



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CONSTITUTIONAL CIVIL CAUSE NO. 15 OF 2005**

**BETWEEN:**

**IN THE MATTER OF SECTION 65 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF QUESTION OF CROSSING THE FLOOR BY  
MEMBER OF PARLIAMENT**

**CORAM:**

**HONOURABLE JUSTICE POTANI**

Mrs Kanyuka, of counsel for the Referral  
Kaphale, Kasambara, Ngwira, Mhango, Msowoya, Mwankhwawa, of counsel for the  
Amicus curiae  
Jere, Recording Officer

POTANI, J.

**RULING**

This matter came before this court by way of a presidential referral pursuant to section 89(1) h of the Constitution. In essence, the court is being asked by the referrer, that is, the President of the Republic of Malawi, to interpret the import of section 65(1) of the Constitution. On August 17, this court refused an application by the referrer to amend the referral, that is, the question the court has to determine. In essence, the proposed amendment sought to invite the court to make a determination as to whether or not section 65(1) of the Constitution is constitutional. The court gave its reasons

for the refusal of the application to amend. The referror now seeks the leave of this court to appeal against the refusal to allow the proposed amendments and also an order of stay of the proceedings pending the determination of the intended appeal.

The application by the referror is supported the by affidavit of counsel. The court has had the benefit of being presented with written and oral submissions from all friends of the court. We have considered the submissions.

The first point we wish to note is that the order of the court the referror seeks to challenge by way of an appeal is of an interlocutory nature. It is an order which does not decide on the rights of any party or dispose of any substantive issues. It is settled practice that an interlocutory order of this court cannot be the subject of an appeal. We therefore hold that this application is out of order and therefore incompetent.

Our minds have also been greatly exercised as to whether an appeal can be had in a referral. We find this question to be very critical considering that as it has been said before by this court, there are no parties, strictly speaking, in a referral so much so that no one can be aggrieved in person as the court simply gives its opinion or interpretation of a particular constitutional provision. That being the position, it seems to us that there is really no merit to persuade this court to grant a leave to appeal. Indeed, it was held in *Steler v University Hospital Board* (1988) 4 WWR (SASK C.A.) referred to us that the power to grant leave to appeal is discretionary exercisable upon a set of criteria which must be shown by the applicant to weigh heavily in favour of leave being granted.

In view of our observations above that the order being sought to be appealed against is of an interlocutory nature and that an appeal ordinary does not augur with the purpose of a presidential referral, we find no merit in the referror's application for leave to appeal. The premise of a presidential referral would be that there is no predetermined position by the President who is the referror. The President merely seeks an opinion of the court. The court should be slow to allow the President to challenge that opinion unless it is clearly perverted. Leave to appeal is therefore refused. Consequently, we cannot grant stay of proceedings.

Hearing of the matter shall proceed tomorrow, 5<sup>th</sup> September 2006 at 9.00 a.m. as earlier directed.

**H.S.B. POTANI**  
**JUDGE**