IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 99 OF 2007

BETWEEN:

THE STATE

AND

THE PRESIDENT OF THE REPUBLIC OF MALAWI.....RESPONDENT

EX PARTE DR BAKILI MULUZI.....1ST APPLICANT

JOHN Z.U. TEMBO.....2ND APPLICANT

CORAM: **HON. POTANI, J.**

Kasambara, Counsel for the applicants
Mbendera, Nyamirandu, and Chalamanda Counsel for the Respondent
Mdala, Court Clerk

R U L I N G

1. INTRODUCTION

This matter is before the court through the judicial review machinery within the purview of order 53 of the Rules of the Supreme Court. The two applicants are leaders of two major political parties in this country in terms of representation in the National Assembly. The matter arises from appointments by the respondent, the President of the Republic of Malawi, of some nine personalities as members of the Malawi Electoral Commission a body created and mandated by law to oversee national electoral processes. The appointments were made by virtue of section 75 of the Constitution as read with section 4 of the Electoral Commission Act. The grievance the applicants have is that contrary to what the law stipulates, the appointments were made without consulting them hence they beseech the court to declare the appointments unlawful and consequently null and void.

2. FACTS

The history of the matter is to be traced from November 23, 2006, when the respondent initially made appointments of members of the Malawi Electoral Commission. Those appointments sparked some legal challenge by five political parties in the names of the United Democratic Front (UDF), the Malawi Congress Party (MCP), the Alliance for Democracy (AFORD), the Peoples'

Progressive Movement (PPM) and the Peoples' Transformation Party (PETRA) who commenced Miscellaneous Civil Cause Number 182 of 2006 seeking the nullification of the appointments on the ground that the respondent did not consult them as required by section 4 of the Electoral Commission Act in making the appointments. As events turned out, it was later conceded by the respondent that the aggrieved parties were indeed not consulted as it was discovered that the letters written to them as part of the consultation process were in fact not delivered to them. Therefore, by a consent order dated January 19, 2007, the appointments were declared null and void.

Realising the pivotal role members of the Electoral Commission play in national electoral processes which are a crucial aspect of our young democracy, respondent on February 7, 2007, ventured into a fresh process of appointing members of the Electoral Commission by writing to all leaders of political parties represented in the National Assembly on the intended appointments. In essence, the letter which is among the exhibits from the respondent set out the names and resumes of the intended appointees and invited feedback from the addresses, that is, concerned political parties by February 26, 2007. The letter was delivered to the concerned political parties on February 8 and 9, 2007. It is to be noted that on January 30, 2007, prior to the respondent's letter of February 7 but in the aftermath of Miscellaneous Civil Cause Number 182 of 2006, the 2nd applicant, as Leader of the Opposition in the National Assembly, on behalf of all parties

represented in the National Assembly wrote to the respondent communicating the common stand taken by the parties that in their understanding of the law the consultation process in appointing members of the Electoral Commission has to be in such a way that each political party represented in the National Assembly should nominate persons to represent it in the Electoral Commission such that appointments by the respondent must be from such nominees. This letter was received by the respondent on February 12, well after the respondent's letter of February 7. Responding to the letter on February 22, the respondent expressed total disagreement with the proposal of appointing members of the Electoral Commission from nominees of political parties represented in the National Assembly and gave his reasons for disagreeing; one such reason being the need to have a politically neutral Electoral Commission. The respondent in his response also drew to the attention of the concerned political parties his letter of February 7 and the intended appointees therein and solicited their endorsement by the concerned political parties. Specifically regarding the letter of February 7 from the respondent to the political parties represented in the National Assembly on the intended appointees to the Electoral Commission, there appears to have been no response except for the Malawi Congress Party (MCP) and the Peoples' Transformation Party (PETRA). In its response dated February 22, the MCP put forward five nominees. In the case of PETRA as per the response of February 23, it made three major observations, that is, firstly relating to the suitability of one intended appointee on

account of her long stay outside the country which in the party's view could adversely affect her interaction with the public, secondly the suitability of appointees aged above 65 in view of the strenuous nature of the work to be involved and thirdly the absence of appointees from some key district notably Mzimba and Lilongwe. What followed next was the decision by the respondent on March 12, about 33 days from this letter of February 7, appointing the intended appointees spelt out in the letter of February 7 as members of the Malawi Electoral Commission publication of which was made on March 15. Following the publication of the appointments, the applicants on March 23 commenced the present proceedings. At the commencement of the proceedings, the applicants obtained stay and injunction orders ***ex parte*** restraining the respondent from swearing the appointees into office pending the determination of the matter. The respondent unsuccessfully applied to have the ***ex parte*** orders vacated.

3. ARGUMENTS AND SUBMISSIONS

The court has been presented with elaborate and lucid written and oral arguments by counsel for the parties together with relevant legal authorities on the matters in issue. As a starting point, the core and all encompassing ground on which the applicants' case hinges is that the appointments by the respondent amount to an exercise in futility in that the law was not complied with. In canvassing the case for the applicants, counsel has advanced

specific areas of argument. The first area of argument taken up by counsel is that the appointments were made without consultations in the legal sense. Among the several cases relied on by counsel as to what constitutes consultations in the legal sense is ***Union of India v. Sankal Chand Himatlala Sheth and Chand ANR*** 1977 INSC 178 decided by the Supreme Court of India in which among others it was held as follows:

"Consultation … means full and effective not formal or unproductive, consultation."

The court went on to observe that deliberation is the quintessence of consultation which implies that each case must be considered separately on the basis of its own facts. It is the contention of counsel that the respondent in this case failed to examine the merits of the views of the applicants and instead took a rigid approach thereby creating no room for deliberation which is at the core of full and effective consultation. According to counsel, the respondent's rigidity manifests itself from his outright rejection, as being unlawful, the applicants' proposal that they should make their nominations for appointment. It is the applicant's submission that the contention by the respondent that appointing nominees by the applicants would compromise the independence of the Electoral Commission as provided for in section 76(4) of the Constitution and section 6 of the Electoral Commission Act is baseless firstly because the applicants never at all intimated that they would appoint their members and secondly because belonging to a political party ***per se*** does not

mean losing one's independence. Counsel further argues that the respondent's rigidity and therefore failure to fully and effectively consult is also demonstrated by the manner the concerns by the Peoples' Transformation Party (PETRA) were treated in that they were not responded to but ignored completely as irrelevant. On this point, it is the submission of counsel that the ***Union of India*** case stands for the proposition that once views of the consulted are ignored, ***prima facie*** there are no consultations unless reasons for ignoring them are given.

The second area of argument advanced by counsel for the applicants which is linked to the alleged lack of consultations in the legal sense is basically that the proposal by the applicants to submit their nominees for appointment which was rejected by the respondent is a matter of constitutional convention that has evolved over the years and therefore is the acceptable mode of the consultation process. It is the submission of counsel for the applicants that a convention should not be confused with a custom as the respondent's counsel seem to in their insistence that for a practice to graduate into a convention, it must have existed since time immemorial. According to counsel for the applicants, there are three basic tests for a convention as laid down by a well known jurist in the name of Jennings and these are precedence, obligation and reason for the rule. On precedence, it is the case advanced by counsel that the Electoral Commissioners that oversaw the Elections in 1994, 1999, 2004 were all appointment by way of nominations from political parties

represented in the National Assembly. Regarding the obligation test, counsel has submitted that the test is satisfied in that the applicants who are seasoned politicians have consistently employed the practice before which demonstrates that they had the conviction that they had an obligation to do so. With respect to the reason for the practice, the submission of counsel is that the test of free and fair elections depends on the public's acceptance of the legitimacy of the Electoral Commission as such the practice came about as political parties felt that appointments from their nominees gave the Electoral Commission the much desired legitimacy. Counsel has dismissed the respondent's stand point that the convention, if at all it has been proved, is illegal as it effectively takes away the power of appointment which the law clearly vests in the president since according to counsel the final appointment still remains with the respondent. Counsel has urged the court to recognise both the law and convention as important except that with the law there is laid down procedure for enactment which is not the case with convention.

Responding to the applicants' case, it has been argued that the respondent was not dismissive to the views of the applicants that they be allowed to make nominations for appointment. In this regard, it is the observation of counsel that the respondent, by letter dated February 22, 2007, explained to the applicants the reasons for not going along with their suggestion. It is further the respondent's submission that the definition and essence of consultation as was held in ***Kembol v***

The State and Enga (1990) PNGLR 67 means seeking views and not obligation to follow the views. In other words, the consulting person is perfectly entitled to ignore the views of the consulted person. In this regard, it is the submission of the respondent that the fact that the views of PETRA were not taken on board in itself does not mean that there were no consultations. Further, the respondent argues that the case he has to answer is that of the applicants and not anything to do with non-parties to the matter such as PETRA.

Regarding the reliance placed by the applicants on a supposed convention that works in such a way that political parties represented in the National Assembly have to make nominations for appointment, the case for the respondent is that for a practice to pass the test of an established convention, four conditions must exist namely; the practice must exist since time immemorial, it must be reasonable, it must have some continuity and it must have certainty. It is the contention of the respondent that much as continuity and certainty may have been established in this case, it is a far cry to begin to suggest that the tests of existence since time immemorial and reasonableness have been satisfied. A far cry because according to the applicants the alleged convention has been in place since 1994 which is within recent and living memory. The convention falls short of being reasonable, it is the respondent's contention, in that it is contrary to section 76(4) of the Constitution and section 6 of the Electoral Commission Act as it tends to erode the

independence bestowed upon the Electoral Commission by those provisions. A convention must supplement and not run counter to the law, it is the respondent's submission. An argument has also been canvassed by the respondent that even if it is accepted that the alleged convention started in 1994, it is to be observed that the Electoral Commission Act was enacted in 1998 and yet it never incorporated the convention which clearly means that the law intended to do away with it and therefore no matter how one defines a convention the alleged convention can not bind the respondent.

4. DETERMINATION

The case at hand is one triggered by the exercise, by the respondent, of Presidential powers of appointment. In this regard, as rightly submitted by counsel for the respondent, section 89(1) (d) of the Constitution which gives the respondent general powers to make appointments is the starting point. The section confers upon the respondent the power to make such appointments as may be necessary in accordance with the power conferred upon him by the Constitution or an Act of Parliament. What is important to note is that in making appointments, the respondent is duty bound to conform with the Constitution or an Act of Parliament as the case may be. In the case of appointment of members of the Electoral Commission which is the bone of contention in this case, their appointment primarily features in section 75 of the Constitution. The section, however, does not confer any specific power of

appointment. It simply states that the appointment has to be in accordance with an Act of Parliament and that Act happens to be the Electoral Commission Act. It is section 4(1) of the Act which provides for the power and mode of appointment and it is worded as follows:

"The president shall, subject to the Constitution and ***in consultation with the leaders of the political parties represented in the National Assembly appoint*** ***suitably qualified persons to be members of the Commission on such terms and conditions as the Public Appointments Committee of Parliament shall determine.***" (emphasis added)

It is clear from the above quoted section that in appointing members of the Electoral Commission, the respondent is duty bound to do so in consultation with leaders of political parties represented in the National Assembly like the applicants. As highlighted earlier in this judgment, the present case hinges on whether or not such consultations were made by the respondent.

The obvious fact that has led to the present case is that section 4(1) of the Electoral Commission Act does not prescribe how the consultations by the respondent are to be done. In **Fletcher v. Minister of Town and Country Planning** (1947) 2 All ER 496 at page 500 Morris, J. had this to say on consultation:

"The word consultation is one that is in general use and that is well understood. No useful purpose would, in my view be served by formulating words of determination. Nor would it be appropriate to seek to lay down the manner in which consultations

must take place. ***The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the case and to decide whether consultation was, in fact, held.*** (emphasis supplied).

The above quoted ***dictum*** by Morris, J. is instructive as to the approach to be taken by the court where an Act, as in the case of the Electoral Commission Act does not prescribe the mode of consultation and there is a complaint of failure to consult as in the present proceedings. The approach to be taken is for the court to examine the facts and circumstances of the case and decide whether consultation was, in fact, held.

The facts of the case amply reveal that before making the disputed appointments, the respondent by letter of February 7, 2007, wrote all leaders of political parties represented in the National Assembly on the intended appointments. It is worth noting that before the respondent's letter of February 7, the 2nd applicant on January 30 wrote to the respondent on behalf of all the other concerned political parties floating the suggestion that they be allowed to put forward nominees for appointment in line with previous practice. It alleged by the applicants that by writing his letter of February 7 containing proposed appointees before responding to the 2nd applicants letter of January 30, it shows that the respondent had already made up his mind on the appointments so

much so that the purported consultation was merely cosmetic. It is to be observed that the 2nd applicant's letter of January 30 only reached the respondent on February 22 as evidenced by the date stamp for the respondent's office thereon. This only goes to show that by the time the respondent wrote and despatched the letter of February 7, he was not aware of the letter by the 2nd applicant of January 30. It can therefore not be correct to say that the fact the respondent wrote the letter of February 7 before responding to the 2nd applicant's letter of January 30 shows that the respondent had already made up his mind on the appointments and was all out to ignore any representations by the applicants. This is further demonstrated by the fact that after receipt of the 2nd applicant's letter on February 12, the respondent subsequently on February 22 responded to that letter giving detailed reasons why he did not go along with the proposals by the 2nd applicant and leaders of other concerned political parties. It would be pertinent to observe that after the respondent's letter of February 22, the 2nd applicant's response dated February 27 was again in the form of nominations for appointment, a move earlier rejected by the respondent.

In the ***Union of India*** case relied on by the applicants, the court noted with approval the definition of consultation in Stroud's Judicial Dictionary quoting **Rollo v Minister of Town and Country Planning** (1948) 1 All ER 13 and

Fletcher v Minister of Town and Country Planning (1947) 2 All ER 946 in the context of expression ***"consultation with any local authorities"*** as follows:-

"Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice."

The definition of consultation in the ***Rollo*** and ***Fletcher*** cases has been criticised as being narrow as a result courts now favour a wider interpretation as was held in ***Re Hanoman (Carl)*** *(*1999) 65 WIR 157 as follows-

However, modern trends indicate that the consultation process embraces more than just affording an opportunity to express views and receive advice. It involves meaningful participation and overall fairness and although it inevitably involves the exercise of a discretion, inherent in that discretion is the obligation to act fairly and reasonably within the boundaries of the statute authorizing the exercise of the discretion.''

The court in the ***Union of India*** case employed the wider definition of consultation and in so doing it stated that consultation must be full and effective and not just formal or unproductive and for that to be achieved there must be deliberation.

In the present case, the respondent gave sufficient information to the applicants regarding the names and resumes of the intended appointees to enable the applicants to tender advice on their suitability for appointment. It took about 33 days from the date the respondent provided the information to the applicants to the time the respondent finally made the appointments. This intervening period, in the view of this court, gave the applicants sufficient opportunity to tender advice. Did they tender the advice? In a sense they did through the 2nd applicant's letter of January 30 albeit coming earlier than the respondent's letter of February 7 as in essence the letter of January 30 directly related to the matters covered in the respondent's letter of February 7. As earlier noted, the respondent replied to the 2nd applicant's letter of January 30 explaining why he never favoured the proposals therein. This exchange of proposals and views on the intended appointments, in the view of the court, is indicative that there was deliberation over the matter. After the respondent's letter of February 22 the applicants never gave any other advice other than their earlier stand. It was then that the respondent proceeded to make the disputed appointments

The question that may arise then is whether the respondent was bound to follow the advice or proposal put forward by the applicants. Put differently, can it be said that by rejecting the proposal or advice by the applicants the respondent failed to consult. In considering this question the court finds the decision of High Court of Botswana in **Sesana and others v Attorney General** (2006) B W H C 1 highly persuasive. It was held in that case that:

"***Consultation does not require the decision maker to accept the views of t those he***

consults. He may quite properly reject their views, as long as he takes them properly into account before doing so."

In the case at hand the facts show that before rejecting the applicants' proposal on how the appointments were to be made, the respondent considered the proposal as evidenced by his letter of February 22, 2007 setting out reasons for rejecting the proposal. He was not merely dismissive as alleged by the applicants.

Further the case of **Morobe Provincial Government v The State and Somare** (1984) PNGLR 212 buttresses the position taken by the High Court of Botswana. It was held in that case that:

"the term consultation is a much less forceful term than "recommendation."

In essence the court agrees with the submission made on behalf of the respondent that consultation should not be confused with recommendation as the latter entails the final step before a decision is made and plays a prominent role in the final decision while consultation has very little effect on the final decision. The respondent, therefore, cannot be faulted for rejecting the proposal by the applicants.

The present case, however, is not just about rejection of views of the consulted. It goes beyond that as it is the contention of the applicants that

the respondent acted contrary to an established convention requiring the respondent to make appointments from nominations put forward by political parties represented in the National Assembly.

There is no contention that the members of the Electoral Commissions that conducted the 1999 and 2004 elections were appointed by the 1st applicant, then President of the country, from nominees of political parties represented in the National Assembly. The point of contention is whether that manner of appointment constitutes a constitutional convention binding on the respondent. Counsel for the parties is at variance as to the tests applicable in ascertaining whether a particular practice constitutes a binding convention. On the one hand, the applicants' submission is that the applicable test has three facets namely; precedence, obligation and reason. On the other hand, it is the respondent's case that the applicable test is fourfold, that is, immemorial, reasonableness, continuity and certainty.

In the quest to determine whether the practice of making appointments to the Electoral Commission from nominees of political parties constitutes a binding convention, the court has stumbled over Hilaire Barnett's **Constitutional and Administrative Law 5th Edition** which offers some assistance on the question. On page 31 the learned author writes as follows as to what constitutes a convention:

"A conventional rule may be said to exist when a traditional practice has been consciously adopted and recognised by those who operate the Constitution as the correct manner in which to act in a given circumstance. A practice will be seen to have become a convention at the point at which failure to act in accordance with it gives rise to legitimate criticism.

Sir Ivor Jennings once suggested that three questions must be asked in order to determine whether a convention exists. First, are there any precedents for the convention? 'Mere practice', he tells us, is not enough. The fact that an authority has always behaved in a certain way is no warrant for saying that it ought to behave in that way. What more, then, is required? According to Jennings, that turns on the normativity of the practice:
…***If the authority itself and those connected with it believe that they ought to do so (behave in certain way), then a convention does exist …. Practice alone is not enough. It must be nominative.***

Finally, Jennings argues that neither practice nor precedent is sufficient. In addition, there must be a reason for the rule … the creation of a convention must be due to the reason of the thing because it accords with prevailing political philosophy."

The facts of the present case show that there is

some precedence on the practice of making appointments from nominees of political parties represented in the National Assembly. There is also every indication that in implementing the practice the authority, that is, the presidency and those connection with it, being the concerned political parties, believed that they ought to behave in that way as evidenced by the averments by the 2nd applicant in his affidavit in reply sworn on October 31, 2007, the contents of which are not at all disputed. It can therefore safely be said that the practice gained some normativity. It is also to be noted that in the affidavit in reply just referred to the 2nd applicant gives the rationale and reason behind the practice, that is, in order to ensure that members of the Electoral Commission are acceptable to all stakeholders thereby giving the Commission legitimacy, a prerequisite to free and fair elections. In view of these observations the conclusion that has to be reached is that the practice has passed the test of a convention as laid down by Jennings and echoed by Barnett in his book **Constitutional and Administrative Law.** The suggestion by the respondent that for practice to qualify as a convention, it must have existed since time immemorial does not seem to be supported by the learned jurists. Indeed according to **O Hood Phillips and Jackson; Constitutional and Administrative Law, 8th Edition** page 135 paragraph 7-001, the validity of a convention does not require immemorial antiquity.

An argument has been advanced by the respondent that the convention the applicants seek

to rely on is not binding on account of being unreasonable because it effectively runs counter to section 76(4) of Constitution and section 6 of the Electoral Commission Act in that it has effect of compromising the independence of the Commission; the argument being that if Commissioners are to be appointed from nominees of political parties, they are bound to toy their political party lines at the expense of professionalism and objectivity in discharging discharging their duties. Such an argument is not wholly correct. As rightly argued by counsel for the applicants, it is fallacious as it does not automatically follow that belonging to a political party makes one lose their independence or professionalism. Certainly, it cannot be said that the disputed appointees do not have political party inclinations. They do have and yet that, in itself, does not necessarily mean that they would not discharge their duties in a professional, neutral and objective manner. The respondent has also sought to argue that the convention is unreasonable in that it takes away the appointing power from the respondent in whom such power is vested by the law in section 4 of the Electoral Commission Act as read with section 75 of that Act and section 89 1(d) of the Constitution. While to some degree such an argument has merit, it is not entirely correct since at the end of the day it is the respondent who decides who to appoint among the so many nominees put forward by the concerned political parties.

In the light of the foregoing remarks and observations, it is the finding of the court that in

making the disputed appointments, the respondent failed to follow an established convention. What then is the consequence? Is it that the appointments are null and void? To answer this question, it must first be recognised that conventions are there to supplement the law. It is submitted by Barnett in **Constitutional and Administrative Law** referred to earlier that conventional rules being non legal rules, the courts have no jurisdiction to enforce breach of such rules although they may give recognition to them as the court has done in this case. See also **O. Hood Phillips and Jackson; Constitutional and Administrative Law, 8th Edition** page 137 paragraph 7-003. Further the cases of ***Attorney General v Jonathan Cape Ltd*** (1976) Q.B. 752 and ***Reference re Amendment of the Constitution of Convention*** (1982) D.L.R. (3d)1, 84 reaffirm the proposition that unlike laws, conventions are not enforceable by the courts. Professor Colin Munro as quoted by Barnett in **Constitutional and Administrative Law** stated as follows in relation to the enforceability of conventions:

‘ ’The validity of conventions cannot be the subject of proceedings in a court of law. Reparation for breach of such rules will not be affected by any legal sanction. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises”

The consequence of beach of a convention, it has been said, would probably be severe public criticism and loss of popularity. In other words, as Barnett puts it in his book referred to earlier, the consequence of violating a conventional rule is

political rather than legal. However, it is recognised by the various commentators that in cases where breach of a convention also leads to breach of law the court would have the jurisdiction to enforce breach of the convention. In the case at hand, as earlier found by the court, in so far as the law is concerned the respondent fulfilled the requirement for consultation in making the disputed appointments.

5 CONCLUSION

In the final analysis the court rules that departure by the respondent from the practice followed by his predecessor in appointing members of the Electoral Commission merely constitutes breach of a convention which the court has no jurisdiction to enforce. In so far as the law is concerned, the respondent acted within the parameters. The applicants' case must therefore fail and it is consequently dismissed.

The upshot of the court's finding is therefore that there is no basis for the sustenance of the stay and injunction orders obtained by the applicants restraining the respondent from swearing into office the appointees. Consequently the orders are hereby discharged.

6. COSTS

The question of costs has greatly exercised the court's mind. As a general rule, costs follow the event. What this simply means is that the

successful party ordinarily gets the award of costs. The court however, has the discretion as to what order to make. It is to be recalled that in its ruling of July 2, 2007, on the respondent's application to discharge the stay and injunction orders, the court did rule that costs incidental to that application would be for the successful party in the substantive hearing which as it has turned out is the respondent. That order is hereby re-affirmed. As regards costs of the substantive judicial review hearing, the court takes the view that considering the importance of the issues raised by the matter to our young democracy, the appropriate order would be that each party should bear its own costs and so it is ordered.

Pronounced in Open Court this Day of January 16, 2008, at Blantyre.

H S B Potani
JUDGE