

REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
MISC CIVIL CAUSE NO. 86 OF 2015

THE STATE

AND

THE STATE PRESIDENT.....1ST
RESPONDENT

THE ATTORNEY GENERAL.....2ND
RESPONDENT

EXPARTE

ENOCK CHIHANA AND 3
OTHERS.....APPLICANTS

Coram : Honorable Mr. Justice D.T.K. Madise

Mr. W. Mwafulirwa Counsel for the Applicants

Hon K. Kaphale AG, Ms. A. Itimu Counsel for the Respondents

Mr. A.M. Mhone Official Interpreter

Mr. C.B. Mutinti Court Reporter

Madise, J

JUDGMENT

1.0 Introduction

1.1 On 27 November 2015 four members of Parliament, to wit, Hon Enock Chihana, Hon Harry Mkandawire, Hon Peter Chakwantha and Hon Kamlepo Kalua hereinafter referred to as the Applicants sought leave exparte to move for judicial review under O. 53 R 3 RSC against the decision of the State President Prof. Arthur Peter Mutharika hereinafter referred to as the 1st Respondent, to appoint Mrs. Fiona Kalemba as Clerk of Parliament (CoP) apparently against the recommendation of the Parliamentary Service Commission (PSC) which had submitted the name of Hon Justice M.C.C. Mkandawire. Hon Justice M.C.C. Mkandawire had emerged the most successful candidate at the interviews that were conducted by the PSC on 5 and 6 October 2015.

1.2 After leave was granted the Applicants filed an exparte summons for an interlocutory order of injunction stopping the Respondents by themselves, agents, employees or any person howsoever from appointing or swearing in Mrs. F. Kalemba as Clerk of Parliament. I granted the interim relief on the same.

1.3 Trial was scheduled for 22 December 2015. However on 21 December 2015 Mr. Wesley Mwafulirwa Counsel for the Applicants filed an application for leave to remove and add a party under O.15 r4 RSC. I allowed the application and Hon Harry Mkandawire was removed as a party to the proceedings and Hon Dzoole Mwale replaced him instead. The matter was heard on 22 December 2015 and I now proceed to give my reasoned judgment on the issues raised by both parties.

2.0 The Facts

2.1 The Applicants filed four affidavits in support of the motion for Judicial Review. In opposition the Respondents also filed four affidavits challenging what was contained in the affidavits in support. As I stated above, on 5 and 6 October 2015 the PSC conducted interviews for the vacant post of Clerk of Parliament. Eight candidates were shortlisted namely:

- 1) Mr. Arthur Nanthulu
- 2) Mr. Jabber Alide
- 3) Hon Justice M.C.C. Mkandawire
- 4) Mr. David Bandawe
- 5) Mrs. Grace Malera
- 6) Lt. Col. Prof. Dan Kuwali
- 7) Mr. Ernest Makawa
- 8) Mrs. Fiona Kalemba

2.2 The composition of the interviewing board was as follows:

- 1) Right Hon Mr. Richard Msowoya, MP, Speaker – Chairperson
- 2) Hon V.G. Dzoole Mwale, MP – Commissioner
- 3) Hon Ralph Jooma, MP – Commissioner
- 4) Hon Aaron Sangala, MP – Commissioner
- 5) Hon Abubakar M'baya, MP – Commissioner
- 6) Mr. Patrick Matanda Ministry of Fianance – Representative
- 7) His Lordship Justice Anthony Kamanga, SC Judiciary – Independent
- 8) Mr. B.G. Chilabade Department of Human Resource Management and Development – Secretary.

2.3 At their meeting of 6 October 2015 the PSC noted that as per section 16(1) Parliamentary Service Act of 1998, there was need to submit the name of the successful candidate to the President for appointment.

There shall be appointed as an officer of the National Assembly a Clerk of the National Assemblywho shall be appointed by the President on the recommendation of the committee.

3.0 The Disagreement

3.1 As instructed by the PSC the Hon. Speaker of Parliament Rt. Hon R. Msowoya issued a memo to the State President His Excellency Prof. Arthur Mutharika dated 8 October 2015 in which he briefed the President on the resolution of the PSC of 6 October 2015 (Resolution No. PSC/11/45/43).

3.2 The resolution in question recommended Hon Justice M.C.C. Mkandawire to be appointed as Clerk of Parliament. In a sudden twist of events and in his minute of 15 October 2015 the President wrote as follows:

“Rt. Hon Speaker, please submit three (3) names for my consideration. Please take into account gender factors as you do so.”

APM

15/10/15

3.3 In reaction to the President’s minute of 15 October 2015 the PSC met again on 21 October 2015 to discuss the way forward on the need to have 3 names submitted. At that meeting it was noted that the proposal by the President was problematic as candidates were selected on merit and they agreed to resubmit the same name of Hon Justice M.C.C. Mkandawire. It was further resolved that the PSC should meet the President and resolve the disagreements before resubmitting the name of Hon Justice M.C.C. Mkandawire.

3.4 On the same day the Rt. Hon Speaker as per instructions wrote the President in which he requested for a meeting between the PSC and the State President in order to brief the Head of State on the process which resulted in the recommendation of Hon Justice M.C.C. Mkandawire before the three names as requested by the President were submitted.

3.5 In his minute dated 28 October 2015 the President wrote as follows:

“Rt. Hon Speaker, I thank you for your memo. I’m glad to learn that you had vigorous, transparent and accountable search process. The practice in our government is that three names are sent to the President and the President selects from that list. Please send me the top three names that you may have shortlisted and I would like a woman on the shortlist in the interest of gender diversity. Let me also request you in the interest of the integrity of the appointment process that the process should not be debated in the media until it is completed.”

APM

28/10/15

3.6 On 29 October 2015 the Hon speaker issued a memo to the State President in which he submitted three names and their CVs as follows:

Justice M.C.C. Mkandawire. 89%

Grace Malera 83%

Fiona Kalemba 80%

In response the President wrote in the following terms:

I have selected Fiona Kalemba to be Clerk of Parliament

APM

1/11/15

3.7 Following the President's directive the Hon Speaker wrote Mrs. Fiona Kalemba a letter of appointment dated 4 November 2015 which we herein reproduce in total so that it can be appreciated how she got in office.

PARLIAMENT OF MALAWI

PARLIAMENTARY SERVICE COMMISSION

Ref. No. NA/PSC/COP/09

4th November, 2015

PSC Minute No. EX/14/45/6.2

Mrs. Fiona Kalemba
C/O Ministry of Finance
Private Bag 333
Lilongwe 3

Dear Madam,

OFFER OF APPOINTMENT TO THE POST OF CLERK OF PARLIAMENT (GRADE P2C)

I wish to inform you that it has pleased His Excellency the State President Prof. Arthur Peter Mutharika to appoint you to the post of Clerk of Parliament (Grade P2C) with effect from 1st November 2015.

The appointment is on recommendation from the Parliamentary Service Commission following your successful participation to the interviews that took place at the Parliament Building on 6th October 2015.

According to the salary structure of the Parliamentary Service, you will be eligible for an initial salary of MK11, 926,404.00 per annum in the MK11, 926,404.00 - MK15, 225,264.00 salary scale segment, which you will commence to draw with effect from the date of your appointment. In view of the existing gap, you are expected to report as soon as possible.

The post carries other benefits applicable to a post at that level in the Parliamentary Service and these will be communicated to you when you report.

Your incremental date is 1st December of every year; therefore your incremental date following this appointment will fall due of 1st December 2016.

Please accept my heartfelt congratulations for the new appointment.

Yours faithfully,

Rt. Hon. Richard Msowoya, MP
CHAIRPERSON
PARLIAMENTARY SERVICE COMMISSION

Copies : The Secretary for Human Resource Management and Development, P.O. Box 30227, Lilongwe 3.
: The Accountant General, P.O. Box 30140, Lilongwe 3.
: The Auditor General, P.O. Box 30045, Lilongwe 3.
: The Salaries Officer, National Assembly, Private Bag B 362, Lilongwe 3.
: The Records Officer, National Assembly, Private Bag B 362, Lilongwe 3.
: Confidential Registry.
: Personal File.

3.8 From the reading of the letter it is clear that the PSC finally succumbed to the requests by the President and indeed submitted three names as a recommendation for the President to appoint one individual. In reaction to the recommendation the State President appointed Mrs. F. Kalemba who was No. 3 during the interviews.

3.9 It is for the reason that the Applicants have sought the aid of the Court on the premises that the appointing authority erred in law when it disregarded the recommendation of the PSC which submitted the name of Hon Justice M.C.C. Mkandawire. That in the alternative, if indeed the appointing authority had wanted to appoint a woman then it could have selected No. 2. Mrs. Grace Malera and not No. 3 Mrs. Fiona. Kalemba.

4.0 The Issues

There are four issues for determination before me.

- 1) Whether the President acted in good Faith and in line with the law by rejecting the name of Hon Justice M.C.C. Mkandawire.
- 2) Whether the appointment of Mrs. Fiona Kalemba was in good faith and on recommendation by the Parliamentary Services Commission.
- 3) Whether the appointment of Mrs. Fiona Kalemba was legal in the circumstances of the case.
- 4) Whether the court should quash the appointment of Mrs. Fiona Kalemba

5.0 The Law

5.1 Burden and Standard of proof

5.1.1 The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a scale of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive. Where at the end of the trial the

probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than NOT must carry the day. As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

5.1.2 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

5.2 Relevant provisions

5.2.1 Section 55 Constitution

There shall be a Clerk to the National Assembly and a Clerk to the Senate who shall be public officer and shall assist the Speaker of the Chamber to which that Clerk is appointed and perform such other functions and duties as the Speaker may direct.

5.2.2 Section 16(1) PSA

There shall be appointed as an officer of the National Assembly a Clerk of the National Assemblywho shall be appointed by the President on the recommendation of the commission.

5.2.3 Section 11(1) (2) PSA

(1) The general functions of the Commission shall be -

(h) To appoint persons to hold office in Parliamentary Service, including the power to confirm appointments, promotions, disciplinary matters and removal of persons from office.

Provided such removal shall be subject to the approval of the House

(i) in exercise of its powers under paragraph (h) to base its employment decisions in the Parliamentary Service on merit.

5.2.4 Section 20 Constitution

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

5.3 What is Judicial Review?

5.3.1 Judicial Review is the most effective means by which courts control administrative actions and stops abuse by public persons/bodies. (Including inferior courts and tribunals) Section 108 (1) and (2) of the Constitution is the starting point.

(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

(2) The High Court shall have original jurisdiction to review any law and any action or decision by government for conformity with this constitution save as otherwise provided by this constitution and shall have such other jurisdiction and powers as may be conferred on it by this constitution or any other law.

5.3.2 The concept of Judicial Review is enshrined in section 43 of the Constitution of Malawi which is lead provision in this case. The section provides as follows:

Every person shall have the right to:

- a) Lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and*
- b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected or threatened if those interests are known.*

5.3.3 Judicial review is a supervisory jurisdiction which reviews administrative actions by public bodies rather than being an appellate jurisdiction. For judicial review proceedings to be entertained by courts the following preliminary issues must be satisfied.

5.4 Public Law

5.4.1 Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be

reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law. On the issue of public law and judicial review Lord Diplock stated in O'Reilly vs. Mackman [1983] 2 AC 237.

It would in my view as a general rule be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions (governing judicial review) for the protection of such authority.

5.5 The Parties

5.5.1 Judicial review can and must not be brought by or at the instance of the government. In general, judicial review only lies against anybody charged with the performance of a public duty in a public law context.

5.6 Locus Standi

5.6.1 An applicant in a judicial review proceeding must have "sufficient interest" in the matter. The purpose is to exclude the so called busy bodies. There must be a direct or personal interest. Whether a general interest qualifies within the meaning of *locus standi* is a question of law and fact. However courts have in recent times adopted a much broader and flexible approach. The more important the issue and the stronger the merits, the more readily will a court grant leave to move for judicial review notwithstanding the limited personal involvement of the Applicant.

5.7 The Grounds

5.7.1 Judicial review proceedings must not issue merely because the decision maker has made a mistake. The Applicant must show that there has

been a departure from accepted norms. That the decision making process has been characterized by illegality, procedural impropriety and irrationality. This is called the tripartite distinction. Based on the above this Court is convinced that this is a suitable case for judicial review.

6.0 The Wednesbury principle

6.1 In Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] All ER 680, Lord Green MR stated as follows

Decisions of persons or bodies performing public duties or function will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review proceedings where the court concludes that the decision is such that not such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.

6.2. A court when reviewing a decision making process will not simply quash a decision because it does not agree with it, but that it was unreasonable regard being had to the circumstances of the case and the dictates of administrative law. The court must be satisfied that no decision maker properly directing his/her mind to the law and facts before him/her could have made such an absurd decision. Once the decision is adjudged to be unreasonable it must be declared null and void within the Wednesbury sense/test and must be quashed.

7.0 The Finding

7.1 This is a thought provoking case. When the lawyers for both sides appeared before me during the interpartes hearing of the summons to continue the order of injunction, Ms Apoche Itimu did raise the issue of standing. That the Applicants in this matter did not have sufficient interests in the matter as the rightful party was the PSC.

7.2 Mr. W. Mwafulirwa opposed the arguments on the premises that the four members of parliament were perfectly entitled to take legal action as *bona fide* members of the House who were duly elected. That the appointment of a Clerk was the business of the whole August House. I agreed with Counsel Mwafulirwa and further ruled that that notwithstanding, the more important the issue and the stronger the merits, the more readily will a court grant leave to move for judicial review notwithstanding the limited personal involvement of the Applicant.

7.3 There is no dispute three names emerged as No. 1, 2 and 3 after undergoing interviews for the vacant post of Clerk of Parliament (P2C). The first was Hon Justice M.C.C. Mkandawire with 89 points, then Mrs. Grace Malera with 83 points and finally Mrs. Fiona Kalemba with 80 points. When a letter recommending Hon Justice M.C.C. Mkandawire was sent to the President, the latter called for three more names which should take into account gender factors.

7.4 At this point the President in my view and on the face of it had rejected the name of Hon. Justice M.C.C. Mkandawire. When the three names were finally submitted including the name of Hon Justice M.C.C. Mkandawire the President appointed Mrs. Fiona Kalemba who was No. 3 leaving out Mrs. Grace Malera who was No. 2.

7.5 The Applicants argued that the President discriminated against Hon Justice M.C.C. Mkandawire by refusing to appoint him despite the fact that he was number one during the interviews. The Applicants further argued that the President had disregarded merit and took into account other considerations not known to the law. That the President had violated the Constitution which he vowed to defend.

Section 20 Constitution

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

7.6 The Respondent through the Hon Attorney General argued that the President had made it clear that gender factors must come into play in the appointment process and therefore no law was injured. They cited the Gender Equality Act.

Section 11 Gender Equality Act

Notwithstanding anything contained in the Public Service Act and subject to subsection (2), an appointing or recruiting authority in the public service shall appoint no less than forty per cent (40%) and no more than sixty per cent (60%) of either sex in any department in the public service.

7.7 Counsel for the Applicants Mr. Wesley Mwafulirwa counter argued that if gender was the factor, then the President could have appointed Mrs. Grace Malera to be the Clerk of Parliament.

7.8 The Attorney General told this Court that section 16 (1) PSA does not mention merit as a requirement and it was within the President's power to pick any one from the list of three noting that this was the practice in government. I will now proceed to analyze each candidate and the legality and or illegality of the President's actions.

7.9 Hon Justice M.C.C. Mkandawire

7.9.1 Why was he not appointed and yet he scored highest (89) during the interviews? His credentials need not be repeated here. Malawian society

holds him in high esteem as a Judge of the High Court of Malawi. But why was he not appointed?

7.9.2 According to the President, he wanted three shortlisted names and expressly called for a woman to be on the list. In my considered view and at that moment the President had already rejected the name of Hon Justice M.C.C. Mkandawire. It became clear at that point that the President wanted a woman to occupy that post.

7.9.3 But why would the President do that when the PSC had recommended Hon. Justice M.C.C. Mkandawire? Was the President overstepping his authority by interfering with another branch of government? Was the President usurping the powers of the PSC to engage people in Parliamentary Service? Was there an abuse of executive authority?

7.10 What is a recommendation?

7.10.1 As per Stroud's Judicial Dictionary of words and phrases, 7th Ed, Vol 2 P2 Thomson, Sweet & Maxwell 2006:

Recommendation..... implies a freedom to follow or not to follow, to accept or to reject the recommendation according to their own discretion.

7.10.2 Similarly in Black Law Dictionary 6th Ed, West Publishing Co. 1990:

Recommendation refers to an action which is advisory in nature rather than one having any binding effect.

In the case of The State vs. The State President of the Republic of Malawi, Exparte Muluzi and Tembo, Miscellaneous Civil Cause No. 99 of 2007, the court observed:

In essence the court agrees with the submission made on behalf of the Respondent that consultation should not be confused with recommendation as the latter entails the final step before a decision is made and plays a prominent role in the final decision while consultation has very little effect on the final decision.

7.10.3 This means that the President was not mandated at law to appoint Hon Justice M.C.C. Mkandawire. It was mere recommendation aiding the candidate favourably to the appointing authority. In his discretion the President decided to opt for a woman notwithstanding Hon Justice M.C.C. Mkandawire's success at the interviews. Was this a violation of law of the Republic? If the President were gagged to appoint a recommended name, that would reduce his powers to mere rubber stamping and thereby removing the power of the executive branch to check on the other branches of government.

7.10.4 Reverse or positive discrimination is allowed under the law in this country and internationally. What reasons did the President give for rejecting Hon Justice M.C.C. Mkandawire as require by section 43 of the Constitution. In my considered view, he wanted three names and that gender factors must play a role. The Attorney General has cited section 11 of the Gender Equality Act.

7.10.5 Mr. W. Mwafulirwa further argued that the PSA should be read purposively in that the word merit in section 11 should be imported into section 16 PSA. That it was the intention of the frames of the law to have all people working for the National Assembly to be employed on merit. I do not think so. If Parliament had intended section 16 to follow the spirit of section 11 PSA it could have expressly said so.

7.10.6 Why was the word merit omitted in section 16 PSA? Parliament employs its own staff. The Hon Members of Parliament are elected officials, including the Speaker. I'm of the view that the frames of the law deliberately singled out the CoP to be appointed by the President as a check and balance on the institution of Parliament.

7.10.7 Similarly the Judiciary appoints its own staff save the senior bench (High Court and Supreme Court). The senior bench is appointed by the President on recommendation of the Judicial Service Commission as a way of checking the judicial branch of government. Names of would be judges are sent to the President and the latter may appoint or refer the names back to the JSC. This has happened before and no one has litigated about that.

7.10.8 Similarly the rejection of Hon Justice M.C.C. Mkandawire who scored highest cannot be faulted as the President had used his discretion to appoint a woman. There is no evidence that he had abused his discretion or that he had taken into account other irrelevant considerations. If the Applicants wish to gag the President into appointing candidates based on merit alone they should move the House to amend the specific provision to wit section 16 PSA in order to reflect this desire. It is not the duty of the judicature to make law. Our duty is to interpret, protect and enforce the Constitution and all laws under it.

7.11 Mrs. Grace Malera vs. Mrs. Fiona Kalemba

7.11.1 We have just found that the President did not error in not appointing Hon Justice M.C.C. Mkandawire. It was evident that he preferred a woman. Why then did he not appoint No 2? Again the President was not gagged to appoint anyone on the list. In my view the positions the candidates received during the interview were mere guideline for the President to follow in making the appointment.

7.11.2 Relevant considerations are allowed to be taken into account when making a presidential appointment. These range from gender, disability and the empowerment of minority groups among many. According to the affidavit of the Solicitor General Dr Janet Banda, Mrs. Fiona Kalemba has worked in government with effect from August 1995 and she is currently the Chief Parliamentary Draftsman.

7.11.3 The affidavit of Mr. Edwin Wocha Director of Human Resource Management and Development at the office of the President and Cabinet shows that out of 74 heads in the public service only 17 are women. He tendered in Court a list of the male and female public officers. This has not been challenged. Was the President bound to appoint Mrs. Grace Malera after a recommendation from the PSC which included 3 names? In Thomson vs. Canada (Deputy Minister of Agriculture) [1992] ISCR 385;

The term recommendation should be given its ordinary meaning. Recommendation ordinarily is the offering of advice and should not be taken to mean a binding decision.

7.11.4 The principle that the role of the recommending body is vital and must be involved in the decision making process should be understood to mean that the body submitting the names has already tested the ability of the candidates and that what remains is for the appointing authority to choose from the shortlisted names. That is their contribution to the decision making process. The final decision lies in the hands of the decision making body.

7.11.5 Section 89 (1) Constitution

- 1) The President shall have the following powers and duties-

(d) To make such appointments as may be necessary in accordance with powers conferred upon him or her by this Constitution or an Act of Parliament.

7.12 For this Court to quash a decision of a public body there must be shown that the public body exercised its discretion arbitrarily and unconstitutionally. It can be argued that when a State has to appoint any officer on recommendation from any statutory body the State has to follow a comperative merit system to avoid discrimination. However in the absence of a clear direction in the specific provision which deliberately omitted the word merit in (section 16 PSA) it will be unprocedural for this Court to fault the appointing authority.

7.13 If Parliament had wished to expressly include merit in section 16 PSA as it did in section 11 PSA they could have said so. If they so wish today they must specifically say so. It is not and it has never been our duty as courts to make the law.

8.0 Conclusion

8.1 Courts must be careful when challenging the use of discretion. There must be evidence of abuse, unreasonableness and bad faith. It is wrong for courts to intervene and substitute their own decisions for that of the authority which was charged with the duty to exercise that power.

8.2 I have searched the evidence and the law and I fail to see where the President erred in this regard. A recommendation does not bind the appointing authority. It simply advises. The President of Malawi had power in this matter to pick someone from a list of three or more or not to pick anyone at all. The same applies with the appointment of Judges. It is a process of creating checks and balances on the other branches of

government by the Executive branch. This segregation of powers is necessary in an open and democratic society.

8.3 The President is elected by the majority of the people of Malawi entitled to vote. But he is only ushered into office after the Chief Justice has administered oath of office and allegiance. The Chief Justice is appointed by the President but can only perform the functions of his office after he has been confirmed by the National Assembly (2/3). This is the repository of trust among the three branches of government. To allow Parliament to send on only name as a recommendation to the President, is tantamount to gagging the President and thereby usurping the powers of the appointing authority to exercise his constitutional mandate under section 16 (1) PSA.

8.4 This is a Court of justice which is guided by law and evidence. I will not allow this ancient and sacred constitutional order to be violated. Parliament is not above the Constitution and the doctrine of the separation of powers. All branches of government must operate within their mandate and it is the duty of the judicature to ensure that this complied with at all times. Parliament is amenable to be checked by the Executive and the Judicature.

8.5 In these premises I see no error of law in the appointment of Mrs. Fiona Kalemba. The process that led to her appointment did not injure any law and she can proceed to take oath of office and allegiance as per section 52 Republican Constitution. The Hon the Chief Justice of the Republic shall direct this duty to be done.

This motion for judicial review must fail.

9.0 Costs

9.1 Costs are awarded at the discretion of the court. The rule is that they normally follow the event. However this motion for Judicial Review was

necessary as it allowed me with the assistance of counsel from both sides to adjudicate on all the issues fully so that the matter can be put to rest once and for all. I'm heavily indebted to counsel from both sides. I therefore order each party to pay their own costs.

Pronounced in Open Court at Mzuzu in the Republic on 12 January 2015.

Dingiswayo Madise
JUDGE