



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CAUSE NO 5 OF 2010

BETWEEN

RESERVE BANK OF MALAWI

PLAINTIFF

AND

**FINANCE BANK OF MALAWI LIMITED
(IN VOLUNTARY LIQUIDATION)
(BY ORIGINAL ACTION)**

DEFENDANTS

AND

**FINANCE BANK MALAWI LIMITED
(IN VOLUNTARY LIQUIDATION)**

PLAINTIFF

AND

**THE ATTORNEY GENERAL
(BY COUNTERCLAIM)**

DEFENDANTS

CORAM

**THE HONOURABLE MR. JUSTICE D.F. MWAUNGULU
THE HONOURABLE DR. JUSTICE C.J KACHALE
THE HONOURABLE MS. R.S. SIKWESE
Nyirenda, of Counsel, For the Plaintiff
Msisha, Mwale of Counsel, for Defendants
Mwanyongo, the official court interpreter**

Mwaungulu J

(INTERLOCUTORY) JUDGMENT

Introductory

The defendants in the counterclaim want us, if it is in our power, to dismiss for want of prosecution the constitutional matter in the counterclaim of the plaintiff. Throughout the judgment, depending on context, ‘plaintiff’ and ‘defendants’ refer to the plaintiff and the defendants in the counterclaim, respectively. Katsala J on 10 February 2010, sitting as a single Judge of the Commercial Division, under section 9 (2), 9 (3) of the Courts Act and Rules 4 (b), 8 (1) and 8 (2) of the Courts (High Court) (Procedure on the Interpretation of the Constitution) Rules, referred the matter to three judges of the Court because of constitutional matters in the plaintiff’s action (counterclaim). The Commercial Division did not issue Form 3, the mandatory way to commence referrals before the three judges, under Rule 4 (b) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. The Chief Justice, on 17 February 2010 certified the proceedings under section 9 (3) of the Courts Act. The Chief Justices’ certification was not in Form 1 of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules.

The three judges, therefore, had not been seized of the matter because the matter had not been commenced. Nonetheless, under Rule 8 (3) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, the three judge panel should have heard the case on 17 February 2011, 21 days after the pre-hearing conference; under rule 8 (4) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules have delivered the decision on 19 March 2011. Up to now the proceedings in the Commercial Division are stayed under Rule 8 (2) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules pending the panel’s decision contrary to the spirit of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) and the High Court (Commercial Division) Rules. The application, filed on 7 December 2012, is to dismiss the matter for want of prosecution. The way to bring the matter live was to do what the defendants had done. Unfortunately, the defendants themselves, by not filing the bundle of issues, breached the Order of Directions, never appeared on the date set for hearing of the constitutional matter and never appeared to prosecute their own applications to dismiss the constitutional matter for want of prosecution.

If we have jurisdiction and, therefore, can or have to, as was pointed out by Lord Diplock, in *Birkett v James*, [1977] 2 All E.R. 801, dismissing an action for want of prosecution is discretionally. The discretion, like all others, must be exercised judicially, that is to say after due regard of all circumstances of the case. In *Shtun v Zalejska* [1996] 3 All E.R. 411, Peter Gibson,

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

L.J., at page 424 urges that in exercising the discretion a Judge must “examine with care all the circumstances of the case, including both the affidavits evidence and issues disclosed by the pleadings.” In *Sabadia v Dowsett Engineering Ltd*, [1984-86] 11 M.L.R 417, 423, Unyolo J., as he then was, “developed the history of the matter in much detail, tracing the course of events from the time when the writ was issued to the time the application was lodged.”

Status of the Proceedings

The Reserve Bank of Malawi (and the Attorney General (the defendants), on 12 December 2008 commenced this action by a writ of summons in the Commercial Division. Katsala J asked the parties, to address him on whether the defence raised constitutional issues requiring three judges to hear the case. Despite stiff opposition from the defendants, the Judge on 10 February 2010, *suo motu*, eventually referred the matter to the Chief Justice within the seven days prescribed under Rule 8 (3) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules.

From Mr. Kaphale’s letter to the Registrar of March 2011 and that the three Judges ordered parties to file bundles of issue, it seems, that there was no Form 3 required under Order 8 (3) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules. The Chief Justice probably certified based on the record, not on Form 3.

The Registrar on 27 January 2011, almost a year later, set the case before Manyungwa (presiding), Mtambo and Mbvundula JJJ. The three, among other things, required parties to state the issues, furnish affidavits and skeletal arguments on different days and, more importantly, set the hearing for 24 March 2011.

The plaintiff and the defendants by 24 March 2011 never filed statement of issues within seven days of the Order for Directions, and, therefore, never filed affidavits, respectively, on 14 February and 28 February 2011. Both never appeared in Court on 24 March 2011. The Judges never called the case. The defendants, despite due service, 16 February and 4 April, 2012 never appeared to prosecute their own motions to dismiss. Once again all the three judges never called the case.

In *Re The Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi*, Miscellaneous Civil Cause No. 127 of 2005, on 24 May 2005, Potani J., on an *inter partes* hearing revoked an earlier *ex parte* order for judicial review. Sometime after the order, it is not clear when, according to the pleadings, the parties filed a consent order.

Procedural and Jurisdictional issues

Since Counsel for the plaintiff in the skeleton argument is adamant that the Chief Justice **duly** certified the matter and on a proper test under section 9 (2) of the Courts Act and that there are matters involving the interpretation of the Constitution it is important to consider whether the Chief Justice could certify when the originating court had not filed Form 3 as required under

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

Rule 4 (b) of Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules; whether the Chief Justice should certify in cases falling in section 9 (2). It is also important to consider whether the Judge should have referred the case. These considerations are important because if we did not have jurisdiction to sit under Section 9(2) of the Courts Act, we have nothing to dismiss. In my judgment, since the referral was the court's *suo motu* and since the referral itself is the reason why a matter concerning financial institutions is delayed in our courts for almost five years, and counting, I discuss before anything else the jurisdictional issues which, if the original court and the certifying authority had considered would have ameliorated rigours in which the parties and the courts find themselves. Jurisdictional issues can be raised at any time and *suo motu*.

Section 9 (2) and 9 (3) of the Constitution

If section 9 (2) is understood and interpreted to mean that courts other than the High Court constituted under section 9 (2), without any statutory prohibition, are incompetent or disabled to handle matters of application and interpretation of the Constitution, it is against many constitutional provisions which give both roles to the 'judiciary' and 'all levels of courts' besides the High Court.

Section 9 of the Constitution Provides:

"The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in the accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.

On application of the Constitution, section 10 (2) provides:

'In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution'

Section 11 provides:

- (1) *"Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.*
- (2) *In interpreting the provisions of this Constitution a court of law shall –*
 - (a) *Promote the values which underlie an open and democratic society;*
 - (b) *Take full account of the provisions of Chapter III and Chapter IV; and*
 - (c) *Where applicable, have regard to current norms of public international law and comparable foreign case law*
- (3) *Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that Act or law as is consistent with this Constitution*

(4) *Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.”*

The construction of section 9 (2) that suggests that other court or a Judge cannot entertain matters concerning the interpretation of the Constitution is not right because section 9 (2) by itself only applies in “Every proceedings in the High Court...” Section 9 (2) does not apply to proceedings in other courts and, therefore, does not oust the jurisdiction of other courts to interpret and apply the Constitution. The downside of section 9 (2), however, is that it is only citizens who appear in the High Court who will have the advantage or disadvantage of appearing before three justices. Those who appear elsewhere have to do with a single arbiter on the same issues. What is very intriguing, however, is that a single Judge of the High Court cannot determine matters of interpretation and application of the Constitution where a magistrate or chairman of the industrial relations or local court can unless the Judge is in the company of two other Judges!

The proper reading of section 9 (2), therefore, can only be in the context of the Constitution and under the context of the High Court’s ‘exclusive power’ of ‘constitutional review.’ ‘Constitutional review’ must be distinguished from the remedy of ‘judicial review’ under Part 53 of the Civil Procedure Rules 1998 repealing or reenacting the Rules of the Supreme Court 1965. Judicial Review, as a remedy, is premised on the general powers the Constitution confers on the High Court under section 108 (1) to hear civil proceedings under any law. Section 108 (2), however, just like section 89 (h) create “exclusive and specific powers” only on the High Court to review for constitutionality.

Section 108 (2) ‘prescribes’ and ‘circumscribes’ this exclusive powers to only two areas: (a) constitutionality of laws and (b) constitutionality of “actions and decisions of Government.” Consequently, Rule 8 (3) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules which gives this Court the power to review the constitutionality of actions of ‘other person’ is against the constitutional prescription and subscription in section 108 (2). Neither is the rule justified as made under the broad power given by other laws to confer jurisdiction to the courts *mutatis mutandis*.

Consequently, section 9 (2) of the Courts Act will only apply when the High Court is considering matters of interpretation and application of the Constitution in the fifteen circumstances where there is :

- (a) Presidential referral (section 89 (h) of the Constitution)
- (b) Constitutionality of customary law (section 108 (2) of the Constitution)
- (c) Constitutionality of international law(section 108 (2) of the Constitution)
- (d) Constitutionality of the Common law (judicial precedent) (section 108 (2) of the Constitution)
- (e) Constitutionality of legislation(section 108 (2) of the Constitution)
- (f) Constitutionality of a government decision(section 108 (2) of the Constitution)

- (g) Constitutionality of a government action (section 108 (2) of the Constitution)
- (h) Appeals from the Electoral Commission (section 76 (3) of the Constitution)
- (i) Judicial Reviews from decisions of the Electoral Commission ((section 76 (5) (a) of the Constitution)
- (j) Referral from subordinate courts under the Courts Act (Section 21 of the Courts Act)
- (k) Referrals from the Industrial Relations Court
- (l) Referrals from the Supreme Court of Appeal (Section 20 of the Supreme Court of Appeal Act)
- (m) Civil Appeals (section 19 of the Courts Act)
- (n) Criminal Appeals (section 18 of the Courts Act)
- (o) Confirmations and reviews (section 25 of the Courts Act)

This list is bigger than the one in Rule 3 (1) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules. There is no power for the High Court to refer a case to itself. Reference to a ‘Judge’ in Rule 8 (1) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules, being made under the Rules of Court, cannot confer such jurisdiction. The High Court, despite having divisions, is one Court. The Rules only talk of transfers between divisions, not referrals. If there is a transfer, the whole matter moves to the transferee division, without staying proceedings in the other division.

The test for referring matters for constitutional review under section 108 (2) of the Constitution and section 9 (2) of the Courts Act is not the one Judge of the Commercial Division used. Reading the Judge’s notes, the Judge and both Counsel proceeded on the test based on section 9 (2) of the Courts Act, namely, whether the proceedings before the Commercial Division and all business thereout ‘expressly and substantively relates to or concerns, or concerns the interpretation and application of the Constitution.’ In the absence of any law, except for matters falling in the exclusive jurisdiction of the High Court under section 108 (2) of the Constitution, making it mandatory for a court to refer matters concerning interpretation and application of the Constitution to the High Court or the three Judges of the High Court under section 9 (2), whether the proceedings concern interpretation or application of the Constitution cannot be the test for the original court.

That is the reason why Rule 8 (1) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules lays a different test: the original court must determine that a referral to the High Court in relation to any matter on the interpretation of the Constitution is ‘necessary’. That can be ‘constitutional’ or ‘general legal necessity.’ Constitutional necessity is coercive and mandatory. Legal necessity refers to situations where the court exercising its general civil and criminal jurisdiction on a matter concerning interpretation and application of the Constitution refers matters to the High Court. In the absence of a general power requiring courts to refer all cases involving matters of applying and interpreting the Constitution, courts other than the High Court should use the power to refer sparingly. Of

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

course, the original court will refer under those provisions only if it is necessary. The two necessities differ in that coercive necessity is mandatory; general legal necessity is elective.

The original court, other than the High Court, faced with any of the following circumstances must refer because it lacks jurisdiction or decline for want of jurisdiction: Presidential referral (section 89 (h) of the Constitution); Constitutionality of customary law (section 108 (2) of the Constitution); Constitutionality of international law (section 108 (2) of the Constitution); Constitutionality of the Common law (judicial precedent) (section 108 (2) of the Constitution); Constitutionality of legislation (section 108 (2) of the Constitution); Constitutionality of a government decision (section 108 (2) of the Constitution); Constitutionality of a government action (section 108 (2) of the Constitution); Appeals from the Electoral Commission (section 76 (3) of the Constitution); and Judicial Reviews from decisions of the Electoral Commission ((section 76 (5) (a) of the Constitution). In the following circumstances necessity is elective: Referral from subordinate courts under the Courts Act (Section 21 of the Courts Act); Referrals from the Industrial Relations Court; and Referrals from the Supreme Court of Appeal (Section 20 of the Supreme Court of Appeal Act). Subject to what I say next about certification, for proceedings from original courts other than the High Court, the Chief Justice must certify under Rule 3(1) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules.

Section 9 (3) of the Courts Act requiring the Chief Justice to certify constitutional matters to the High Court and for the paneling of three Judges must be construed strictly: it risks by unbridled fiat of curtailing the President's power to refer matters of a constitutional nature to the High Court; limiting the High Court's exclusive constitutional review powers under section 108; limits citizen powers to challenges Electoral Commission decisions. If anything it must be limited only to cases where 'other persons' (other than Government) challenge constitutionality in courts other than the High Court and where citizens challenge the constitutionality of other citizens.

On the subject matter for review, it is sensible to filter actions by and against persons other than Government in courts other than the High Court that are subordinate to the High Court. Referrals from the Supreme Court cannot be subject to certification by the Chief Justice. The Chief Justice need not certify matters which were before subordinate courts and are in the exclusive jurisdiction of the High Court; the subordinate court lacks jurisdiction and the High Court must resume jurisdiction and it is mandatory to refer. Where, however, the constitutional matter arises under elective necessity, requiring the Chief Justice, a Justice of the Supreme Court, to certify matters within the competence of the High Court bases on the unsure premise that the Chief Justice is a Judge of the High Court.

The Chief Justice is not a Judge of the High Court. Sections 5 and 6 of the Courts Act are based on the 1966 Constitution and have not been amended. In the 1966 Constitution the Supreme Court was constituted from the High Court. Section 5 and 6 only created the High

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

Court and seniority based on that formation. Sections 109 and 111 (c) of the Constitution, replace sections 5 and 6 of the Courts Act and determine the composition of the High Court:

“The Judges of the High Court shall be such number of Judges, not being less than three, as may be prescribed by an Act of Parliament.”

Section 111(2) provides:

“All other Judges shall be appointed by the President on the recommendation of the Judicial Service Commission.”

The Chief Justice is not a Judge of the High Court under the 1994 Constitution. Section 2 (which defines ‘Judge’), 5 and 6 of the Courts Act and Rule are based on the 1966 Constitution when the Supreme Court of Appeal constituted from the High Court. The legislature is advised to consider sections 5 and 6 of the Courts Act. It sounds odd to me that the Chief Justice can override or reverse the decision of a Judge sitting *en banc* when constitutionality arises in a matter before the Judge. A Judge’s decision *in curiam* exercising powers *ex cathedra* can only be appealed from. It is really odd that the decision whether Constitutionality arises in a particular case so that a properly constituted court under section 9 (1) or (2) of the Courts Act must be made by or overridden by another Judge, the Chief Justice who is not a member of that Court without an appeal or review procedure, even if he is a member of the Court.

Consequently, matters which are in the High Court’s constitutional and statutory jurisdiction need not be certified by the Chief Justice and should be set directly under section 9 (2) of the Courts Act. This is where the High Court is exercising jurisdiction in its exclusive jurisdiction and powers on Criminal Appeals (section 18 of the Courts Act; Civil Appeals (section 19 of the Courts Act); and Confirmations and reviews (section 25 of the Courts Act)

The High Court has no power to refer a case to another court or itself. Consequently, a Judge of the Commercial Division has no power to refer a case to a panel of three judges. The words ‘other courts’ appear on the title of and on the side notes to Rule 8(1) of the (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules. They are not part of the statute. They aid interpretation of the section. The Rules do not define the words ‘Court or Judge’: the definitions in the Courts Act are determinate because of section 19 of the General Interpretation Act. Rule 8 (1) refers to the ‘original court’. That court must be a court other than the High Court. The word ‘Judge’ has been defined as a Judge of the High Court. There is an absurdity in the suggestion that a ‘Judge of the High Court shall refer the matter to the High Court.’ Neither the Constitution nor the Courts Act provides for referrals from the High Court to the High Court. Section 21 of the Courts Act provides for referrals from subordinate courts to the High Court. The Courts Act does not provide for referrals from the High Court to the Supreme Court. Section 20 of the Supreme Court of Appeal Act provides for referrals from itself to the High Court.

Rule 8 (1) cannot and does not purport to create such a power. It presupposes that the power to refer already exists. That is why in the commencing words it starts with “Where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary ...” There is no inherent power for a court to refer matters to another court. That can only be by statute. Of course, under section 108 of the Constitution, ‘any law’ can confer powers on the High Court. Where a specific mode of law is chosen, the intricacies of law making determine how and who can confer that power. At common law, only superior courts make law. Query how customary law creates law. It is difficult to see how the common law, the international law and customary law can confer jurisdiction to the High Court. The inherent powers of this Court are not created by common law; they arise by virtue of creation of a High Court itself. Probably written law was meant. In this case, it is written law that is opted. A statute can confer such power. Subsidiary legislation cannot. The inclusion of a ‘judge’ in Rule 8 (1) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules, if it purports to confer referral power, is by subsidiary legislation. Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) are rules of court, made by the Chief Justice under the general power to regulate their procedure. They cannot make, confer or reduce the jurisdiction generally and the jurisdiction to refer generally. Rules of court only facilitate process. They cannot add or subtract jurisdiction. Section 21 of the General Interpretation Act provides:

“Where any written law confers to power to any person to make subsidiary legislation, the following provisions, shall, unless a contrary intention appears, have effect to the making of subsidiary legislation ... no subsidiary legislation shall be inconsistent with the provisions of the Act and any such legislation shall be of no effect to the extent of the inconsistency.”

Consequently, for matters already in the general and special or exclusive jurisdiction of the High Court, there should be no certification or referral. The power to determine whether a matter falls in the competence of the High Court (section 108 (3)) is a judicial matter and cannot by any extension of imagination be left to the Chief Justice by fiat. Certification by the Chief Justice cannot be supporting section 11 (4) of the Constitution. It must be left to the High Court en banc or in chambers. Consequently, the requirements in the rules of court cannot assign that function to the Chief Justice.

Under Order 1, rule 4 (3) of the High Court (Commercial Division) Rules all matters of a commercial nature must commence in that division. Order 22 speaks of ‘transfer’ rather than referral. The High Court (Commercial Division) Rules do not provide for referral between that division and the principal registry. As to matters which must commence between divisions, the High Court (Commercial Division) Rules are silent as to referral. They are also silent on transfers between divisions. Order 1, rule 4 (1) of the High Court (Commercial Division) Rules applies rules applicable to the High Court under section 29 of the Courts Act. Practice Direction

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

– Commercial Court now, with modification, replaces the repealed Order 72, rule 5 of the Supreme Court 1965 in the Civil Procedure Rules 1998.

The Civil Procedure Rules 1998, while retaining some provisions, effectively repealed the Rules of the Supreme Court 1965. This is in 1999. Consequently, on the definition of the Rules of the Supreme Court, the applicable Rules under section 29 of the Courts Act were as from 1999 the Civil Procedure Rules 1998. Of course, in 2004 section 29 was amended and stated that the Rules of the Supreme Court 1999 apply. By 1 April 1999, the Rules of the Supreme Court 1965 had been repealed and replaced by the Civil Procedure Rules 1998. The Rules of the Supreme Court 1999 were the Civil Procedure Rules 1998. There have never been as in ever the Rules of the Supreme Court 1999. The error cannot, as some would think, emanate from that the *Supreme Court Practice 1999*, Sweet & Maxwell, 1998, popularly, the *White Book*, has 1999 in it. For on page 2 of the book the authors write clearly in relation to the Rules of the Supreme Court in the edition: “These Rules may be cited as the Rules of the Supreme Court 1965” (Order 1, Rule 1 of the Rules of the Supreme Court 1965). The learned authors do not say that in 1999, the Rules of the Supreme Court 1999 apply. Even if there were amendments to the Rules of the Supreme Court 1965 up to 1999, they could not be called the Supreme Court Rules 1999. This is because of section 7 (1) of the General Interpretation Act.

If the 2004 amendment was intended to repeal the Rules of Court applicable to Malawi as at 2004, it either failed or was crudely unsuccessful. First, the Rules of Court are subsidiary legislation to the Courts Act. Amending the Act does not affect existing subsidiary legislation unless the subsisting subsidiary legislation is specifically repealed. Section 14 (1) of the General Interpretation Act provides:

“Where a written law repeals and re-enacts with or without modification any provisions of any other written law, then unless a contrary intension appears ... any subsidiary legislation made under such repealed legislation shall remain in force, so far as it is capable of being made under the repealing written law, and it is not inconsistent therewith until it has been revoked or repealed by any other written law, and shall be deemed for all purposes to be the subsidiary legislation made under such repealing law.”

In 2004 when the amendment was made to the Courts Act, the Rules of the Supreme Court 1965 were in 1999 repealed, reenacted and replaced by the Civil Procedure Rules of 1998. Under section 29, now repealed and replaced by the 2004, the Civil Procedure Rules 1998 were the applicable Rules of Court in the High Court. Under section 14 (1) of the General Interpretation Act, the Civil Procedure Rules had to be specifically repealed or revoked at the time of the amendment or later. The amendment to section 29 never revoked or repealed the Civil Procedure Rules 1998. There has been no written law revoking or repealing the Civil Procedure Rules 1998. The Civil Procedure Rules 1998 must “be deemed for all purposes to be the subsidiary legislation made under such repealing law.” Just amending section 29, if the aim was to repeal

the Civil Procedure Rules 1998, was not enough. The subsidiary legislation had to be revoked or repealed.

Moreover, if the intention of the 2004 amendment was to reintroduce the Rules of the Supreme Court 1965, repealed at the time, it should have (a) specifically repealed the Civil Procedure Rules 1998 and pacifically revived the Rules of the Supreme Court 1965. Section 10 of the General Interpretation Act provides:

“Where under any written law repealing in whole or in part any former written law is itself repealed, such last repeal shall not revive the written law or provisions before repealed unless words be added reviving such written law.”

The Civil Procedure Rules 1998 repealed the Rules of the Supreme Court 1965. If the 2004 amendment was to repeal the Civil Procedure 1998 which, as we have seen, it never did, the 2004 amendment should have added that the Rules of the Supreme Court 1965 are being revived. The 2004 amendment never said so. The Rules of the Supreme Court are not revived; the Civil Procedure Rules 1998 apply to the Commercial Division.

The point is that both the High Court (Commercial Division) Rules and the Civil Procedure rules 1998 and the repealed Rules of the Supreme Court 1995 never provide for referrals from and to a Division.

Where, therefore, the matters fall in the exclusive constitutional jurisdiction or statutory jurisdiction of the High Court, the Registrar (s) must empanel the three judges under section 9 (2) as a matter of course. Where the matters are outside the exclusive jurisdiction the Judge must decide whether it is necessary to refer the case to a panel of three judges. It will not be necessary to do so in matter of breach and violation of the Constitution where matters of fact are better handled by a single judge of the High Court rather than three judges. Section 9 (2) is an independent section and when those circumstances rise, the High Court must act by its jurisdiction and not the Chief Justices’ certification. There is nothing in the wording of section 9 (2) that suggests that the Chief Justice must certify all things or at all. Section 9 (2) of the Courts act only states that the Chief Justice’s certificate shall be conclusive proof that the matter falls under section 9 (2) of the Courts Act. There is no need for proof if the High Court determines that the issue is within its competence.

In this matter, the defendants complain about actions of a Minister, who is Government, and an organ of the State, Reserve Bank of Malawi. The matter concerns breaches or violation of the Constitution. It is very possible that violations or breach of the constitution involve interpretation and application of the Constitution. In a majority of cases, however, the question is whether there were in fact actions or omissions of a Government and whether the actions or omissions were in breach of the Constitution. In those cases there are factual questions. In those circumstances, in my judgment, a panel of three judges to determine purely factual questions is disingenuous and was never intended by the legislation requiring a panel of three judges. Referral is unnecessary and that is why and where the Judge must use the necessity test. The test

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

under section 9 (2) is unhelpful to the original court. That test should be applied by the Chief Justice on certification. Once a Judge determines that a referral is necessary, the Registrar of the Division must empanel three judges either within or without the division.

Dismissal of the constitutional matter for want of prosecution

Where, like here, there is no contumely, the law on dismissal of an action for want of prosecution can be summarized as follows. The court will dismiss an action for want of prosecution, where there is likelihood of unfair proceedings or prejudice, in two situations: where there is inordinate delay or inexcusable delay. It is not that the defendant must prove both grounds: the court will dismiss on any one of the grounds (*Pursey v British Aerospace P.L.C.* May 2, 1984, unreported, and *Purcell Meats (Scotland) Ltd v International Board for Agricultural Produce* 1977, *The Times*, June 5). The court, however, on the principle of *res judicata*, scarcely dismisses an action if the action is within the statutory period. More importantly, the court must examine all material facts and circumstances.

Of the many cases Counsel on either side cited only two are important on what the Court is to determine. The Supreme Court of Appeal cases of *Electricity Supply Commission v Ngulinga* Civil Appeal Cause No 27 of 2011, unreported; *Mbewe v Agricultural Development Corporation* [1993] 11 M.L.R 301; *Proprietary Engineering Company Limited v Dwangwa Cane Growers Trust and Plem Construction Company Limited* Civil Appeal Case No 6 of 2008, unreported; *Mhango v Ng'oma and Chartered Insurance Co Ltd*, Civil Appeal Case No 29 of 2012, unreported; and *Nico General Insurance v Munyimbiri*. Civil Appeal Case No 54 of 208, unreported, despite the defendants' importune, has very insignificant consequences on the principles applicable to dismissal of an action for want of prosecution in the present application. These decisions were on cases on appeal where, unlike here, issues of *res judicata* and the Limitation Act do not apply. The cases from this Court of dealt with applications to set aside a judgment and are about exercise of discretion on many principles such as merit and preponderance of success not limited by the Statute of limitation and the principle of *res judicata*. In those cases, unlike here, a judgment is in place.

Only the cases of *Bilji v Electricity Supply Commission* 1978 M.L.R 8 345, by Skinner, C.J. and *Sabadia v Dowsett Engineering Limited* 1984-86, M.L.R., Vol. 11 are closer to the court is determining. *Bilji v Electricity Supply Commission* case was decided on 21 September 1977 and Skinner C.J. It underlines the importance of the need for proof of prejudice or risk of an unfair trial. Between March and May 1977, the House of Lords decided *Birkett v James*, after reviewing all previous decisions. I need not repeat the history of the rules and how those principles surfaced in our shared rules of court and practice. Diplock and Simon LJJ did that. This decision is very persuasive. It lays practice. It forms our law under section 29 of the Courts Act. It was, properly in my view, followed by this Court in *Sabadia v Dowsett Engineering Ltd*. Without the Rules, the Court has inherent jurisdiction to dismiss an action for want of prosecution. Such power is 'a proper way of terminating delay,' per Skinner, C.J. in *Bilji v Electricity Supply Commission*. *Sabadia v Dowsett Engineering Limited* was this Court's decision. Unyolo did not refer to *Bilji v Electricity Supply Commission*. A lot happened since these cases. Currently, the guiding principles are the 14 points by Lord Justice Neill in *Trill v Sacher* [1993] 1 All E.R. 96, 978 - 980:

“From these and the other relevant authorities, I would extract the following principles and guidelines for use on an application to strike out for want of prosecution where it is not suggested that the plaintiff has been guilty of intentional and contumelious default.

(1) The basic rule is that an action may be struck out where the court is satisfied”

‘(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party’ (See Birkett v James [1977] 2 All ER 801 at 805, [1978] AC 297 at 318.)

(2) The general burden of proof on an application to strike out for want of prosecution is on the defendant.

(3) ‘Inordinate’ delay cannot be precisely defined. ‘What is or is not inordinate delay must depend on the facts of each particular case’ (see Allen’s case [1968] 1 All ER 543 at 561, [1968] 2 QB 229 at 229 at 268). It is clear, however, (a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action and (b) that delay in issuing the writ cannot be classified as ‘inordinate’ provided the writ is issued within the relevant period of limitation.

(4) Delay which is inordinate is prima facie inexcusable (see Allen’s case [1968] credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.

(5) Where a plaintiff delays issuing proceedings until towards the end of the period of limitation he is then under an obligation to proceed with the case with reasonable diligence (see Birkett v James [1977] 2 All ER 801 at 809, [1978] AC 297 at 323). Accordingly, a court is likely to look strictly had the action been started earlier.

(6) A defendant cannot rely on a period of delay for which he has himself been responsible.

(7) A defendant cannot rely on a period of delay if at the end of the period he

‘so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff’s delay.....’ (See Allen’s case [1968] 1 All ER 543 at 556, [1968] 2 QB 229 at 260.)

It has been said that this rule is based on waiver or acquiescence, but the better view appears to be that the defendant is estopped (see County and District Properties Ltd v Lyell (1977) [1968] 2 QB 229 at 260.)

(8) Save in exceptional cases an action will not be struck out for want of prosecution before the expiry of the relevant limitation period (see Birkett v James [1977] 2 All ER 801 at 807, [1978] AC 297 at 321). Alternatively, it may be that, though the delay is both inordinate and inexcusable, the court would not in the ordinary case exercise its discretion to strike the action out if a fresh writ could be issued at once. To do so would only delay the trial.

(9) Once the limitation period has expired the court is entitled to take account of all the earlier periods of inexcusable delay since the issue of the writ. These periods can

include: (a) periods of delay occurring before the expiry of the limitation period which at an earlier stage could not be treated as 'inordinate' (see 8 above); (b) periods of delay on which at an earlier stage the defendant could not rely because he was estopped from doing so by inducing the plaintiff to incur further costs in the reasonable belief that the action was going to proceed to trial, but which have been revived by subsequent inordinate and inexcusable delay. This proposition seems to follow from Diplock LJ's proviso in Allen's case [1968] 1 All ER 543 at 556, [1968] 2 QB 229 at 260.....unless the plaintiff has thereafter been guilty of further unreasonable delay'. It is also supported by a later passage in his judgment in Allen's case [1968] 1 All ER 543 at 556, [1968] 2 QB 229 at 260 where he said:

'It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay.'

(10) A defendant cannot rely on any prejudice caused to him by the late issue of a writ. Thus such prejudice is not due to delay which can be characterized as inordinate or inexcusable. Some additional prejudice after the issue of the writ must be shown:

'The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step' (See Birkett v James [1977] 2 All ER 801 at 809, [1978] AC 297 at 323).

(11) Prejudice to the defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases witnesses may die or move away and become untraceable.

(12) The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eye witness or of witness who will testify to the words used when an oral representation was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents. A defendant may also suffer some prejudice from prolonged delay in an action which involves imputations against his reputation, though this factor by itself is unlikely to provide a ground for striking out.

(13) When considering the question of prejudice and, if it is raised, the question whether there is a substantial risk that it will not be possible to have a fair trial of the issues in the action, the court will look at all the circumstances. It will look at the periods of inordinate and inexcusable delay for which the plaintiff or his advisers are responsible and will then seek to answer the questions: has this delay caused or is it likely to cause serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action? As Slade LJ stressed in Rath's case [1991] 3 All ER 679 at 688, [1991] 1 WLR 399 at 410:

'.....a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.'

(14) An appellate court should regard its function as primarily a reviewing function and should recognize that the decision below involved a balancing of a variety of different

considerations upon which the opinion of individual judges may reasonably differ as to their relative weight. Accordingly, unless intervention is necessary or desirable in order to achieve consistency where there appear to be conflicting schools of judicial opinion, the appellate court should only interfere where the judge has erred in principle (see Birkett v James [1977] 2 All ER 801 at 804, [1978] AC 297 at 317).

No contumelious behavior or abuse of the process of the court

The fourteen points apply where there was no contumely. A party must deliberately disobey a peremptory order or abuse of the process of the court. Here there was no peremptory order. Mr. Nyirenda, Counsel for the defendants, argues that peremptory arises because the steps under the Courts (High court) (Procedure on the Interpretation and Application of the Constitution are statutory. The provisions themselves do not comport peremptory. At the end, these are just but Rules of Court and, unless there was a peremptory order, their breach, according to *Samuels v Linzi Dresses Ltd*, is not *per se* contumely. Such times can be extended by a court under the Rules of Court and must be extended under section 47 of the General Interpretation Act:

“Where, in any written law, a time is prescribed for doing any act or taking any proceeding, and power is given to a court or other authority to extend such time, unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.”

The order by the three judges was never peremptory. That order pressed onerous demands not required under the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution Rules. Neither are the actions of the plaintiffs in the counterclaim abuse of process. It is suggested that abuse is in that delay suits them as the counterclaim slow. The plaintiff was genuinely putting a defence until the Commercial Division suggested *suo motu* to refer. The plaintiff never wanted or suggested that the matter be referred. The defendants bitterly opposed it. I agree with the plaintiff’s Counsel based on *Wallersteiner v Moir* [1974] 3 All E.R. 217 that there was no contumely and abuse of the process of the court.

The relevant delay

The relevant delay cannot be from the date of filing the defence. The plaintiff (and the defendants) was in control until the judge referred the matter. The Chief Justice certified, without Form 3, within seven days. The Registrar, according to Rule 8 (3) of Courts (High Court) (Procedure on the Application and Interpretation of the Constitution) Rules, should have set the case within 14 days of certification. The Registrar set the on 27 January 2011, almost twelve months after certification. The parties did not cause the delay of up to 27 January 2011. The Courts (High Court) (Procedure on the Application and Interpretation of the Constitution) Rules requires the Registrar to act. If the plaintiff had any duty, there was an equal duty on the defendants to enjoin the Registrar for dispatch for their main claim. The period that counts,

therefore, is the one after the Order for Directions. The delay for our consideration, therefore, starts from 24 March 2011, the date the three judges' panel set for hearing. The delay should be computed to the next action which, in this case, was the one by the defendants. This was on 7 December 2011 when the defendants filed their application for dismissal of the constitutional matter for want of prosecution (see the chronology of events presented by the defendants to the counterclaim). There was, therefore, under eight months of delay. After this, the defendants themselves never appeared on the set dates to prosecute their own application to dismiss.

Analysis on the principles since Birkett v James (Trill v Chaser)

The first point reiterates the basic principle that an action may be dismissed if there has been inordinate and inexcusable delay by the plaintiff or the plaintiff's lawyers, and (b) there is a substantial risk to having a fair trial of the issues or likelihood of serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

On the second principle, Lord Justice Neill confirms what Mr. Misha, Senior Counsel, stated; the burden of proof lies on the defendant, including proof of prejudice. Specific evidence or proof is unnecessary:

“In my judgment, in order to determine whether a defendant has suffered the necessary prejudice when it is in the form of impairment of witness' recollections as a result of inordinate or inexcusable post-writ delay, the court must examine with care all the circumstances of the case, including both the affidavits evidence and issues disclosed by the pleadings it is not, in my judgment essential in every case that there should be evidence of particular respects in which potential witnesses' memories have faded ... So long as there are primary facts from which inferences can properly be drawn ... it is not a reversal of the burden of proof that the court at the invitation of the defendants should draw an inference of prejudice from the material put before it” (Shtun v Zalejska [1996] 3 All E.R. 411, Peter Gibson, L.J., (424).

The delay was not inordinate

The third point requires that it be established that there was delay in the sense that the inordinate delay must “exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action and (b) that delay in issuing the writ cannot be classified as ‘inordinate’ provided the writ is issued within the relevant period of limitation.” Lord Diplock defines inordinate delay as “materially longer than the time usually regarded by the profession and courts as an acceptable period’ (page 809). For Lord Neill inordinate delay is delay that ‘must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action’ (page 979).

The Defendants' Counsel cited many cases where the High Court and the Supreme Court determined certain times inordinate. Cases are just instances where, on the peculiar circumstances, the court exercised its discretion one way or the other. On one extreme, is the time which all fair minded people would consider long enough as to be inordinate. On the other extreme is short time which, with everything, is still inordinate delay. In *Headford Bristol*

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

District and Health Authority [1995] P.I.Q.R.P. 180, 28 years and in *Biss v Lambeth, Southwark and Lewisham Health Authority (Teaching)* [1978] 2 All E.R. 125, 11 ½ years were not, alone, considered inordinate delays. On Lord Neill's definition, there was inordinate delay. See, however, the cases *Unyolo J* cited in *Sabadia v Dowsett Engineering* where two years was not considered inordinate despite accepting the definition in *Birkett v James*. Here it is over seven months. I do not think that this is inordinate delay on *Sabadia v Dowsett*.

Delay excusable

On the fourth point, Lord Justice asserts that inordinate delay is on the face of it inexcusable and the plaintiff must proffer a credible excuse.

Mr. Nyirenda, on *Speedys Limited High Court (Commercial Division)* Cause No. 49 of 2007, unreported, contends that the liquidator, not the deponents, must excuse the delay. The judgment of Mtambo J. suggested the contrary. Mr. Msisha is right that the deponent declares at the aegis or for the Liquidator and the company. From the record, the plaintiff has for one reason or another changed and sought legal representation. It appears as if Mr. Msisha just joined recently. At one point, Mr. Kaphale was holding the file as a lien for costs. The company liquidators also changed, making it difficult for the deponent to obtain documents for purposes of the proceedings. On these matters, it is deposed in paragraphs 19 to 23, and the date is significantly 27 October 2012, in the affidavit of Dr. Rajan Lekhraj Mahtani dated 20 May 2013:

“In order to protect the interest of the Shareholders of FBM from further deterioration on 27th October 2012 the shareholders of FBML accepted the resignation of Mr. Kapeta SC and in his place Mr. Pempho Likongwe was appointed Liquidator of Finance Bank (FBML)

(20) Following the appointment of Mr. Likongwe, the lawyers acting for FBML in this matter could not allow him access to the files on this matter until after their fees were paid.

(21) Mr. Likongwe as the Liquidator has been having difficulties in getting the necessary information from Mr. Kapeta SC on the state of the liquidation of FBML.

(22) However, in order not to jeopardize the prospects of FBML succeeding in the various cases before the Courts, including the Constitutional Reference, on account of delays, I arranged for monies to be transferred from Zambia to Malawi to pay the outstanding legal fees.

(23) It was only after the payment was made that the files on the Constitutional Reference were released to Mr. Pempho Likongwe who in turn appointed Messrs Nicholls ^Brookes to assume conduct of this matter on behalf of FBML. `

In *Gilberthorpe v Hopkins v Hawkins*, (1995), *The Times*, April 3, where the case was held up by finances, seeking legal assistance was held a sufficient excuse. In *Birkett v James* Lord Salmon said:

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

“It seems to me in deciding whether the delays ... were inordinate or inexcusable, scant consideration was given to the fact that a very large portion of the time was occupied in obtaining legal aid and also in obtaining the documents in the action from the plaintiff’s former solicitors. Clearly there would have been no point in setting the action down for trial until legal aid and the relevant documents had been available to the plaintiff. I find it impossible to find any reason to justify the finding that the delay due to obtaining legal aid and the relevant documents was either inordinate or inexcusable.”

The fifth point, which is not relevant here because the plaintiff were not the plaintiff in the main action, reiterates the plaintiff’s duty where there is delay up to close to the expiry of the limitation period.

The defendant cannot rely on delay defendant caused

On the sixth point, Lord Justice Neill said, “A defendants cannot rely on a period of delay for which he has himself been responsible.” The defendants’ actions, in not filing the bundle as in the Order of Directions, made it difficult for the plaintiff, who, of course never filed theirs either, to file the affidavits on 14 February 2011.

The defendants’ assumption in all this is that this was the plaintiff’s referral. Both the defendants and the plaintiffs opposed the referral as can be seen from the exchanges on the prehearing conference; the referral was the courts *suo motu*. The proceedings were supposed to be court driven. Not once, not twice, the defendants failed to prosecute their own application for dismissing the action. More importantly, the defendants themselves never appeared before the court on 24 March 2011. There was an overarching duty on the defendants, as plaintiffs in the main action, to ensure dispatch.

The actions of the Commercial Division

On the earlier legal discourse, I do not for once think that the Commercial Division could not handle the matter. If I am mistaken in this regard, I think that, rather than refer the case, the Commercial Division, through the Registrar of that division, could have just constituted the panel of three judges to consider the matter, without requesting for the Chief Justice’s certification for reasons expressed earlier. There was no need to refer the case let alone ‘transfer’ the case to the principal Registry.

Concerning whether the matter should have been referred as a constitutional matter, the Commercial Division was not exacting on the test under section 9 (2) of the Act or removal of the case from the Commercial Division to the Principal Registry under Rule 4.1 of the Practice Direction – Commercial Court under the Civil Procedure Rules of 1998. There is always a possibility that matters concerning the interpretation or application of the Constitution may arise, as in this case, in a matter also in the jurisdiction of the Commercial Division. The principle cannot be that in all such cases the Commercial Division should not handle such cases.

In fact Rule 8 (1) provides that the original court must submit such questions where the original court ‘determines it is necessary’ to have the matter determined by three judges of the High Court. As earlier indicated, breach and violation of constitutional provisions involve mixed

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

fact and law. It is not necessary to have these tried by a panel of three judges. The Commercial Court must deliberatively consider that question and decide try to ensure, in the spirit of that court and the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules, that matters are handled speedily and economically.

In this regard the Commercial Division must be guided by the decision of Donaldson J in *Midland Bank Ltd v Stamp* [1978] 3 All E.R. On the principles in *Midland Bank Ltd v Stamp*, the Commercial Division was to consider whether the matter, because it was a Constitutional matter, the Commercial Division should proceed with it because it was a mixed case. In any case, the Constitutional issues formed a very minor aspect of the pregnant and enormous counterclaim. That would have meant the constitutional matter was only 15% of an otherwise 85% commercial case. It would not then have been necessary to refer. The court could even have considered severance under Order 15, rules 1 and 2 of the repealed Rules of the Supreme Court 1965 or the more robust Part 1, rule 3 (1) (2) (e) and (i) under the Civil Procedure Rules 1998.

Under, Rule 4 (b) of the Courts (High Court) (Procedure on the interpretation of the Constitution) Rules proceedings in this Court commence by Form 3 of the Schedule which requires the Judge frame or provide the constitutional question or issue. The Judge, not Counsel or the parties, must sign Form 3. The Commercial Division never provided framed questions and prejudiced the plaintiff as can be seen from Mr. Kaphale's letter. This court had no jurisdiction without Form 3. The proceedings never commenced. The three judges should have rejected the matter.

Problems at the level of certification

Failing to provide issues put the Chief Justice in difficulty. The Chief Justice must certify where the original court has framed the issues. The Chief Just must only sign where the matter has properly commenced. A matter is properly commenced when there is a Form 3 signed by the Judge. Moreover, the certification was not in Form 1. According to Rule 3 (2), "The certification by the Chief Justice under subrule 1 shall be in Form 1 of the Schedule." I, therefore, disagree with the plaintiff's Counsel that the Chief Justice duly certified.

Difficulties at the Pre-hearing Conference

Absence of Form 3 and an improper Form 1 created problems for the earlier panel of judges as can be seen from the order made on 28 January 2011.

First, this panel ordered the parties to frame the constitutional issue before it. Only the Judge in the original Court can frame and sign for issues the Judge wants this Court to consider.

Counsel for the plaintiff is not right in the Skeleton argument about the affidavits and the procedure followed by the three judges. Counsel and the three judges proceed as if this process was under Rules 4, 5 and 6 of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules where affidavits are necessary. There is no reason and need for affidavits on court referrals under Rule 8. The original court will have framed the question. The court should not therefore have made the orders requiring affidavits.

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

More importantly, since the questions or issues had not been provided, how and on what were the parties going to provide affidavits? The difficulty that the Commercial Division put the earlier panel was in that it ordered the parties to formulate the issues and furnish affidavits, something that should have been done by the original court. As I have stated before, both the plaintiff and defendants never filed the bundles. Both of them could not file the affidavits. Significantly, the plaintiff could not file the affidavit on the due date if the defendants had not served statement of issue.

The earlier panel did not check Rule 8 (4) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) and set orders and trial dates well in excess of the 21 days required. I really doubt, if, on reading of the rule, the panel could by itself, without explanation and an order to that effect, set the case beyond the 21 days.

The Registrar's problems and the Panel's loss of jurisdiction

First, there not being Form 3 before this Courts, the Registrar should not have set the case down under rule 8 (3) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules for a pre-hearing conference within fourteen days of the Chief Justice's certification.

The Registrar, whose duty it was under rule 8 (3) to set the case down, did not do so within the fourteen days of the Chief Justice's certification. The Registrar set the case down for 27 January 2011, almost a year after the Chief Justice's certification. The Registrar's inertia, given the nature and the purpose of the procedure, made the Panel of Judges lose jurisdiction if the Registrar does not comply with rules 6 (6), 7 (4) and 8 (3) of the Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules.

On the seventh point Lord Neill said:

"A defendants cannot rely on a period of delay if at the end of the period he- 'so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendants intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay....."

The defendants have not established that the delay put them to extra cost.

The action is within the Limitation Act.

Point number 8 underscores that dismissal for want of prosecution and to dismiss when the statute of limitation is running would delay the trial and not benefit the defendant or improve the chances of obtaining a fair trial (per Lord Diplock in *Birkett v James* (807) and would only add to costs (per Lord Salmon (813).

There is argument that the decision of Potani J makes the claim by the plaintiff *res judicata*. I have read the decision. It is not a judgment. It is a decision. Judgments are probably decisions. Decisions are probably judgments. Judgments that are *res judicata* are judgments on the merits. The application before Potani J was an application for leave for judicial review. If granted the matter would have been considered on the merits. If it did not, only the remedy,

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

judicial review, was stopped. The applicant was free to pursue other remedies, though also tenable under judicial review, through ordinary proceedings. That decision cannot be *res judicata*.

The plaintiff in the pleadings refers to a consent judgment signed by a judge. It is unclear whether the consent judgment was obtained in 2005 or later. The consent order creates a new contract and is enforceable by action. The parties' action can only be on the consent judgment (*Shiptrade International Company Ltd v Transglobe Produce Exports* [1997] 1 M.L.R 87). While the action dates from 2005, the Limitation Act runs for the consent judgment as from the date of signature. Under the Limitation Act contracts run for six years and judgments for twelve years. If this Court were to dismiss the constitutional matter, the second action on the consent judgment would not be statute barred. This Court's dismissal of the action for want of prosecution, it not being a decision on the merits, would not be caught by the doctrine of *res judicata* and the principles of limitation espoused in *Birkett v Jones* must apply. The plaintiff's action was within the Limitation Act.

On point 9 Lord Justice Neill said:

“Once the limitation period has expired the court is entitled to take account of all the earlier periods of inexcusable delay since the issue of the writ. These periods can include: (a) periods of delay occurring before the expiry of the limitation period which at an earlier stage could not be treated as ‘inordinate’ (See 8 above); (b) periods of delay on which at an earlier stage the defendants could not rely because he was estopped from doing so by inducing the plaintiff to incur further costs in the reasonable belief that the action was going to proceed to trial, but which have been revived by subsequent inordinate and inexcusable delay.

The principle has limited application to the present case. The plaintiff is not the plaintiff in the main action. There was no delay by the defendants in commencing proceedings. There was no delay until the Commercial Division referred the matter to three judges. Moreover, as earlier noted, the plaintiff is not wholly and substantially responsible for the delay; the defendants and the courts carry equal blame.

On point 10, Lord Justice Neill said:

“A defendant cannot rely on any prejudice caused to him by the late issue of a writ. Thus such prejudice is not due to delay which can be characterized as inordinate or inexcusable. Some additional prejudice after the issue of the writ must be shown.”

The principle does not apply in this case.

No prejudice or prospect for an unfair trial

Point 11 underscores the importance of the importance of the defendant to prove prejudice. Lord Diplock in *Birkett v James* said at page 809:

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

“To justify dismissal for want of prosecution some prejudice to the defendants additional to that inevitably flowing from the plaintiff’s tardiness in issuing his writ must shown to have resulted from his subsequent delay (beyond the period allowed by the rules) in proceeding promptly with the successive steps in the action.”

No unfair trial proved

There is a presumption that the statute of limitation presupposes that a fair trial is possible in the times set. The defendants, therefore, must be by some evidence able to prove prejudice. In *Benoit v Hackney Borough Council* February 11, 1991, C.A. Transcript, unreported, the plaintiffs delay meant that the defendants could not collect a witness statement.

Mr. Nyirenda contends in the skeleton argument (not in the affidavits or pleadings) that material witnesses have left the company. It is unclear whether they left the country. If they are here, they can make a statement. If outside the country, they can give evidence on commission or by video link. What Unyolo J. said in *Sabadia v Dowsett Engineering Company* applies to the defendants’ witnesses:

“I sympathise with the first defendant, I really do. However, I am inclined to think that, upon the facts, the first defendant has not tried enough. With regard to the two expatriate witness, it appears to me that these worked for the first defendant for a number of years and I find it difficult to suppose that the two would leave the first defendant’s employ without leaving addresses of their new places of work or residence to which mail, for example, could be forwarded. Further, the first defendant must have records of the permanent home addresses the two witnesses. I think that what I have just said here relating to home addresses applies equally to the three local witnesses. As a result, I am unable to say that the first defendant has been prejudiced. For these reasons, I would allow the appeal and set aside the order of the learned Registrar.

There would equally be prejudice if the plaintiff’s delay causes some detriment to the defendants or the defendants, by the delay, has been put in a position where the defendants cannot meet or it will be very difficult for the defendants to meet the demands or duties arising if the plaintiff were to succeed. In *Anticliffe v Gloucester Health Authority* [1992] 1 W.L.R. 1004, if the plaintiff had acted promptly the defendants would have availed a medical aid scheme. The court held that there was prejudice because the delay made it impossible for the defendants to avail of a medical scheme to cover his costs.

Mr. Nyirenda contends that position that the defendants to the counterclaim will not be paid because the liquidator is now not in funds. In my view, the delay from the referral has not been the plaintiff’s fault alone. The courts have not been exemplary. As between the immediate parties, what the defendants’ complain about applies to the plaintiff. The defendant’s have an equal share of blame. The plaintiffs would not have been to where they are insolvent were it not that the defendants took the necessary steps to reduce the delay.

On Point 12 Lord Justice Neill said:

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

“The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eye witness or of a witness who will testify to the words used when an oral representation was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents. A defendant may also suffer some prejudice from prolonged delay in the action which involves imputations against his reputation, though this factor by itself is unlikely to provide a ground for striking out.”

In *National Insurance Guarantee Corp Ltd v Robert Bradford & Co. Ltd*, (1970) 114 S.J. 436, C.A., where the case turned on documentary evidence, the court held that the trial was going to be fair and there was no prejudice to the defendants. The issues in the counterclaim, namely, the constitutional issues, do not involve any evidence involving memory. The issues, anyway, as the pleadings (defence) show, were subsumed in the consent judgment.

On point 13, Lord Neill said

“When considering the question of prejudice and, if it is raised, the question whether there is a substantial risk that it will not be possible to have a fair trial of the issues in the action, the court will look at all the circumstances. It will look at the periods of inordinate and inexcusable delay for which the plaintiff or his advisers are responsible and will then seek to answer the questions: has this delay caused or is it likely to cause serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action? As Slade LJ stressed in Rath’s case [1991] 3 All ER 679 at 688, [1991] 1 WLR 399 at 410:

‘... a casual link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.’”

The inordinate and inexcusable delay is the one from 24 March to 7 December 2012. The prejudice suggested by Mr. Nyirenda is that the company is insolvent and will not be able to pay him. Did the delay from 24 March 7 December cause the insolvency? No. Mr. Nyirenda shoots himself in the foot for in his affidavit he urges vehemently that the Liquidator has not been up to his duties. According to the Companies Act, the winding up should have been over in twelve months since. This case has been there since 2008. It was only referred in February 2010. This was like 6 years on before the referral. I do not think that the delay in this referral caused the insolvency and with it, the prejudice suggested by Counsel.

On point 14, which deals with appeals, does not concern us.

It is very important in determining whether to dismiss this action for want of prosecution to recall that the three judges had set down the case for 24 March 2011. Consequently, examination of what happened and should have happened on that day against the order for directions on the prehearing conference will show who should take responsibility for the delay that engulfed this matter. Mr. Nyirenda wants us to believe that it was all the fault of the respondent and, to that effect, he has filed a notice of non-compliance to that effect. It is contended from both sides that they understood the order of directions differently.

The Order of Directions was not followed by the plaintiff and defendant

Under item 1 of the Order of Directions, both parties were supposed to have within seven days (of the order) filed a bound copy of statement of issue. The defendants do not say that the bundle was filed; neither does the plaintiff. There is no suggestion here that one should file the bundle because of or after the other. They are to file the bundle in and at the same time.

Under items 2 and 3 the Order of Direction the plaintiff and the defendants, respectively were supposed to serve affidavits on 28 February 2011 and 7 March 2011. The plaintiff did not serve the affidavits. The defendants could not, therefore serve affidavits. That, my Lords is irrelevant if the defendants did not file statement of issues. Although, the dates are scattered, and I understand that the parties understood it differently, the defendants never filed their affidavit either because they never filed the bundle of issues in the first place.

Both parties were supposed to serve and file their skeletal arguments by 18 March 2011. None did. The Order of Directions set the case for 24 March. Up to this point, all this shows is that that both parties, by 24 March 2011, were guilty of non-compliance. It cannot lie in the mouth of the defendants to point the omission of the plaintiff and ignore similar neglect.

On 24 March 2011, the Court should have called the case. It did not. My Lords, the defendants has not stated that he appeared before the Court. The record of the Court does not show that the case was called. It does not show that the defendants appeared. The defendant, much like the plaintiff, was guilty of non-attendance.

If the defendants had appeared before the three judges, they would have sought two things. First, the defendants would have asked the three Judges to extend time for service of the bundle of issues. Secondly, the defendants could have applied for dismissal for want of prosecution. The second application would have been refused since the defendants did not comply with step 1 in the Order for Directions. I do not think the defendants are in a better position now.

If the three judges had called for the file, since both parties were absent, they would have dismissed the whole case for non attendance or want of prosecution, probably with liberty to restore. I say probably because, given the strict schedules under the Courts (High Court) (Procedure on the Interpretation of the Constitution) Rules, the three Judges would have considered the matter dilatory. In any case, a couple of missteps, by the three judges, earlier on would have justified dismissing the action. First, in the absence of Form 3, there were no issues for the three Judges to decide a Constitutional question, if any. The three judges could have rejected the case or remit the matter back to the Commercial Division to remedy the error. Secondly, as stated earlier, the three Judges proceeded on the matter as if the matter was not a referral from the courts. There is no need for facts or evidence when a court refers a case to this Court.

The plaintiff in his skeleton argument has raised the constitutional issues. I do not think it avails much. According to the Courts (High Court) (Procedure on the Interpretation of the Constitution) Rules the issues should have been issued by the Judge. Introducing them here would imply that this Court be involved in the contestation about whether they are constitutional issues. That is not a function of the panel of three judges. That is the function of the original court.

CONCLUSION

On the principles governing dismissal for want of prosecution, there being no contumely, I find that there was no inordinate delay. Even if there was delay it is excused because (i) the plaintiff was seeking legal representation and the file was held over as a lien for costs (ii) changes, indolence and non-cooperation from the liquidator made it difficult for the plaintiff to find information for deposing to the issues; (b) the delay was only tangentially caused by the plaintiff in that (i) the Commercial Division should not have referred the matter even if it raised constitutional issues, the Commercial Division never commenced proceedings by failing to file Form 3 and framing the issues for the Chief Justices certification and this Court's consideration, the Chief Justice should not have certified the case in the absence of Form 3 and the three judges had no jurisdiction to entertain the matter; the defendant did not file the issues to enable the plaintiff to file affidavits. The defendant has not established prejudice either in showing that there would be unfairness in the trial because witnesses will lose memory or prejudice in that the defendant would not be able to meet the obligations should the plaintiff succeed. Since there is a consent judgment signed by a judge and, therefore, the parties' actions can only be on the judgment, the cause of action is within the limitation period and dismissing the action would be costly and dilatory for the parties and the courts.

On the other hand, the three judges have never had jurisdiction because the Commercial Division never commenced referral proceedings in that the Judge did not lodge Form 3. The Chief Justices' certification could not have been had without Form 3, since really, no proceedings were commenced. The Chief Justice's certification is not in Form 1 although it is saved by section 5 of the General Interpretation Act. If the three judges had jurisdiction, according to the spirit of Courts (High Court) (Procedure on the Interpretation and Application of the Constitution) Rules, the jurisdiction was lost after the Registrar failed to set the case within seven days of the Chief Justice's certifications (setting it eleven month later. If we did not lose it then, we lost it later.

The action is not before us. It was not transferred. It was stayed in the court below. We do not have power to dismiss the constitutional matters in the defendant's claims. We certainly have power to dismiss the referral to this court, which we must and do for want of jurisdiction. The matter was never before us.

The record should be sent to the original court as soon as possible. The Commercial Division has jurisdiction to resolve the constitutional issues in the case of mixed jurisdiction. If

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

the defendant still wants to press constitutional issues to the three judges, the judge of the Commercial Division should consider severance under Order 15, rules 1 and 2 of the Rules of the Supreme Court 1965. The powers of the Court are more robust in Rule 3 (1) (2) (e) and (i) under the Civil Procedure Rules 1998, the applicable rules in this Court.

Each party bears its own costs.

Kachale, J

INTRODUCTION

This is an application by the Reserve Bank of Malawi and the Attorney General (The Applicants) to dismiss the Constitutional Referral for want of prosecution on the part of Finance Bank of Malawi (In Voluntary Liquidation) (The Respondent). Besides filing lengthy affidavits both parties filed elaborate skeletal arguments in support of their respective positions before this court. For present purposes it will not be necessary to recite all those arguments; suffice to say that the resourcefulness of counsel on both sides of the case has been much appreciated in articulating the relevant law. In essence the Applicant contends that by failing to file its affidavit in support of the Constitutional Referral in time as per the directions of the court dated 27th January 2011 the Respondent has breached Rule 8(4) of the Courts (High Court) (Procedure on Interpretation or Application of the Constitution) Rules which requires the High Court to hear the Constitutional matter within 21 days from the date of the pre-hearing conference. The consequence of such default, it has been proposed, is to facilitate the continued breach of the Companies Act by the Respondent (in that the voluntary liquidation has been sustained beyond the statutory twelve months) and it further compromises the Applicants' claim against the Respondent. In other words, the Applicants seem to suggest that the Respondent's default has created a situation whereby the original commercial action can no longer be prosecuted with the requisite speed to yield an effective and prompt legal remedy. For the Respondents it has been conceded that there has been delay in litigating the Constitutional Referral but it has been argued in defence that such delay was neither intentional nor contumelious and in any event it has not been shown that proceeding with the Constitutional Referral at this stage would occasion any prejudice or injustice on the Applicants or that a fair trial would not be possible in all the circumstances of the case; as such the Respondent argued that the present application should be disallowed, at worst they should simply be condemned to bear any costs occasioned by the delay.

Brief chronological context

The historical context within which the present application emanates, bears recounting in some detail for reasons that will become clear in the rest of this decision. On 12th December 2008 The Reserve Bank of Malawi commenced the main action claiming the sum of K34, 986,401.88 which is later amended to MK44, 874,774.88 with interest thereon. On 27th January 2009 Finance Bank Malawi Limited (In Liquidation) filed its defence and counter-claim and on 23rd March 2009 the Attorney General was added a party to the proceedings. On 6th August 2009, the Attorney General and the Reserve Bank of Malawi applied to strike out the counter-claim on account of abuse of court process since the issues raised in the defence and counter-claim were *res judicata* as the High Court (Justice Potani) in Miscellaneous Civil Cause No. 127 of 2005 had already made determinations on the same. The High Court (Commercial Division) dismissed the application and reserved the reasons for the decision on 26th August 2009. On 5th

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

November 2009 Orders to file amended defence and statement of claim was made and the amended documents were dully filed. Thereafter on 4th February 2010 the trial court referred the matter to the Chief Justice for certification as a constitutional matter. The certificate was issued on 17th February 2010. On 9th April 2010 the Registrar issued a notice setting down the pre-hearing conference on 19th April 2010; however the initial constitutional court panel proposed recused itself from the matter (basically because one of the judges had actually made the constitutional referral and another judge had made a decision which was being invoked by RBM in response to some of the issues for constitutional adjudication). Eventually on 27 January 2011 The High Court comprising a reconstituted constitutional panel made directions on the hearing of the constitutional matter, which (among others) required the FBM (IVL) to file its affidavit in support of the constitutional referral on or before 14th February 2011. The hearing of the referral was set for 24th March 2011. On 26th May 2011 RBM filed a certificate of non-compliance with respect to the Order for directions made on the 27th January, 2011 and on 7th December 2011 an application to dismiss the matter for want of prosecution was filed. The same was scheduled for hearing on 16th February 2012 but that appointment failed due to industrial action amongst court staff (which ended around March 2011). Thereafter even by the time the Applicant filed Notices of Adjournment on 15th March 2013 as well as on 4th April 2013 FBM (IVL) did not file any affidavit or any other process to explain their subsisting default. Instead on 12th April 2013 the hearing of this same application to dismiss mater for want of prosecution was adjourned on account of the fact that the Respondent had appointed Messrs. Nichols & Brookes to take over further conduct of the matter (that information was disclosed to the court by the outgoing lawyers). The case was adjourned to the 2nd day of May, 2013, on which occasion the matter was adjourned sine die by Judges Mbvundula and Dr. Mtambo following the death of Justice J Manyungwa; however FBM (IVL) was absent on the last two court appointments.

The present application has been heard on 24th May 2013. On 21st May FBM (IVL) filed an affidavit purported to be in support of the constitutional referral.

Reasoned determination of the application It has been proposed by counsel for the Applicant that the present proceedings must be distinguished from any case authorities that were decided based on the ordinary rules of procedure obtaining under the applicable English Rules of the Supreme Court (or otherwise). That proposition is premised upon the argument that this being a constitutional matter it is governed strictly by the Courts (High Court) (Procedure on Interpretation or Application of the Constitution) Rules (hereinafter the Constitutional Interpretation and Application Rules) which under Rule 8 (4) prescribes a hearing within 21 days post the scheduling conference. Accordingly the dictum of Tambala, JA in *Dr. Bakili Muluzi-v-The Director of the ACB*, MSCA Civil Appeal No. 17 of 2005 (unreported) to the effect that the courts are mandated under section 9 of the Constitution to interpret, protect and enforce all laws has been cited to invite this court to so enforce Rule 8(4) and so dismiss the present application for breaching the 21 days period of hearing such referrals.

However for the Respondent it has been argued that according to settled precedent ‘in deciding whether or not it is proper to dismiss an action for want of prosecution, the court asks itself a number of questions. First, has there been inordinate delay? Secondly, is the delay nevertheless excusable? And thirdly, has the inordinate delay in consequence been prejudicial to the other party?’ Per Unyolo J (as he then was) in *Sabadia-v-Dowsett Engineering Ltd* 11 MLR 417, at 420. In that decision the learned Justice Unyolo with his characteristic lucidity discusses

the various aspects of the applicable law on the subject and even offers a definition of the term ‘inordinate and inexcusable delay’. Thus ‘giving the words their ordinary, natural meaning, there can be no doubt that the kind of delay envisaged is both excessive and without excuse’ (at p 423). According to his analysis of the facts in the *Sabadia Case* (supra) Justice Unyolo concluded that the delay could not fit the afore-cited definition. In the first place, there was evidence that the defaulting party had been actively pursuing the action during the alleged delay; besides even the applicant had contributed to the delay by (among others) applying for further and better particulars as well as engaging in out of court negotiations to try and settle the matter. The court was quick to explain that under the rules such applications for further particulars were legitimate but it nevertheless observed that they contributed to the slow pace of prosecuting the action in the end. Indeed some of the adjournments were granted with consent of the party applying to dismiss the action. Judge Unyolo further considered that the fact of two of the applicant’s witnesses having left the jurisdiction did not create such prejudice as to warrant a dismissal of the action. In the opinion of the court, with adequate effort the applicant could procure the attendance of those witnesses to ensure a fair trial. On the whole therefore the two year lapse was deemed as not being so inordinate as to warrant a grant of the application to dismiss for want of prosecution.

In our case the actual application to dismiss for want of prosecution was lodged on 7th December 2011. At that time ten months had lapsed since the directions of 27th January 2011. That default has actually been conceded by the Respondent. The explanation offered suggests that it was the either the illness of the deponent to the affidavit in support or indeed the absence from the jurisdiction of its former principal officers that rendered it impossible for FBM (IVL) to comply with the directions of 27th January 2011. However, there are two points to be made in light of the period of default. In the first place, as has been pointed out by the Applicant, there is a deliberate legislative intent for speedy disposition of constitutional referrals reflected within the rules by the strict time frames for scheduling and hearing as well as delivering decisions of this court when it is empanelled as a constitutional court. See for example Rules 8(3) and (4) of the Constitutional Interpretation and Application Rules which stipulate 14 days for the Registrar to set down a pre-hearing conference from date of certification and thereafter a hearing within 21 days. In my considered opinion therefore the ten months default must be analyzed within such clear expectations for speed in order to determine whether it amounts to inordinate delay or not. Quite clearly, failure to take action for close to ten months (instead of the directed 14 days) coupled with the continued neglect to remedy the situation even after the certificate of non-compliance had been filed on 26th May 2011 RBM aggravates the default by FBM (IVL).

Indeed the present situation would further be removed from the analysis of the court in *Sabadia’s case* (supra) because of the inactivity on the part of the defaulting party (FBM (IVL)) until quite literally this year. In other words one of the reasons the court was able to excuse the two year delay in that earlier decision was, among other factors, the clear evidence that during the alleged default the respondent had in fact taken several active steps to prosecute the action. Above and beyond that the applicant had in fact contributed to slowing down the pace of the litigation in *Sabadia’s case* (supra) which factor further militated against a grant of the application to dismiss for want of prosecution. Thus I find the delay to have been excessive especially in light of the spirit and import of the Constitutional Interpretation and Application Rules which clearly stipulate speedy disposition of referrals.

The next question then becomes is that delay nevertheless excusable? Again the wisdom of erudite Justice Unyolo (as he then was) discussed earlier in this decision becomes apposite: in his consideration of the assertion that the applicant would suffer prejudice should the trial be allowed to proceed because his two key witnesses had left the jurisdiction the judge retorted that with adequate effort such witnesses could have been easily traced and produced at trial. Correspondingly, it is my view that the Respondent cannot simply allege the absence of the proposed witnesses (former principal officers) as the basis for its default. There is no evidence that much if any effort was expended to seek to trace those witnesses to adduce the necessary evidence. In any case no attempt was made to inform the court of such effort (even in the face of the certificate of non-compliance of May 2011).

There is an affidavit of Mr. Mpaka for the Respondent alleging that in fact an application was sought to be made returnable on the same date appointed for the very first hearing of the present application; the court must be quick to observe that such an application (assuming it was ever done) does not in any way excuse the clear lack of initiative displayed within the initial ten months of default as concluded earlier. It has further been suggested that the delay was occasioned by negotiations between the parties. First that fact has been disputed by counsel for the Applicants. In any event the case of *Mohanlal-v-City of Blantyre* [1993] 16 (1) MLR 339 is authority for the legal position that negotiations or discussions do not stop the running of time. On the other hand such a suggestion would fly in the face of the assertion of the Respondent that the default was occasioned by both the sickness as well as absence from the jurisdiction of its principal officers. How come they would have been unavailable for the litigation and yet able to conduct negotiations at the same time? It is my conclusion that this patent contradiction only goes to diminish the probative value of any purported explanation for the default proffered by the Respondent. According to the decision of the Malawi Supreme Court of Appeal in *Chiume-v-Attorney General* [2000-2001] MLR 102 if substantial delay occurs without any explanation the court is entitled to exercise its discretion in refusing an application to extend time. Such an approach sounds sufficiently prudent to be invoked in this application too in so far as there has been an inordinate delay which I find lacks any justifiable basis.

On the foregoing conclusions I would be entitled to grant the application to dismiss for want of prosecution. In the alternative it is worth observing that in fact the protracted nature of the vconstitutional referral has been occasioned principally by the antecedent default within the first ten months. Without any dispute the law has contemplated a speedy resolution of commercial matters as stipulated in the applicable rules of procedure (vide O. 1 r.2 (2) (d) of the High Court (Commercial Division) Rules 2007). The whole delay has arisen from the amended defence and counter-claim which the Respondent lodged (of course with the leave of the trial court). However when the prescribed process for bringing resolution to the pleaded matters was initiated the Respondent chose to go to sleep. Even after the Applicant engaged the corresponding process to dismiss that referral the Respondent chose to continue to so sleep. This late in the process it seems very prejudicial indeed to the legally recognized right of the Applicant to a speedy disposition of commercial matters to condone the Respondent's deleterious tardiness. Even on that limb therefore I would grant the present application.

CONCLUSION AND ORDERS

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

On the foregoing premises it is my considered conclusion that the application has been made out and must accordingly be upheld. The Applicant raised the issue whether the Respondent acted in order by filing the outstanding affidavit in support of the referral without first seeking extension of time from the court. This court having disallowed the explanations offered by the Respondent with regard to their default to comply with the directions of 27th January 2011 finds it moot to reopen that issue. In other words, the Respondent's filing of the affidavit in support on 21st May 2013 is unprocedural and cannot remedy the default at this stage. Let the parties return to the commercial division of the High Court to litigate the commercial action.

The Respondent is condemned in costs for having conceded to occasioning the antecedent delay.

Sikwese J.

BACKGROUND

This was an application to dismiss action for want of prosecution. The action was brought by way of referral by another court under Rule 8 (1) of the Courts (High Court)(Procedure on the Interpretation or Application of the Constitution) Rules. The original action is registered under *Commercial Case Number 202 of 2008* where the Reserve Bank of Malawi is claiming **MK44 874 774-88** with interest from the Finance Bank of Malawi (in Voluntary Liquidation). When the original action came up for defence, the defendant filed and served a counter-claim. The counter claim raised some issues concerning economic rights. The Judge in the original court felt that the counter claim was a matter suitable for the Constitutional Court. He therefore invoked Rule 8 as indicated above and referred the matter for certification. On 17 February 2010, the Hon. Chief Justice duly certified the matter as raising constitutional issues to be decided by the High Court sitting as a Constitutional Court.

At this point I need to caution myself that the matter before this court was not to consider the propriety of the process of referral or certification but rather whether the action ought to be dismissed for want of prosecution. The failure to prosecute arose from failure by the Finance Bank of Malawi Ltd (hereinafter referred to as Respondent) to comply with an order for directions.

On 27 January 2011 this court made directions regarding the conduct of the matter. The directions were with regard to specific dates within which the Respondent and the Reserve Bank of Malawi (hereinafter referred to as Applicant) must file and serve their respective affidavits for hearing of the matter. The contentious parts of the order for directions were framed as follows:

1. That the parties shall file a bound copy of statement of issues herein within 7 days hereof
2. That the plaintiff by counter claim shall file and serve its affidavits in relation to the constitutional case on or before 14 February 2011
3. That the defendants by counter claim shall file and serve their affidavits in relation to the constitutional case on or before 28 February 2011
4. That the plaintiff by counter claim if need shall file and serve any affidavits in reply to the affidavits by the defendants by counter claim on or before 7 March 2011

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

None of the parties complied with the directions until on 26 May 2011 when the Applicant filed a certificate of non compliance. This was because it was the understating of the Applicant that the directions required the Respondent to move the court first with its documents before the Applicant could respond. It was not possible for the Applicant to make a case in its defence or in response in the absence of a case being made out against them. It was the view of the Applicant that the Respondent was obliged to file and serve their affidavits before the Applicant could take any step. The Respondent were of a different view. They argued that the Applicant could have filed and served their documents even in the absence of any affidavits from the Respondent. Hence both parties did not comply with directions and the Applicant should not be allowed to dismiss action for want of prosecution.

I do not appreciate the reasoning of the Respondent regarding conduct of the matter in view of the directions. The practice of commencing proceedings is that the claimant must put forward his case first so that the defendant can decide whether or not they should defend or concede. In commencing proceedings in the constitutional court in general, it is a requirement under Rule 5 (1) (b) of the Courts (High Court)(Procedure on the Interpretation or Application of the Constitution) Rules that the claimant shall provide sufficient particulars of the relief sought. Thereafter it is expected that the defendant who wishes to defend the whole or any part of the claim shall file an affidavit in opposition containing a concise statement of the defence. The sequence of events in the order for directions of January 2011 takes that form.

I therefore agree with the Applicant that their compliance with the directions of the court depended on them being presented with a concise statement of issues from which they could respond. As it will be shown later in this judgment, the non compliance with these directions, also affected the rules regarding time limits in both the original action and the constitutional matter. By the conduct of the Respondent the Rules were not complied with.

Consequently, on 7 December 2011 the Applicant filed an application to dismiss action for want of prosecution. The application was scheduled for hearing on 16 February 2012. However the hearing did not take place because the court staff were on strike. Thereafter several adjournments took place, for instance there was an adjournment on 4 April 2013, 12 April 2013 and 5 May 2013.

It should be noted that by then the Respondent had still not complied with the directions made in January 2011 to file their affidavits. It was also submitted and conceded that during this time the Respondent did not offer any explanation to the court for the delay. Neither did they file an application to extend time within which to comply with the court order.

On the application to extend time, it was contended that the Respondent had made that attempt but that the late Honourable Justice *Manyungwa* who was leading the panel of the Constitutional Court handling the matter then foiled their attempt to have the summons filed. My observation is that no such application was ever made. If it was made it would have been on the court record among all other documents. Any document purported to have been brought to the attention of a Judge in his chambers, outside court proceedings and in the absence of the other party or a court official to witness the process cannot be relied upon as forming part of the court record.

The concern of the Applicant was that failure to prosecute the constitutional matter affected the right of the Applicant to access courts for an effective relief against the Respondent. They averred that by law constitutional matters have to be disposed of within specific time limits. Under Rule 8(2) of the Courts (High Court)(Procedure on the Interpretation or Application of the Constitution) Rules the constitutional matter had stayed the commercial matter. The Applicant therefore argued that the conduct of the Respondent in delaying the constitutional matter was prejudicial and went against laid down rules on time limits both in the Commercial Court division and the Constitutional Court division, see Rule 8(4).

ISSUES

The Court was called upon to decide whether the inordinate delay in prosecuting the matter was excusable and whether the delay had caused the Applicant any prejudice?

Counsel on both sides cited several authorities on the above issues. It is imperative to remember the primary duty of the court is to ensure efficient case management and the public interest to promote expeditious dispatch of litigation. This consideration must be balanced with the requirement that ‘a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default’. (See, generally, Supreme Court Practice, 1999).

In terms of case authorities special emphasis was placed on the case of *Birkett v James* [1978] AC 297, where the court held that the power to dismiss action should be exercised only where the court is satisfied either:

- (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or
- (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and
(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

Several authorities were cited to buttress the above factors in favour of the Respondent. In arriving at my decision I considered all the above factors as my analysis below will show.

INORDINATE DELAY

The first factor to consider was the delay. According to the summary of chronology of events, the Respondent did not file any affidavits for a period of close to 12 months from the time the order for directions was issued. This delay was inordinate and this fact was conceded by the Respondent. Therefore there was no issue for the court’s determination. In an adversarial system of justice as Malawi ‘the trial Judge’s first task is to discover the issues in dispute between the parties and he must proceed to determine those issues’, *Saukila v National Insurance Company* [1999] MLR 362 at 366.

REASONS FOR DELAY

Secondly, the Court must consider whether there was a valid reason for the delay. A number excuses were raised by the Respondent including the following: Negotiations, ill health, Liquidator, legal counsel, former members of management, industrial action, professional fees, Judge (late Hon. Justice *Manyungwa*) and communication breakdown etc etc.

Thirdly, the Respondent asked the court to find these reasons good enough to compel it to rule in favour of not dismissing action for want of prosecution. I was not convinced with the reasons especially in light of the fact that none of these occurrences were brought to the attention of the court or the other party if only to set the record straight. Further, as stated earlier in this judgment, the Respondent did not at any point apply to court to seek an extension of time citing these reasons or any of the reasons. It was also noted that most of the excuses were mere allegations. No evidence was adduced to substantiate them. For instance, there was no proof of the Chairman's ill health other than a mere assertion that he was unwell. This excuse was also in contradiction with another excuse that the delay was caused by out of court negotiations between the parties. How was the Chairman able to engage in these negotiations in his incapacitated state? Or indeed if the Chairman could negotiate in an incapacitated state surely he must have been following progress of the matter in court and should have dropped a word to the court that he was unwell and therefore needed an extension? The same question goes to the assertions that there was communication breakdown among concerned parties on the Respondent's side, that there were issues concerning the Liquidator, legal counsel and non payment of legal fees.

The contradictions and inconsistencies have an adverse effect on the Respondent's credibility on these contentions, see generally, *Mwabukusi (Administrator of the Estate of Amon Mwabukusi (deceased) v Kamba* [Civil Cause Number 531 of 2010 (unreported)] HC. If we exclude the period during which court staff were on strike (January to March 2012), the delay would still be inexcusable because the strike took place one year after the order. While issues of former staff, lawyers and Liquidator were matters under the control of the Respondent which should have been brought to the attention of the court to seek an extension of time as required by the Rules of Procedure. For the above reasons I find that the reasons offered by the Respondent for the delay are inexcusable.

INTENTIONAL AND CONTUMELIOUS

Even after finding that the delay was inexcusable the Respondent still wants the Court to find that the failure to comply with the court order and rules was not intentional or contumelious. In making their submissions, Counsel for the Respondent dwelt on the issue of whether there was a peremptory order of the court to justify dismissing the action? Going back to *Birkett supra*, where it says: 'that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court'. My understanding of this quote is that the 'disobedience of a peremptory order' is just an example of when a default can be viewed as intentional or contumelious. There could be other instances where the default could be intentional and contumelious without necessarily arising out of a disobedience of a peremptory order of the court.

The Respondent did not consider whether their non compliance was restricted to the order of the Court of January 2011? My view is that the delay was not confined to the order of the court. It extended to Rules of Procedure regarding conduct of matters of constitutional nature. In any case, it should really not be left to litigants to decide to obey only those orders that are

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

peremptory in nature. The court has ‘a very substantial interest in seeing that its orders are upheld and complied with. It is one way of upholding the reputation of civil justice in general.’ (See generally, Supreme Court Practice, 1999).

PREJUDICE

The Respondent averred that the delay has not caused any prejudice on the Applicant’s case. They argued that if anything, any inconvenience caused by the delay can be adequately compensated by an award of costs. On the other hand, the Applicant argued that the delay has a prejudicial effect on them both as plaintiffs in the original action and as defendants in the constitutional matter.

The general rule is that a party to a case should not be denied adjudication of his/her claim on its merits because of procedural default unless default causes prejudice to his opponent for which an award of costs cannot compensate, see *ESCOM V Ngulinga* [Civil Appeal Number 27/2011 (unreported)] SCA, per *Ansah*, SC. JA.

In his summary Counsel for the Applicant said the following in relation to the prejudice suffered and which it continues to suffer because of the Respondent’s default:

3.13: “As liquidation of the plaintiff by counter-claim is about to be concluded and as conceded by *Dr Mahtani* in his affidavit in opposition that the Liquidator had no money to pay its lawyers, delay has prejudiced the plaintiff by original action as; if it succeeds in its commercial case against the plaintiff, there would be no money to pay the plaintiff by original action. The plaintiff by original action is unable to prosecute the commercial matter because of the constitutional matter. In addition, the plaintiff by original action’s right to have an expeditious and economic disposal of both the constitutional matter and commercial matter have been violated. The memories of witnesses may also have faltered and some of its crucial witnesses, namely *Dr Wilson Banda* and others who were employees of the Reserve Bank of Malawi at the time of revocation of the licence are not available in addition to the fact that the delay has caused deterioration of witnesses’ recollections. There is also no prospect of fair trial because of the passage of time. *Mr. Neil Nyirongo* who was working for Reserve Bank of Malawi and appointed as Chief Executive of Finance Bank Malawi Limited under the consent order is also no longer working for the Reserve Bank of Malawi. There is also strain and anxiety on the defendant’s caused by the constitutional referral. The plaintiff by original action has also suffered financial prejudice in that it is unable to get what it claimed under the commercial case”.

I agree with Counsel for the Applicant that prejudice has been and continues to be occasioned on the rights of the Applicant. Rules are made to be obeyed. As a matter of fact the Supreme Court has held that even without showing prejudice, in a proper case, a matter may be dismissed for failure to comply with rules, see, *Attorney General V Chiume* [1996] MLR 132 per *Banda CJ*.

ABUSE OF COURT PROCESS

In relation to abuse of court process, Counsel for the Applicant made the following assertions in his final submissions which assertions were neither responded to nor disputed by the Respondent:

Reserve Bank of Malawi and Finance Bank of Malawi Ltd (In Voluntary Liquidation)
(By Original Action) and Finance Bank Malawi Ltd (In Voluntary Liquidation) and
The Attorney General (By Counterclaim)

Mwaungulu J
Kachale J
Sikwese J

3.14: “We also submit that the plaintiff is here using the constitutional referral to delay the commercial matter lodged by the plaintiff by original action until the company is dissolved and we submit that this amounts to an abuse of court process”.

It is true that the conduct of the Respondent was tantamount to abuse of court process. In terms of the Rules, the court was supposed to hear the referral within 21 days after pre hearing conference, Rule 8(4). In the absence of affidavits from the Respondent the Court could obviously not set down the matter for hearing as required. An option available to Court at that point would have been to dismiss the action for want of prosecution. The lack of movement in the constitutional matter was capitalised upon by the Respondent because they are assumed to know that under Rule 8(2): ‘Where the original court has made a referral under subrule (1), the proceedings in the original court shall be stayed pending a decision of the Court’. The Respondent abused court process by knowingly and intentionally allowing the delay to continue which delay also affected the original action economically and procedurally. I so find.

WHETHER COSTS COULD BE ADEQUATE COMPENSATION FOR THE DELAY

The Respondent urged the Court that instead of dismissing the action for want of prosecution, the Applicant should just be compensated with costs. I find that the plea has come too late. This would have been a natural course of action to take if the Court had found that the delay was caused by the Respondent, which it has. I find that costs alone would not cure the damage caused by the delay.

ORDER

I grant the application sought by the Reserve Bank of Malawi to dismiss the constitutional referral for want of prosecution. I further make an order that the commercial case in the commercial division of the High Court should proceed.
The Respondents are condemned to bear costs of this action.

Made this 12th Day of June 2013

D.F Mwaungulu
JUDGE

C.J. Kachale
JUDGE

R. Sikwese
JUDGE