IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 63 OF 1996

BETWEEN

FRED NSEULA **PETITIONER**

AND

THE ATTORNEY GENERAL **FIRST RESPONDENT**

AND

MALAWI CONGRESS PARTY **SECOND RESPONDENT**

CORAM: MWAUNGULU, J

Chirwa, for the Petitioner
Nyirenda, for the first Respondent
Mhango, for the second Respondent
Kamanga, Official Interpreter
Matekenya, Recording Officer

Mwaungulu, J

JUDGMENT

On 25th October, 1996 the Speaker of the National Assembly declared the seat at Mwanza North Constituency vacant. This is the seat which the petitioner, Mr. Nseula, won in the last general election. The Speaker declared the seat vacant under section 65 of the Constitution. This petition is taken out under the Presidential and Parliamentary Elections Act. In the petition Mr. Nseula is challenging the decision of the Speaker for being unconstitutional. The main thrust of the petition is that the Speaker could not decide that the petitioner had crossed the floor on the information that was before him. He queries that the Speaker let the matter of the petitioner having crossed the floor to be debated by the House based on which the Speaker decided that the petitioner had crossed the floor.

The Attorney General, the first Respondent, contends that the Speaker of the National Assembly had sufficient information before him on which to decide. The Attorney General further contends that since the matters before the House are protected by absolute privilege, the petitioner has failed to establish his case. The application, the Attorney General contends, should be dismissed. The second Respondent, Malawi Congress Party, much like the Attorney General, contends that there was information before the Speaker on which the decision was made. The second Respondent led fresh evidence in this matter to show that the Speaker's decision was right and should not be reversed. He further contends that since the petitioner had resigned from his political party, even if he had not joined another political party, the petitioner had crossed the floor.

I have had time to look at the evidence before me and the cases made available to me. I must say that I benefitted considerably from the cases that all legal practitioners laid before me on the matters they raised before me. I raised another matter with them that had to be considered in view of the reliefs sought before me. The evidence from the second respondent showed that the petitioner was a Cabinet Minister. Even if it was not raised by evidence, the Court will take judicial notice of all Ministers of Government past or present (**Whaley -v- Carlisle** 17 I.C.R. 792) The matter was important because, if Cabinet Ministers are public officers or appointees, under our Constitution, they cease to be members of the National Assembly or are precluded from holding another public office. The consequence of that is that the petitioner's seat became vacant on the day the petitioner was appointed a Deputy Minister. It would follow that the decision of the Speaker and indeed the decision of this Court on the matter under consideration would be otiose. It would then be unnecessary to decide the question because the decision of this Court and indeed that of the Speaker would be nugatory because the seat at Mwanza North Constituency would be vacant by operation of law without any declaration from the Speaker, the National Assembly or this Court. I have had the benefit of a full address on this matter and the other matters.

The starting point in my view would be the contention by the Attorney General that the matter is not in the purview of the Court because the matters in the House are covered by absolute privilege. I think I need not go further than the decision of the Supreme Court in this very case (**The Attorney General -v-- Nseula** (1996) M.S.C.A. cas. No. 18. The gist of that case is sufficient indication that this Court has jurisdiction and the immunity suggested by the Attorney General under the many decisions which he cited are to be looked at in the light of the decision of the Supreme Court. If the question is whether a decision is constitutional, I have real difficulties with the suggestion that one can have a defence to the question except that the act or law is constitutional. The Supreme Court has recently looked at the defence of necessity. This is in the case of **The Attorney General -v- Malawi Congress Party** (M.S.C.A. cas. No. 22) They did say the defence never arose in the case. On the generality of constitutional law, there can be no defence to that which is unconstitutional. Any such suggestion would make a fundamental law subject to all sorts of considerations that would denigrate its authority, magisterium and efficacy. The petitioner's contention in this matter is that in deciding what the Speaker had to decide under the relevant power conferred by the Constitution the Speaker of the National Assembly denied the very document the source of that power. The answer to that cannot be, I think, that the Speaker is immune from the Constitution. That would be contrary to the spirit of our Constitution and section 4 in particular.

On the actual decision of the Speaker, the starting point would be section 65(1) itself. The section provides as follows:

"The Speaker shall declare vacant the seat of any member of the national Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly."

This section has two aspects to it. The first aspect is ministerial. The Speaker of the National Assembly shall declare. He has to do so once a member crosses the floor. He has no discretion in the matter. There is nothing like he has to decide to declare. The matter is peremptory on the Speaker. The suggestion by Justice Tambala in **Mkandawire -v- The Attorney General** (1996) Misc Civ. No. 49, that the Speaker makes a decision to declare, is not supported by the dictates of the section. Once the fact is established that a member has crossed the floor, the Speaker has to declare the seat vacant. There is no need for a decision. The second aspect has to deal with the question of determining that a member has crossed the floor. This has something to do with determining the factual basis on which the declaration has to be made. This duty has been given to the Speaker of the National Assembly by section 65 of the Constitution. This aspect is what has become known as the 'precedent fact'. (**Reg. -v- Governor of Pentonville Prison, Ex parte Azam** [1974] A.C. 18; **Reg. -v- Secretary of State for the Home Department, Ex parte**

Zamir [1980] A.C. 930). For the matter to fall in the 'precedent fact' category, it is not necessary that certain words be used in the provision. In the latter case Lord Wilberforce said:

"My lords, for the reasons I have given I think the whole scheme of the Act is against this argument. It is true that it does not, in relation to the decision in question, use such words as 'in the opinion of the Secretary of State' or 'the Secretary of State must be satisfied,' but it is not necessary for such a formula to be used in order to take the case out of the 'precedent fact' category."

The Speaker of the National Assembly declares a seat vacant once the precedent fact has been proved. The Constitution imposes him with the responsibility of ascertaining that a member has crossed the floor. This connotes an investigation of the facts on which the decision is made.

This leads us to the criticism of the petitioner in the way the Speaker handled the matter. I think that criticism is justified. There are two sides to the matter. The first side is that the Speaker of the National Assembly seemed to have compromised the procedure for deciding the question. The framers of our Constitution were careful enough to demarcate the line of authority as to whom, between the House and the Speaker, should deal with declaring which vacancy. In section 63 there are those vacancies that come by operation of law. For these, as we shall see later, there is no need for a declaration by the House or the Speaker. The seats are vacant on the happening of the event. The House under section 63(3) of the Constitution has been charged with the responsibility of declaring seats for matters that it has itself specifically provided for by its Standing Orders. In this provision there is no suggestion that the Speaker should declare the vacancy in the seat. In section 65(1), however, the responsibility has been assigned to the Speaker of the House, not the National Assembly. The demarcation should not be compromised. The reasons for the demarcation are obvious. Surely, if the matters are in relation to Standing Orders that the House itself makes and promulgates, the framers of our Constitution intended that them, not the Speaker, should determine the matter and declare the seat vacant. Different considerations, however, come to bear when it comes to crossing the floor. The parties to the dispute are members themselves or political parties represented in the House. If the matter was left to the House, settling the dispute would depend on the party that has or could command a majority in the House whether the matter is between the political parties themselves or between a member and his political party. Regardless, the framers of our Constitution were mindful of the inconvenience it would cause to other members of the House who are not party to the issue if the matter was to be debated in the House. For the others it was rather that the matter, which strictly speaking is a matter between the political parties involved and the member involved, was resolved elsewhere. The framers of our Constitution chose that aspect to be considered by the Speaker independent of the House. This is precisely what the framers of our Constitution intended. The manner in which the Speaker of the National Assembly dealt with the matter in leaving the matter to be debated in the House leaves me in grave doubt

about whether he considered the demarcation. It has been suggested by the Attorney General's side that all that the Speaker did was to let the House help him galvanise information on which to decide. I have my doubts. These are entrenched by the fact that the Speaker decided almost immediately after the debate. This aspect is related to the second aspect of the criticism.

In establishing a precedent fact, the person on whom the duty rests must be satisfied by evidence. This is implicit in the statements of their Lordships in **Reg. -v- Secretary of State for the Home Department, Ex parte Hussain** [1978] 1 W.L.R. 700. There Lord Widgery, C.J., said, '... our obligation... is to be satisfied that the Home Office approach to the problem is one taken in good faith. Further we have to decide whether there is or there is not adequate evidence ..." This was said by the Lord Chief Justice in the Divisional Court. Lord Justice Geofrey Lane approved this statement in the Court of Appeal in these words, 'If, on the evidence taken as a whole, the Secretary of State has grounds, and reasonable grounds, for coming to the conclusion that the applicant is here illegally... this court will not interfere.' Later there will be another statement by Lord Wilberforce that has the same purport. The Speaker let the matter to be debated in the House by all and sundry. Most of the speeches, as the petitioner has demonstrated, could not pass as evidence which the speaker can use to determine a constitutional matter. Much of it was based on information that required further investigation and proof which, with respect to the Speaker, could not form the basis of a decision as grave as the one he was required to make under the Constitution.

Where the Constitution gives power to the Speaker to declare a seat vacant, the Court will review that decision. The Court will review the evidence on which the decision was made to see if there was compliance with the Constitution. This is based on powers that this Court has under our Constitution. Here there is a precedent fact which had to be decided by the Speaker. Courts have jurisdiction to review the evidence on which the decision was made. In **Reg. -v- Home Secretary, Ex parte Khawaja** [1984] 1 A.C. 74, 105, Lord Wilberforce, dealing with power given to immigration officers, said:

"I would therefore restate the respective functions of the immigration authorities and of the courts as follows: 1. The immigration authorities have the power and the duty to determine and to act upon the facts material for the detention as illegal entrants of persons prior to removal from the United Kingdom. 2. Any person whom the Secretary of the State proposes to remove as an illegal entrant, and who is detained, may apply for a writ of habeas corpus or for judicial review. Upon such application the Secretary of State or the immigration authorities if they seek to support the detention or removal (the burden being upon them) should depose the grounds on which the decision to remove or detain was made, setting out the factual evidence taken into account and exhibiting documents sufficiently fully to enable the courts carry out their function of review. 3. The Courts investigation of the facts is of a supervisory character and not by way of appeal... It should appraise the quality of the evidence and decide whether that justifies the conclusion reached ..."

In deciding whether a precedent fact exists to justify the ministerial action under consideration, the court is not limited to the evidence as was before the authority exercising the duty. At one stage it was thought that the court could only decide on the evidence that was before the authority. That is no longer the law. Courts have accepted fresh evidence not before the authority to determine whether the precedent fact existed that justified the ministerial action that is being questioned. (**ibid**)

This leads to the consideration of the evidence that was before the Speaker that formed the basis of the decision. I think there was none. The onus was upon the Attorney General to satisfy the Court that the decision of the Speaker was justified on the material which the Speaker had before him. No evidence was given by the Attorney General. The Attorney General was the first one to reject what was in the Hansard. Relying on the powers and privileges in the National Assembly (Powers and Privileges) Act, nobody from the House was before the Court. There is no evidence from the second respondent on what formed the basis of the decision. The petitioner has given evidence on what actually took place. It is clear that the matter was left to debate. There was no evidence gathered. The debate was in the form of expression of opinion on a matter on which members could only volunteer information that was not evidence or required the Speaker to get evidence on which his decision should have been made. This no doubt would have meant sometimes interviewing people and verification of facts. It would have meant getting information on an oath from those who could best testify to the matters that were being suggested. A debate in the House would be an inappropriate tool of gathering evidence on which a decision is made.

The petitioner is therefore right in his criticism that the Speaker of the National Assembly did not have evidence before him on which to base his decision. This Court, however, received evidence from the second respondent to show that the petitioner had crossed the floor. That evidence was accepted without ado. The second respondent's contention is that, based on that evidence, the Speaker's decision should be upheld. The second respondent states that on the evidence which has been received, the petitioner had joined his party and had therefore crossed the floor. On the question whether the petitioner had joined the Malawi Congress Party, there is little difficulty. I actually find as a fact that the petitioner had joined the Malawi Congress Party before the Speaker of the National Assembly declared the Mwanza North constituency seat vacant. I do so not based on the press conference, the contents of which have not even brought to this Court or the House. There is reason to think that the petitioner is telling the truth that he never said at that press conference that he had joined the Malawi Congress Party. There is however evidence that before he had met Mr. Chimera, the Regional Chairman for Malawi Congress Party in the South, at City Motors. At this meeting the then Vice President of the party was there. The petitioner told Mr. Chimera that he had joined the party after resigning from the United Democratic Front. It is Mr. Chimera who advised him that a press conference was the best way to let everybody know. Before the Speaker declared the petitioner's seat vacant, the petitioner had been to Nkhota-Kota where he was

campaigning for the Malawi Congress Party. The petitioner was wearing party insignia and recanting party slogans of the Malawi Congress Party. On the way to Nkhota-Kota he was accompanied by Mr. Juma Phiri, the Malawi Congress Party public relations officer. The petitioner told the man that he had joined the Malawi Congress Party. There is much on the evidence before me that the petitioner had joined the second respondent well before the Speaker declared the petitioner's seat vacant. Before the declaration by the Speaker therefore the petitioner had joined the Malawi Congress Party after resigning from the United Democratic Front.

It has been contended for the petitioner that it is irrelevant that the petitioner had joined the Malawi Congress Party. The issue is whether, on the evidence before the Speaker at the time, the Speaker's decision is justified. Courts have not approached the matter that way. They have not said because a person performing ministerial authority has acted on inadequate evidence or compromised procedure the decision he has made should be reversed. Courts have been more pragmatic in their approach. 'If the court', declared Lord Wilberforce in **Reg. -v- Home Secretary, Ex parte Khawaja**, 'is not satisfied with any part of the evidence it may remit the matter for reconsideration or it receives further evidence. It should quash the detention order where the evidence was not such as the authorities should have relied on or where the evidence received does not justify the decision reached or, of course, for any serious procedural irregularity." To that statement I would add that the court should not reverse the decision of the authority exercising ministerial power where evidence has been brought before it to justify the decision of the authority. This would cater for the case such as the present where evidence has been brought to the Court in the proceedings for review to show that the decision was justified. Moreover, the question of procedural irregularities should be looked in the light of the whole matter. Albeit there were irregularities in the proceedings before the House, they have been outweighed by the evidence that has surfaced in the proceedings which the petitioner had a chance to test.

It now remains to consider the last aspect of the second respondent's submissions that even if the petitioner did not join the Malawi Congress Party, he had still crossed the floor when he resigned from the United Democratic Front and decided to be an independent within the House. Mr. Mhango, appearing for the second respondent, has followed two lines of argument. The first one, if I understand it correctly, is that, if one examines section 40 (2) of the Constitution, a member of parliament elected on a party sponsorship has a constituency that belongs to a political party. The reasoning goes that if a member sponsored by a political party resigns from the political party that sponsored him, he cannot become an independent. This is a formidable argument. The reasoning could be supported by reading section 62(2) of the Constitution. The section provides that the manner in which the constituents are to be represented is to be prescribed by statute. It is important to note that ' in such manner as may be prescribed' follows the verb 'represent' not 'elect'. The manner of representation has been prescribed by section 32 of the Parliamentary and Presidential Elections Act. This is either as an independent or a person sponsored by a political party. The section provides that the position will be determined at the election. That is only how far we can go with the argument. The

question that arises is what happens if a member sponsored by a political party resigns from the political party that sponsored him. The argument cannot be that he has crossed the floor. For that, as we shall see shortly, only applies when he joins another political party represented in the House. The point cannot be that he has to be deemed to have crossed the floor because it could also be deemed that he resigned from his seat under section 63. It could be that if a member resigns from the political party that sponsored him he cannot be an independent as it is suggested. The question that remains is what is he. The good thing is that the Constitution does not say that his seat becomes vacant. For that reason alone it must be good to accept the definition of an independent as has been given by N. Wilding and P. Launchy in Encyclopedia of Parliament 4th edn. :

"A member of Parliament is described as an independent if he acknowledges no allegiance to a political party, whether he has obtained his seat without the aid of any party organisation or whether he leaves his party to become an independent after he has been elected."

The second aspect of Mr. Mhango's argument is based on the decision of the Supreme Court of Zambia in **The Attorney General and The Movement for Multi party Democracy -v- Lewanika and Others** (Appeal No. 57 of 1993). Then the Supreme Court was dealing with section 71(2)(c) of the Constitution. The section provides:

" A member of the National Assembly shall vacate his seat in the Assembly ... in the case of an elected member, if he became a member of a political party other than the party of which he was elected or, if having been an independent candidate he joins a political party."

In the Court below Mambirima, J., applied the literal approach to the construction of the section. Based on this approach, she decided that if a member sponsored by a political party resigns from the party, he becomes an independent member. The Supreme Court thought that result was born out by the literal interpretation of the section. The Supreme Court however thought that the Court below should also have used the purposive approach. Based on this approach, the Supreme Court thought that the purpose of the section was to proscribe crossing the floor by any member whether sponsored by a political party or an independent. The Supreme Court that objective is not achieved by a provision that allows members of a political party to become independent. The Supreme Court thought that there was a gap which should be filled because, like under our Constitution, the Constitution was silent on what happens when a member resigns from his party. The court, applying the purposive approach, therefore, read in the section the words 'vice versa', the effect of which was to declare seats vacant where a member of a political party resigns the party and becomes an independent. Mr. Mhango wants me to follow the approach of the Supreme Court of Zambia.

There are conceptual problems with some aspects of the reasoning of the Supreme Court of Zambia. One has to be wary of criticising a superior Court of another land on the manner it construes that land's Constitution. It is our provision which needs to be constructed, not theirs. One can be content with the pretext that section 71 of the Zambian Constitutions is worded differently from our section 65(1). Ours does not bar independents from joining a political party. In fact it does not even bar a member of a political party represented in the National Assembly who is the only representative of that party to join a party that has got more than one member in the National Assembly. It goes further than that: it does not bar a member sponsored by a political party from joining a political party that is not represented in the House. It is very difficult from reading our provision to conclude that the purpose of the framers of our Constitution was to proscribe crossing the floor completely. The purpose of the provision was to my mind to prevent political slanting for political parties that have wider representation in the House. It can be said that there will be a tilt whenever members are allowed to become independent, particularly when all they want is that they can align themselves with major parties. The framers of our Constitution foresaw this aspect and dealt with it in a manner not perceived in the Zambian Constitution. First, they provided specifically that there is no crossing the floor when all that has happened is that a member has during voting done so contrary to the direction of the political party that sponsored him (section 65(2). This dispenses with the desire to change allegiance where there is disagreement on policy issues with the political party that sponsored the member. Secondly, our Constitution does not provide that a member who resigns a political party should resign his seat. Neither does our Constitution provide that a seat should be declared vacant on resignation of a member from that party that sponsored him. I think the framers of our Constitution saw more and better sense. Political views are as many as there are men and as fluid as water. If each time those views change, a seat becomes vacant, it would be at much cost to the populace. A measure of fluidity in changing political allegiance allows for political adjustment. This has been achieved in our Constitution. It must be appreciated that our provision does not envisage a situation where a member sponsored by a political party becomes an independent as a transit point to join another political party. A member who does that will still be caught by the section. For at that stage he will still have been a person who was sponsored by a party at the election and is joining a political party represented in the National Assembly. It is very difficult to conclude on the generality of our provision that the purpose of the framers of our Constitution was to, proscribe floor crossing completely. The framers of our Constitution allowed a measure of flexibility. It is that purpose which underlines our provision.

On this analysis I find that the Speaker of the National Assembly had no evidence before him on which to declare the seat vacant. Moreover by putting a matter on which he should have decided, not the House, before the House the Speaker was oblivious to the demarcation that the Constitution has made on who can declare what. The duty imposed on the Speaker under section 65(1) of the Constitution is a constitutional duty that must be discharged on facts founded on evidence. This Court is aware that in discharging this function it is not expected that the Speaker is acting judicially. The decision he has to make however must be based on matters that he can verify. This is not achieved, in my judgment, by letting the issue to be debated. The framers of our Constitution foresaw this

and made the demarcation that I referred to earlier. The Speaker's decision will however be upheld

on the evidence that this Court received on the matter. The petitioner had crossed the floor and the Speaker was entitled to declare the Mwanza North constituency seat vacant.

As I mentioned earlier, there is the very question whether this decision will have any effect. This decision is unnecessary, and indeed the Speaker's declaration if the seat in Mwanza North was already vacant. The sections that deal with vacancies in the National Assembly are 63 and 65, the latter quoted in full earlier. It is useful to reproduce section 63(1) of the Constitution:

"The seat of the National Assembly shall become vacant -

(a) if the National Assembly has been dissolved;

(b) if the member dies or resigns his seat;

© if the member ceases to be a citizen of Malawi;

(d) If the member assumes the office of President or Vice President, or becomes a member of the senate;

(e) if any circumstances arise that, if he or she were not a member of the National Assembly, would cause that member to be disqualified under this Constitution or any other Act of Parliament;

(f) if the National Assembly declares a member's seat vacant in accordance with such Standing Orders as may permit or prescribe the removal of a member for good and sufficient reason provided that they accord with the principles of natural justice ..."

In sections 63(1) and 65(1) of the Constitution there are vacancies created by operation of law, that is to say, those that do not require a declaration from the Speaker or the National Assembly. One of these is section 63(1)(e). This is the operative section in this discourse.

The disqualifying provision is section 51(2) of the Constitution. The relevant part is

paragraph (e). It should be read as follows:

"Notwithstanding subsection (1), no person shall be qualified to be nominated or elected as a member of Parliament who ... holds, or acts, in any public office orappointment, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that public office or appointment or where that person resigns from that office in order to stand."

The disqualification is against a person holding **any** public office or appointment. This to my mind connotes a public office of whatever description. The word 'any' is an ordinary word. It has been defined in The Concise Oxford Dictionary rep.1987 as ' one or some but no matter which'. The phrase 'public office' has not been defined in this Constitution.

As far as we know, parliamentary and presidential elections in this term were held simultaneously. The State President appointed his cabinet shortly after his election. The petitioner, a Member of Parliament, was appointed Deputy Minister of Finance. Unlike the former Constitution which provided for the President to appoint a cabinet from his pool of Ministers, the 1994 Constitution makes all Ministers and Deputy Ministers members of the Cabinet. The petitioner was in fact a member of the Cabinet.

As I said earlier, the phrase 'public office' has not been defined. The definition may not be necessary in relation to the petitioner who was a Cabinet Minster. This is because of section 88(3) as amended the relevant part of which reads, 'The President and members of the Cabinet shall not hold any other public office.' There are two operative words here. The words '**any**' and '**other**'. The word 'any' was considered before. The word 'other' in the section connotes that the offices of President and members of the Cabinet are public offices. This is a very plain and clear provision. It is unambiguous. It clearly points to the offices of President and a member of Cabinet as public offices.

The petitioner and the Attorney General say they should not be so construed. It is contended for the Attorney General that there are other provisions in the section which show that Members of the Cabinet are not public officers. In all the provisions referred to the phrase 'public office' has been used alongside the word 'Minister'. So the argument goes, if the phrase 'public office' was meant to include Ministers the provisions would not have been so worded. It is submitted that the provision would have just read 'public office.' It may be useful to look at some provisions referred to before dealing with the submission.

The first provision referred to is section 98(5) of the Constitution. The section provides as follows, 'The office of Attorney General may either be the office of a Minister or may be a public office.' Apart from the other general principles of construction that we will consider in a moment, it is important to see why the word 'Minister' had to be included in

this provision. The office of Attorney General has been declared a public office in section 189 subsections 1 and 2. If the word Minister had not been included in the section, then, by operation of section 88 (3), a Minister would automatically be disqualified to be Attorney General because the latter office is a public office. It is a rule of interpretation of statutes, a rule which should be applied to the construction of the Constitution, that where a word or phrase has a purpose to serve in a particular provision, it should be restricted to that purpose. It cannot be said that in this provision the intention was to make a Minister not a public officer. The inclusion of "Minister" was necessary because of the effect of Section 88(3).

The other provision looked at is section 80(7) of the Constitution. That section, extracting the relevant bit, reads, 'No person shall be eligible for nomination as a candidate for election as President or First Vice President or for appointment as First Vice President or second Vice President if that person ... is the holder of a public office or a member of Parliament. There were two sides to this argument. The first is that if a Member of Parliament is a public office, the provision would not have included the phrase in the provision. I deal with this aspect later. For now I should deal with the second argument which is that if the Office of President is a public office, it means that when continuing a second term, since he is a public officer, he has to resign his office. This argument cannot hold. This is a general provision. Then there are specific provisions relating to the Presidents reelection (Section 83(3)). There are provisions about the President continuing up to his end of the term (Section 83(2)). Since the Constitution specifically provides that a President can serve a second term, this general provision cannot displace the specific provision.

There is a rule of construction that where there is a general provision the specific rule applies. This rule was applied in **Republic -v- Yiannakis** (1994) Misc. Crim. Appl. No 9) This rule should be applied to construction of the Constitution.

There is another provision which was not referred. It is section 75(2) of the Constitution. That provision reads, '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 a public office.' The argument here is the same one, namely that if the offices mentioned were public offices they would have been well served by using the phrase 'public office.' The matter will be considered shortly. It suffices to say that this is an instance of the ejusdem generis rule.

There is however something fallacious with the argument that because in certain provisions of the Constitution the word 'Minister' has been juxtaposed with the phrase 'public office' the office of a Minister is not a public office. The argument is non sequitur. It is usual in common speech and in affairs of men that there is mention of a specific thing and letter something less specific that encompasses the specific. A man

who says bring me a Benz or a car is not suggesting that a Benz is not a car. A man who says bring my wife or a woman is not suggesting that his wife is not a woman. In the earlier instance, the Benz is a car because it falls in the general descriptive word. In the latter case the wife is a woman because she is in the description of woman. This is the case in section 88(3) of the Constitution. There the phrase used is 'The President and members of the Cabinet'. In section 92 the Constitution provides, 'There shall be a Cabinet consisting of the President ...' It cannot be said that because the word 'President' has been juxtaposed with the phrase 'Members of the Cabinet', the President is not in the Cabinet. Where, therefore, in a provision there is mention of a specific thing which is included in the general, the rule of construction is that the general includes the specific unless, of course, where that is the only inference. I think, the argument that the juxtaposition of the word 'Minister' with the phrase 'public office' means that a Minister is not a public officer is non sequitur.

Regardless, the doubts, if any, in the provisions mentioned by the first respondent cannot be used to obscure the plain words used in section 88(3) of the Constitution whose purport is clearly to leave the President and other members of the Cabinet as public officers. If the sense of a word can be clearly discerned in its ordinary meaning, the subject matter and object, the occasion and the circumstances in which it is used, resort should not be had to its use in other sections of the legislation(**Spencer -v- Metropolitan Board of Works** (1882) 22Ch. D. 142, 162) or other statutes (**Macbeth & Co -v- Chislett** [1910] A.C. 220, 223). If the words of the statute are clear and unambiguous, they indicate the intention of the legislature, it is unnecessary to search elsewhere to find the intention of the Legislature as to their meaning. (**Sussex Peerage case** (1844) 11 Cl & Fin 85, 143; **Philpott -v- President etc., of St. George's Hospital** (1857) l H.L. Cas. 338,349; **Honsey Local Board -v - Monarch Investment Building Society** (1889) 24 Q.B.D. 1, 5; **Vacher & Sons Ltd., -v- London Society of Compositors** [1913] A.C. 107, 117 - 118).

The principles just stated are not in derogation to the principle that a provision should be read in the light of its context or in the light of the whole. Indeed the words of a statute albeit should be interpreted in their ordinary meaning, their deployment depends on the subject matter and object. They should be looked in the light of the occasion and circumstances with which they are used. They can only be understood in the context in which they are used (**Viscountess Rhondda's Claim** [1922] 2 A.C. 339; **Black Clawson International Ltd. -v- Papierwerke Waldhof - Aschaffenburg AG** [1975] A.C. 373.). The exercise only becomes necessary when the words are unclear or ambiguous. The context in which they are used refers not only to the particular word or phrase used. It includes other parts of the statute. In the particular case, it is important to look at other places where it is used as was done here. The purpose of the exercise is to ensure that there is no repugnance in the use of the word in the provision and also in other provisions in the statute under consideration (**Canada Sugar Refining Co. -v- R** [1898] A.C. 735, 741; **R -v- Value Added Tax Tribunal, ex parte Happer** [1982] 1 W.L.R. 1261). I think there is nothing in the other provisions where the phrase 'public office' is used that would be inconsistent or repugnant if the phrase 'public office' is construed as to include

the President and members of his Cabinet. On the other hand there would be repugnance and inconsistence within section 88(3) if the phrase ' public office' is interpreted to exclude the President and members of his Cabinet. There is the added difficulty that it is difficult, as we shall see, to limit the word to any rendition of what the phrase actually means. Unlike in **Blackwood -v- R** (1882 8 App. Cas. 82, 94, there is basis here for broadening the meaning of the phrase to include the President and members of his Cabinet.

As I have said, there is nothing inconsistent or repugnant with other provisions of the Constitution if the phrase 'public office' is construed as to include the President and Cabinet members. Even if it is given this rendition, the meaning can be used consistently across the Constitution without any ado. The phrase can be used differently in the same or other sections of the same statute depending on the context

(**R -v- Kelly** [1982] A.C. 665,678; **Doe d Angell -v- Angell** (1846) 9 Q.B. 328,355)

In section 88(3) the word was intended to make the President and Cabinet members public officers.

In interpreting a provision or discovering the object of a provision the Court may have to regard its legislative history, that is to say in the light of previous legislation, even if it is repealed (**Beswick v- Beswick** [1968] A.C.58, 73-74; **Thompson -v- Brown Construction (Ebbw Vale) Ltd.** [1981] 2 All E.R. 296). The repealed Constitution, the 1966 Constitution, had a definition of 'public office' in its interpretation section, section 98. Even there, however, the phrase, like the rest of the words and phrases, had to be interpreted in that way 'unless the context otherwise requires.' 'Public office' was defined as "an office of emolument in the public service." 'Public service' was defined to mean "subject to subsections (2) and (3), the service of the Government in a civil capacity." In subsection 3 the Constitution provided as follows:

"In this Constitution, reference to an office in the public service shall not be construed as including references to the office of the President, the Speaker or Deputy Speaker of the National Assembly, any Minister or Parliamentary Secretary, a member of the Assembly, a member of any Commission established by this Constitution or a Chief or Sub-Chief."

The President and Ministers were not in public office in the former Constitution. The phrases 'public office' and 'public officer' are used several times in that Constitution: sections 55(1), 56(30), 58(1), 87(1), 87(5), 91(3) and 95(2)(a). In each case they are used in the sense of the public service. In that context the words were restricted by the Constitution to what is generally known as the civil service. In whatever context, therefore the phrase public office was limited to the Civil service and excluded the President and Ministers. That is what that Constitution provided.

The question that arises is whether that is the meaning to be given to the word in this Constitution. There is no problem with looking at the legislative history in order to understand a provision. Recourse can be had to a statute even if it has been repealed(**R -v- Loxdale** (1758) 1 Burr 445, 447; **IRC -v-Littewoods Mail Order Stores Ltd** [1963] A.C 133, 156). Resort to such a reference however may be of little weight where the scope of the repealed Act has changed (**Attorney General -v- H.R.H. Prince Ernest Augustus of Hanover** [1957[A.C. 436,471). Equally the principle does not apply where the terminology used has changed(**Richard v- Curwen** [1977] 3 All E.R. 426. In the Constitution of 1994 the scope of the Constitution has changed. So has the terminology used. The phrase 'public service' which, as we have seen, in the previous Constitution was intended for the civil service and naturally and by section 98 excluded political officials in public office, has been replaced by the appropriate phrase 'civil service'(see chapter XX of the Constitution). There is a marked demarcation between a 'public office' and an office in the civil service(see sections 187(1) and 189). There is from this chapter enough to show that the phrase 'public office' is wider in its application than it was understood in the former Constitution. There would be no justification for extrapolating the narrow meaning attributed to the phrase under the former Constitution.

Regardless, recourse to an interpretation in a previous Constitution can only be had if the words in question are ambiguous. Where the words used are unambiguous it is impermissible to resort to their legislative history if only to leave doubt on their meaning(**Grant -v- Director of Public Prosecutions** [1982] A.C. 190, 201; **Beswick v- Beswick**, ante, **Black-Clawson International Ltd -v- Papierwerke Waldhof-Aschaffenburg AG**, ante. Although the previous Constitution excluded Ministers and the President from the definition of 'public office' there is a clear provision in section 88(3) which makes the President and members of the Cabinet public officers. It is unacceptable that the previous provision should be called in aid of obscuring this clear provision. In **Tilling Stevens Motors -v- Kent County Council** Lord Hailsham, L.C., said:

"In my judgment that falls within the exact language of the Act of Parliament, and I do not think it is open to your Lordships, to speculate as to the reasons which induced Parliament to use that language, it being that there is nothing in the statute itself which throws any light upon the subject or which gives any reason for departing from its plain meaning."

Regardless, however the former Constitution defined 'public office' the extrapolation of that definition has been expressly proscribed by this Constitution. Section 198 of our Constitution provides as follows:

"The Republic of Malawi, the organs of State and the **offices** referred to in this

Constitution shall be **defined** and constituted in accordance with this Constitution."

This is an outright rejection of definitions of offices as were defined in the previous Constitution. Without any definition, therefore, the courts have to interpret the offices in their ordinary meaning and in their context.

The phrases 'public officer' or 'public office' have been defined by Courts. In **Re Mirrams**, [1891] 1 Q.B. 594, 596 -597, Cave, J., said, "To make the office a public office, the pay must come out of a national and not out of local funds, and the office must be public in the strict sense of that term. It is not enough that the due discharge of the duties of the office be for the public benefit in the secondary and remote sense." In **Spring v Constantino** 168 Conn. 563, 362 A2d 871, 875, Loiselle, A.J., said :

"The essential characteristics of a public office are (1) an authority conferred by law, (2) a fixed tenure of office, and (3) the power to exercise some portion of sovereign functions of government."

The purport of a fixed tenure can be detected from the judgment of Larson J, in **State v Taylor** 260 Iowa 634, 144 N.W .2d 289, 292:

" They are: (1) The position must be created by the constitution or legislature, (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or implied, by the legislature or through legislative authority, (4) The duties must be performed independently and without control of a superior power other than law, (5) The position must have some permanency and continuity, and not only temporary and occasional."

It is therefore, the position, as opposed to tenure, which must have some permanency and continuity. That these other considerations only help to determine who holds public office can be seen from the remarks of Reardon, J., in **Town of Arlington v Bds. Of Conciliation and Arbitration** Mass., 352 N.E.2d 914. He said at 914:

"As was stated ... a person may be deemed a public official where he is fulfilling duties which are public in nature, 'involving in their performance the exercise of some portion of the sovereign power, whether great or small' "

I think the phrase 'public office' must be given its ordinary meaning. I do not agree with the suggestion that they are public offices only those that have been declared to be. It may be necessary to specifically declare some. It does not follow however that the rest of the public offices should be spelt out. The Constitution has not said that they are public

offices only those that have been so declared. The Phrase ‘public office’ must therefore be given its ordinary meaning. In the light of the cases referred to anybody is a public officer who is paid from national funds, does duties conferred on him by the Constitution or legislature. The office must exist by force of the Constitution or legislation. The public office in point must be permanent and not temporal and ad hoc. The officer must exercise some aspect of sovereign functions. Under this definition the President and members of his Cabinet are public officers. This is why section 88(3) uses the word ‘other’ because in normal parlance the President and members of his Cabinet are public officers. The Cabinet shall always be there. The Constitution provides that there shall be a Cabinet. The position is therefore permanent, not temporal. The functions of that office are created directly by the Constitution. Members of the Cabinet are paid from national funds. It was said that Ministers cannot fall in the definition because under section 97 they are responsible to the President for administration of their Ministries. The remarks of Reardon, J., in **Town of Arlington -v- Board of Conciliation and Arbitration** are appropriate. If section 97 is read, it will be seen that ministers are responsible to the President for administration of their ministries. Members of the Cabinet have other functions in the Constitution besides running Ministries. Section 93(1) of the Constitution is in the following terms:

“There shall be Ministers and Deputy Ministers who shall be appointed by the President and who shall exercise such powers and functions, including the running of government departments...”

The functions of the Cabinet are provided in section 96(1). I do not think the statement by Larson, J., in **State -v- Taylor** should be taken to mean that a person is not a public officer simply because certain aspects of his functions are not exercised independently. Such a person, if he exercises some aspect of constitutional or sovereign power is a public officer. This is what Reardon, J, meant when he said in **Town of Arlington - v- Boards of Conciliation and Arbitration** that there must be exercise of “some sovereign power, whether great or small.” The President and members of his Cabinet are public officer that is why section 88(3) of the Constitution uses the word “other.” Regardless the employment of the word ‘other’ to my mind indicates that the President and members of Cabinet are public officers. They are also by definition.

This brings us full swing to section 63(1)(e) of the Constitution. The seat of a member of the National Assembly becomes vacant if any circumstances arise that, if the member were not a member of the National Assembly, would cause that member to be disqualified for election under this Constitution or an Act of Parliament. It is important to note that when the fact takes place the seat becomes vacant by operation of law. There is no need for a declaration by the Speaker the House or anyone. The Speaker of the National Assembly shall give notice of the vacancy in the Gazette. One such disqualifier is in section 51(2)(e) of the Constitution. On assumption of a public office or

appointment, and as we have seen, of any description, provided it is a public office or appointment, the officer is disqualified to be nominated or elected as a member of Parliament, if there is an election, and the seat is vacated when he is already a member of Parliament, unless it is shown that the Constitution, not an Act of Parliament, provides that the person is not disqualified from standing for election merely because he holds that office or appointment. The provision is conjured in negative terms. It is not that the Constitution should exclude: every public officer or appointee is caught by the prohibition unless the Constitution provides that one is not excluded. In the present case, even if there is doubt about whether a Member of Cabinet is a 'public office', membership to a cabinet office is a 'public appointment.' Ministers and members of the Cabinet are appointed by the President under sections 92(1) and 94(1) of the constitution. The suggestion in the Supreme Court case of **The Attorney General -v- Chipeta** (M.S.C.A. cas. No. 33) of 'elected ministers' is not correct. All Ministers are appointees. They are not elected as Ministers. In the former Constitution, the President appointed most Ministers from Members of Parliament (Section 49(e) and 50). There will be no disqualification if the public office or appointment has been excluded by the Constitution from the ban. Here there is no where in the Constitution where the office or appointment of a Member of the Cabinet has been excluded from the ban. On the contrary, on the wider definition of public office, in section 88(3) the Constitution has gone the other way. It has specifically excluded any Member of the Cabinet from holding another public office. Membership of Parliament is on the wider definition of a public office one. The result is that a member of the Cabinet cannot be a Member of Parliament. The Constitution has gone the other way in Section 63(1)(d) by disqualifying the President from being a Member of Parliament. The office of Speaker of the National Assembly is one public office which the Constitution has stated that the assumption of which does not disqualify. The seat becomes vacant on assumption of a public office or appointment. It is significant that a corresponding ban applies to appointment to Minister. In section 94(3) it is provided, subject to syntaxical and illogical errors:

"Notwithstanding subsection (2), no person shall be qualified to be appointed as a Minister or Deputy Minister who ... holds or acts in any public office or appointment, except where this Constitution explicitly provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment, or where that person resigns from that office in order to stand."

If the matter in **Mkandawire -v- The Attorney General** had been approached from this section, the analysis would have been different. Membership of Parliament would be a public office. A Member of Parliament who takes up the office of Member of the Cabinet will have to resign. There are, therefore, prohibitions from whichever side these public offices are assumed. In the case at hand, when the petitioner assumed the office or appointment of Deputy Minister of Finance as a Cabinet Minister, the Mwanza North Constituency became vacant. Even if there is doubt whether the office of membership to the Cabinet or Minister is a public office it is a public appointment. Its assumption disqualifies a person for nomination and election as Member of Parliament and, if a person is already a member, causes the seat to be vacated without any declaration or

order.

This result has many ramifications because, besides the petitioner, there are many Ministers who have retained their seats and are holding the offices or appointments of Ministers. In relation to the National Assembly none of its business is affected by the decision. The matter is covered by the Constitution itself. In Section 56(3) it says, "The presence or participation of any person not entitled to be present or to participate in the proceedings of each Chamber shall not invalidate those proceedings." This decision must not be read to mean that Ministers are strangers in the National Assembly. Cabinet Ministers are, however, entitled to be present in the House, not as Members to explain Bills and answer quarries or participate in any debate about the content of the policies of the Government (Section 96(1)(a) and 96(1)(e)). Their role in the National Assembly is clearly spelled out in section 96(1) of the Constitution as explained by the Supreme Court in **The Attorney General -v- Chipeta.** There are, of course, Ministers who have to consider their positions in the light of this decision on the Constitution. The consolation is that this is what the framers of our Constitution intended. They wanted a good measure of separation of powers that would engender a measure of independence and autonomy of the three branches of Government.

They achieved this in many ways which were unheard of before this Constitution was adopted. Their intention was clear right from the beginning. There is legitimate uncertainty in using marginal notes in aid of interpreting the Constitution (**Chandler -v- Director of Public Prosecutions** [1964] A.C. 763). Marginal notes are of some use in discovering what the mischief was that was targeted. (ibid). In sections 7, 8 and 9 of the Constitution, the marginal notes point to the 'separate status, function and duty' of each branch of government. Somehow it was perceived that some excesses of the period before the Constitution could be attributed to the lack of clear separation between the branches of Government. The previous scenario encouraged carrying out policies that were in normal parlance anathema because the same people were in the Cabinet proposing legislation and not only participating in the debate in the Assembly but voting for the legislation. The matter was complicated by the influence that the political party had on the business of Government in that the people in the echelons of the party machinery were in the Cabinet. The framers of our Constitution wanted to forestall all that by ensuring that those who do executive or other public functions are excluded from exercising other constitutional functions. In relation to the Legislature, it meant the exclusion of those in the Cabinet, the President and his Minsters. The framers of our Constitution ensured that the life of Parliament was not subject to a dissolution or summoning by the Executive. This decision is therefore not meant to stifle any of the objectives of our democratic process.

It is said that the Court must always regard the consequences of its interpretation of the Statute. It is always the duty of the judge where the provision is plain or unambiguous to give effect to the intention of Parliament despite the consequences of that interpretation (**R -v- Southampton Income Tax Commissioners, ex parte Singer** [1917] 1 K.B. 259,

271;**Metropolitan Police Commissioner -v- Curran** [1976] 1 All E.R. 162, 173-174.) Where the provision is ambiguous, an interpretation should not be adopted which has unpalatable consequences such as injustice, inconvenience, repugnance, inconsistence unreasonableness or absurdity(**Hill -v- East and West India Dock Co.** (1884) 9 App. Cas. 448, 456.). The situation here is that we are not dealing with an ambiguous provision. Section 88 (3) is unambiguous, in stating that the President and Members of Cabinet are in public office. The phrase 'public office' should be given its ordinary meaning. There is no doubt, seen from the ordinary meaning of the phrase, that the President and his members of Cabinet are public offices. Anyway, membership to the Cabinet is a public appointment, if it is not a public office. The duty of the Court is to interpret the provision disregarding the consequences. Nevertheless there is no odium in advocating a system that achieves better separation of powers. It would mean that there is some odium in the like of the American legal system. That would be an unwelcome statement to those who for good reasons still regard that system to be a good example of a modern democracy that has a government that affords liberties and opportunities for its citizenry. There are benefits. One of such is that those in the Executive Branch can concentrate more on governing the Country by avoiding sharing their precious energies, efforts and time with the demands of their constituency and constituents.

With this conclusion, the seat of the Petitioner was vacant by operation of law when he assumed the public office or appointment of Deputy Minister of Finance. The declarations of the Speaker and my decision on whether the petitioner had crossed the floor are without effect. I would therefore dismiss the petition both on the basis that there was evidence at the time of the Speaker's declaration that the petitioner had crossed the floor and that the decision of this court and the declaration of the Speaker are otiose.

Made in open Court this 1st Day of October, 1997

D.F. Mwaungulu

JUDGE