IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1861 OF 2003

BETWEEN:

THE REGISTERED TRUSTEES OF THE
PUBLIC AFFAIRS COMMITTEE.....PLAINTIFF

and

THE ATTORNEY GENERAL.....1ST DEFENDANT

and

THE SPEAKER OF THE
NATIONAL ASSEMBLY.....2ND DEFENDANT

THE MALAWI HUMAN RIGHTS
COMMISSION.....AMICUS CURIAE

CORAM: **HON. JUSTICE A.C. CHIPETA**
Kasambala, of Counsel for the Plaintiff
Ngwira, of Counsel for the Plaintiff
Fachi, S.C., Attorney General, for Defendants
Matenje, Solicitor General, for the Defendants
Nyirenda, Assistant Chief Parliamentary Draftsman,
for the Defendants

Tembenu, of Counsel for the Amicus Curiae

Kapindu, of Counsel for the Amicus Curiae

Mankhanamba, Official Interpreter

RULING

This action has been commenced by the Registered Trustees of the Public Affairs Committee. There are two defendants to it. These are the Attorney General and the Speaker of the National Assembly. In addition to these parties to the case there is also, however, one other party. This is the Malawi Human Rights Commission which only joined the case on 1st September, 2003 as a friend of the Court, otherwise technically known as Amicus Curiae. All three parties are legally represented in this Court.

Although the matter was, by virtue of the Consent Order for Directions issued on 1st September, 2003, heard in open Court, with the consequence now that its ruling is also being pronounced in open Court, in reality it is an action that was begun by an Originating Summons. Now whereas ordinarily a study of Orders 7 and 28 of the Rules of Supreme Court will show that Originating Summonses are heard and determined in Chambers, it has to be appreciated that under Order 28 rule

9(1), when such type of case is ready for determination, the Court has power to "make such order as to the hearing of the cause or matter as may be appropriate."

Indeed as will be further noted, Order 28 rule 9(3) of the same rules goes on to mandate the Court to by order "determine the place and mode of the trial" (my emphasis) and even to then leave it open to the said Court to vary any such order by a subsequent order "made at or before the trial." It is therefore quite legitimate that this matter has proceeded in open Court, as per the Order for Directions reached by consensus of the parties, just as it would have been had it otherwise proceeded in Chambers had the parties not agreed otherwise.

I should at this juncture, in passing, mention that initially when filed the Originating

Summons herein bore two points of concern to the plaintiff on which the said plaintiff wished this Court to issue declaratory orders. On 10th September, 2003, however, when the matter was called for hearing, the plaintiff duly dropped one of these two points. It is a point which related to the hitherto abolished Senate under the Constitution of the Republic of Malawi and to the perceived impact of the absence of that body in Parliament vis-a-vis legislation the plaintiff is now querrying in this action. The prayer in question, however, having been withdrawn, I propose to make no more reference to it in the balance of this ruling.

An immediate display of the factual setting from which the current case arises will, I believe, help depict the case in its correct context. The current Constitution of the Republic of Malawi, according to Section 212 thereof, provisionally came into force on 18th May, 1994. Subject to the education and consultations, proposals for amendment or repeal and replacement, and to the bills for amendment or repeal and replacement that might have resulted from such proposals as were sanctioned during the period of provisional application, by Sub-Sections (2) to (9) of Section 212 aforesaid, this Constitution definitely came into force at the expiry of exactly twelve months from the date of provisional commencement.

Among the provisions in the Constitution that survived this one year "probation period" of relatively easy amendment and/or repeal and replacement before becoming definite was Section 65 which is on the subject of crossing the floor in the National Assembly. In its Sub-Section (1) this provision allowed the Speaker of the National Assembly to declare vacant the seat of any Member of that assembly, if, on election, he was a member of a political party represented in that Assembly upon his voluntarily ceasing to be a member of that party and joining another political party also represented in the same Assembly.

In the year 2001 under the Constitution (Amendment) (No. 2) Act of that year, the same being Act No. 8 of 2001, herein exhibited as "KKN4" to the first affidavit in opposition, Section 65 above-referred was amended. It now reads:-

"65(1) 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 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 or has joined another political party represented in the National Assembly or has joined any other political party or association or organization whose objectives or activities are political in nature."(my emphasis)

As must be apparent the amendment loosens and alters the concept of crossing the floor as originally provided in that apart from extending the floor that can be crossed to outside the National Assembly, it also dispenses with the need to understand crossing the

floor as a combination of both voluntarily ceasing to be a member of one political party and joining another political party, both being represented in the National Assembly.

The present action has been instituted on basis of the amendment just depicted above. On 11th July, 2003 the plaintiff took out an Originating Summons complaining that Section 65, as amended, is unconstitutional and invalid and calling on this Court to so declare the said amendment unconstitutional and invalid. By the affidavit filed in support, sworn by its Board Member Aloisio Nthenda, the plaintiff laments that the provision as amended purports to abridge the fundamental freedoms of association, of expression, of opinion, and that it also abridges political rights as enshrined under Section 40 of the Constitution and that it does so without there having been held a referendum as required by Sections 196 and 197 of the Constitution. The deponent also alleges that the amendment violates the Constitutional principles embodied in Section 12 of the Constitution and that it was not effected in

the interest of Malawians in that, on the whole, it fundamentally jeopardizes constitutionalism by eroding the rights of the people and the constitutional principles this Nation believes in.

Following service of the originating process, the defendants on 13th August, 2003 filed a response to the Originating Summons accompanied by an affidavit in opposition with four exhibits. They later, on 22nd August, 2003, followed this up with a supplementary affidavit, itself carrying two more exhibits. Both the affidavits filed on behalf of the defendants were sworn by Assistant Chief Parliamentary Draftsman Kenyatta Nyirenda, of Counsel.

From what all these documents portray the defendants are basically fighting the action of the plaintiff from two distinct angles. A point they initially wanted to raise as a preliminary objection to the commencement of the hearing, but which they later decided to incorporate in their general arguments during the substantial hearing of the Originating Summons herein, is one concerning the locus standi of the plaintiff in this matter.

They claim that the plaintiff does not have a sufficient interest in the matter to entitle it to bring up this action. Through exhibits “KKN5” and “KKN6”, being respectively the Constitution of the Public Affairs Committee and its Certificate of Incorporation, the defendants argue, especially under their supplementary affidavit, that the plaintiff, not being a political party within or outside the National Assembly, also not being (so they allege) an association or organization with objectives that are political in nature, and that none (so it is alleged) of the registered trustees of the plaintiff being a Member of Parliament or a party to this case, it therefore has no interest over and above that of any other member of the public and that as such it does not have sufficient interest to bring

these proceedings.

Next, in case the Court finds that the plaintiff has locus standi in the matter, the defendants have completely denied, through their first affidavit in opposition and through their response to the Originating Summons, the allegation that Section 65 as amended is unconstitutional and invalid. They claim that this amendment was properly passed in line with Section 196 of the Constitution (although they probably meant S197) and that it therefore properly became law. It was thus the prayer of the two defendants herein that the plaintiff's Originating Summons should just be dismissed with costs.

It will be prudent in this matter, I think, to first attend to the question of the plaintiff's standing, alias locus standi, in it. This is so because presence of standing means that I can proceed to examine the merits and demerits of the Originating Summons taken out by the plaintiff, while absence of standing means the automatic end of this case upon my so holding. It would thus be futile to go into a debate of all the merits and demerits of the action herein when it may well be that the case does not even pass the first hurdle of standing. I will therefore proceed to examine the parties' arguments on this basic question and either terminate the case at this point or proceed to determine it on the merits depending on what I find to be the plaintiff's position vis-a-vis locus standi.

The arguments of the defendants on the subject of locus standi were in the main advanced by the learned Solicitor General, Mr Matenje. He began by recognizing the existence of two approaches to this question, to wit, what he called the restrictive approach and the wider approach. In the final analysis it was his submission on behalf of the defendants that on either premise the plaintiff herein has no locus standi to bring up the present proceedings.

Starting with arguments on the restrictive approach, it was contended on behalf of the defendants that the Constitution of the Republic of Malawi in this case, expressly provides the relevant tests for identifying who can and who cannot institute proceedings for breaches of the Constitution or proceedings to challenge any of the provisions in the Constitution. It was the Solicitor General's argument that locus standi being a jurisdictional issue as recognized in The Attorney General vs Malawi Congress Party, L.J. Chimango, MP, and Dr. H.M. Ntaba MP. (alias The Press Trust Case)

M.S.C.A. Civil Appeal No. 22 of 1996, this Court has no jurisdiction to hear a person who does not have sufficient interest in an action he has brought to the Court.

The first point taken by the defendants was that in terms of the Supreme Court's observation regarding the value of pleadings and the need for the parties to strictly adhere to them, per Fred Nseula vs Attorney General and Malawi Congress Party MSCA Civil Appeal No. 32 of 1997, the way the plaintiff has presented its complaint in the Originating Summons against the amendment of Section 65 does not clearly indicate the unconstitutionality of Act of No. 8 of 2001 is being pleaded. It was thus argued that the plaintiff should on this point be confined to its pleadings.

Next it was contended on behalf of the defendants that the plaintiff has no interest in the Section whose amendment it is complaining against. The Section, it was argued, has no general application but specifically applies to Members of Parliament who have crossed the floor. An aggrieved Member of Parliament, it was said, is entitled to seek redress directly from the Court. It was thus argued that the plaintiff has no authority to institute any proceedings concerning Section 65(1) whether directly or in a representative capacity. Reference in this regard was made t o the decision of the High Court of

St Vincent and the Grenadines in Richards and Walker vs Governor General and Attorney General reported in The Commonwealth Law Bulletin, Vol. 16, No. 2, April 1990 at pp 446-448, where relative to their Section 96(5) of the Constitution the Court found that the plaintiffs who were registered voters and tax payers did not have "relevant interest" to commence the case they instituted.

The defendants hereafter made further reference to local cases on the subject of locus standi. The first authority cited in this line was the case of United Democratic Front vs The Attorney General Civ. Cause No. 11 of 1994 (unreported). The late Hon. Justice Chatsika (as he then was) in that case held that the plaintiff having failed to show that it had a legal right or a substantive interest in the subject it was suing on had no locus standi to bring up the suit. It was however conceded by the defendants that the case in question, having been decided on 5th May, 1994, it was accordingly decided before the current Constitution had come into force.This notwithstanding, it was argued that since then, however, the authority has been cited with approval in two unanimous Supreme Court decisions, to wit, in The President of Malawi and Speaker of National Assembly vs R.B. Kachere and Others M.S.C.A. Civil Appeal No. 20 of 1996 (alias The Concerned Citizens Case decided on 20th November, 1995 and The Press Trust Case (earlier cited) decided on 31st January, 1997. Indeed these two decisions echoed what late Hon. Justice Chatsika held by interpreting " sufficient interest" to be a personal interest over and above that of every other citizen.

These latter decisions, it was argued, being decisions of the Malawian Supreme Court of Appeal, the highest Court in the land, have binding effect on this Court. I was thus urged to follow the above decisions of the Supreme Court on point of locus standi unless I can distinguish the present case from them. Calling in aid at this point the case of St Kitts

and Nevis,

Attorney General vs Lawrence, party relied on by the Supreme Court in the Press Trust Case, the defendants argued that no one whose rights are not directly affected by a law can raise the question of the constitutionality of that law.

In this case the defendant's contention was that there is no evidence to show that the rights and freedoms of the plaintiff have at all suffered as a result of the amendment of Section 65(1) of the Constitution and that as such the plaintiff has not shown that its interest is over and above that of every one else for it to qualify to sue. It was further contended that there is no evidence to show that the plaintiff is acting on behalf of the people of Malawi or in the public interest. It was

at this point argued that a person cannot act on behalf of another unless he or she has authority to do so, be it under the law or directly from that other person.

With reference to Sections 15(2) and 46(2) of the Constitution, which have a direct bearing on locus standi, it was submitted that the plaintiff has not shown that any of its rights has been infringed and that it can therefore not be held to have locus standi in the case it has commenced.

As regards the wider approach to the question of locus standi, it was argued that some jurisdictions e.g. South Africa, have only adopted it for the effective enforcement of their Bills of Rights and nothing more. In this regard Section 38 of the South African Constitution was quoted as clearly itemizing persons who have locus standi before the Courts on those issues. It was argued that in Malawi the Supreme Court of Appeal has adopted the restrictive approach taken by the Common Law and that in contrast with the South African scenario Sections 15(2) and 46(2) of our Constitution do not expand the categories of persons who have locus standi on issues of fundamental rights and freedoms, let alone on provisions like S65(1) which fall out of that category of rights.

It was thus submitted that for lack of locus standi, the Plaintiff's Originating Summons herein should be dismissed with costs.

On its part, and in complete contrast, the plaintiff was clearly of the view that it definitely has the locus standi to bring up the present proceedings in this Court. Whether one takes the common law approach or the interpretation of the Constitutional provisions approach, in its arguments, the plaintiff in either case found itself arriving at the conclusion that it is well qualified to bring up these proceedings in Court.

Mr Kasambala, learned Counsel for the plaintiff, began his argument by first pointing out that in Malawi there are two ways of looking at the issue of locus standi. These he pointed out to be (1) the Common Law way and (2) the constitutional provisions way. Whereas in the past the traditional way of viewing locus standi was strictly that only a

party whose interests have been violated or whose personal interests are at stake over and above those of the general public could access the Courts, over the last 30 years, it was argued, Courts in England, where Malawi borrowed its common law system from, have changed their stand and adopted a very liberal way of dealing with questions of standing, especially on matters involving complaints against public authorities, as is the case here.

To demonstrate the point a quotation was sourced from Lord Dennings's 1979 book entitled "The Discipline of the Law" at pp 116-117 as quoted with approval in the Ghanaian Supreme Court case of New Patriotic Party vs AttorneyGeneral (1999)2 LRC 283 at 305. Lord Denning's words are as follows:-

"The tendency in the past was to limit them to persons who had a particular grievance of their own over and above the rest of the public. But in recent years there has been a remarkable series of cases in which private persons have come to the Court and have been heard. There is now a much wider concept of locus standi when a complaint is made against a public authority. It extends to any one who is not a mere busy body but is coming to the Court on behalf of the public at large."

Mr Kasambala suggested that if Lord Denning was referring to the above position as being current twenty-four years ago in 1979 then the position of Malawian law on the subject cannot now really be any different from that.

Building on the above Mr Kasambala cited a number of case and text book authorities tending to support the existence of a definite shift from the strict old common law position to a more liberal granting of standing. Among these authorities were the following: (1) R vs Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd (1982)A.C. 617, where Lord Diplock said:-

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped." at p. 644

(2) Minister of Justice vs Borowsk 1 [1981]2 SCR 265 where in granting standing to a tax-payer to impugn pro-abortion legislation the Court said:

...to establish status as a plaintiff seeking a declaration that the legislation is invalid, if there is serious issue of invalidity a person need only show that he is affected by it directly or that he has genuine interest as a citizen in the invalidity of the legislation and that there is not other and effective manner in which the issue may be brought before the

Court."

(3) Blackburn vs Attorney General [1971]1 W.L.R. 1037 where in relation to locus standi of a party seeking to prevent UK's joining of the common market and her signing of the Treaty of Rome, Lord Denning said:-

"A point was raised as to whether Mr Blackburn has any standing to come before the Court. That is not a matter which we need rule upon today. He says that he feels very strongly and that it is a matter in which many persons in this country are concerned. I would not myself rule him out on the ground that he has no standing. But I do rule him out on the ground that these Courts will not impugn the treaty-making power of Her Majesty..." at p. 1041

(4) Judicial Review of Administrative Action by De Smith, Woolf and Jowell where at p 111 it is indicated that sufficient interest is given a generous interpretation by the Courts so that they assess the extent of the applicant's interest against all the factual and legal circumstances of his application.

(5) R vs Foreign Secretary, ex parte World Movement Ltd (1995)1 WLR 386 where the Court, inter alia, took into account the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief was sought, and the prominent role of the applicants concerned in giving advice, guidance, and assistance with regard to aid, in concluding that the applicants had a sufficient interest in the matter they had sued upon.
It was Mr Kasambala's submission from this litany of authorities, among others, that Courts are taking an increasingly liberal approach to standing. He further submitted that standing varies from case to case and that where exceptionally grave or widespread illegality is alleged Courts may accord standing to a person who would not otherwise qualify for it.

Besides this it was further argued on behalf of the plaintiff that the merits of a matter are an important, if not dominant, factor when considering locus standi. Reference was made to Professor Wade's words in his book Administrative Law, 7th edition (1994) where that learned author says:-

"...the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved." at p. 712

After citing a number of other authorities from England Mr Kasambala made reference to comparative foreign case law, inter alia, from Australia, India, Canada, New Zealand and the Netherlands to drive home the point that the approach adopted towards locus standi follows a similar pattern in most of these jurisdictions, i.e. relaxing from the previously strict position.

Tying up with the Solicitor General's preliminary remarks to the effect that the amendment now in issue in this case has attracted wide interest among members of the public Mr Kasambala argued that the plaintiff clearly falls within the category of persons who could take up this action. The plaintiff, as the Public Affairs Committee, he said, is a registered body that was established to promote, protect, and enforce human rights, democracy and the rule of law. As such, he argued that the plaintiff has a duty under Section 12(vi) of the Constitution to uphold the Constitution and the rule of law.

Any unconstitutional issue, it was contended, is a matter of concern to the plaintiff both under its own Constitution and under the Malawi Constitution. Placing reliance on New Patriotic Party vs Attorney General (supra) it was submitted that the plaintiff has an obligation under the Constitution to assert its rights or to generally challenge acts that are inconsistent with or in contravention of provisions affecting it or any of its members, or the public at large.

In summing up the plaintiff submitted that even at Common Law it has locus standi in this matter. Thus concerning the UDF vs Attorney General decision (supra) of the late Hon. Justice Chatsika which was emphatic on locus standi being connected to personal interest on the part of a plaintiff, it was argued that had the learned Judge looked at all these decisions that show a new trend at common law he would in all

probability have come to a different decision from the one he reached. In addition the present plaintiff was distinguished from the plaintiff in that authority in that whereas the Court found the plaintiff in that case to be a pressure group bent on gaining political mileage, the same cannot be said of the plaintiff on the present case, the said plaintiff being a bona fide Non Governmental organization established to deal with Human Rights issues and to support the Rule of Law.

Moving on to an examination of Constitutional provisions on locus standi Mr Kasambala first pointed out that, as prescribed under Section 10 thereof, the Constitution is the supreme arbiter and ultimate source of authority in the interpretation of all laws. He then read out Section 15(2) and claimed that it is so clear in what it provides that one does not even need to have gone to Law School in order to understand it. The said provision reads

as follows:-

“15(2) Any person or group of persons with sufficient interest in the protection and enforcement of rights under this chapter shall be entitled to the assistance of the Courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.”

The provision, it was said, gives standing to “Any person or group of persons.” It was then contended that the plaintiff, the Registered Trustees of the Public Affairs Committee, is certainly such a group of persons as is contemplated by the Constitution. As regards the question whether or not this group of persons does or does not have a sufficient interest in the protection and enforcement of rights under Chapter IV of the Constitution, it was submitted that the answer must be in the affirmative.

Referring to exhibit “KKN5" of the defendants and in particular to paragraph 3(d) of that document, which is the Constitution of the Public Affairs Committee, it was pointed out that one of the objects for which the plaintiff exists is:-

“ to safeguard the rule of law and human rights in the Republic of Malawi.”

The group therefore, it was argued, has a sufficient interest in the protection and enforcement of human rights in Malawi and as such, under S15(2) of the Constitution, it was submitted, it has locus standi to approach this Court with this case.

Mr Kasambala, however asked a further question as to what the rights in issue are in the case the plaintiff has so brought up. In answer to this he made reference to Freedom of Association under Section 32 of the Constitution, to political rights under Section 40 of the Constitution, and also to the right to access the Courts under Section 46(2) of the Constitution.

Section 32 of the Constitution provides as follows:-

“32 - (1) Every person shall have the right to freedom of association, which shall include the freedom to form associations.

(2) No person may be compelled to belong to an association.”

As for Section 40 of the Constitution the part mainly referred to, i.e. Sub-Section (1), reads as follows:-

“40 - (1) Subject to this Constitution, every person shall have the right -

(a) to form, to join, to participate in the activities of, and to recruit members for, a political party;

(b) to campaign for a political party or cause;

(c) to participate in peaceful political activity intended to influence the composition and policies of the Government, and

(d) freely to make political choices.”

In its turn Section 46(2) of the Constitution provides:-

“46(2) Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled -

(a) to make application to a competent Court to enforce or protect such a right or freedom; and

(b) to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.”

Taking the argument that the plaintiff trustees of the Public Affairs Committee squarely fall within the class of persons Section 15(2) means to give standing to, Mr Kasambala cited the case of The Administrator of the Estate of Dr. H. Kamuzu Banda vs Attorney General Civ. Cause No. 1839(A) of 1997 (Principal Registry, unreported) in which the Hon. Justice Chimasula Phiri on point of locus standi under the Environmental Management Act noted it to be a departure from the orthodox requirements for standing in that it gives the right to sue to “any person” to bring suits to enforce the right to a clean and healthy environment.

Quoting from p. 13 of that judgment Counsel argued that “Any person” in that case was strictly understood to be “Any person” without necessarily it being the person whose rights were infringed by the defendant. The Constitution here, it was argued, was equally deliberately drawn to grant standing to “Any person or group of persons” as a way of

giving locus standi to human rights observers.

Directly on the wording used by Section 15(2) of the Constitution, Mr Kasambala referred to the decision of the Hon. Justice Mwaungulu in Thandiwe Okeke vs Minister of Home Affairs and The Controller of Immigration Miscellaneous Civil Application No. 73 of 1897 (Principal Registry - unreported). In that case the learned judge considered the wording of the material provision along with the wording in Section 46(2) in considerable detail and came to the conclusion that in granting

the right to approach the Courts to "any person" and in establishing a scheme for the protection and enforcement of "rights" as opposed to the protection and enforcement of the violated rights of a particular complainant, suggesting that only persons whose rights have been violated have sufficient interest

in the protection and enforcement of rights amounts to a restrictive and unjustified interpretation of Section 15(2) of the Constitution.

After suggesting a survey of similarly decided Constitutional cases in Ghana, South Africa, India, and Bangladesh, among other countries, Mr Kasambala asked this Court to take heed of the caution raised by the Constitutional Court of South Africa in the case of The State vs T. Makwanyane and M. Mchunu, Case No. CCT/3/94 to the effect that it pays to read and understand your own document first before seeking guidance from interpretation of provisions in other countries. To this end Mr Kasambala submitted that if the Malawi Supreme Court of Appeal had really looked at Sections 15 and 46 of the Constitution they would have understood "Any person" to mean "Any Person."

As regards the two American cases the Supreme Court used to justify its views on locus standi in the Press Trust Case, which same cases Hon. Justice Tembo (as he then was) also relied on in The State vs Registrar General and Minister of Justice, ex parte Civil Liberties Committee Civ. Cause No. 55 of 1998 (Principal Registry - unreported) his comment was that those cases ought to have been viewed in the light of the particular wording in the United States Constitution and in the Federal Practice Rules that influenced them. The implication was that they ought not just to have been transposed on the Malawian situation which should be governed by the wording as peculiarly employed in our Constitution.

On this same point of locus standi it is my observation that what the Amicus Curiae said on it is not going to be very useful in the determination of the issue now under consideration. I say so because the address from that quarter rather concentrated on the standing the Malawi Human Rights Commission itself ought to have in this case as

opposed to the standing of the plaintiff. The locus standi the defendants have, in this case challenged, however, is the locus standi of the plaintiff. If the challenge launched is successful the case will come to an end as the issues raised by the plaintiff in its Originating Summons will then not fall for determination. At that point the standing the Amicus Curiae may be having will not be useful as their arguments on the main issue can then not be entertained if the convener, so to speak, of the case is ruled unfit to bring up this case. Amicus Curiae arguments on locus standi would therefore have been more helpful if they had been geared towards throwing light on the question whether or not the plaintiff in the matter has a right to present this case to the Court.

I should, however, mention here that the friends of the Court having already been admitted to this case on 1st September, 2003 as earlier disclosed, by virtue of that order they did not have to justify their right to participate in the present case afresh. This notwithstanding I have all the same looked at both Section 129 of the Constitution and Section 12 of the Human Rights Commission Act cited by them along with the brilliant Ruling in favour of their standing in this Court in these types of matters as pronounced by Hon. Justice Nyirenda in Malawi Human Rights Commission vs Attorney General Miscellaneous Civil Cause No. 1119 of 2000 (Lilongwe District Registry - unreported). All I can say in the end is that I think there was ample legal justification for my brother Judge letting them into this case. I accordingly certainly stand to benefit from their wise Counsel as friends of the Court on the substantive issues of this case, should I end up finding that the

plaintiff has locus standi in the matter and consequently proceed to a meritorious determination of the Originating Summons.

I have in this case heard very lengthy, very lucid, and very learned arguments on the question of locus standi. I really must commend all learned Counsel from both sides of the case for not sparing any efforts in researching very deeply on the subject and presenting me with very able, exhaustive and comprehensive arguments on the issue. Although I was initially inclined to think that they had done a bit of overloading on the subject of authorities, it was after applying myself to the various authorities they so generously supplied me that I found myself sincerely appreciative of the efforts they have expended in this regard. In so making available this wide library of authorities they have enabled me to comfortably digest the considerations truly at state when locus standi is in issue and to finally emerge confident about how I now view this issue.

As will have been clearly discerned from my recount above of the parties' arguments on this subject of standing, the plaintiff and the defendants are at ad idem about the existence of two approaches to the issue. They both acknowledge one of these approaches to be a Common Law one, which incidentally the defendants have also referred to as the restrictive approach. The parties are, however, diametrically opposed on the consequence that approach entails for the plaintiff as regards the case it has commenced

in this Court.

From what I understand the defendants to be saying the common law position on standing is as rigid as it has always been , ever since the development of the rule that a person whose rights have not been infringed or threatened, i.e. one who does not have any interest in an action over and above that of any other member of the public, will not be allowed to

commence an action in Court in the absence of such a personal interest. As happened to be the case in the entire lengthy arguments presented on behalf of the defendants on locus standi I saw no acknowledgment or admission, even to a remote degree, of any shift in this original common law position.

Further than this the defendants carried forward this rigid common law position, and on authorities including local cases, fused it in with the second approach to the question of locus standi. In net effect, without conceding even one inch, the stand of the defendants was and has in this case remained that the plaintiff in this case, has no interest over and above any other member of the public, and that it thus has no right of its own which it can point to as having been infringed or threatened so as to give it the springboard on which to launch this action. In short the defendant very rigidly stood by their point in this case that the plaintiff has no locus standi in this action. In fact in all earnest they pray, in the circumstances, that the action taken out by the plaintiff be dismissed with costs.

In contrast to the position taken by the defendants the plaintiff, while coincidentally agreeing with the defendants that originally at common law locus standi was determined in the rigid terms just discussed above, the uncompromising stance as then taken has since undergone remarkable softening, especially in cases such as the present where the complaint touches on the enjoyment of constitutional rights as against the conduct of a public authority in relation to such. Arguing that the plaintiff is not merely a busy body, but a responsible NGO directly working on human rights and rule of law issues and that it therefore in various respects qualifies for standing on the modern common law approach to issues of locus standi,

the plaintiff herein was equally adamant that even under the common law as it has stood since the past 30 years or so it would easily qualify for standing.

Having sufficiently pondered over the arguments I have heard on this subject, and having

read and scrutinized the various authorities both parties cited to me on the subject, I must say that it is quite evident now that the common law position on standing, at least as regards constitutional rights cases as opposed to ordinary cases, has not remained as rigid and static as it originally was, as the defendants would have me believe. It is very clear from authoritative text books such as Lord Denning's "The Discipline of the Law" and from the various weighty and highly persuasive case authorities, such as Lord Dennings's Blackburn, Lord Diplock's and Lord Wilberforce's Inland Revenue Commissioners case, among others, that there is definitely a visible and distinct shift in Court attitudes on standing, which cannot just be wished away, from the originally very strict common law position that locus standi only goes hand in hand with possession, on a complainant's part, of a personal grievance over and above that of the general public to a more liberal grant of standing.

Now, if there is, currently in existence, as vividly shown by the authorities cited on behalf of the plaintiff, a whole new trend of how Courts currently assess locus standi, even within the common law itself, and this has been on for many years now, and if in past local case authorities, such as the Kachere (supra) and Press Trust Cases (supra), this new trend has not, if at all, been as ardently marketed to the Supreme Court of Appeal, is there a way of telling with any certainty what result that Superior Court would have come up with upon a thorough consideration of this new trend on standing? I think not. This shift in legal position, in my observation, even by Courts in the jurisdiction from which we borrowed the Common Law, marks

a jurisprudential development which appears to be by-passing us, but which we cannot just neglect when we come to know of it. It is certainly not just a creature of Mr Kasambala's lips because he is quoting from existing authority. As demonstrated by the authorities in issue, legal heavyweight minds such as that of the ever amazing late lamented Lord Denning both in his 1979 book and, inter alia, in his 1971 Blackburn vs Attorney General (supra) judicial pronouncement, and of Professor Wade's ever authoritative and illuminating legal texts, and of Lord Diplock's incisive and eloquent judgments such as he pronounced in the R vs Inland Revenue Commissioners case (supra), among others, cannot, in my view, be taken lightly and relegated to the dustbin just like that.

In the light of these highly persuasive authorities I for one would not dare to hazard that our Supreme Court would not wish to lend an ear to the observations, not casually made, by such learned minds in their legal writings and in their judgments. I, in the circumstances, will however definitely dare to think that if this new regime of case authorities had been put to the Supreme Court, or that if it had been so well presented to that Court, as it has been to me in this case, that Court might not in the famous Kachere and Press Trust cases have pronounced and maintained the inflexible and uncompromising views they issued on locus standi in regard to Sections 15(2) and 46(2)

as they did. In short, on the strength of the chain of the persuasive authorities I have been exposed to about the current Court attitudes, even in the very country the old and rigid common law rule was initially developed, I find myself led into the entertainment of genuine reasonable doubts about whether our Supreme Court would still stick to its current position on the issue and remain unshaken in its stand when fully exposed to the impact of these authorities.

Be this as it may my position is not necessarily that the common law, old or new, is the solution to the question whether or not the plaintiff in this case has the locus standi to pursue the present matter. With a written Constitution in place, bearing as it does, direct provisions on standing, I do not think that one necessarily needs to, as an initial step, call in aid the common law in order to comprehend what the Constitution says, unless the assumption is that it does not speak clearly enough.

In England, where to date there is no written Constitution, I can understand why one must rush to discover what the current common law position is on questions of standing when faced with such a querry. As seen, however, Courts out there nothwithstanding absence of a written Constitution, have not had much difficulty in adjusting to the changing times and in thus keeping pace with their accommodation of a new wave of cases concerning people's rights as against public authorities.

In Malawi, it is my view after hearing all the arguments in this matter and after looking up the relevant provisions in the Constitution, that the Constitution is far from ambiguous in its prescriptions on matters of standing in relation to presentation of complaints of violations of fundamental rights under it. It speaks so directly, and I believe without equivocation, that I tend to think that it is the style in which our Courts have approached it that have complicated things. It strikes me that instead of being patient and sincerely listening to its direct message, Courts have rushed to put on old common law spectacles, and to dig up ancient foreign case law, before getting convinced that they can even begin to understand the document before them. This, with due respect, is what has tended to cloud the otherwise clear document and I think it is a fallacy.

The answer on locus standi on the issues raised in the current Originating Summons will not come from how Judges in America, in England, in South Africa or elsewhere in the World construe it depending on their peculiar traditions and/or special wording in their Constitutions or Statutes, although that might still provide us a guide on the trend

generally applicable. I do believe that the answer we need on this issue and in this case will come directly from our own Constitution, which after all is the document that contains the wishes and aspirations of our people. The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi.

This now brings me to a consideration of the arguments the parties in the case presented me with on what they jointly recognized as a second legal approach to the question of locus standi. Again here, just as was the case during arguments on the common law approach, the defendants see no locus standi emerging for the plaintiff under this head while on its part the plaintiff clearly sees itself mandated to bring up these proceedings.

I have just advocated for a chance to be given to the Constitution to speak with an uninterrupted voice and to first try and understand what it means before rushing to borrow the influence of decisions in other jurisdictions for the construction of our Constitution. I should think that it is only when a direct understanding of the Constitution proves difficult to capture that resort can be meaningfully had to such other guiding material and precedent. The excise thus involves the employment of appropriate and effective ways of interpreting the Constitution.

It will be a worthwhile reminder at this point to bear in mind that under its Section 4 the Constitution unreservedly proclaims that it binds all executive, legislative and judicial organs of the State and that it guarantees equal protection to all the people of Malawi. By its Section 9 the same Constitution accords to the Judiciary the responsibility of interpreting, protecting, and enforcing the Constitution and all laws in line with it, in an independent and impartial manner, with regard only to legally relevant facts and to the prescriptions of law. It then by its Section 10 claims the status of supreme arbiter and ultimate source of authority in the interpretation of all laws. It has then urged Courts, under its Section 11, to develop and employ appropriate principles of interpretation when they are faced with the interpretation of the Constitution in order to reflect its unique character and supremacy.

In so doing Courts have particularly been enjoined to promote the values that underlie an open and democratic society, to take full account of the fundamental principles on which the Constitution is founded and the Human Rights it has enshrined, respectively covered in Chapters III and IV of the Constitution, and where applicable to have regard to norms of public international law and comparative foreign case law. It therefore is, I think, vitally important that a Court faced with an interpretation assignment keeps all these valuable prescriptions at the back of its mind as it embarks on such assignment.

There is, I believe, sufficient guidance both from local and foreign decisions that have been cited in this case to the effect that the interpretation of a country's Constitution is an exercise quite different from the interpretation of ordinary pieces of legislation. As Sowah, J. S.C. said in the Supreme Court of Ghana in Tuffour vs Attorney General [1980] G.L.R. 637:-

"A written Constitution...is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit... The language... must be considered as if it were a living organism capable of growth and development... A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time." at pp 647-648

From the same jurisdiction in interpreting a particular provision of the Ghanaian Constitution Ampiah, J. S.C. of the

Supreme Court of Ghana said in New Patriotic Party vs Attorney General (1999)2 L.R.C. 283:-

"It is true that the plaintiff in this case has not alleged a violation of its personal rights, but under article 2(1)(a) the Constitution gives a right to any person who alleges that "an enactment or anything contained in or done under the authority of that or any other enactment...is inconsistent with, or is in contravention of a provision of the Constitution" to bring an action for a declaration to that effect... The plaintiff has an obligation under the Constitution to assert its right or generally to challenge acts which are inconsistent with or are in contravention of the provisions affecting it or any of its members, or of the public at large." at p 305

This trend on wide and liberal interpretation of Constitutions, from the authorities, is world wide. Honourable Justice Nyirenda remarkably depicted that trend in his detailed consideration of case authorities from numerous jurisdictions in the case of the Malawi Human Rights Commission vs Attorney General (supra).

Happily our own Supreme Court has authoritatively embraced this liberal approach to constitutional interpretation. As boldly and eloquently put by then Honourable Chief Justice Banda when on 23rd October, 2000 delivering the decision of that Court in the Gwanda Chakuamba, Kamlepo Kalua, Bishop Kamfosi Mnkhumbwe vs The Attorney General, The Malawi Electoral Commission and the United Democratic Front, MSCA

case, there is no longer any doubt how Courts in Malawi ought to interpret the Constitution His Lordship said:-

"Section 11 of the Constitution expressly empowers this Court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop must promote the values which underlie an open and democratic society, we must take full account of the provisions of the fundamental constitutional principles and the provision on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution. There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society." at pp 5-6

It is encouraging to note that this was not the first time the Supreme Court was so plain in its position on this matter. The following passage from the Fred Nseula vs Attorney General and Malawi Congress Party Case (supra) decided on 15th March, 1999 is equally instructive. Again the then Chief Justice Banda pronounced the decision of the Court. Said he:-

"Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. It is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution." at p. 9

Taking these forceful dicta on their face value I find all the encouragement from my Superior Court to be as liberal and as broad-minded as possible in this case when trying to comprehend what message Sections 15(2) and 46(2) of the Constitution have for the

people of Malawi and for the Courts in particular. Honestly, it seems to me that if it be the case that the Supreme Court has always held the above-quoted views on constitutional interpretation, then I find it difficult to understand how in the Kachere and in the Press Trust cases it could have ended up with a narrow and legalistic, if not also pedantic, version of locus standi in its interpretation of Sections 15(2), 41(3), and 46(2), the said Sections having been coached in very open and liberal terms. To begin with, as earlier seen, the Court in its interpretation appears not to have relaxed even one bit. Instead it clung so unduly hard to the strict old common law position and did not have chance to note that even that position has somewhat changed.

Secondly, it appears to me that no real effort was employed by the Supreme Court to first try and understand the plain wording of the provisions for what they truly stood for. Thirdly, it also appears to me that undue attention was given to foreign precedents, which were not after all directly interpreting this Constitution, to impose on the provisions under interpretation values it was deemed this Constitution ought to propound. It thus appears to me that warm as the embrace of the Supreme Court has appeared to be for the manner in which the Constitution ought to be interpreted so as to give full meaning to the intention of its framers and to reflect its unique character and Supreme Status, from the interpretations that emerged from the Kachere and the Press Trust cases it would not be far from the truth to say that the Supreme Court did not then practice what it has since then been preaching about avoiding narrow legalistic and pedantic ways of interpreting constitutional provisions.

Going to Section 15(2) first I tend to think that “Any Person or group of persons” cannot mean anything other than what it says and that narrowing it to a special species of “any person or group of persons” violates the liberal and wide style of interpreting a Constitution. As regards the wording “with sufficient interest”, from the way the provision is coached, in my view, it amounts to deliberately choosing to walk down the narrow path rather than through the recommended highway of interpretation if we choose to interpret that phrase only to mean persons possessing personal interest and to leave out all others. I do not doubt that a person with a clearly identifiable personal grievance on a matter he wants to bring to the Court will certainly have a sufficient interest. Can we, however, confidently say that that is the only person the provision had in mind when it was coached so broadly and loosely? I sincerely think not.

It will be observed that the provision encompasses not only enforcement but also protection of rights with a view to achieving their promotion, protection as well as the redress of grievances. In my considered view, it cannot be, that what passes as “sufficient interest” for a person or group of persons trying to enforce a right should necessarily also be the only qualification to pass as a “sufficient interest” for a person or group of persons merely trying to protect a right or rights as opposed to enforcing the same.

The short Oxford English Dictionary, among other meanings, defines protection as "defence from harm, damage, or evil", while it, among other meanings, defines enforcement as "the compelling of the fulfilment of (a law, a sanction e.t.c.)" Certainly as the definitions above serve to demonstrate, protection and enforcement are two distinct things.

Section 15(2) of the Constitution entitles both those that want to protect rights and those that want to enforce them, inter alia, to the assistance of the Courts. The two assignments being so different, I think it would be very presumptious to prescribe one uniform test of "sufficient interest" for both of them. I thus do believe, and sincerely so for that matter, that if the generous guidance from the Supreme Court on constitutional interpretation emanating from the dicta quoted above is to be given the meaning it deserves, "sufficient interest" for a party that merely wishes to protect rights cannot be the same as "Sufficient interest" for purposes of a party wishing to enforce them.

In the circumstances I find myself in agreement with the broad manner in which Hon. Justice Chimasula Phiri understood the words "Any Person" in the Environmental Management Act case and I would not hesitate to extend the same latitude to an interpretation of like words in S15(2) of the Constitution. I thus also find myself quite in agreement with Hon. Justice Mwaungulu when he so broadly and purposively understood the same words as used in this Section in the Thandiwe Okeke case (supra). I further see merit in Hon. Justice Mwaungulu's further observation in the same case to the effect that it is significant in Section 15(2) that the provision is focused on "protection and enforcement of rights" and not necessarily on the protection and enforcement of the particular rights of the person or the group of persons bringing an action. Indeed if that had been the intention of the framers they would have prefixed the adjective "his", "her", or "their" to the word "rights" they so wanted to be protected or enforced.

I find, accordingly, that limiting "sufficient interest" under Section 15(2) of the Constitution to only a person or only a group of persons that have a personal grievance does not take full account of the full breadth of the provision in question, in that it omits the fact that the provision also gives this right of access to the Courts to persons merely interested in protecting the rights (not necessarily their personal rights) and that apart from seeking remedies for grievance, the provision is open enough to allow promotion of rights well apart from protection of those rights.

Turning to Section 46(2) of the Constitution my views are not really different from those I have expressed in respect of Section 15(2). As can be seen this provision also gives the right of making an application to a competent Court to "any person" Going by the rules of interpretation of the Constitution as above-discussed I apprehend "any person" should be understood as widely as the term itself suggests. Further, just like S15(2) does it, this provision classifies the intended applicant as a person who claims that " a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened" (my

emphasis). I would again here opine that "a fundamental right or freedom" is different from "his or her fundamental right or freedom."

With such plain wording I cannot comprehend why "a" should here be restrictively construed to mean the fundamental right or freedom of the particular applicant and not of anybody else. Of course if the applicant's right or freedom is indeed infringed or affected that will be the clearest example of the type of applicant the provision envisaged, but that does not mean that we have to stop there and cut out all others whom the article "a" was meant to accommodate. Further still as the provision clearly shows the aim of such application would be "to enforce or protect such right or freedom."

Again here I would maintain that enforcing and protecting are two different activities. In my view, therefore, this Section was meant to give the right to apply to Court, not only to those seeking to enforce rights (not necessarily their rights), but also to those who see fundamental rights or freedoms being infringed or threatened and feel compelled to jump in to protect those rights or freedoms, as is openly allowed by the Constitution. I would therefore find it unduly restrictive and pedantic to say that S46(2) of the Constitution only caters for applicants that have a personal interest over and above anyone else due to infringement of or threat to their personal rights or

freedoms. To so hold, in my view, would be to directly go against the recommended way of interpreting this Constitution and to paying lip service to the dicta of the Supreme Court on the point.

I have made my reasons plain for entertaining reservations against the Supreme Court's definition of locus standi under Sections 15(2) and 46(2) of the Constitution as per their 1995 Kachere and their 1997 Press Trust cases judgments. I have thus not deliberately avoided the binding effect of those authorities. It is for reasons I have taken pains to explain above in some detail and it is also with the greatest respect to my Superior Court that I have opted to differ from those two authorities as I believe them to harbour some serious faults. It must therefore be quite plain now that the argument of the defendants in this matter to the effect that the plaintiff does not have the locus standi to bring this action does not, in my view, tally with the way I understand the law.

On a plain, liberal and purposive interpretation of the constitutional provisions touching on this subject and also on an acknowledgment of the fact that even the common law has shifted from its original rigid stance on the subject towards a more liberal way of viewing standing, I am convinced on balance that the plaintiff herein is, by direct authority of the Malawi Constitution itself mandated to come to the Courts as it has done to protect and enforce rights generally, even if its own may not be currently infringed or threatened. I hold therefore that the Registered Trustees of the Public Affairs Committee have the locus

standi they need to pursue the proceedings they have commenced in this Court via Originating Summons and I will therefore proceed to adjudicate on the same on the merits.

Before I go far there is an issue that was raised by the learned Solicitor General on behalf of the defendants, first under the arguments on locus standi, and later under the substantive arguments on the Originating Summons which I need to resolve. I must say that I really was not quite sure what pigeonhole of the case the Solicitor General wanted that argument slotted into. The argument having cropped up twice in two different segments of the case I now think it best to deal with it now as I cross no man's land from the locus standi side of the case to the substantive Originating Summons argument side of the case.

The point raised was in relation to the manner the plaintiff his coached its prayer in paragraph (a) of the Originating Summons. That paragraph reads:

"(a) A declaration that the amendment of Section 65 of the Constitution as amended is unconstitutional and invalid."

It was pointed out, if I understood the argument correctly, that the plaintiff not having specifically mentioned the Constitution (Amendment) (No. 2) Act, 2001 or referred to it as Act No. 8 of 2001, by the rules which bind parties to argue their cases according to their pleadings, the said plaintiff should not be allowed to argue for a declaration to the effect that that Act is unconstitutional and invalid, but that it be strictly confined to arguing the matter in the manner it had pleaded its case at paragraph (a) as earlier shown.

To my mind the problem highlighted here is relatively simple. It is true that the amendment Act in question is nowhere mentioned in the Originating Summons of the plaintiff. I must also say that there is some tautology reflected in the manner the plaintiff has used the words "amendment" and "amended" in that short paragraph. All the same, however, I think that despite this the meaning of the paragraph is far from clouded, if at all it is. It appears to me that it is very clear that the attack the plaintiff has launched is directed at the amendment of Section 65. In other words it is directed at the amended version of Section 65 of the Constitution.

Indeed I am convinced that this meaning was not lost to the defendants in this case because right from the beginning of the case, as demonstrated by their very initial

response to the Originating Summonses, at paragraph 2 thereof and through the affidavit in opposition and its exhibits, they answered the plaintiff's concern at the paragraph (a) herein by making direct reference to the amendment Act in question and also to the Act number in question apart from exhibiting it. I am sure if the plaintiff's style of pleading had prejudiced or confused them in any way they would not have been so direct and sure in their response. As it turns out, however, it has emerged very clearly throughout these proceedings that since the advent of the current Constitution there has not been more amendments than one to its Section 65. Reference to the amendment of Section 65 or to Section 65 as amended in paragraph (a) of the Originating Summons, therefore, is as good as referring to that same amendment by its short title or by its Act number, since it is not capable of being understood to mean and to refer to any other amendment, none other on the same provision having taken place.

Thus while I fully subscribe to what the Supreme court of Appeal said about the value of pleadings in Fred Nseula vs The Attorney General and Malawi Congress Party (supra) I think in this case confining the plaintiff to arguing its case strictly as pleaded as the Defendants have urged me to is exactly the same thing as confining it to argue the case as per Act No. 8 of 2001 or as per the Constitution (Amendment) (No. 2) Act, 2001. This argument, therefore, does not in any way advance the stand of the defendants in this case, be it on the limb of locus standi or on the limb of the substantive matter. I accordingly reject it.

In the light of my finding locus standi for the plaintiff above, I will now move on to consider the substantive arguments of all the parties, including the Amicus Curiae. Before I do so, however, let me disclose that, both on the issue of locus standi and on these substantive arguments, all three parties filed long written submissions with the Court. Since, per consent order for directions, they each only had limited time within which to make their oral presentations on the case, I was trusted to read their written submissions as a supplement to their said oral presentations and I have duly done so. Thus as I try to recount the sides each party took in the case, I will as best I can be putting forward a hybrid of their oral and written submissions.

I should here assure the parties that I have done my best to as fully understand their arguments as possible so as to end up determining the matter in the light of the requisite full understanding of the case. Countless authorities, in the form of foreign and local cases, foreign and local legislation, and text books and articles, were in this branch of arguments also cited by all the parties, and again here I sincerely appreciate that almost all of the authorities were made available to me. Much as it will not be possible for me to cite each such authority as part of this ruling the parties should be rest assured that I have made full use of these authorities in the formulation of my decision on it.

Beginning with the plaintiff, as indicated at the outset, its stand is and has throughout

remained that it is seeking a declaratory order from this Court to the effect that the amendment to Section 65 to the Constitution, which it is complaining about in this Originating Summons, is unconstitutional and invalid. I have already earlier on in this ruling indicated the form that amendment took by highlighting it. The plaintiff has, in the course of presenting its case, made

extensive reference to a number of provisions in the Republican Constitution, which it believes to have a direct bearing on its

arguments in the case. Among these is Section 5 which provides that any act of Government or any law that is inconsistent with the Constitution shall, to the extent of such inconsistency, be invalid (my emphasis).

Section 8 has also been singularly mentioned. Applying directly as it does to the legislature, it enjoins that institution when enacting laws to, in its deliberations, reflect the interests of all the people of Malawi, and to further both the explicit and the implicit values of this Constitution. I in fact need not here recite each and every constitutional provision that has been touched upon as a prelude to the Plaintiff's or indeed to any other parties' arguments on the Originating Summons. Suffice to say that I have already highlighted some of these provisions when discussing the arguments advanced on the subject of locus standi and that the others will more prominently feature in due course as I proceed with this ruling.

I should, however, probably all the same separately here mention Section 15(1), as opposed to the Section 15(2) I have already extensively discussed. This provision requires, inter alia, the executive, the legislative, and the Judiciary, to respect and to uphold all the human rights and freedoms the Constitution has enshrined in its Chapter IV and it makes them enforceable in the manner prescribed under the same chapter.

With all relevant Constitutional provisions lurking in the background the plaintiff began its arguments by making it plain that its attack in this Originating Summons has nothing to do with Section 65 as it originally stood when the Constitution came into force. In this regard the plaintiff indicated that it accepts the principle enunciated by the Supreme Court I n the Fred Nseula case (supra) to the effect

that you cannot use one Constitutional provision to destroy another constitutional provision. The plaintiff's attack, it was made vividly clear, is specifically targeted at the Act that amended Section 65 by changing it from its original form and it is this Act in particular the plaintiff would like to have declared unconstitutional and invalid.

The plaintiff hereafter proceeded to express the view that the amendment so carried out did not auger well with the general spirit of the Republican Constitution in that it unconstitutionally curtailed the freedom of association as provided under Section 32 of the Constitution. The plaintiff further indicated that it viewed the amendment herein as also curtailing the political rights granted to every person as provided for under Section 40 of the Constitution. It was argued in this regard that in extending the concept of crossing the floor from its original position where loss of a seat in the National Assembly could only be incurred if one moved from one political party represented in that House to another political party also represented therein, to its new position where loss of a seat can even be incurred by joining associations or organizations outside the said Assembly amounts to a clear curtailment of the freedoms and rights earlier referred to.

It was thus contended that since in net effect the amendment of Section 65 was indirectly limiting the rights of Members of Parliament from freely exercising their freedom of association with any association or organization, be it a political party or not, and as it was also, inter alia, limiting their rights as guaranteed by Section 40 to e.g campaign for any particular political policies, apart from limiting their political choices, it ought therefore to have been effected in compliance with Section 196 of the Constitution, the rights so affected by it being in the Schedule to the Constitution, by first exposing the said amendment to a referendum before it could

be effected. No referendum having been so conducted before this amendment was effected, the plaintiff argued that it followed that the amendment was therefore unconstitutional and invalid.

As can be seen the Plaintiff has challenged the constitutionality of the amended Section 65(1) at two levels. The first level has been that of an attack on the procedure Parliament followed when passing the amendment. The second level has been that attacking the content of the new Section 65(1), which content is said to directly abridge the freedom of association under Section 32 and the exercise of political rights under Section 40 of the Constitution. In regard to the impact the amended S65(1) has on the enjoyment of these fundamental rights, it has been contended on behalf of the plaintiff that the original S65(1) was much more in keeping with the functioning of a multi-party democracy than the present one is.

Under the original Section 65(1) Members of Parliament, it was argued could freely go about their duties and exercise their right to the freedoms and rights earlier referred to by joining hands with organizations or associations such as the plaintiff's Public Affairs Committee and the like without fearing for any reprisals for working with such institutions. Presently, it was contended, with the amended S65(1) in place, Members of

Parliament face the prospect of losing their seat on joining any such association or organization even if it is not a political party, simply on the basis it might be construed to have objectives or activities that are political in nature.

The extensions in regard to the novel forms of crossing the floor which the amended S65(1) has brought on the scene, it was argued, are seriously at the expense of constitutionalism in this country. The effect of the same, it was lamented, is to reduce Members of Parliament liable to be caught up by this

amendment to the level of merely being the singing puppets of the leaders in the parties they belong to.

Mr Kasambala, in continuing with the submissions of the plaintiff, made reference to the marginal note for Section 65 as being "Crossing the floor." He pointed out that this is a concept borrowed from the English constitutional system. In a literal sense the floor in question, he said, is that between the side of the National Assembly that accommodates the ruling party and the side that accommodates the opposition parties. The original S65(1) was only concerned with the willy nilly crossing of this floor between members of the political parties represented in the House. It was only this conduct that met with the sanction of loss of one's seat and this preserved constitutionalism.

It was then contended that the amended S65(1), in even covering the joining of associations or organizations outside the National Assembly as a form of crossing the floor, not only makes this term a misnormer, but it also actually promotes party dictatorship over the Member of Parliament. It was submitted that Members of Parliament more than anyone else need fuller protection against any attempts to deprive them of their basic right to associate.

Parliament, it was further alleged in the arguments, failed in its duty to promote the democratic values implicit in the Constitution. It also failed, it was argued, to take into consideration the fundamental rights and freedoms enshrined in the Constitution, especially those under Sections 32 and 40. It was thus submitted that the amendment to Section 65(1) went overboard. Reference was then made to the judgment of Farewell, L.J. in Amalgamated Society of Railway Servants vs Osborne [1909]1 Ch. 163, among other cases, to demonstrate the point that all stable democracies tend to be more tolerant

of floor crossing. The amended S65(1) was accused of weakening good governance and

accountability and it was suggested that it inevitably encourages subservience of Parliamentarians to the party bosses.

Reference was also made to Section 44(2) of the Constitution which permits the imposition of some measure of limitations or restrictions on the derogable rights of Chapter IV of the Constitution. It was contended, however, that the amended S65(1) cannot be argued to be a justifiable limitation or restriction on the freedoms and rights under discussion. It was then argued that the onus is on the defendants to show whether the limitations or restrictions occasioned by the amendment do fall within Section 44(2) by being reasonable, recognized by international human rights standards, and being necessary in an open and democratic society. In support of this proposition the plaintiff had recourse to the recent decision of Hon. Justice Chikopa in Civil Cause 50 of 2003 Hon. J.Z.U. Tembo and Hon. Kate Kainja vs The Attorney General (Mzuzu District Registry - unreported). All in all it was the contention of the plaintiff that, tested against Section 44(2), the amended Section 65(1) would not pass the prescribed tests.

Moving on from here it so happens that the substantive arguments of the Malawi Human Rights Commission, as friends of the Court, coincided with those of the plaintiff on the prayer for a declaration from this Court vis-a-vis the amendment to Section 65(1) of the Constitution in issue herein. As such it will be best for me to discuss them now before proceeding to a consideration of the arguments offered by the defendants. Human rights, it was the view of Amicus Curiae, are indivisible and inter-dependent. The Human Rights Commission thus feels that the enjoyment of one right necessarily affects the enjoyment of other rights, just as it also

feels that a denial of the enjoyment of one right has a ripple effect on the enjoyment of other rights.

In the light of the case before the Court Amicus Curiae, through the learned Mr Tembenu, called upon this Court to decide for clarity's sake whether the amendment to Section 65(1) of the Constitution is inconsistent with and in violation of the freedom of association provided for under Section 32 of the Constitution and of the rights especially at Section 40 (b) and (c) of the Constitution to respectively campaign for a political party or cause or to participate in peaceful political activity intended to influence the composition and policies of the Government. Like the plaintiff, Amicus Curiae, also then referred to the Supreme Status of the Constitution, the mandate of the Court to strike out executive action and legislation that are not consistent with the Constitution, appropriate principles of interpreting the Constitution, and they then asked the Court to test the amendment in issue against the Constitution for consistency.

Amicus Curiae, as a National Human Rights Commission under the Constitution and under the Human Rights Commission Act, and being engaged in observing the enjoyment of rights, submitted that the amendment of Section 65 herein severely restricts the enjoyment of the freedom of association. This freedom, it was argued, entails the ability of people to come together by way of groupings to achieve set objectives without unnecessary restraint from the State and that it is one of the core and fundamental rights for the existence of democracy. Taking away this freedom, it was submitted, undermines the basis of an open and democratic society. The amendment to Section 65, it was argued, takes away what S32 gave and does not therefore create an open society. Reference was at this point made to the decisions of

the European Court of Human Rights in Chassagnou and Others vs France 7 BHRC 151 and in Sidiropoulos and Others vs Greece 57/1997/841/1047 to demonstrate the value of the freedom of association and how its curtailment also affects the enjoyment of other related freedoms such as the freedoms of opinion, conscience and of expression.

Amicus Curiae also observed that Section 65 as amended severely limits the right of Members of Parliament to associate with other groupings with objectives of a political nature. The right to freedom of association will be elusive, it was feared, if as amended Section 65 remains in its present from. Referring to the United Communist Party of Turkey and Others vs Turkey 133/1996/752/951, yet another European Court of Human Rights case, where the Court observed that political parties, as forms of associations, are essential to the proper functioning of democracy, Amicus Curiae argued that association by Members of Parliament with organizations of whatever objectives is a necessary part of the development of a vibrant democratic society in this country and that unfortunately that cannot be achieved in the face of Section 65 as amended.

Amicus Curiae made it clear, however, that they were in no way advocating that the freedom of association as given by Section 32 of the Constitution cannot be amended. They duly acknowledged that this can certainly be done, but insisted that such can only be achieved in strict compliance with the prescriptions of the Constitution. Per Section 44(2) of the Constitution and the lucid decision of Hon. Justice Chikopa in The Republic vs Maggie Kaunda Criminal Appeal No. 89 of 2001 (Mzuzu District Registry - unreported) the limitations that can be placed on this right need to be prescribed by law, be reasonable, be recognized by international human rights standards, and also be necessary in an open and democratic society.

It was at this point the submission of Amicus Curiae that as amended Section 65(1) does not meet the above prescriptions and that it has simply swept away the rights of the

people of Malawi under Section 32 and that Members of Parliament are affected by that. The amendment in question was said to be too wide and to be making it impossible for Members of Parliament to exercise their rights under the said Section 32.

A Member of Parliament, as viewed by Amicus Curiae, is a career politician and he is said to be at his best when he associates with others and advances his cause. He should thus be allowed to campaign freely, to change his ideas at will, and to lobby for changes in policy and in the law. To effectively do that he should have the liberty to join associations and organizations, even with political objectives, in order to freely enjoy his rights. Each time he so joins an a ssociation or

organization with objectives that are political in nature, however, Section 65(1) as amended catches up with him and he is thereby denied his rights under Sections 32 and 40.

Amicus Curiae thus believe that this is not in tandem with the values expected in a society that is open and where democracy flourishes. They submit that the amendment is not consistent with Section 32 of the Constitution in that it has become a dangerous weapon against the full enjoyment by a segment of the Malawian society of the rights accorded to them by the Constitution. To the extent the Court might indeed find the amendment herein inconsistent with Sections 32 and 40 of the Constitution, as urged by them, Amicus Curiae prayed for a declaration of invalidity of that amendment.

Taking up the substantive arguments on the Originating Summons on behalf of the defendants the Hon. Attorney General, Mr Fachi S.C, first urged this Court to look at both the original and the amended versions of Section 65. He pointed

out that the concept of crossing the floor has always been there and he querried why the Plaintiff and Amicus Curiae did not challenge it in its original form. He submitted that they did not do so because they knew that it was proper in a democratic State to control the behaviour and conduct of Members of Parliament in this fashion.

It was further argued that the principle of crossing the floor is not peculiar to Malawi. It is recognized in many other countries including Tanzania, Ghana, Uganda, Zambia Namibia, and India. Portions of the Constitutions of the countries cited bearing on the subject of crossing the floor have all been made available to the Court.

Beyond this Mr Fachi SC, pointed out that the amendment now challenged does not change the principle of crossing the floor, but merely expands its application. Whereas originally the principle was satisfied when a Member of Parliament voluntarily moved from one political party represented in National Assembly to another political party also represented there by voluntarily resigning from the one and then joining the other, he/she

now, however, equally crosses the floor by mere act of resignation from the party under which he entered the National Assembly or by simply joining another political party organization, or association whose objectives or activities are political in nature.

Section 65, it was argued, does not affect the rights of Malawians in general. It only affects the rights of Members of Parliament who are elected on a party ticket. The Speaker, it was argued, only declares the seat of such a Member of Parliament vacant, if he is satisfied that the concerned member has taken the voluntary step of either resigning from his political party, which has representation in the National Assembly or joining another political party or an association or

an organization with objectives or activities that are political in nature.

The Attorney General then made reference to a report of the Law Commission at p. 268 of the Malawi Government Gazette of 16th November, 1998. The report in question emanated from the Law Commission on the Technical Review of the Constitution and it touched on the issue of crossing the floor and expressed concern that once Members of Parliament resigned from the party under which they entered the National Assembly, propriety would demand that they return to their Constituency to seek fresh mandate from the electorate. Agreeing with these observations and with the recommendation to make resignation from or the joining of a political party represented in the National Assembly operate as alternative modes of crossing the floor, Section 65(1) was then amended to its present form.

All in all, in continued justification of the amendment, the Attorney General contended that it is simply aimed at stopping Members of Parliament from engaging in political prostitution by requiring them to seek the fresh mandate of the electorate once they leave the party under which they got elected or once they join other political parties or organizations or associations covered by the amendment.

Turning to Section 32 on the freedom of association and to Section 40 on political rights it was argued that although these freedoms are guaranteed there are limits within which a Member of Parliament elected on a party ticket can enjoy them. The Court was here invited to in particular have regard to the fact that Section 40(1) opens with the words “Subject to this Constitution.” The meaning of this, it was argued, is that Section 65 being part of the Constitution, the enjoyment of rights under Section 40 is subject to it too.

Per the holding is the Fred Nseula case (supra) that the Constitution should not be so read as to allow for one part of it to destroy another part of it, the enjoyment of rights under Section 40 by a concerned Member of Parliament are subject to the provisions on crossing the floor. It was thus submitted that there is no conflict between Section 65(1), even as amended, with the freedoms guaranteed by Sections 32 and 40 of the Constitution. On the contrary, it was argued that Section 65(1) rather enhances freedom of association and the right to make political choices.

In case, however, the Court be of the view that S65(1) as amended does limit or restrict the said freedoms, it was further submitted that the said limitations or restrictions are justified and that they fall within the test laid down by Section 44(2) of the Constitution. The argument offered here was that since provisions similar to Section 65(1) exist in Constitutions of the different countries earlier referred to, and these Constitutions also have Bills of Rights enshrined in them, then our Section 65(1) in issue here should also be seen to place on Sections 32 and 40 aforesaid restrictions or limitations that are prescribed by law, that are reasonable, that are recognized by international human rights standards and that they are necessary in an open and democratic society. It was accordingly the stand of the defendants that Section 65(1) as amended cannot be unconstitutional as the plaintiff alleges.

The above substantive arguments of the defendants were supplemented upon by both the Solicitor General, after he had concluded his arguments on locus standi, and by the Assistant Chief Parliamentary Draftsman, Mr Nyirenda, who mainly cited case authorities to back up the points raised in the arguments of the Attorney General.

For the most part these supplementary arguments were meant to add greater emphasis on the points the Attorney General covered, but did also add a few other new points. One

such point was the question whether the amendment of Section 65(1) really ought to have been referred to a referendum before being effected. On this point Mr Matenje stood by the view of the defendants that the amendment does not curtail the rights under Sections 32 and 40 of the Constitution and that as such since S65 does not appear in the schedule of provisions to be amended after reference to a referendum, it was accordingly amended in line with Section 197 of the Constitution.

The other point Mr Matenje added was that even if this Court ends up being satisfied that the amended S65(1) is unconstitutional, it does not follow that the whole Sub-section should be rendered invalid. With reference to Section 5 of the Constitution he argued that only such portion of the amended provision as the Court would find to be inconsistent

with the Constitution is what the Court can declare to be invalid. He also made reference to Section 11(3) of the Constitution which provides that where a Court of law declares a piece of legislation to be invalid the Court may apply such interpretation of that law as is consistent with the Constitution.

Beyond adding these two new points Mr Matenje otherwise merely emphasized his belief that the amended S65(1) is mild when compared, say, with the Indian constitutional provision on crossing the floor where even voting contrary to his party's line can cost a Member of Parliament his seat. He thus felt that crossing the floor here as covered by the amended S65(1) does not infringe the freedoms and rights of Members of Parliament as complained about in this case.

As I earlier indicated when Mr Nyirenda took his turn to address the Court it was mainly to link up the various points already raised in the defendant's substantive arguments with case authorities. I have carefully gone through the presentation Mr Nyirenda made and matched it against the authorities cited, copies of which were kindly supplied to the Court.

Mr Nyirenda's arguments covered a wide area and, inter alia, covered a contention for mutual sustainance of Sections 32, 40, and 65(1), citing Attorney General of the Gambia vs Momodou Jobe [1984] H.L. 689 as authority, a contention that the burden of proof lies on the plaintiff to prove the unconstitutionality they allege in the amended S65(1), citing Attorney General vs Morgan [1985] L.R.C. 770, a further contention that the argument that the alleged indirect effect of S65(1)'s amendment on Sections 32 and 40 ought to have triggered a referendum does not hold water, citing Attorney General of Trindad and Tobago and Another vs McLeod (1985) L.R.C. (Const)81, among others.

Without necessarily wishing to repeat Mr Nyirenda's every argument, which as already indicated, was only building on what the Attorney General and the Solicitor General had already presented, I should mention that I have fully taken on board my consideration the sum total of the arguments advanced on behalf of the defendants just as I have done likewise in respect of the arguments concerning the other parties to the case.

As my above attempt to restate the three parties' positions on the main issue in the case has served to demonstrate, with the plaintiff and the Amicus Curiae standing on one side of it and the defendants, standing on the other, it is clear that the parties herein do not see eye to eye on the question whether the amendment to Section 65(1) herein is indeed unconstitutional and invalid as alleged by the plaintiff. While the plaintiff and Amicus Curiae insist that the amendment is not compatible with the principles held by the Constitution before the amendment came on the scene, the defendants are as adamant that no fault can be attached to the said amendment for it to deserve the declaration of

unconstitutionality and invalidity the

plaintiff has sought against it from this Court. I have thus spent ample time reading and considering the parties' arguments and the authorities they called in aid, apart from analysing the various constitutional provisions that can help me to resolve the issue at hand.

I should begin by mentioning that I have noticed, in the course of the arguments of the parties in this case the emergence of a number of points requiring determination before I can come to the resolution of the main issue. I should

therefore try to resolve those points now one after the other as I advance towards the final determination of the case.

It will be recalled that the case of Fred Nseula (supra) has already featured highly in this case on different aspects of the case. One such aspect is where it has been quoted by all the parties to the case as authority for the proposition that the Constitution must be read as a whole "without one provision destroying the other but sustaining the other." If I have followed the arguments of the defendants clearly, especially as put forward by Mr Nyirenda, on this aspect and in reliance on this authority, among others, it has been contended that the amendment to Section 65(1) herein having passed and thus become part of the Constitution, it is now too late for this Court to test it for constitutionality. Being part of the Constitution itself now, as I understood the argument, we cannot use other parts of the Constitution to destroy it, but only to sustain it.

I would like to think that the argument I have just tried to capture goes a bit too far in trying to protect the amendment now under consideration. Carried to extremity the above argument is in effect suggesting that amendments to the Constitution, once complete, cannot be touched by the Courts because they immediately inherit or acquire the protection of the doctrine not to be destroyed by sister parts of the Constitution they have just become part of.

I must say that the way I understand the authority in the Fred Nseula case in relation to this style of Constitutional construction markedly differs from the way the defendants have, by their argument, suggested that it be understood. In my view the meaning of the dictum referred to in that case is that our Constitution having come into provisional operation as I pointed out initially, the period of twelve months allowed for wide-scale consultation, panel beating, and balancing having successfully passed, and the provisions

in the Constitution that remained intact and those that were altered during the provisional period both having definitely come into force at the end of that grace period, it is not acceptable and not open that one day five years or so down the line Party A wakes up and comes to Court to challenge the validity of one such surviving part of the Constitution on basis that it is in conflict with another surviving part of the same Constitution.

Thus if in this case on basis of the said authority, as I understand it, it would not have been permissible for the plaintiff or anyone else to come to Court any time after the Constitution had definitely come into force to wage war between S65(1) in its original form as against Sections 32 and 40 or any other human rights provision in Chapter IV of the Constitution. To however understand this authority and to interpret it to mean that any or all other constitutional amendments would escape challenge immediately they pass and become part of the Constitution on basis that they must then be deemed to be in harmony with the rest of the body of the Constitution they have just been attached to would be to overstretch the limits of the authority. Indeed in Minerva Mills Ltd and Others vs Union of India and Others AIR 1980 SC 1789 the Courts did not out of hand dismiss a challenge raised against the validity of the 42nd Amendment to the Constitution of India. It was recognized in that case that to the extent a Constitutional amendment itself damages or destroys the basic

structure of the Constitution, Courts would have power to declare it invalid.

In this case, as already made very clear by the plaintiff, both orally and through the Originating Summons the relationship between the original Section 65(1) and the human rights provisions in Chapter IV of the Constitution, including sections 32 and 40, is no part of this case. That relationship would clearly enjoy the protection the Fred Nseula case spoke of. The amendment carried out to S65(1) in 2001, however, cannot escape scrutiny by merely being smuggled into the protection of that authority when in fact it is not covered by the same.

Constitutional (Amendment) (No. 2) Act 2001 is, as far as I am concerned, a piece of law that was passed separately and after the original integral Constitution had already definitely come into force. Section 108(2) of the Constitution gives the Court power to test any law, including this Amendment Act, for consistency with the Constitution. I thus do not see any legitimate obstacle to this Court so testing the amendment to this Section and either rating it as constitutional and valid or as unconstitutional and invalid to the extent of whatever inconsistency might be found. In short, therefore, I hold that Section 65(1) of the Constitution, as amended, is not exempt from the scrutiny of this Court vis-a-vis whether it fits in with the Constitution it was made to join.

One other issue that has arisen for determination in this case as a component of the main issue is the question whether the amendment carried out to Section 65(1) herein ought or ought not to have first been submitted to a referendum before being undertaken. As already indicated at the outset the Originating Summons seeks a declaration to the effect that the amendment in question is unconstitutional and invalid. As one

of the means of showing that the amendment is indeed unconstitutional the plaintiff has alleged that even the procedure adopted in passing it was wrong. Having already recounted the arguments the parties have made on this point it now is only really necessary for me to refer to Sections 196 and 197 of the Constitution and to the schedule to the Constitution, all of which are directly material in the resolution of this contest.

As will be recalled, the argument the plaintiff has offered in this regard comes to its conclusion rather circuitously. It claims the right to a referendum on the amendment, not by direct assertion from the manner the Constitution has been drawn, but by indirectly arguing that if the Court finds that the amendment in question abridges the freedoms and rights provided by Section 32 and 40, then it must be taken to be in effect also an amendment of those provisions, and that since those provisions ought only to be amended after consultation through a referendum, then by virtue of that the amendment to Section 65(1) too ought to have been effected after a referendum.

Granted that constitutional interpretation, as per the authorities, including local ones, ought to be broad, liberal, and purposive, it still strikes me that the style of catching the amendment to Section 65(1) of the Constitution within the requirements for a prior referendum is very long winded and opportunistic. Section 196, as read with the schedule to the Constitution, is very clear on the provisions it directs to be amended after first referring the proposed amendment to a referendum. It very clearly covers amendments to Sections 32 and 40, among others, but it also very clearly does not cover Section 65 of the Constitution. I thus understand this provision to mean that where Parliament wants to amend

Section 32 or Section 40 directly, it has no option but to comply with the requirement of a prior referendum, unless it is otherwise proceeding by virtue of Section 196(3).

There is, it is to be noted, nothing in this provision extending the referendum requirement to amendments that indirectly affect rights arising from the provisions listed in the schedule. On this point I find the argument advanced on behalf of the defendants based on the maxim expressio unius est exclusio alterius i.e. the specific mention of one thing is the exclusion of the other, quite compelling and appropriate. Section 65(1) of the Constitution, I am convinced, was never intended by the framers of the Constitution to be one of those provisions that would require a referendum before they could be amended.

Whatever effect the amendment of that provision may or may not have on the rights and freedoms covered by the Sections listed in the schedule, let that be judged on a plain test of whether or not it is consistent with the spirit of the constitution as a whole. Section 65 of the Constitution the way I see it cannot just find itself among provisions within the definite and fixed list that has been set apart to be amended after a referendum, as appears in the schedule, by sheer genius of deductive reasoning when it was never in the first place intended to be there. I hold accordingly, on this point, that the plaintiff's argument which attributed procedural impropriety to the amendment of Section 65(1), by claiming that the major step of referendum consultation had been skipped, is not valid and I dismiss it as lacking in merit.

The way the law stands, that provision could be amended under Section 197 of the Constitution without need of any referendum. Being so procedurally amended in line with that Section, however, is not the end of the story. It certainly does not mean that the amendment then becomes exempt from such testing of laws as Sections 5, 46(1) and 108(2) of the Constitution permit vis-a-vis consistency with the Constitution and so even if the amendment was done procedurally the main question would still be pending in this matter.

I think I should next move to an interesting tug of war which I witnessed between the parties for and the parties against the declaration sought in this matter. Those for, i.e. the plaintiff and Amicus Curiae argued that as amended S65(1) has eroded or abridged the rights of Malawians, and in particular, the rights of Members of Parliament vis-a-vis their enjoyment of the freedom of association under Section 32 and of political rights as guaranteed under Section 40 of the Constitution. The defendants, in their turn, completely excluded Malawians in general from the effect of the amendment and forcefully argued that the amendment in question only affects Members of Parliament. In fact on the premise that, if anything, this amendment only affects this smaller category of persons, and the argument going along with this was that it is justifiable to put the behaviour and conduct of these Members of Parliament under control, the suggestion was that the plaintiff, in the circumstances, has no business poking its nose into the amendment's restriction of those minority rights, so to speak.

As my ruling on locus standi clearly indicates the Constitutional provisions on the subject of protection and enforcement of fundamental rights and freedoms does not limit the right of access to the Courts only to those whose rights have been infringed or threatened. A person who approaches a Court with a view to merely protecting rights that are infringed or threatened need not necessarily himself be the direct victim of that infringement or threat. My interpretation of the law on this point, as will be recalled, was guided by the clear principles of constitutional interpretation enunciated by the Supreme Court of Malawi in the Fred Nseula case (supra) and in the Elections case (supra) and assisted by

the High Court decisions in the Thandiwe Okeke and Dr. Kamuzu Banda's Environmental Management Act cases.

Thus even if it were true that the amendment to Section 65(1) herein only affects Members of Parliament, if I did find in this case that its effect is to unconstitutionally abridge those rights, it would not matter that the rights infringed or under threat are only those of Members of Parliament. On my finding of wide constitutional locus standi for those seeking to enforce as well as those seeking merely to protect infringements or threats to rights as generally guaranteed by the Constitution, the plaintiff herein would not be barred from prosecuting an action aimed at protecting the rights of Members of Parliament.

This notwithstanding, I think it is dangerous, as the defendants have seriously attempted to do, to exclusively limit the effect of the amendment of Section 65(1) to Members of Parliament only. As I understand it a Member of Parliament is a representative of the people in his constituency. He is elected into that office for a purpose. He carries with him in his discharge of the functions of that office the aspirations and interests of his constituents. To empower him to do that job most effectively must therefore have a direct positive bearing on the expectations of his constituents. In the same way, I take it, that to unduly restrain him in the performance of his duties as a man of the people, assuming S65(1) does that, would also have a direct negative bearing on the expectations of those same constituents. I accordingly do not agree with the argument advanced by the defendants that Section 65(1) only affects Members of Parliament who have secured their positions through a party ticket and not Malawians in general.

On the contrary I think, while the first receptient of the amendment's effect is the Member of Parliament himself, it cannot be denied that the interests of the people the said Representative stands for are also clearly affected thereby. In any event I have already found that even if it were true that the effect of the amendment ends at the Members of Parliament, that would not affect the right of the plaintiff to pursue its case.

Thus the way I see this case the tug of war about who is and who is not affected by the amended provision will have no effect if I should find that the amendment went so far as not to be compatible with the Constitution.

One other point I need to address before I entertain the main question in the case is the point raised in the arguments, concerning the relationship between the amendment carried out to Section 65(1) of the Constitution and the report carrying observations and recommendations of the Law Commission on the Technical Review of the Constitution

on the subject of crossing the floor. I have studied the material portions of the report in question alongside the amendment effected and I have accordingly done some comparing and contrasting.

I do recall the Hon. Attorney General advising this Court that the amendment to Section 65(1) was done after acceptance of the report of the Law Commission. After carrying out the comparison I have just referred to between the report cited and the resultant amendment, I must say that whereas it is true that to some extent the amendment reflects the recommendations of the Law Commission, in truth the amendment went much further than the said recommendation. To make it look, as the defendants tried to do, as if the amendment was largely the result of the recommendation of the Law Commission is certainly not true. So also, in my view, to make it appear as if the amendment was a mere expansion of the principle of crossing the floor and that it was minor in degree, is equally not to give a correct impression of the amendment in question.

Recalling to mind the observations and recommendations of the Law Commission on the Technical Review of the Constitution, the idea they suggested to the National Assembly was that it create two alternative modes of crossing the floor in the National Assembly from the previously single mode available. The building blocks for the proposed two alternative

modes were picked right from the then existing single mode and not from anywhere else. The principle that legitimate crossing of the floor which would entail loss of a seat in the Assembly and which was initially selected to live side by side with the freedoms and rights guaranteed in Chapter IV of the Constitution, as featured in the original S65(1), was that involving a Member of Parliament who belonged to a political party represented in the National Assembly at the time his election, switching allegiance midway, to another political party also represented in the same National Assembly.

The recommendation was that it should not make any difference whether the Member of Parliament voluntarily resigns from his party without joining another political party represented in the Assembly or he simply joins such other political party represented in the Assembly without formally resigning from his first party. In either case the consideration was that the proper thing to do would be for such individual to go back to the electorate to seek fresh mandate. Hence it was recommendend that on the occurrence of either event he should be deemed to have crossed the floor and qualified for the loss of his seat.

True the amendment that was carried out did accommodate this recommendation, but it not only went further than the recommendation made, but much further. As can be seen from the amendment actually effected, having so taken care of the possible crossing by Members of political parties represented in Parliament, the amendment stretched the floor

to outside the National Assembly. It thus created a new form of crossing from a political party represented in the National Assembly to any other political party if such a member joined such party. Thus even if the political party joined is not represented in Parliament and is, so to speak, out in the cold, going out to join it caused the floor to follow you and you crossed it on joining.

As if this was not enough the floor was additionally stretched to organizations or associations that are not political parties and which therefore have no prospect of being represented in the National Assembly. As long as they are organizations or associations with objectives or activities that are political in nature, if a Member of Parliament belonging to

a political party represented in Parliament joined one such organization or association, he is equally deemed to have crossed the floor.

As can be seen the amendment effected is so wide. Whereas in its original form the proverbial floor capable of being crossed by a Member of Parliament was only available in the National Assembly and then only between members belonging to political parties represented in that Assembly, the amended Section 65(1) almost makes that floor magically available for crossing whenever and wherever a Member of Parliament belonging to one of the political parties represented in Parliament joins, inter alia, some organization or association with objectives or activities that are political in nature. During the hearing of the Originating Summons I was rather curious and I thought after saying the National Assembly had accepted and acted on the recommendation of the Law Commission that the Hon. Attorney General was going to explain how the floor that was previously only available in the Assembly ended up being made so readily available for crossing literally everywhere outside the National Assembly. He did not do so.

In fact the impression the Defence side throughout projected in their arguments was that this amendment is a minor expansion of the principle of crossing the floor and that it basically proceeded on a recommendation of the Law Commission which recommendation this Court ought certainly to show respect for. After evaluating the amendment for what it truly is I completely reject the false impression so persisted

in by the defendants. It is my finding therefore that whereas a link no doubt exists between the recommendation in the report of the Law Commission on the Technical Review of the Constitution and the amendment carried out to Section 65(1), this link is so remote and insignificant that the defendants cannot fairly lay the responsibility of the new S65(1) at the door of the Law Commission. I find that they departed from that recommendation as much as they could and this I have just demonstrated above. The defendants, from the look of things, simply used the Law Commission recommendation

as a scape goat. They otherwise went ahead to load the amendment with species of floor crossing from origins other than the Law Commission.

When the time comes I will duly assess whether these expansive extensions and these stretches of the floor to anywhere literally outside the National Assembly are in keeping with the intention of the framers of the Constitution whose wisdom, per the original S65(1), only accepted and incorporated a very limited form of crossing the floor. It is only then that I will be in a position to determine the constitutionality of the amendment complained of. For now I simply want to make it quite plain that the Law commission report cannot be used by the defendants as a shield and a justification for this wholesale amendment that was effected herein, when that recommendation, on comparison, was very narrow and very focused. I certainly therefore reject that contention.

I now finally come to the main issue in this Originating Summons. The all encompassing question to be answered following my hearing of all the lucid arguments of learned Counsel as presented on behalf of the three parties in this case is whether as alleged by the plaintiff, and as coincidentally supported by Amicus Curiae, the amendment of Section 65(1)

of the Constitution can really be said to be unconstitutional and invalid.

The first limb on which the plaintiff sought to rely for this allegation, which sought to show that by not having first put the amendment at the time of its proposal to a referendum Parliament procedurally effected an invalid amendment, has failed as it will no doubt be recalled. There now therefore only remains the second limb on which the plaintiff also proceeded to support its allegation. This was the point that, as amended, S65(1) abridges the freedom of association in Section 32 and the political rights in Section 40 and that it therefore offends the Constitution.

Considering the contents of Section 8 of the Constitution, it follows that when enacting this constitutional (Amendment) (No. 2) Act of 2001, the legislature was supposed to reflect in its deliberations the interests of all the people of Malawi and to further both the explicit and the implicit values of the Constitution. Further, as captured by paragraph (vi) of Section 12 of the Constitution one, amongst the available constitutional principles in Malawi for general guidance is that all institutions and persons are obliged to observe and uphold the Constitution and the rule of law and that none of them is above the law.

Section 15(1), also as earlier already seen, does not mince words when it compels all

organs of the government, including the legislative, to respect and uphold the human rights and freedoms enshrined in Chapter IV of the Constitution. Further, as also already observed, Section 46(1) of the Constitution provides that unless the Constitution itself so authorizes, inter alia, the National Assembly shall not make any law which abolishes or abridges the fundamental rights and freedoms conferred in Chapter IV on pain of any such law being invalid to the extent it contravenes this prescription.

A question that readily comes to mind after this review of constitutional provisions is whether in effecting the amendment of Section 65(1) now under consideration Parliament did bear in mind all the prescriptions referred to above and emerge compliant with the Constitution. Admittedly crossing the floor is almost a universal concept. It of course differs to some extent from country to country. While it is true as claimed by the defendants that Tanzania, Ghana, Uganda, Zambia, and India, among other countries have provisions covering this concept in their Constitutions, and this I have verified from the portions of their Constitutions which the defendants supplied to the Court, and while I accept that these countries so have these provisions alongside bills of rights in the same Constitutions encompassing freedom of association and political rights, among others, upon doing another comparative analysis of these Constitutions and our own I do find that while it would be true that our original S65(1) was either just like these other provisions or milder than them I honestly cannot say the same about our amended S65(1). Much as the Indian Constitution on the whole sounds a bit more harsh in extending the concept of crossing the floor to a member failing to vote according to the party line, at least the little merit in that is that it touches on and refers to the conduct of a Member of Parliament within the house where I apprehend crossing the floor primarily applies to.

In general, from amongst the constitutional provisions proffered for comparison, a uniform thread that transcends all of them is that at least crossing the floor has been confined to movement of elected Members of Parliament between political parties, especially those with representation in Parliament. Our Constitution with S65(1) in its original form was indeed comparable with these other Constitutions and one can say it indeed stood on the mild side. The amendment to Section 65(1), however, has been so radical and revolutionally that in effect it

has completely uprooted our Constitution from the mild position it occupied to where it now stands quite alone on the new concept it now holds on crossing the floor.

Definitely none of the other cited and supplied Constitutions has dared to so stretch their

floor to so far outside their National Assemblies or Parliaments. By the amended S65(1) we have made ourselves unique and lonesome by making it possible, out of the Assembly, to have a floor awaiting to be crossed wherever a Member of Parliament belonging to a Party represented in Parliament attempts to join an organization or association believed to have objectives or activities that are political in nature. It incidentally strikes me that so stretching the floor anywhere and everywhere outside the House does not just amount to an expansion of the principle of crossing the floor. It almost amounts to a complete abandonment of the original principle and to an adoption of a completely new concept. Now whereas it might possibly make some sense that when one joins another political party it can be understood as some form of crossing, but where one has not resigned form his party, has not joined another political party, has merely joined an organization or an association, even one with objectives or activities that are political in nature, how that should amount to a crossing of the floor I sincerely fail to understand.

Much as the defendants would have me believe that the aim of the amendment is merely to control the behaviour and conduct of Members of Parliament, inclined towards what the Attorney General called political prostitution, I do not see what prostitution would be involved in joining an organization or an association which is not even a competing political party. Comparing with these other countries, whose Constitutions have been examined, Malawi must certainly be standing on a lonely island now in conceiving this strange and ingenious kind of crossing the floor. I see a heavy measure of oppression or at

least a heavy threat of oppression in a law that so changes the constitutional atmosphere that was prevailing before it came into being, that it tends to shadow a Member of Parliament wherever he goes and whatever he does, to threaten him with possible loss of his seat should he dare join an organization or association with objectives or activities that can be taken to be political in nature.

Now certain organizations or associations may well be development - oriented despite having objectives or activities that are political in nature. Much as such organizations or associations might be of help to the constituents of a Member of Parliament belonging to a party represented in Parliament, with S65(1) as amended in place, he will not join such an organization or association for fear of losing his seat in the National Assembly. In such a case his constituents, who are Malawians at large, are as much disadvantaged by this amendment as he himself also is.

In fact the very phrase “objectives or activities that are political in nature” appears to be such a wide and all - catching phrase, in my view, that it will scare away the Member of Parliament even from organizations and associations that are “pure” by any standards. Among the meanings applicable to the word “Political” according to the Shorter Oxford

English Dictionary one runs as follows:-

"Of belonging or pertaining to the State, its government and policy; public, civil; of or pertaining to the science or art of politics."

With a definition as wide as this, it appears to me that most of what people do everyday is political and that it would be very difficult to draw the line between objectives or activities in life that are from those that are not political. At this rate almost every organization or association will somewhow or other have

a political objective or activity and a Member of Parliament would lose his seat if he joined it.

One can therefore see how wide, and I dare say wild, the phrase "having objectives or activities that are political in nature" can be. Indeed by adding the rider "in nature" tends to even worsen the situation in that it seems to suggest that the objectives or activities need not even be strictly political, as long as in nature they appear to be such.

When the floor is so stretched beyond the usual limits of the National Assembly, and when it extends so far out of the House that one can cross it even if he is in the most remote part of the country, unlike the defendants, I do not see this rather maverick dramma concerning the crossing of the floor as a matter of genuine maintenance of discipline. Discipline of the sort of detail being chased here, really should be mainly left to the Constitutions of the various political parties concerned. To so make that discipline the business of a National Constitution, in my humble view, is about as good as degrading the number one law of the land to a mere party document.

Stretching the floor so much out of the National Assembly especially as regards Members of Parliament joining organizations and/or associations, in my view, amounts to a gross interference with the enjoyment of the freedom of association and of the exercise of political rights guaranteed under Sections 32 and 40. The argument from the defendants that in fact S65(1) as amended actually promotes the enjoyment of such rights is almost perverse. You do not promote enjoyment of constitutionally guaranteed rights by threatening negative action unless you are sadistic.

There was argument that the limitation, if any, achieved by the amended S65(1) as regards the freedoms and rights under Sections 32 and 40 passes the standards set for such limitations as provided for under Section 44(2) of the Constitution. To begin with I

apprehend that what Parliament set out to do when it embarked on the exercise of amending Section 65(1) was to address whatever mischief it perceived needed rectification under the original Section 65(1). Now assuming the mischief aimed at was the one reflected in the report of the Law Commission, then most likely upon accommodating that recommendation Parliament had achieved that objective. When it hereafter went on a floric to create the other rather puzzling categories of crossing the floor, it certainly had gone beyond the concerns the Law Commission had professionally pointed out to it in its report.

As they stand, the extended aspects of the amendment in question are menacing and clearly oppressive. I thus quite agree with the plaintiff that they severely restrict or at the very minimum threaten restriction of the enjoyment of the freedom of association and political rights generally to a far greater degree than the framers of the Constitution had bargained for through their original S65(1). This threat, as I earlier observed, is not only held out by the amended Section against the Members of Parliament likely to be affected, but also against the constituents they represent.

In a free country like this I cannot call such a piece of law reasonable. Also looking at the other comparable constitutional provisions on crossing the floor from the various jurisdictions covered in the arguments and seeing what a misfit our new provision has become in this comparison, I certainly cannot say that our current provision on crossing the floor is recognized by international human rights standards. If it was I believe it would have resembled some of those other provisions. I equally therefore cannot say that policing the movements and activities of a Member of Parliament, who is a representative of the people, to this extreme degree, through keeping him under constant threat of losing his seat if he becomes daring and active, is a necessary species of surveillance in an open and democratic society.

Whether or not when passing this amendment the legislature had Sections 32 and 40 in contemplation, by virtue of Section 46(1) of the Constitution, it was duty-bound to avoid either abrogating or abridging them or any of the other fundamental rights and freedoms as conferred by Chapter IV of the Constitution. In so creating an amendment that amounts to a monster by holding a Member of Parliament to perpetual ransom of losing his seat if he dares join organizations or associations which are not part of the National Assembly but which might well turn out being found to have objectives or activities that are political in nature, it severely abridges the freedoms and the rights complained about, which are clearly in Chapter IV of the Constitution. As such, even if the legislature correctly employed Section 197 of the Constitution to effect the amendment of Section 65(1), what it did is still contrary to Sections 8 and 46(1) of the Constitution.

Despite my above finding, however, I am enjoined both by the Constitution under Section 5 and Section 11(3) not to throw out the baby, or at any rate the entire baby, with the bath

water. These provisions, especially the latter, basically in the spirit of the maxim ut res magis valeat quam pereat urges me to salvage innocent parts from the offending amendment i.e. to save those parts that do not impinge on or threaten the rights that have since been abridged by the totality of the amendment.

As I see it the amendment as proposed by the Law Commission and as backed by the observations that accompanied the recommendation, geared as it was at respecting the voice of the electorate in the defined circumstances the recommendation was applicable to, was quite sound and democratic for the Malawian society. The extensions, however, which were apparently added just to ride on the back of this professional recommendation, as seen above, are the ones that have abridged the fundamental rights

and freedoms now standing affected at Sections 32 and 40 of the Constitution. Accordingly it is only these extra extensions, that stretch the floor to outside the National Assembly, by extending the concept of crossing the floor to the joining of political parties not represented in the National Assembly or to the joining of organizations or Associations with objectives or

activities that are political in nature, that I ought to strike out of the amendment.

On authority of Sections 5 and 11(3) of the Constitution therefore the amendment capturing the voluntary resignation by a Member of Parliament from a party represented in the National Assembly and/or the joining of a political party represented in the National Assembly by a Member of Parliament who belonged to another political party also so represented in the said Assembly at the time of his election must be saved and it will therefore survive. Accordingly therefore, having in terms of the jurisdiction of this Court under Section 108(2) of the Constitution reviewed and found the amendment to Section 65(1) of the Constitution, as embodied in Act No. 8 of 2001, being constitutional (Amendment) (No. 2) Act of 2001, in terms of S5 of the Consititution inconsistent with the Constitution, only to the extent where it deems the joining of any other political party, or the joining of any association or organization whose objectives or activities are political in nature to amount to a crossing of the floor, I now duly declare the same unconstitutional and invalid, as prayed. The Originating Summons herein thus succeeds with costs.

Pronounced in open Court this 6th day of October, 2003 at Blantyre.

A.C. Chipeta

JUDGE