IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONSTITUTIONAL CAUSE NO. 6 OF 2006

(BEING MISC CIVIL CAUSE NO. 165 OF 2006)

BETWEEN

THE STATE

-AND-

PRESIDENT OF THE REPUBLIC OF MALAWI **1ST RESPONDENT**

MINISTER OF FINANCE **2ND RESPONDENT**

SECRETARY TO THE TREASURY **3RD RESPONDENT**

EXPARTE: MALAWI LAW SOCIETY **APPLICANT**

CORAM: The Hon. Mr. Justice R. Chinangwa
The Hon. Mr. Justice L.P. Chikopa
The Hon. Mr. Justice M. Kamwambi

Mr. R. Kasambara, K. Kaphale, Chalamanda and J Mwakhwawa of Counsel for the Applicant.

Mr. M. Mbendera of Counsel for the Respondents

E. Malani (Mrs.), Nthunzi (Mrs.) and N. Nyirenda (Ms) Court Clerks/Recording Officers

Place and Date of Hearing: Blantyre, 8th and 21st December 2006

Date of Ruling: **9th February, 2007**

RULING

INTRODUCTION

The genesis of this matter has to be the letter, appearing in this case as Document 9, from the National Assembly and signed by the Clerk of Parliament in *inter alia* following terms.

'3rd July, 2006

The Registrar of the High Court and
Supreme Court of Appeal
P.O. Box 30244
Chichiri
BLANTRYRE 3

cc: The Secretary to the Treasury,
P.O. Box 30049,
Capital City.

LILONGWE 3

The Secretary for Human Resource
Management and Development,
P.O. Box 20227,
BLANTYRE 3

Dear Sir,

RE: REVIEW OF CONDITIONS OF SERVICE FOR THE JUDICIARY

I write to refer to your letter No. HC/ADM/66/84 dated 19th May, 2006 and wish to inform you that the Public Accounts Committee met on 28th June, 2006 and determined a Review of Terms and Conditions of Service for the Judiciary as follows:

The Revised Conditions of Service for the Judiciary are with effect from 28th June, 2006.

Your faithfully

M.M. Katopola

CLERK OF PARLIAMENT" [sic]

Included in Document 9 is a 59-page document clearly setting out the salaries, allowances, terms and conditions on which holders of judicial office in Malawi are employed.
Following Document 9, there was an exchange of written communications between the Office of the Registrar of the High Court and Supreme Court of Appeal [the Registrar] and the Respondents. The former was trying to procure the implementation of the Terms and conditions of Service contained in Document 9. He did not have much joy if any. The Applicant, a statutory body incorporated under section 25(1) of the Legal Education and Legal Practitioners

Act Cap 3:04 of the Laws of Malawi then joined in the action. It wrote the Respondents Document 12. It was also seeking to procure the implementation of the said Terms and Conditions contained in Document 9, or at the very least seeking clarification as to why they were not being implemented. It had no joy either. It, as a result, decided to bring the present proceedings seeking to judicially review the Respondents' decision to, in their view, **'unilaterally and wrongfully decline to implement salary and allowances determined by the National Assembly and communicated to the Judiciary by way of letter from the national Assembly dated 3rd July 2006'**. **[Sic] [Our emphasis]**

They *inter alia* declarations that:

I. *The Respondents are duty bound to implement the determination of the National Assembly as regards the salaries and remuneration of the Chief Justice and all holders of Judicial office;*

II. *That the refusal of the Respondents to implement the determination of the National Assembly as regards the salaries and remuneration of the Chief Justice and all other holders of judicial office is in violation of section 114(3) of the Constitution; and*

III. *The Respondents have no legal powers to determine the remuneration of the Chief Justice and all other holders of Judicial office;* **[sic]**

They also seek an order, akin to *mandamus*, 'requiring the Respondents to implement the determination of the national Assembly as regards the salaries and remuneration of the Chief Justice and all other holders of judicial office as stipulated under section 114(3) of the Constitution' **[sic]**. We should point out though that there does not appear to be a subsection 3 to section 114.

The Respondents responded to the Applicant's case. We do not at this stage want to go into details of their case. Suffice it to say at this stage that it is clear from our understanding of the Respondents' case that this matter revolves around who, under our law, has the power to

determine Judicial Conditions of Service including salaries and allowances, whether in the circumstances of this case there was a determination of such conditions of service and thirdly the implementation of any such Terms and Conditions of Service. It appears to us however that before we proceed to deal with the issues as directly raised by the parties we must put to rest an issue, which though not raised by either of the parties hereto, we will do well to deal with. This is the matter of whether in view of the obvious fact that the matters in issue herein have an impact on the welfare of the Judiciary it would be right and proper that we, as sitting Judicial Officers, sit in adjudication over this case. Whether, in doing so, we would not be acting against the dictates of natural justice especially the rule against bias. Whether, at the end of it all, the Respondents will go away feeling that they have been before an independent and impartial tribunal as is their constitutional right.

PRELIMINARY ISSUE – THE RULE AGAINST BIAS

Traditionally this is understood to mean that one should not be a judge in his own cause. Where therefore the decision maker has a pecuniary or proprietary interest in the outcome of the proceedings they should not sit. See **R v Rand**(1866) L R I Q B 230 at 232 where Blackburn J said:

> **"***Any pecuniary interest, however small, in the subject matter of the inquiry, does disqualify a person from acting as a judge in the matter".*

The much lamented Lord Denning said in **Metropolitan Properties Co (FGC) Ltd v Lannon**(1969) 1 Q B 577 at 579 that:

> *The court does not look to see if there was a real likelihood that he would, or did, in fact favor one side at the expense of the other. The court looks at the impression which would be given to other people".*

As a matter of principle therefore we have no problem with the proposition that if there is an appearance of bias or a reasonable suspicion of bias, any decision thereby arrived should not be allowed to stand. Applied to the instant case, this would ordinarily have meant that because of

the possibility that the court itself, indeed the Judiciary, might benefit from any decision arrived at in this matter the prudent thing to do would have been for the Judiciary to altogether refrain from sitting in this case.

In Malawi, the principle above notwithstanding, the situation appears, in our most considered view, to be different. Whereas we, and as we have said above, have no quarrel with the principles enunciated in the above cases, it is obvious that the matter at hand is specifically regulated by our Constitution, a document the jurisdiction the origin of the above case law, if people need to be reminded, does not have. Meaning as we see things that the above principles should primarily be looked at in the context of the Constitution of Malawi. Section 9 of the Constitution of Malawi provides that:

> "*the Judiciary shall have the responsibility of* ***interpreting****, protecting and enforcing this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law". **[Our emphasis]***

Our understanding of the above section is that the Judiciary, and no other institution, shall have the responsibility of interpreting and, if need be, enforcing the Constitution. We doubt whether we should, just because the Judiciary seems to have an interest in the matter, abdicate that function. If the answer is yes the question, for which we can find no legally sound answer, is who then would in that instance take up the Judiciary's function?
Section 103(2) is of importance here as well. If we may it provides as follows:

> *The Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence."*

We have no doubt that in so far as this matter involves the interpretation of the Constitution it is a judicial matter. It is, to that extent, only the Judiciary in our view that can assume jurisdiction over its determination. There would, in terms of our Constitution, be nowhere else to take the matter if the Judiciary were to recuse itself. Such a recusal, we think, would in the circumstances in fact be bad for both the law and the very society the law seeks to serve.

More than that, we think that the Judiciary assuming jurisdiction over a matter in which they would, ordinarily, be perceived to have an interest is not without precedent. Canada seems to have a plethora of instances where judges have sat in cases where others would have been held to be judges in their own causes. In the case of **Water Valente v Her Majesty the Queen**[1985] 2 SCR 673 the matter for determination was section 11(d) of the Canadian Charter of Rights and Freedom which provides:

> *"any accused charged with an offence has the right:*
>
> > *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"*

The question was whether or not Provincial Courts (Criminal Division) were independent tribunals in terms of section 11(d). The argument was that because the judges had no security of tenure [some of the judges were on contract], and also because the judges had their salaries and pensions fixed by the Executive and they were generally subject to the administrative authority of the Minister of Justice and the Attorney General they could not be regarded as sufficiently independent and impartial as envisaged in section 11(d) quoted above. The Canadian Supreme Court heard the matter. Regarding bias the court said:

> ***"****The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is* *'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – have concluded ….."* ***(underlining and emphasis supplied by us).***

Put differently, but in the context of that particular case, the test was stated as follows:

> ***"****The question that now has to be determined is whether a reasonable person, who was informed of the relevant provisions, their historical background and the tradition surrounding them, after viewing the matter realistically and practically would conclude*

that a provincial court judge sitting ……. to hear the Appeal in this case was a Tribunal which could make an independent and impartial adjudication. In answering this question it is necessary to review once again the specific concerns which were raised before [Judge Sharpe] and then conclude whether singly or collectively they would raise reasonable apprehension that the tribunal was not independent and impartial so far as its adjudication was concerned."

Another case is that of **Ref re Remuneration of Judges of the Provincial Courts of Prince Edward Islands**[1997] 3 SCR 3. In that case salaries of provincial judges were reduced in accordance with an Act of Parliament i.e. Public Sector Pay Reduction Act. The question was whether in the light of such reduction the provincial judges could be said to have sufficient financial security, security of tenure and freedom from administrative interference from the Executive as to be independent in terms of section 11(d) abovementioned. The Supreme Court of Canada heard the matter the fact that part of the Judiciary had an interest in the matter notwithstanding. More recent cases are that of **Provincial Court Judges' Association of New Brunswick v R; Ontario Judges' Association v R; Attorney General of Quebec v Conference Des Juges Du Quebec**also decided by the Supreme Court of Canada [July 22nd2005]. At stake again was the remuneration of provincial judges in the context of judicial independence. The Supreme Court of Canada had no problems hearing and determining the matter.

Slightly different, but still on bias, are the cases of **SOS-Save Our St Clair Inc v City of Toronto**from the Ontario Superior Court of Justice [November 3rd2005] and that of **Indah Desa Saujana Corp SDN BHD v James Foog Cheng Yuen**from the High Court of Malaysia [November 23rd2005]. In the former one member of the court was involved in public controversy on another issue with one of the parties to the case. In the latter the court sat to hear a civil claim against the Head of the Civil Division of the High Court. Irrespective of the verdicts the cases serve to show that the courts will not shrink from sitting in cases where one of their own might be said to be on trial just because some people might have reservations about the court's lack of bias.

The situation has not been any different in Malawi. In the cases of **A H Sinkereya v Attorney General**Civil Cause Number 743 of 2004 and that of the **State v Judicial Service Commission ex parte Mrs. E L Msusa**Civil Cause Number 407 of 2005 **[**also of **Mbekwani and Another v Judicial Service Commission]**High Court was called upon to determine whether the Judicial Service Commission had acted in accordance with section 43 of the Constitution in dealing with disciplinary matters concerning the ex parte applicants who were at all material times judicial officers to wit magistrates. In sitting in the matters the High Court had to decide, effectively, on issues of their own tenure of office in which they clearly had a direct interest. They also had to adjudicate on the propriety of actions taken by the Judicial Service Commission, a constitutional body that sits to effectively appoint and discipline judicial officers and whose membership includes a Judge of the High Court and no less a personage than the Honorable the Chief Justice himself as the Chairman.

The United Kingdom is not spared cases of this nature. Some might remember that towards the end of Lord Hailsham's reign as Lord Chancellor there was a dispute between the Government and the Bar as to levels of remuneration payable to Barristers doing legal aid work. The matter was the subject of litigation. The Bench, which traditionally draws its human resource from the Bar, did not recuse itself just because it would have been perceived to be sympathetic to the Barristers. Or, in the alternative that it would favor the Lord Chancellor to whom it was, in effect, institutionally answerable. Fortunately for them the matter was never litigated to finality. The Lord Chancellor saw the good sense of having the matter settled out of court.

Our view, and we think we have said this above, is that this is a judicial matter. A matter that specifically calls for the interpretation and the enforcement of our Constitution. Under our Constitution it is only the Judiciary that can assume jurisdiction over such a matter. We do not think that the framers of our Constitution intended that the Judiciary should abdicate such function where it so much as seemed that they might have some interest in the matter at hand. Had such been their intention they would, in our view, have provided an alternative to the Judiciary in cases like the one under consideration. We actually are of the most considered opinion that the framers of our constitution intended that unless the situation was clearly

untenable, which we think this one is not, the Judiciary should proceed to hear any matter that was in the view of the Judiciary a judicial matter in that it *inter alia* involved the interpretation and/or enforcement of the Constitution. And if we may, but without in any way belittling any concerns that people might have, our view is that we are not in this matter determining under what terms and conditions holders of judicial office should serve. Not even how much a judicial officer should get by way of salary, allowances and other benefits. To that extent it would be incorrect to suggest that this court would be inclined to decide in a particular fashion in order to benefit itself. Rather we think that we are in this action being asked to decide which institution under our constitutional framework has the mandate to determine the terms and conditions of service for judicial officers. This case is about parliamentary privilege i.e. whether proceedings of the National Assembly are subject to review by the Courts and if yes under what circumstances and to what extent. It is also about the definition of National Assembly as used in section 114 of our Constitution. Indeed, it is about judicial independence, the rule of law, separation of powers, checks and balances and the relationship between the three branches of government in a modern and functioning democracy. These, we think, are important issues concerning our nascent democracy. It appears to us that this is as good a time/chance for the law relating to them to be set straight by the Courts. It would be a sad day for democracy, we think, if just because the Judiciary has an interest, one way or the other, in the outcome of the present action the Courts were to abdicate their function as given in section 9 abovementioned. It is not, after all, as if the National Assembly, the Executive, indeed the general citizenry are entirely without any interest in the outcome of this case. It is in the light of such thoughts that we have no doubt that any person properly appraised of the constitutional provisions under consideration, their historical background, the traditions surrounding them, the need for orderly government and the importance of the rule of law would agree with us that it serves the interests of Malawi better that we hear this matter. That the reasonable person would agree with us that this court has sufficient professionalism, independence and impartiality as envisaged in section 9 of our Constitution to hear and determine this matter. That the Respondents will walk away from these proceedings, whatever the outcome, feeling not hard done by. We shall proceed to so determine the matter.

ISSUES FOR THE COURT'S DETERMINATION

Like we have said above we think the matter can be disposed of by considering firstly who determines the terms and conditions of service for holders of judicial office, secondly whether in the circumstances of this case whoever the determinant is has made such a determination and thirdly what conditions must exist before the judicial officers' terms and conditions can actually be implemented.

1. WHO DETERMINES JUDICIAL OFFICERS' CONDITIONS OF SERVICE?

The Applicant's case is premised on section 114(1) of the Constitution. If we may it is in the following terms:

> **"**the Chief Justice and all other holders of judicial office shall receive a salary for their services and, on retirement, such pension, gratuity or other allowance as may, from time to time, *be determined by the National Assembly"* **(emphasis and underlining supplied by us)**

In the Applicant's view the power to determine the terms and conditions of service for holders of judicial office is under that section granted to the National Assembly. They further argue that the National Assembly has the power to delegate such of its functions, as it deems necessary to any one of its Committees. That in accordance with such powers the National Assembly has under Standing Order 162(g) delegated *inter alia*the determination of judicial officers' Terms and Conditions of service to the Public Appointments Committee [PAC]. See pages 15 – 16 of the Applicant's skeletals.

The Respondents' case is to be had mainly from their response to the application for judicial review and their skeleton arguments. Paragraph 1 of the response is in the following terms:

> "*that Respondents do not admit that section 114 of the Constitution vests the National Assembly with the power to determine salaries of holders of judicial offices and puts the Applicant to strict proof thereof*"

Argument 2 in their skeletals amplifies this position, in our view. We doubt though whether we

will do justice to the Respondents' arguments on this point if we paraphrased them. We therefore have reproduced them in extenso. On page 4 they are as follows:

> ***"****2.3 the Respondents contend that Article 114(1) [we have quoted this section if full above] can only be read as making two statements:*

1) *that holders of judicial office shall receive a salary for their services.*
2) *that holders of judicial office shall, upon retirement, receive such pension, gratuity or other allowance as may, from time to time, be determined by the National Assembly.*

> *2.4 Article 114(1) should not be read as stipulating that the National Assembly should determine the salaries of serving holders of judicial, but only benefits of retired holders of such office.*

> *2.5 The treatment of salaries and allowances for serving holders of judicial office is, in fact, fully dealt with in Article 114(2) of the constitution. The Respondents contend that Article 114(2) places an obligation on those responsible for payment of judicial salaries to ensure not only that they are not reduced without consent, but also that they should periodically be increased in order to compensate for cost of living increases.*
>
> *2.6 There is no stipulation in 114(2) that the necessary adjustments should either be calculated or authorized by the House of Assembly. The Respondents contend that had the framers of the Constitution intended that salaries themselves should be determined under section 114(1) by the House of Assembly, then there would have been no reason to include article 114(2) governing the same procedure.*
>
> *It appears highly unlikely to the Respondents that the authors of the Constitution would have created, side by side, two clauses governing how salaries of serving judicial officers were to be adjusted over time, as it would have been clear that the two clauses would be bound at some point to come into conflict"* ***[Sic]***

Immediately let us point out that we do not find ourselves in favor of calling sections of the

Constitution Articles. It may be fashionable but we find it inappropriate. Similarly we would rather we stuck to calling the National Assembly that or the House and not the House of Assembly.

Secondly, it is important that we, at this stage, restate the law relating to constitutional interpretation. There is the case of **Fred Nseula v Attorney General and Malawi Congress Party**MSCA Civil Appeal No. 32 of 1997. It says that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one.

The case of **Attorney General v Dr Mapopa Chipeta**MSCA No. 33 of 1994 also comes to mind. It implores courts to interpret the Constitution in a manner that gives force and life to the words used by the legislature and at to all times avoid interpretations that produce absurd consequences. And we do agree with the late Lord Denning that we best achieve that [i.e. the avoidance of absurdities] by not subjecting the words used in the Constitution to destructive analysis.

Regarding the Respondents' position herein it surprises us that their Response and skeletals are at variance with the first affidavit of Mrs. Matilda Katopola and that of her assistant. In paragraph 5 thereof she states that one of the functions of the Public Appointments Committee of the National Assembly is to "determine and recommend to the House the conditions of service for judicial officers". In Paragraph 6 she narrates the procedure for so doing. How, if we may ask, do the Respondents want that statement to relate to their assertion in paragraph 1 of their Response that the National Assembly has no power to determine the terms and conditions of service for judicial officers? Or indeed with the assertion, in their skeletals, that the National Assembly only has the mandate to determine the terms and conditions of service for retired judicial officers?

Secondly, it seems to us that the Respondents' arguments raise too many questions to be correct. In paragraph 2.5 thereof we note that they do not make any reference as to who determines the said salaries but only to who actually pays. Various questions arise: who, in their view, then is responsible for determining the salaries and allowances etc? Is it the same 'person' who actually pays? And who in this context can be said to be the paying agency? The Respondents' argument is silent on the foregoing questions. And is there any logical reason for providing, as the Respondents argue, that the National Assembly should determine only benefits of retired judicial

officers while at the same time making no specific provision as to who should determine compensation for serving judicial officers?

In paragraph 2.6 of the Respondents say that there is no stipulation in section 114(2) to the effect that adjustments envisaged therein should be 'calculated or authorized' by the House of Assembly'. Again the question is: is there any public expense that is not authorized by the National Assembly? And, by extension, if the National Assembly must authorize all expenditure, is it not a given fact that they must, in so doing indulge in some manner of calculation however slight? The truth of the matter, in our view, has to be that the Respondents have got the wrong end of the law in so far as section 114(1) of the Constitution is concerned. They have for some unknown reason broken section 114(1) into parts with the result that an absurdity and pedantry has inevitably been achieved. Read as a whole, see Nseula's case, the section's meaning is not hard to come by. It caters for the determination of salaries, allowances, pension and gratuity, by the National Assembly, for both serving and retired judicial officers. The framers of our Constitution, it is clear in our mind, intended that whatever was to be paid to judicial officers [serving or retired] as salary, pension gratuity or other allowances was to be determined by the National Assembly. And the reason should be clear enough. Issues of judicial remuneration touch on judicial independence and separation of powers. Judicial independence in turn revolves around three things: security of tenure, administrative independence and financial security. See the Prince Edward Island Reference Case. Allowing, for instance, the Executive to by itself determine or have the final say on the Terms and Conditions of Service for judicial officers would in effect make judicial officers subordinate to the Executive. That would create the impression, for good reason, that judicial officers would and do favor the interests of those that butter their bread. That can, in turn erode the public's confidence in the independence of the judiciary. The Judiciary would then be perceived as failing to provide the necessary checks and balances on abuse, actual or potential, of Executive discretion. It would also create the impression that the judiciary is negotiating with the Executive, which for good reason in our opinion, the case authorities and even our Constitution abhor. See the Prince Edward Island case. Negotiations involve compromises. Give and take so to speak. Questions will always arise as to what the judiciary gave or took in order to get any suggested improvements to their Terms and Conditions of Service approved. Could the loss of their independence have been part of the deal?

Having the terms and conditions decided in the National Assembly on the other hand is more in keeping with an independent and impartial judiciary on the one hand and an open and accountable system of governance on the other. Firstly because the National Assembly is peopled by the peoples' representatives, the Terms and Conditions are in effect being decided by the people themselves. In other words the people decide on what terms and conditions they want their Judicial Officers to serve. Secondly, it appears to us that deciding the matter in the National Assembly is more open and democratic in that it allows all involved to say a piece of their mind without cloaking the process in the usual secrecy that clouds government business. The people would comment through their elected representatives. The Executive through, not only government ministers but also legislators that sympathize with government policy positions within the House. The Judiciary itself will have been heard in Committee through the process of contributing its proposals towards the section 114(1) process.

We are aware of course that there was mention in Mr. Madula's affidavit of the Public Remuneration Board to which the Judges' salaries will have to be sent. Our view is that such a Board does not and cannot have the power to determine such salaries unless section 114 of the Constitution is amended. The most that it can do is to contribute, maybe on behalf of the Executive and probably by way of expert opinion, to PAC as it considers the Judiciary's terms and conditions of service. In cannot by itself sit to determine such terms and conditions of service. The outcome of such sitting would be an illegality and the whole exercise futile in the extreme.

To the question "who, under section 114(1) our constitution, has the mandate to determine judicial officers' compensation" our answer must be that it is the National Assembly.

2. WAS THERE A DETERMINATION?

The Applicant's case is a simple yes. The evidence, in so far as they are concerned, is Document 9. The Clerk of Parliament advised the Judiciary, the Treasury and the Secretary for Human Resource Management and Development that there had in fact been such a determination which was to take effect from June 28th2006.

The Respondents hold a different view to wit that there was, in fact, no such determination. They have various reasons for holding such view. We try to as much as possible reproduce such reasons.

In their response to the Applicant's case they argue that:

(a) There was in fact no determination made by the National Assembly;

(b) If the recommendations by the Public Appointments Committee [PAC] are held to be the determination then the same are unconstitutional by virtue of being in breach of section 114(2);

(c) Standing Order 162 of the National Assembly under which PAC apparently acted does not give it the power to make a determination but only to make recommendations regarding terms and conditions of judicial officers;

(d) If PAC was delegated the power to make the said determination by the National Assembly then such delegation is unconstitutional, illegal, and a nullity; and

(e) If PAC was validly delegated then whatever new terms and conditions it came up with cannot be implemented unless section 57, 173,174, 175, 176, 177 and 183 of Constitution are complied with.

In their skeletals the Respondents have compressed the above into three broad arguments. Firstly, that there was no determination because the procedures for so doing as provided for in the Standing Orders was not followed; secondly that the determination made by PAC is against section 114(2) of the Constitution; and thirdly that any determination did not comply with section 57 and 183 above mentioned and cannot therefore be considered a valid determination in terms of the Constitution.

In our analysis, the Respondents do not actually dispute that there was some kind of determination made i.e. as contained in Document 9. They only challenge its validity/legality on

the grounds listed above. We as much as possible consider the challenges raised separately.

Procedure

The Respondents' case is based on Standing Orders 162(g) and 180(3). In their view Standing Order 162(g) gives PAC the mandate only to determine and recommend to the National Assembly conditions of service for judicial officers. Standing Order 180 on the other hand obliges PAC to put its report i.e. its recommendations before the whole House before the report can gain the status of the decision of the House. That there being no evidence that the report herein, meaning Document 9, was put before the full House and adopted as the said House's report the recommendations from PAC remain recommendations. They do not amount to a determination of the National Assembly as envisaged in section 114(1) above cited. The affidavit evidence of three parliamentary officials was brought in to support the allegation that Standing Orders of Parliament were flouted.

Mrs. Matilda Katopola swore two affidavits. The second one we can more or less disregard. We were told that the attachments thereto were flawed. The first one set out to buttress the allegation that Standing Orders were not followed in coming up with the 'determination' as a result of which the said 'determination' should be regarded as a nullity. In paragraph 7 she deponed:

> *"the procedure for approving the conditions of service for the judiciary adopted by the Committee in this case was flawed because the steps in paragraphs 6 (d) to (f) were not complied with. Instead the Clerk of the Committee merely presented me with certain documents purporting to be conditions of service for the Judiciary, as determined by the Committee and a covering letter for my signature*.

In paragraph 8 she depones that:

> *"I assumed that the Committee had followed the procedure in paragraph 6 above and that all I had to do was to sign the relevant documents and forward them to the Registrar of the High Court"*. [**Sic**]

In paragraph 9 she deponed that the procedure adopted by the Committee was **'unprocedural and irregular'**in that the procedures listed in paragraph 6 of her affidavit should have been complied with in their entirety.

A Mr. Masauko Malcolm Chamkakala swore an affidavit as well. He is Parliamentary Legal Counsel. It was clearly intended to support the position that Standing Orders were flouted in coming up with Document 9. He exhibited certain documents to show that previously i.e. in 2001 and 2003 the Committee's determination of the Judiciary's terms and conditions of service had been taken before the full House.

A Mr. Chitseko also swore an affidavit. He is Senior Clerk Assistant of Parliament, a position be has held since 1999. He deponed in paragraph 4 of his affidavit that he was 'serving' the Committee when it met on 28th, 2006 in Development House at City Center to consider conditions of service for the judiciary. From paragraph 5 to 9 thereof he says in our view that:

(i) the delegation from the Judiciary comprising Justice of Appeal Mtegha SC, Justice Nyirenda, His Honor Kalembera (Registrar of the High Court and Supreme Court) and Mr. Kapanga (Human Resource Manager) effectively lied to the Committee that the figures they brought had been agreed to by the Treasury and had been keyed into the budget;

(ii) that the Judiciary's submissions were deliberated upon by the Committee and thereafter a covering letter was sent by the Secretariat together with the conditions of service to Treasury. Copies of 'the documents' which the Judiciary submitted to the Committee for its consideration were attached to the affidavit;

(iii) that Standing Order 162 (5) was flouted by the Committee in considering the conditions of service and further that he, Mr. Chitseko, '**failed'**to direct the Committee to follow the correct procedure as laid down in Standing Order 162(5).

In answer to the case law cited by the Applicant, to which we make reference hereinafter, the

Respondents argue that it is not correct to say that it is not open for anyone to question the House's procedures. That in their view is only true when the matters in issue are internal to the House. Where however, as is in their view the case herein, the matter pertains to the Constitution then internal procedures can be questioned. In the Nseula, Bradlaugh and Burdett v Abbott cases the courts did not intervene because the cases dealt with the rights of a Member of Parliament in the House. The House does not however have a free hand on procedure in cases touching on the Constitution. The cases of, **The State v Attorney General and the Speaker of Parliament; ex parte Brown Mpinganjira, The State v Attorney General and the Speaker of Parliament ex parte Gwanda Chakuamba** , according to the Respondents, the courts intervened because the matter went beyond mere internal procedures, were cited.

The Applicant's case is based on law and case law from here and beyond. Section 56(1) of our Constitution is for the Applicant clear in so far as procedure in the National Assembly is concerned. It provides that:

> *"subject to this Constitution, the National Assembly may by Standing Order regulate its own procedure."*

Article 9 of the Bill of Rights [UK] provides:

> "*that the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.*

According to the Applicant Article 9 had the effect of making the House of Commons the sole judge of its own proceedings and procedure. It was thus able to depart from its own procedure without having such procedure questioned in a court of law. The following cases were cited:

R v Jackson (1987) 8 NSW LR 116 where Hunt J said about parliamentary privilege that:

> *"The English and American authorities stress the immense historical importance of Art 9 [of the Bill of Right]. They also stress that the*

privileges and rights of Parliament go beyond the interest of an individual Member of Parliament and are necessary to represent the interest of Parliament as a whole.

Bradlaugh v **Gossett** (1883-4) 12 QBD 217 Coleridge CJ said:

"*as for certain purposes and in relation to certain persons it [the House of Commons] certainly is, and is on all hands admitted to be, the absolute Judge of its own privileges, it is obvious that it can, at least for those purposes and in relation to those persons, practically change or practically supersede the law."*

Pickin v **British Railways Board** [1974] WRL 208 at 220 Lord Morris said:

"*it must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become at Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Order and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. ……. It would be impracticable and undesirable for the High Court of Justice to embark upon an enquiry concerning the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed."*

In **Butadroka**v **Attorney General of Fiji**[1993] FJHC 56 the most relevant bits of the court's opinion were:

"*the compelling authority of the common law and the law as it applies in Fiji, I believe, forcefully and logically can only lead to the conclusion that Parliament in its internal proceedings should not be, and is not subject to the scrutiny or jurisdiction of the High Court unless specifically provided*

for in that capacity in the Constitution.

Parliament must be free to control and regulate its own internal proceedings free from the interference of the court. In a society where the rule of law is paramount, Parliament is presumed to, and can be relied upon to act properly and to lawfully regulate itself. ……. it [Parliament] must be unfettered in controlling its own proceedings, empowering itself to give force and effect to those proceedings and applying those powers in a manner and with the discretion of its own choosing.

In the management of its own internal proceedings, powers and privileges the House of Representatives has the exclusive control of those proceedings subject to the Constitution, where it specifically provides for the regulation of those proceedings."

In Nseula's case the Malawi Supreme Court of Appeal *inter alia*said:

"*it is our view that the correct legal position is that the National Assembly is not subject to the control of Courts in relation to matters which are governed by the Parliamentary Standing Orders and which relate to the internal proceedings of the National Assembly. ……. Courts have no right to inquire into the propriety of a resolution of the National Assembly."*

Two members of PAC swore affidavits on behalf of the Applicants. They were Honorable Brown James Mpinganjira MP and Honorable Mahmudu Ali MP. The latter's affidavit was withdrawn. We therefore make no further reference to it in this our opinion. The former was kept on record and the deponent twice cross-examined on it by the Respondents.

Honorable Mpinganjira's affidavit was in direct response to Mrs. Katopola's first affidavit. He deponed that:

I. no procedure or Standing Order was flouted in the approval of the Conditions of Service for the Judiciary;

II. what transpired during such approval is in line with the practice and procedures of the National Assembly;

III. the failure by the Executive to implement the conditions was an attempt to question the internal proceedings and procedures of the National Assembly which is not allowed;

IV. and that if there was any irregularity in the process during the said approval the same had been waived by the National Assembly and cannot now be questioned by the Respondents who are members of the Executive Branch of Government.

The deponent toed much the same line during cross-examination. We will make reference to some of his relevant responses as we go along with our opinion. Except perhaps at this point to mention that Honorable Mpinganjira insisted that the National Assembly and its Committees are guided not only by the Standing Orders but also by practices, traditions and usages. That in the instant case because there was nothing controversial about the Terms and Conditions it was decided that the determination/approval by PAC, which is an all party Committee [i.e. it has representation from all political parties in the National Assembly including Independents] should be taken as an adoption by the House. It was in his view pursuant to that agreement that the Speaker's Office through its Secretariat informed the Offices concerned, to wit the Registrar and the Secretaries to the Treasury and for Human Resource Management and Development, that the Terms and Conditions had been approved as per Document 9. This, it must be noted, and according to Honorable Mpinganjira was unlike the other years where due to some disagreements in the Committee the matter was taken before the floor of the House for the Report/Recommendations to be adopted by the whole House in terms of Standing Order 180(3).

The starting point in our view has to be the reiteration of the fact that some kind of determination of the Judiciary's Terms and Conditions of Service was made. This is clear from the affidavits of M/S Katopola, Chitseko, Chamkakala and Honorable Mpinganjira MP. The issue at this stage is not, in our view, necessarily whether or not a determination was made but firstly whether there was non-compliance with the relevant procedures in making the 'determination'. The second port

of call has to be the Republic of Malawi Constitution. Section 56(1) abovementioned gives the National Assembly the power to regulate its own procedures by Standing Orders subject to the Constitution. We understand this to mean that the National Assembly will regulate its own procedure unless the Constitution has provided otherwise. Thus for instance Parliamentary Standing Orders cannot provide for a manner of passing a Bill into an Act of Parliament other than that which is provided for in section 49(2) of the Constitution. In the instant case it is pertinent, in our view, to observe that the Constitution did not make provision for procedures to be followed in determining Terms and Conditions of Service for holders of judicial office except tangentially, in our view, in section 114(2) [on quantums] which is the subject of discussion later herein. The conclusion has to be that the National Assembly, in terms of section 56(1) abovementioned, has a free hand in the procedure to be used in arriving at such Terms and Conditions. Going through the Courts' reasoning in the *Pickin v British Railways Board Case*, *Nseula's Case*, section 56(1) abovementioned and the unchallenged testimony of Honorable Brown Mpinganjira MP, we must agree that it is not for this court, indeed any court, to question the procedures of the House or any of its Committees where the same are not specifically provided for by the Constitution. As the High Court in Fiji said in the Butadroka case, the National Assembly, in its internal proceedings should not be, and is not subject to the scrutiny or jurisdiction of the High Court unless specifically provided for in the Constitution. It is for the House itself to say whether or not its Standing Orders have been followed. The House must, in any given case, be relied upon to properly and lawfully regulate itself. To do otherwise would be to undermine the integrity and independence of the House. If we may be allowed to use the Court's words in the Pickin case it would be 'impracticable and undesirable for the High Court to embark on an inquiry concerning the effect or effectiveness of the internal procedures of Parliament or whether or not such procedures were followed'. If, in our view, there has to be a challenge to the 'determination' it must be as to the constitutionality of the decision/determination and not the procedures followed. If some party be unhappy about the procedures used the remedy, in our considered view, is not to come to court and try to question the said procedures. It is, as was said in Bradlaugh's case, to go back to the House and seek its reconsideration of the issues.

We are aware that the Clerk of Parliament, one of her assistants and the Parliamentary Legal Counsel swore affidavits trying to impeach the determination by PAC on procedural grounds. It

is important in so far as their comments on this matter are concerned to note that the status, duties and functions of the Clerk of Parliament, and with it the Clerk Assistants, are also a matter for the Constitution. Section 55 of the Constitution specifically provides that the Clerk of Parliament's duties shall be to assist the Speaker of the National Assembly and to perform such other functions as the Speaker may direct. Document 9, in our view, is a document of the National Assembly i.e. from Speaker's Office. It could therefore only have been sent to its addressees pursuant to the said section 55. Certainly neither Mrs. Katopola nor her assistants have said that it was sent otherwise. The question one would ask is whether or not in repudiating the same in their affidavits the Clerk of Parliament and her assistants were acting as agents of the National Assembly or of the Speaker as envisaged in section 55. If they be would not one have expected them to say so in their affidavits? Or indeed to proffer some semblance of their full powers to so act? We think the truth of the matter is that the Clerk of Parliament has no authority to withdraw National Assembly documents or validly question the validity of its decisions. She cannot. In fact she has neither the power to make decisions on behalf of the National Assembly nor a voice of her own except in accordance with section 55 aforementioned in respect of which there is no evidence herein. We will however not go so far as to call her affidavit or sentiments a red herring. Suffice it to say that we found it rather unfortunate that in trying to exculpate her office from what she deponed were its own deficiencies/failings she found necessary to effectively say that certain officers of the court had been economical with the truth. It is clear from her affidavit that she did not attend the PAC meeting in issue. Her role was merely to sign Document 9. She cannot be a competent witness as to what happened at the said Committee meeting. And without in an way trying to believe Honorable Mpinganjira's sentiments about the lack of probity on the part of Mr. Chitseko let us say that it is clear even from Mr. Chitseko's affidavit that his role on this Committee was limited. It is equally clear that Mr. Chitseko was not, to the extent that he knew something, inclined to tell the whole truth as to how the Committee went about its business on the material day. Even if therefore, it was within the ambit of this court to question the procedures used by the Committee or the House we doubt that we would have done so on the basis of the testimony of the Clerk of Parliament or any of her assistants. It is in any event important to note, we think, that none of the members of PAC came forward to suggest, let alone say, that what Hon Mpinganjira told us was not the whole truth.

We also remind ourselves of the Respondents' argument that the House's internal procedures might be open to questioning if the issue at hand involves the Constitution. We are sufficiently acquainted with the cases cited in respect thereof. With the greatest respect however allow us to say that we believe that the Respondents have again got the wrong end of the law. The law, as we understand it, only allows the courts to question a decision of the House, and with it the procedure used, if the decision itself is thought to be in conflict with the Constitution or if the Constitution itself provides for a different procedure. See *inter alia*Butadroka's case. In Nseula's case for instance the issue was whether or not the late Nseula had in terms of section 65 crossed the floor. The Speaker said yes and followed certain procedures in doing so. When the matter came to court, the court did not so much as decide on whether the proper procedure had been used but rather whether the Speaker had, on the facts, correctly applied section 65 abovementioned. The reason the court went into that inquiry was therefore not because all of a sudden it had acquired powers to inquire into the internal procedures of the House but because in terms of section 9 and 103(2) abovementioned it is only the Judiciary that have the powers to interpret the Constitution and not the Speaker. Where the Speaker purports to interpret the constitution the courts have the power to interfere. The same can be said about Mpinganjira's case which we must say was not, to our knowledge, decided on the merits. The question was also whether or not the Speaker had properly applied/interpreted section 65. It came to court for the Judiciary to decide on that point **not**to question the internal procedures of the House. Even in the Chakuamba case the issue was whether the Speaker had Section 43 of the Constitution in mind when he purported to exclude him from the House. Not, strictly speaking, an inquiry into the propriety of the procedures of the House.

Our conclusion of this part of the debate therefore is that the determination by the National Assembly cannot in this instance be impeached on grounds of alleged non-compliance with Standing Orders. This Court has no mandate to inquire into the internal procedures of the House. If there was a problem with the said internal procedures then it is for the National Assembly itself to say so and take whatever corrective measures it deems fit to, in the circumstances, redress the situation. Of course in cases like these the House would have to contend with the need to seek and obtain the consent of serving judicial officers if the revisiting of its decision would in any way result in a reduction of already granted/vested benefits. We are supported in

this view by section 114(2) of the Constitution which we have cited above.

Lack of Mandate and/Or Ineffectual Delegation

As we understand the Respondents they argued firstly that PAC is not the National Assembly as envisaged in section 114(1) and that its decision on the terms and conditions of service cannot therefore be that of the National Assembly; secondly that under the Standing Orders PAC has the mandate only to recommend, as opposed to determining the terms and conditions of service of holders of judicial office; and thirdly that if the determination by PAC was as a result of a delegation by the House of its section 114(1) powers to PAC then such delegation was illegal, a nullity and unconstitutional.

Lack of mandate

We dealt with this matter when we debated the matter of procedure. We here have a communication from the National Assembly about the terms and conditions for the Judiciary. It is not for this court, indeed any court, to begin to ask or lift the veil to find out how the decision was arrived at or who actually made it. It is enough, in our view, that a decision was made by the National Assembly, that the same was communicated to stakeholders and that to date the National Assembly has not renounced that decision. That only a Committee actually made it is irrelevant. We should not, after all, forget what Honorable Mpinganjira MP said that in this instance, and because of the uncomplicated/uncontroversial nature of the matters in issue, it was decided that the Committee's report be that of the House. If, as we said above, there be people who feel aggrieved by such procedure the remedy is not to come to this court and ask it to question the validity of the National Assembly's procedure. It is to go back to the House and prevail upon it to reverse or revisit its decision. The lack of a mandate is not an issue herein.

Delegation

The Respondents' argument is that in so far as PAC's decision was the consequence of a delegation by the House of its section 114(1) powers, such delegation and the resultant determination of the terms and conditions is null and void, illegal and unconstitutional.

We think it vital to remember that section 114(1) mandates the House to determine the

Judiciary's compensation subject, as we shall show later, to section 114(2). Section 56(1) grants the House the freedom to determine its procedure in exercising its section 114(1) powers. Section 56(7) then mandates PAC to perform such functions as may be granted it by the Constitution, an Act of Parliament, a resolution or Standing Orders of Parliament. Standing Order 162 specifically empowers PAC to determine and recommend terms and conditions of service for holders of judicial office. We are, on our part, unable to understand how, in the face of such legal instruments, it can be said that any delegation by the House of its section 114(1) functions would be illegal, a nullity and unconstitutional. It might actually be worth noting that, apart from raising it in their Response, the Respondents did not pursue the issue of delegation in their skeletals. One would be tempted to regard that point as having been abandoned. Such however is the nature of this matter that we have to address it in any event. We must say anyway that we saw no merit in the argument that the delegation by the House to PAC of its section 114(1) powers was in this case illegal, a nullity and unconstitutional.

Breach of section 114(2)

The section itself provides as follows:

> "*the salary of any holder of judicial office shall not without his or her consent be reduced during his or her period of office and* ***shall be increased at intervals so as to retain its original value*** *and shall be a charge upon the Consolidated Fund'.* ***[Our emphasis]***

The words emphasized are the ones in issue. The Respondents believe that the framers of our Constitution set out to balance the need for judicial independence against the harm to be done to the national economy by wanton increases in judicial salaries. They [the framers] sought to do this by decreeing that any increase to judicial officers' salaries should be such as would enable the salaries to retain their original values. In their view this should be done by increasing the salaries in line with the increase in the cost of living [no more no less] by reference to the Consumer Price Index.

The Terms and Conditions approved by the National Assembly i.e. Document 9, in the Respondents' view violate section 114(2) in that they 'seek to increase judicial salaries by almost

10 times the amount requires to restore their July 2003 values' **[our emphasis].** See page 6 paragraph 3.4 of the skeletals. In paragraph 3.5 the Respondents say that:

> ***"****The basic salaries and allowances that have been recommended by the Public Appointments Committee are enormously in excess of these figures. Calculations done by DHRMD indicate that the average salary increase would amount to some 300%. Not only are these increases clearly excessive, they also clearly violate the provision for periodic cost of living increase contained in article 114(2) of the Constitution"' [**sic**]*

They then go on to make reference to the fact that such an increase would trigger increases in the emoluments of other public servants which the national budget cannot stomach and that they would also most likely lead to government breaching its undertakings to IMF (we presume they mean the International Monetary Fund) under its PRGF which we are not sure means what.

The Applicant holds a different view. In their view section 114(2) deals not just with the quantum by which judicial salaries and allowances should be increased but with overall, the financial security of holders of such office. That subsection 2 does not mean that increases in judicial salaries and allowances cannot surpass the original value. As they see things, the subsection only lays down minimum standards that the State should meet in order to guarantee judicial independence.

It is correct, in our view, that subsection 2 must have some say as to the extent of increases that may be effected under section 114(1). But we think that the Respondents have, contrary to established principle, decided to look at the phrase 'so as to retain its original value' in isolation, legalistically, pedantically and literally. See Nseula's case. The correct approach, in our view, is to look at these words as part of a constitutional scheme out to protect the salaries and allowances of holders of judicial office for purpose of enhancing their independence. In that regard it will be noted that the Constitution provides the identity of the determinant of such salaries and allowances to wit the National Assembly. But to guard against a malicious National Assembly that can decide to tamper adversely i.e. by way of reduction, with such salaries and allowances the Constitution provides that the same shall not be reduced without the consent of

the office holders while at the same time being increased so as to maintain their original value. The aim of the increase is therefore strictly speaking not in order to determine the levels of compensation payable to the Judiciary but in order to ensure that whatever increases the National Assembly awards are not only not illusory in nature and extent but also to cushion them against the ravages of currency fluctuations i.e. inflation. The amount of increase to be awarded therefore is not necessarily one that will strictly put the new salaries and allowances on an equal footing with the last preceding ones but one that apart from being in reality higher than the preceding ones will withstand the ravages of inflation to such an extent that by the time the next review comes about holders of judicial office will in real terms not be receiving less than what they started out with. Looked at from that angle it is clear that the interpretation of section 114(2) adopted by the Respondents is replete with absurdity. It is common knowledge that the cost/value of money is constantly changing. How then would the National Assembly set the level of allowances/salaries that would, from the date of review, keep them at precisely the same level up to the date of the next review. If we take the purposive approach however it is clear that the purpose section 114(2) seeks to achieve is to keep the allowances and salaries abreast with inflation. And in our view you do not, in the face of obvious increases in inflation rates, achieve that by setting the salaries and allowances at a level equal for instance to the level of inflation, or cost of living, on the date of the review. Rather you set them higher so that any increases in the rate of inflation or weakening of the Kwacha between the date of the review and that of the next review does not erode the value of the remuneration. Where the salaries and allowances are being set in a deflating economy or where, if possible, the rate of inflation is static, the levels of remuneration would be frozen and not reduced [which would be the logical consequence of the Respondents' interpretation] for to reduce would require the consent of the office holders. We thus are unable to accept the argument advanced by the Respondents that the levels of salaries and allowances are unconstitutional merely because they are not exactly equal to their original value on some date whatever that might be. It would in our view have been different if the salaries were shown to be less that the minimum set in subsection 2 i.e. if they were less than their original value. We must actually say that it is in reality difficult to envisage a situation where judicial salaries and allowances will be declared unconstitutional under subsection 2 for being in excess of their most immediate past real value. It seems to us that the duty of the National Assembly is to at all times go beyond a quantum that maintains the salaries' and

allowances' original value. How far beyond is left to their good judgment. And because this is decided in the National Assembly where all branches of government are represented it was thought this would be easy to achieve.

But let us for arguments' sake discuss the assertions in paragraphs 3.4 and 3.5 of the Respondents' skeletals. Firstly, we doubt whether these percentage increases were raised in any of the affidavits filed herein. But more than that we doubt whether they are accurate. For instance in Document 9 the new gross monthly salary of the Chief Justice is said to be K101540.67. That, in keeping with the clean wage bill policy adopted by government, see first affidavit of Randson Mwadiwa, is an aggregate of all sums payable to the Chief Justice by way of salary and allowances etc. If we aggregate the Chief Justice's present emoluments we have a monthly salary of K881554.00. See RM2 an attachment to Mwadiwa's affidavit. Is that a 400% increase? Or indeed a tenfold increment? The answer is no. It is also clear from the documents on show therein that because of the clean wage bill policy housing allowance is not considered separately from the salary payable to any of the judicial officers. There cannot therefore be any mention of housing allowances going up by 300% if at all. It is obvious to us that in so far as paragraphs 3.4 and 3.5 are concerned the Respondents simply have no evidence to back their arguments. They actually fell into error. As to the belief that increases in the Judiciary would trigger a request for increases elsewhere in the public sector that, with respect, is no more than the Respondents speculating. It might not actually happen. This court would be slow, indeed would loathe, to proceed on the basis of unfounded speculations. But more than that is it beyond the Respondents to deal with requests for public sector salary increases on merit? Should such failure have any influence on this case? We think the answers should be in the negative. Our conclusion is that the determination made by the National Assembly is in no away against the spirit and intendment of section 114(2) of the Constitution.

3. SECTIONS 57 AND 183 OF THE CONSTITUTION

In their Response the Respondents made reference to a litany of constitutional sections. In their skeletals they made reference only to section 57 and 183. It is safe, we think, to assume that they have abandoned any reliance on the other sections. Regarding section 57 the Respondents emphasized subsection (a) (ii) and (iii). The point according to the Respondents is that no

withdrawals or charges can be made from or on the Consolidated Fund, on which judicial salaries are charged under section 114(2), unless with the consent in writing of the Minister of Finance. Section 183 on the other hand deals with the Protected Expenditure Fund. That fund includes the salaries of the higher bench of the judiciary. The Respondents' argument, as we understand it, is that at the beginning of the 2006 – 7 financial year no provision was made in terms of section 57 and 183 of the Constitution for the new salaries and allowances in Document 9. That because of that no new salaries and allowances are payable to Judiciary. There were some documents attached to the second affidavit of Mwadiwa in respect of such proposition.

The Applicant in response argues that sections 57 and 183 refer to Money Bills which the matter of judicial emolument is not. The sections are therefore not applicable to this case. Secondly, it is their view that the said sections cannot be interpreted so as to make the Executive the final arbiter in whether or not Judges' salaries should be paid.

With respect yet again the Respondents seem to have misapprehended the purport of sections 57 and 183 in relation to government finance generally and with respect to judicial officers' remuneration in particular. In our view matters of sections 57 and 183 should not needlessly be confused with section 114 which deals with determination of judicial compensation. It appears to us that once judicial compensation has been determined under section 114 above mentioned it becomes the duty of the Executive to implement such terms and conditions. If it be necessary that the sums in respect of such compensation be part of the Protected Fund it becomes the duty of the Finance Minister to take the necessary legal steps to ensure that appropriate sums are voted into the said Fund. If it is necessary that sums in respect of such compensation be part of the annual budget again the Minister of Finance is duty bound to take the necessary legal steps to ensure that such monies are voted into the budget. The said sections do not in our view give the Minister, and through him the Executive Branch of Government, any say over whether the determination by the National Assembly vide section 114 should be paid or not. The minister cannot therefore put up as a defense or reason for his inability to effect the terms and conditions his own failure to do the needful. That would be to allow the Minister to benefit from the exercise of a nonexistent discretion. Further, it would grant the Executive the ultimate power over judicial terms and conditions of service which under section 114 vests with the National

Assembly. And that would, as we keep saying, produce an absurd result. And also be a recipe for bad governance and an erosion of the rule of law. There would be no certainty as to who has the power to determine terms and conditions of service for the judiciary. The National Assembly would think it had and the Executive would put a stop to it. The fact of the matter is that once the terms and conditions are determined in terms of section 114 the Executive branch is obliged to implement. They cannot open negotiations afresh on them with the judiciary either collectively or with individual judicial officers. To do so would not only be to circumvent the Constitution but is actually also frowned upon if only because of the possibility [danger] of it introducing two sets of conditions of service for the same judiciary . And the Judiciary should be the last to try and do things that might be interpreted as having the effect of either circumventing the Constitution or being against its spirit and intendment. See the Prince Edward Island case. Any input that the Executive may have should ideally be made in the PAC or in the House as the case may be but in any case before a determination is made in terms of section 114 above. Once the National Assembly actually makes a determination about terms and conditions of service the matter is, in our view, by law closed. It can only be reopened by the National Assembly itself, again in terms of section 114(1) but only, probably, with a view to further increasing the compensation for a reduction can only come about with the consent of the individual serving judicial officers. Or to a limited extent the manner of implementation i.e. in installments or the date when they will be paid. But may be it is at this time that we should remember that Honorable Mpinganjira said that the salaries and allowances in issue were in fact factored in to the budget. And there seems good reason for believing that he is a witness of truth if what we read in the Hansard is anything to go by which it should be. We think though that the above should not really be important. What is important in our view is the fact that whether or not the Minister of Finance has taken any action in respect of the salaries and allowances in terms of section 57 and 183 has nothing to do with the validity of the determination of the same by the National Assembly under section 114(1). Only with when they will become actually payable. So that if such action has been taken they are payable almost immediately. If on the other hand no such action has been taken then it behoves the Minister to take such action within reasonable time of the determination. He cannot simply fold his hands and literally stultify or hold the whole process to ransom.

The overall answer to whether or not a determination of judicial officers' terms and conditions of service were made the answer is in the positive. They are with effect from June 28th2006 those contained in Document 9.

RELIEFS SOUGHT

The Applicants sought three declarations namely that:

1) the Respondents were duty bound to implement the determination of the National Assembly as regards the salaries and remuneration of the Chief Justice and other holders of judicial office;
2) the refusal by the Respondents to implement the determination of the National Assembly as regards the salaries and remuneration of the Chief Justice was in breach of the Constitution;
3) the Respondents had no power to determine the remuneration of Chief Justice and other holders of judicial office.

They are all granted. As we have shown in our discussion above once the National Assembly has in its wisdom determined the terms and conditions of service of the judiciary it becomes the duty of the executive to implement such determination. Any refusal can only be in breach of the constitution. The power to determine the Terms and Conditions of service in the Judiciary resides with the National Assembly not in the Executive. The Applicant also sought an order akin to mandamus requiring the Respondents to implement the determination of the National Assembly as regards the salaries and remuneration of the Chief Justice and other holders of judicial office. It is also granted. It is the natural consequence of the above discussion and declarations.

COSTS

These are in the discretion of the court. We grant them to the Applicants. With a little bit of sobriety of thought we doubt whether it would have been necessary to have this matter the subject of litigation.

Pronounced in Open Court this day of February 9th, 2007 at the Principal Registry, Blantyre.

R CHINANGWA

JUDGE

L P CHIKOPA

JUDGE

M KAMWAMBI

JUDGE