense since we are referring to a Government Bill), is to be found in clause 3 of the Bill:

> "4. *(1) Subject to section 75(1) of the Constitution, the President shall, on the recommendation of the Judicial Service Commission, appoint a Chairman of the Commission on such terms and conditions as the Chief Secretary to the Government shall determine:*

> *Provided that the Judicial Service Commission shall recommend for possible appointment, not less than three names.*
>
> *(2) Subject to section 75(1) of the Constitution, the President shall appoint suitably qualified persons to be members of the Commission, on such terms and conditions as the Chief Secretary to the Government shall determine."*

110. It is plainly clear that the text that was proposed by the Government (read the executive branch of government) is fundamentally different from the text that was passed by the National Assembly and enacted into law. The Government Bill gave the President almost unbridled power to appoint members of the Commission as he or she wished subject only to the members of the Commission being suitably qualified and the number of members of the Commission not exceeding the number stipulated by section 75(1) of the Constitution, that is, *"not being less than six"*. For example, the President was not required to consult political parties under the Government Bill.

111. In contrast, the text of section 4 of the Act, as amended, significantly whittles down the powers of the President. If truth be told, the tables have been turned upside down. It is not the President but political parties (those that meet the requirements of section 4 of the Act) that are calling the shots under the Act in so far as nomination and appointment of members of the Commission is concerned,

112. In light of the foregoing, I am not persuaded by the claim by Counsel Chakaka Nyirenda that the unlawful appointments by the Defendant were a result of an honest mistake on the part of the Defendant. Actually, the evidence points to the contrary. The Defendant knew the applicable law but deliberately chose to ignore it. This was again impunity on the part of the Defendant at play. It seems to me, in my not so fanciful thinking, that the Defendant was flexing his muscles in "mumati mutani" attitude as a way of trying to hit back at the National Assembly for throwing out the text of section 4 of the Act as proposed in the Government Bill. The intention behind that text was to vest the Defendant with almost unlimited powers to appoint members of the Commission as he or she wished. The National Assembly, in its wisdom, opted to have none of that.

Prayer for consequential pronouncements and orders

113. It is now time to consider what the Interested Parties have termed consequential pronouncements and orders. The Interested Parties argued that in the event that the appointments of all of them or one of them is quashed for

being ultra vires, then the Court should make sure that the matter is taken to its legal logical conclusion and make consequential pronouncements and orders. The argument was worded as follows:

> *"If the appointments of all the interested parties or one of them are ultra vires, they are invalid from the time the appointments were made. Actually, the effect is no appointments were made. This in turn begs the question whether in terms of* ***Section 75(1) of the Constitution*** *the country has had an electoral commission from the time the ultra vires appointments were made? This is because of the constitutional requirement that the electoral commission must be made up of at least six commissioners plus the chairman was not met from the word go. If we remove the four interested parties herein or one of them it will mean the threshold set by Section 75(1) was not met from the word go. Our contention is that this means the country has had not electoral commission and we pray that the Court should make such a consequential declaration and finding.*
>
> *We further respectfully invite the Court to make a consequential declaration and finding that all the acts that by the electoral commission that included the interested parties herein are invalid, if the appointments of the interested parties or one of them are set aside for being ultra vires, because as we have noted above, there was no electoral commission from the word go. Such acts include the fresh presidential elections that were won by the His Excellency Dr. Lazarus McCarthy Chakwera and Right Honourable Saulos Klaus Chilima as well as the by elections that have been managed by the irregularly constituted electoral commission. Effectively, we invite the Court to declare that the country has had not president and vice president among other things.*
>
> *It may be contended that the situation is saved by section 10 of the Electoral Commission Act which is to the effect that subject to the Constitution and to section 11(3), any vacancy in the membership of the Commission shall not affect its decisions, the performance of its functions or the exercise of its powers under the Constitution, this Act or any other written law . We would disagree. The provision in issue is expressly subject to the Constitution which includes* ***Section 75(1) of the Constitution*** *that provides for the composition of the Electoral Commission to be at least six commissioners plus the Chairman. If section 10 were to be interpreted to mean that the Electoral Commission can operate with less that six commissioners plus the chairman the provision would stand in conflict with* ***Section 75(1) of the Constitution****, as a result of which the provision would to the extent of such inconsistency be invalid in terms of* ***Section 5 of the Constitution****.* ***Section 75(1) of the Constitution*** *uses the word* ***shall*** *which means it is mandatory that the composition of the electoral commission should be six commissioners plus the chairman."*

114. To my mind, section 42 of the General Interpretation Act fully addresses the argument being raised by the Interested Parties. Section 42 of the General Interpretation Act is couched in the following terms:

> *"Where, by or under any written law, any board, council, commission, committee or similar body, whether corporate or unincorpoarate, s established, the, unless a contrary intention appears, the powers of such board, council, commission, council, committee or similar body shall not be affected by-*
>
> *(a) any vacancy in the membership thereof; or*
>
> *(b) <u>any defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof</u>.*" – Emphasis by underlining supplied

115. I am fortified in my view by the case of **Chilima and Another v Mutharika and Another (Constitutional Reference No. 1 of 2019) [2020] MWHC 2 (03 February 2020).** In this case, the High Court sitting as a *"Constitutional Court"* held that the decisions of the President and the Vice President who were found to have been irregularly elected were unaffected by the Court's nullification of the results of the irregular election. This decision was upheld on appeal to the Supreme Court of Appeal in **Mutharika and Another v. Chilima and Another (MSCA Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 (08 May 2020)**.

116. The second miscellaneous matter is more or less related to the first miscellaneous matter that we have just discussed. It is worded as follows in the skeleton arguments by the Interested Parties:

> *"In the alternative, if the Court is of the view that the consequential declarations and findings cannot be made within the scope of the present action, we pray that the same be certified for the determination of the High Court, sitting as the Constitutional Court in terms of section 9 of the Courts Act as the issues clearly border on the interpretation of* ***Section 75(1) of the Constitution****."*

117. The answer to this issue is short and sweet. The mere fact that there is reference in the present case to section 75 of the Constitution does not make this case, or certain issues herein, fit for determination by the High sitting as a *"Constitutional Court"*. In terms of section 9(2) of the Courts Act, it is only those matters that *"expressly and substantively relate to, or concern, the interpretation or application of the provisions of the Constitution"* that have to be placed before a *"Constitutional Court"*: see **James Phiri v. Dr. Bakili Muluzi and Attorney General, Constitutional Case No. 1 of 2008** and **Maziko Charles Sauti-Phiri v. Privatization Commission and the Attorney General, Constitutional Cause No 13 of 2005**. Of course, this can only happen after certification by the Chief Justice to that effect.

118. In the present case, as the foregoing would have shown, the central issue in the present case is whether or not the members of the Commission whose names were announced on 7th June 2020 were nominated and appointed in accordance with the nomination process and appointment process laid down in section 4 of the Act. I have great difficulties in understanding how such an issue can be said to fall under section 9(2) of the Courts Act.

Whether or not the Claimant's is entitled to the reliefs being sought?

119. The reliefs being sought by the Claimant are set out in paragraph 12 above.

120. The Court has found and held that the nomination process and appointment process leading to the appointment of the Interested Parties as members of the Commission were legally flawed. It is also commonplace that the DPP was only entitled to submit three names in terms of section 4 of the Act. This then means that the number of members on the Commission representing the DPP has to be limited to three as prescribed by law.

121. Even if we were to suppose, for the sake of argument, that the nominations of the Interested Parties were lawfully done, the vexing question is how do you choose out of the four Interested Parties the three persons that should continue to be members of the Commission? The Court cannot arbitrarily pick out one Interested Party out of the four Interested Parties as being the one who was nominated and appointed contrary to the law laid down in section 4 of the Act. Similarly, what method does the Court have to use to decide which three of the four Interested Parties have to be deemed to have been duly appointed according to the requirements of section 4 of the Act? Do you have to simply pick the first three names on the list of nominees submitted by DPP ((Mr. David Kanyenda, Mr. Steve Duwa and Mr. Arthur Vincent Nanthuru)? As we have already seen, it does not work that way. The case of Mr. David Kanyenda on my mind. His name was at No. 1 on the list of nominees submitted by the DPP but the Defendant, in his own wisdom, decided to leave him out. Do you have to go by the gender card perhaps? There is just no sure way of knowing which of the three out of the four Interested Parties the Defendant would have settled for as his appointees under section 4 of the Act.

122. In the circumstances, and particularly having regard to the holding at paragraph 101 above that the Interested Parties were not duly appointed, the legally correct thing to do is to declare that the Defendant's appointment of the Interested Parties is ultra vires section 4 of the Act and, therefore, illegal. Accordingly, the appointments of the Interested parties as members of the Commission have to be quashed. It is so ordered.

123. The quashing of the respective appointments of the Interested parties means that the number of members of the Commission that were appointed from the list of nominees submitted by the DPP has been reduced to zero. In terms of section 4 of the Act, the composition of the Commission has to include three members of the Commission appointed by the Defendant from the list of nominees submitted by the DPP. This situation has to be immediately addressed. I, accordingly, order that the leader of the DPP must act according to section 4(2) of the Act by submitting to the Defendant *"a maximum of three names as the political parties' nominees as members of the Commission"*. The leader of the DPP must make the submission within 7 days hereof. It is so ordered.

124. I now turn to look at reliefs relating to nominees of the Claimant. As already stated, the Claimant submitted three names, namely, Dr. Anthony Mukumbwa, Mrs. Olivia Liwewe and Mr. Richard Chapweteka. Only Dr. Anthony Mukumbwa and Mrs. Olivia Liwewe were appointed by the Defendant from the nominees made by the Claimant. Neither the nomination nor the appointment of Dr. Anthony Mukumbwa and Mrs. Olivia Liwewe can be questioned. Both of them were duly nominated and appointed in accordance with the law. In the premises, I see no legal basis for interfering with their appointment or tenure of office. Accordingly, at the expense of confirming the obvious, Dr. Anthony Mukumbwa and Mrs. Olivia Liwewe shall continue to be members of the Commission.

125. My holding that Dr. Anthony Mukumbwa and Mrs. Olivia Liwewe's membership has to continue deals a fatal blow to the prayer by the Defendant to the effect that the Court should quash the appointments of all the members of the Commission save for the Chairperson. The matter was put thus in paragraph 3.11 of the Defendant's skeleton arguments:

> *"Considering that the Defendant swore to defend the law and the Constitution, it may be impossible to remove a commissioner and appoint another without violating the provisions of the Electoral Commission Act. The appropriate course of action ought, therefore, be to quash the appointments of all the commissioners except the Chairperson and request the eligible parties to submit fresh nominations within the period prescribed by the Electoral Commission Act."*

126. The submissions by the Defendant cannot be sustained. Firstly, neither the sworn statement by Mr. Zangazanga Chikhosi nor the Defendant's skeleton arguments give any reason for the Defendant's position that *"it may be impossible to remove a commissioner and appoint another without violating*

the provisions of the Electoral Commission Act". Secondly, the Defendant is talking of removing commissioners. I don't know how that arises in the present case. Section 75(4) of the Constitution provides that a member of the Commission may be removed from office by the President on the recommendation of the Public Appointments Committee on the grounds of incapacity or incompetence in the performance of the duties of that office.

127. In the present case, the appointments of the Interested Parties have been quashed. There is a world of difference between quashing an appointment of a member of the Commission and removal of a member of the Commission from his or her office. Correct usage of terminology is of prime importance in legal matters. Thirdly, as discussed in paragraph 124 above, it would be inequitable and unlawful to quash the appointment of Dr. Anthony Mukumbwa and Mrs. Olivia Liwewe when (a) their respective nominations and appointments were done in accordance with section 4 of the Act, and (b) neither Dr. Anthony Mukumbwa nor Mrs. Olivia Liwewe has done anything to warrant his or her ceasing to be a member of the Commission under section 75(3) of the Constitution or removal from office under section 75(4) of the Constitution. That Dr. Anthony Mukumbwa and Mrs. Olivia Liwewe should be *"victims of collateral damage"* not premised on sound legal basis cannot be allowed by this Court. The rule of law has to be upheld at all times.

128. We move on to consider the case concerning Mr. Richard Chapweteka. The Defendant did not appoint Mr. Richard Chapweteka. It is not possible to tell on the evidence before the Court why he was not appointed. Matters have not been helped by the fact that the Defendant did not return the name of Mr. Richard Chapweteka to the Defendant as required by the Act. Could it be that he was not *"suitably qualified*"? The Court is not in a position to answer that question. In the circumstances, and in order for the Court not to be seen as usurping the powers of the Defendant, I reckon that the correct thing to do would be to require that the Claimant should re-submit the name of Mr. Richard Chapweteka as a member of the Commission. This has to be done, within 7 days hereof. It is so ordered.

129. For the sake of clarity and avoidance of doubt, no issue was raised in this case regarding the nomination and appointment of Justice Dr. Chifundo Kachale as the Chairperson of the Commission. Accordingly, although strictly speaking it is not necessary to say so, the tenure of Justice Dr. Chifundo Kachale as the Chairperson of the Commission is not in anyway affected by this judgement. In other words, Justice Dr. Chifundo Kachale shall continue to be the Chairperson of the Commission.

130. The Claimant also prays for costs of the action.

131. The position of the Defendant on the question of costs, is that each party should bear own costs because of the public interest nature of this case. The case of **Ex Parte Muluzi & Another (99 of 2007) [2008] MWHC 207 (16 January 2008** was cited as an authority on this point.

132. Costs are in the discretion of the Court: see section 30 of the Courts Act. It is also commonplace that costs follow the event. An instructive authority is Order 31(3)(2) of the CPR which provides that where the Court decides to make an order about costs, the unsuccessful party should be ordered to pay the costs of the successful party.

133. In the present case, it cannot be denied that the Claimant was forced to commence these proceedings as a way of seeking to put an end to impunity on the part of the Defendant. Having succeeded in its claim, I was inclined to award the Claimant costs of this action but for three reasons.

134. Firstly, issues raised by this case are such that even the Claimant and many others have benefitted from (the issues herein not only attracted a lot of comments and publicity, within and outside the legal circles, but also aroused anxiety and expectations in some people,). Secondly, the circumstances surrounding the office of the Defendant place this case in a special category. The challenged decisions were made before there was change of *"government"*. Thirdly, the Interested Parties were made parties to this case by operation of law: see Order 19, rule 23, of the CPR.

135. It would be inequitable in these circumstances to award costs against the Defendant and the Interested Parties. I, accordingly, consider that the appropriate order to make would be that each party should bear his, her or its own costs and so it is ordered.

Pronounced in Court this 2nd day of June 2021 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE