JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CAUSE NO. 60 OF 2021

BETWEEN

THE STATE (ON THE APPLICATION OF MALAWI REGULATORY AUTHORITY ..... CLAIMANT

-AND-

THE OMBUDSMAN ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Kita, Counsel for the Claimant
Messrs. Malera (Ombudsman), Mangulama and Namondwe, Counsel for the Defendant
Mr. Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

Introduction

1. This is my Ruling on an application taken out by the Defendant, who seeks an order for discharging (a) permission to commence judicial review and (b) interim reliefs granted to the Claimant [hereinafter referred to as the "Application to Discharge Permission and Interim Reliefs"].

2. The Claimant is opposed to the Application to Discharge Permission and Interim Reliefs.

Application to Commence Judicial Review

3. On 10th November 2021, the Claimant filed with the Court a without notice application for permission to commence judicial review of the decision by the Defendant to commence and carry out an inquiry into the legality or procedural correctness of Mr. Henry Kachaje as the Claimant's Chief Executive Officer [hereinafter referred to as the "challenged decisions"].

4. The reliefs sought by the Applicants are also contained in Form 86A and the same are reproduced in full:

> *"1. An order quashing the Defendant's decision herein as the Defendant has a personal interest in the matter;*
>
> *2. An order quashing the Defendant's decision herein as the Defendant has no jurisdiction over the subject matter;*
>
> *3. A declaration that the decision of Defendant is unconstitutional and ultra vires and therefore null and void for not complying with the requirements under Section 43 of the Constitution and the Ombudsman's Act;*
>
> *4. If permission is granted a direction that the hearing of the Application for judicial Review be expedited;*
>
> *5. If permission is granted, an order for the interim reliefs sought;*
>
> *6. An order for costs and that all necessary and consequential directions be given."*

5. The grounds for making the application for judicial review have been stated as follows:

> *"1. The issues before this Court is as to whether the Defendant appreciated her jurisdiction and indeed the Claimant's constitutional right to fair administrative action when she decided to commence and/or continue with the enquiry of the Claimant's recruitment of Mr. Henry Kachaje as its Chief Executive Officer.*
>
> *2. The Claimant's locus standi in this case is trite as it is the one whose recruitment of its Chief the Ombudsman has decided to enquire.*
>
> *3. Mr Richard Chapweteka, is one of the persons that applied for the post of the Chief Executive of Malawi Energy Regulatory Authority (MERA).*
>
> *4. The incumbent Ombudsman is also one of the persons that applied for the said post; but unlike the Complainant, she was not shortlisted and therefore was not interviewed for the post.*

5. *The Mr. Richard Chapweteka did attend the interviews but emerged fifth meaning that there were four candidates that scored higher than him.*

6. *The foregoing notwithstanding Mr. Richard Chapweteka, proceeded to lodge a complaint with the Ombudsman that Mr Henry Kachaje that emerged as top candidate was recruited unprocedurally.*

7. *The Ombudsman then, in September, 2021, made a decision to hear a complaint in which Richard Chapweteka and others are challenging the recruitment of Mr Henry Kachaje herein.*

8. *It should be pointed out that recruitment of the Chief Executive Officer (CEO) of MERA is a sole prerogative of the Board of MERA; and that there is no law that regulates the same.*

9. *Further, the policy of MERA can be changed at any time by the Board; and that the Complainant cannot point out any legitimate expectation planted to him that the recruitment of the CEO will be dictated in a particular manner.*

10. *That notwithstanding the Board was very transparent in its appointment process of Mr Henry Kachaje as is demonstrated hereunder.*

11. *During the process of recruitment of the new Chief Executive Officer, the Board applied its professional judgement to ensure that the successful candidate to take up this strategic position meets all the requirements as specified in the job which was advertised in the media for a month during the month of December 2020.*

12. *The following is a summary of process of recruitment followed leading to the appointment of Mr. Kachaje*

    a. ***That** the candidate in question, **Mr. Henry Kachaje** was initially shortlisted by the Department of Statutory Corporation which was appointed by the Board to act as the Secretariat for the receipt of applications and other vetting processes.*

    b. ***That** the Board of MERA reviewed the initial list of 92 candidates and selected the best **eight** candidates who were invited for the interviews.*

    c. *For purposes of transparency and accountability the interviews were conducted by the full Board of MERA witnessed by Representatives from the Department Statutory Corporations and Department of Human Resources Management.*

    d. *The Board therefore convened **70th Extraordinary Board Meeting** on 12th April 2021 to shortlist the candidates to be invited for the interviews for the position of Chief Executive Officer of MERA on 29th April 2021.*

e. ***That*** *the Board interviewed the said candidate and the other seven shortlisted candidates.*

f. *Following this interview process, it transpired that Mr. Henry Kachaje performed outstandingly and emerged as the best candidate based on both quantitative and qualitative assessment of the Board after the interviews.*

g. *The results of the interviews for the post of the CEO of MERA were as follows:-*

INTERVIEW RESULTS SUMMARY FOR THE POST OF CHIEF EXECUTIVE OFFICER FOR MALAWI ENERGY REGULATORY AUTHORITY (MERA) HELD AT BINGU INTERNATIONAL CONVENTION CENTRE IN LILONGWE ON 29TH APRIL, 2021.

NO.	NAME	SCORE/%
1.	Mr. Henry Kachaje	89.83%
2.	Eng. Alfonso Chikuni	78.08%
3.	Mr. Ishmael Stan Chioko	76.42%
4.	Mr. Damien Kafoteka	73.58%
5.	Mr. Richard Chapweteka	73.42%
6.	Mrs. Charity Musonzo	70.92%
7.	Ms. Linda Mzumara Phiri	66.92%
8.	Dr. Ted Oliver Nakhumwa	57.42%

PANELISTS		
NAME	POSITION AND INSTITUTION	SIGNATURE
Mr. L. Chikadya	Board Chairperson for MERA	
Mrs. I. Chirombo	Vice Board Chairperson for MERA	
Mr. P. Likongwe	Director for MERA Board	
Dr. T. Chimkono	Director for MERA Board	
Mrs. P. Manguluti	Director for MERA Board	
Mr. C. Chiwambo	Director for MERA Board	
SECRETARIAT		
Mr. H. Mwasola	DDMS at DHRMD	
Mr. J. Nkhokwe	DDHRM at DSC	

i.

h. *That having examined Mr Kachaje's curriculum vitae, and from his performance during the interviews, the Board was convinced that the candidate did not only meet the set minimum qualifications for the position, but also possessed the relevant experience to carry out duties of the strategic position of CEO for MERA.*

i. ***That*** *Mr. Kachaje has served in various Senior Managerial positions for over 20 years as General Manager and Managing Director. He has relevant*

expertise in the energy sector having worked in the fuel transport brokerage, consulted extensively with the oil industry and the energy sector. He demonstrated strong leadership skills, a thorough understanding of the energy sector and its strategic importance to the socioeconomic transformation of the nation and a very good understanding of the political-economic environment.

j. ***That*** *academically and professionally, the said candidate has all the relevant qualifications for the job. He is a respected economist who once served as the President of the Economics Association of Malawi, a holder of a Masters' Degree in Business Administration, possesses an international post-graduate certification in Business Consulting and Organizational Management. He is also a holder of the following relevant certificates: Diploma in Downstream Petroleum Management (PETRAD); Trade Negotiating Techniques (International Trade Strategies); Public Finance Governance (African Development Bank Group).*

k. *The Board is aware that the appointment of Mr. Kachaje as CEO of MERA has attracted public interest for obvious reasons bearing the diversity of vested interests of Stakeholders of MERA and the economic and social impact of MERA activities to the country in general.*

l. *The Board exercised due diligence and care to ensure that the selected candidate met the expectation of the Board to rebuild the reputation of MERA and win back public trust of MERA as a Regulator of the Energy Sector in Malawi.*

m. ***That*** *the Complainant, Mr Richard Chapweteka, emerged fifth in the interviews meaning that even if for some reason Mr Kachaje was disqualified or was not chosen there were three other candidates that were preferred persons and therefore Mr Chapweteka cannot say that he was prejudiced or unfairly treated or discriminated against in the selection process.*

n. *That indeed even if one was to allege that there was unfair labour practice in the recruitment of Mr. Kachaje, that practice would not have adversely affected Mr Chapweteka as he was not amongst the top three candidates ear marked for that post.*

o. *Similarly, the other complainant being a human rights NGO had no direct interest in the outcome of the interviews and can thus not claim to have suffered any maladministration. At most the said NGO is purely a busy body interfering with the due administration by MERA.*

p. *In short, both complainants cannot say that they have suffered injustice, ill treatment, or are victims of abuse of office or unfair labour practice.*

q. *As for Mr Chapweteka, this is purely a labour related or employment complaint that he could have taken and can still take to the Industrial Relations Court (IRC) that is set up to deal with such complaints.*

r. *Further, he has not demonstrated that the courts cannot grant him effective remedy for his alleged complaint.*

s. *In any event, the Ombudsman has no jurisdiction over labour related or employment matters as the same fall under the jurisdiction of the IRC.*

t. *Further still, the Ombudsman having been interested in the said post and having applied for the same post but having failed to qualify even for shortlisting, has a personal interest in the said matter; and therefore seriously conflicted.*

u. *In view of the foregoing, the Ombudsman is apparently biased in this matter.*

v. *This being an inquiry process, the Ombudsman* ***ought*** *not only to be impartial but seen to be impartial at all times.*

w. *As Justice Twea (as he then was) remarked in the case of* ***Mkwapatira v Malawi Broadcasting Corporation and Another*** *(Civil Cause Number 2124 of 2007) (2124 of 2007) [2008] MWHC 25 (23 January 2008):*

> *This case raises a lot of questions. However, my view is clearly that, as Skinner C. J. said in the case of Ngilazi v Chimbende (t/a Tithokoze Transport) 10 MLR (M) 354 following the dictum of Lord Hewart C. J. in R. V. Sussex, ex p. McCarty) [1924] 1 K.B. 259, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

6. The Without Notice Application for Permission to Apply for Judicial Review came before me on 10th November 2021 and I granted the Claimant's permission to apply for judicial review. I also granted the Claimant its application for interim reliefs, namely, an interlocutory order of injunction restraining the Defendant from continuing hearing a complaint in which Mr. Richard Chapweteka and others are challenging the recruitment of Mr. Henry Kachaje as the Defendant's Chief Executive Officer and an order staying the challenged decision pending the determination of the substantive judicial review matter.

Application to Discharge Permission

7. The Defendant seeks to have the permission to commence judicial review herein discharged for being irregular and contrary to the dictates of the Constitution. The Application to Discharge Permission is supported by a statement sworn by the Ombudsman herself. It is expedient that the sworn statement be reproduced in full:

> *"3.* ***THAT*** *I have read the grounds for Judicial Review and the Sworn Statement of Mr. Leonard Chikadya, the Chairperson of the Board of Malawi Energy Regulatory Authority (MERA), in support of the Grounds for Judicial Review and the Application for Interim Reliefs. I respond to the matters of fact as follows:*
>
> *4.* ***THAT*** *on 28th June, 2021, the Office of the Ombudsman received a complaint from Mr. Richard Chapweteka alleging that MERA advertised for the position of Chief Executive Officer (CEO), which he applied for and was interviewed for, however, the Board of MERA deliberately gave him low scores in order to ensure that he was not the successful candidate.*
>
> *5.* ***THAT*** *Mr. Richard Chapweteka further stated that the Board of MERA had planned and agreed to give him the low scores as the Chairperson Mr. Leonard Chikadya had informed the Board that Mr. Richard Chapweteka was being said to be the "anointed" Candidate for the role of CEO of MERA and therefore the Board needed to fail him so as to appear that they were an independent Board.*
>
> *6.* ***THAT*** *on the basis of the above assertions as laid down in the complaint of Mr. Richard Chapweteka to the Office of the Ombudsman, he stated that he had suffered an injustice.*
>
> *7.* ***THAT*** *on 7th September, 2021, Mr. Richard Chapweteka submitted a supplementary complaint against MERA alleging that MERA had appointed Mr. Henry Kachaje as the CEO despite the fact that Mr. Kachaje did not have a Master's Degree, which was a requirement for that position.*
>
> *8.* ***THAT*** *on the same day of 7th September, 2021, the Office of the Ombudsman received another complaint from the Forum for National Development (FND), containing similar allegations to the supplementary complaint by Mr. Chapweteka, that the Board of MERA had recruited Mr. Henry Kachaje as CEO despite him not having the requisite minimum qualifications that were stipulated in the Job Advertisement for the position. The bundle of copies of the three complaints are hereby exhibited and marked "**GTM 1.**"*
>
> *9.* ***THAT*** *on 1st September, 2021, I took up the role of Ombudsman having been appointed as such by Parliament. Upon commencing my work, the matter of the*

recruitment of Henry Kachaje was one of the files that was tabled for discussion and requiring further handling.

10. ***THAT*** *the Office of the Ombudsman had been seized of the Henry Kachaje recruitment matter since June 2021. In the preliminary process of handling the matter, the issue of the fact that I had applied for the MERA CEO position and therefore had some connection with the matter was duly put on record and considered.*

11. ***THAT*** *it was opined that the said connection of the Ombudsman with the matter was not substantive nor material as to raise a prejudicial interest. Accordingly, it was resolved that the Office of the Ombudsman could carry on handling the matter, having been seized of this matter from June 2021 as curtailing the handling of the matter would not have been in the interest of justice.*

12. ***THAT*** *following the receipt of the additional complaints in September 2021, my office proceeded to write the MERA Board through the Chairperson, Mr. Leonard Chikadya on 10th September, 2021, informing him of the complaint and asking him to respond to the allegations. The letter is hereby exhibited and marked "**GTM2**."*

13. ***THAT*** *on 30th September, 2021, I received a response from Mr. Leonard Chikadya providing an account of the events that led to the recruitment of the said Mr. Henry Kachaje, as well as supporting documents on the same.*

14. ***THAT*** *the response from MERA acknowledged the important role that the Office of the Ombudsman had done previously in the matter relating to recruitment of the previous CEO, Dr. Collins Magalasi and other members of staff and the determination thereof, which the MERA Board had duly complied with and indicated to the Office of the Ombudsman that as a Board they had resolved that in the recruitment of Dr. Magalasi's successor they should not commit the same errors that were raised with respect to the recruitment of Dr. Magalasi and others. The response from MERA is hereby exhibited and marked "**GTM 3**."*

15. ***THAT*** *on 21st October, 2021 and then on 2nd November, 2021, the Directors of the Board of MERA including Mr. Chikadya attended a Public Inquiry in which they submitted on oath the details of the process that was followed when recruiting the CEO of MERA and how they discharged the powers and duties vested on them as a public office in that regard.*

16. ***THAT*** *having concluded the investigative and inquiry process, I compiled a determination on the matter, whose release was scheduled for the 10th November, 2021, a notice of release of the determination was accordingly served on the Claimants. The notice of release of the determination is hereby exhibited and marked **"GTM4."***

17. ***THAT*** *on the appointed day, 10th November, 2021, while releasing the determination I was served with an order on Permission to Commence Judicial Review and an Interim Stay Order and an interim Injunction Order restraining me through my officers, employees or agents, from commencing and carrying on an inquiry into the legality or procedural correctness of the recruitment of Henry Kachaje as CEO of MERA on the basis of an application for permission for Judicial Review and Interim Interlocutory Reliefs that the Claimants made and were duly granted, and restraining me from pronouncing the outcome of the Inquiry and the determination.*

18. ***THAT*** *I refer to paragraph 5 of the sworn statement in support of Grounds for Judicial Review, that this was a matter of extreme urgency and state that the Claimants herein were made aware that the Office of the Ombudsman was seized of this matter since June 2021, that investigations thereon commenced on 10th September, 2021 and they duly complied and participated in all investigative steps, including participating in the Inquiry sessions on 25th October and 2nd November, respectively, and were made aware of the completion of the inquiry and compilation of the determination thereof on 9th November, 2021.*

19. ***THAT*** *MERA was duly notified of the scheduled release of the Determination and the Chairperson had in fact delegated the Deputy Chairperson to attend the public determination dissemination meeting.*

20. ***THAT*** *in the morning of 10th November, 2021, I dispatched through email copies of the determination to the two respective complainants and by hand delivery to the Claimant, MERA through the Deputy Chairperson of the Board.*

21. ***THAT*** *on the same day, 10th November, 2021, at 10:00am, I commenced the release of the determination, whereupon I was served with among other things, an order of the court restraining me from releasing the determination when I had just read the introductory part thereof. I duly complied with the order."*

Submissions by the Defendant

8. It is the case of the Defendant that the Order granting Permission to Commence Judicial Review was wrongfully sought and wrongfully granted/obtained as it is a clear breach of section 123(2) of the Constitution. The Defendant's arguments on this point are covered in paragraph 3.2 of the Defendant's skeleton arguments. The said paragraph is couched in the following terms:

"3.2 ***WHETHER THE DEFENDANT'S DECISION TO COMMENCE AN INQUIRY INTO THE RECRUITMENT PROCESS OF MR. HENRY KACHAJE IS***

AMENABLE TO JUDICIAL REVIEW BEFORE RELEASE OF THE DETERMINATION AND PRONOUNCEMENT OF DIRECTIVES.

3.2.1 The Office of the Ombudsman derives its powers to investigate cases under section 123 of the Republic of Malawi Constitution. The said section is as follows:

(1) The Office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.

(2) Notwithstanding subsection (1), the powers of the office of the Ombudsman under this section shall not oust the jurisdiction of the courts and ***the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined.*** *(Emphasis by underlining supplied).*

3.2.2 ***In Air Malawi Limited v The Ombudsman MSCA CIVIL APPEAL NO. 1 OF 2000*** *the Supreme Court of Appeal in considering whether Judicial review lies at or on any step the Ombudsman takes, stated that:*

> ***"We find it difficult to imagine that Parliament's intention was that any step the Ombudsman took in preparation to commence an investigation was reviewable. Section 123(2) of the Constitution makes it clear, when it says that the application which a person with sufficient interest takes to the High Court for review is a case which the Ombudsman has determined. Where all the Ombudsman has done is to make preliminary enquiries or where he has only heard evidence as has happened in the present there is no case which the Ombudsman has determined. It is with greatest respect therefore, that we dissent from the decision which the High Court and the Supreme Court made when they held that it is every step which the Ombudsman has taken which is reviewable. There can only be a determination of a case after the Ombudsman has heard evidence from both parties and has come to a final conclusion. That in our judgement, is what Section 123(2) of the Constitution means."***

3.2.3 From the reading of section 123(2) and how the Supreme Court interpreted the said section, one cannot apply for Judicial review for every step that the Ombudsman takes until the Ombudsman makes a determination on a case. The Claimants therefore cannot take for review the decision of the Ombudsman to commence an inquiry into the recruitment process of Mr. Kachaje and they cannot take for review the decision of the Ombudsman to hold Public Inquiries in order to obtain evidence that would enable the Ombudsman to fairly determine this matter. In effect, and as stated in the ***Air Malawi Case*** *cited above, they can also not take for judicial review*

a concluded inquiry process until a determination and pronouncements thereof are made and released. It is only after the Ombudsman has come to a final conclusion in her determination and the same has been released, and the directives thereof pronounced, that those who are aggrieved and have sufficient interest can invoke section 123(2) of the Constitution of the Republic of Malawi and seek a review.

3.2.4 In embedding section 123(2) of the Constitution into the provisions that grant the Office of the Ombudsman its mandate and powers, clearly it was envisaged that the determinations of the ombudsman will be reviewable. However, to have a situation where the Office of the Ombudsman's case handling processes would be subjected to injunctions, restraining orders or judicial review as and when a party claiming to be aggrieved, deems necessary to make applications to the Courts for the same, before the determination and pronouncement has been made, would lead to absurdity and render the office of the Ombudsman non-functional.

3.2.5 Moreover, in exercising its powers the Office of the Ombudsman is guided by provisions of the Constitution and the Ombudsman Act (Chapter 3:07 of the Laws of Malawi), which lay out a clear criteria regarding admissibility of cases before the Ombudsman and the complaints/case handling procedures. In terms of section 123(2) of the Constitution the Ombudsman's exercise of his/her powers and conduct of cases as to both the questions of legality and procedural correctness, are ultimately reviewable upon conclusion and adoption and release of the Ombudsman's determination. Thus, to proceed as the Claimants proceeded in the present case and obtain permission to commence judicial review as well as interlocutory reliefs restraining the Ombudsman from discharging the lawful and constitutional powers and mandate of the office is a contravention of the applicable laws, ultra vires and unconstitutional.

***3.2.6** The conduct of the Claimant amounts to undermining the rule of law and the powers and mandate of a constitutionally established office, that is the Office of the Ombudsman. The Claimants ought to have been aware at all material times that an aggrieved party over determinations from the Ombudsman has rightful recourse to the Courts under the law as provided for in section123(2) of the Constitution, and as interpreted by the Supreme Court in **the Air Malawi case.** Therefore, in disregarding these clear principles of the law in relation to the issue as to when judicial review proceedings can lie against determinations from the Ombudsman, the claimants acted in bad faith.*

3.2.7 The application for Judicial Review was therefore prematurely and wrongfully made, it was ill conceived and therefore tantamount to abuse of process. The Claimants also proceeded on suppression of material facts."

9. The Defendant also disputes the Claimant's assertion that the Defendant lacks jurisdiction over the matter under consideration in this case. Paragraphs 3.2.8 to 3.2.11 of the Defendant's skeleton arguments are relevant and they read thus:

"3.2.8 Regarding the claim that the Office of the Ombudsman has no jurisdiction over this matter, it is our submission that the Ombudsman in fact has jurisdiction over this matter, it is our submission that the Ombudsman in fact has jurisdiction over this matter as there was an allegation of injustice and maladministration manifested through abuse of power, unfair treatment, and a failure by the Board of MERA to follow set down administrative processes in the exercise of their public duty and power.

3.2.9 In terms of the Constitution and the Ombudsman Act, issues of injustice, maladministration, abuse of power, unfair treatment are the very issues over which the Office of the Ombudsman has jurisdiction.

3.2.10 The Ombudsman proceeds to handle issues of allegations of injustice and maladministration where there are no remedy reasonably available by way of proceedings in a court of law, or where there is no other remedy available to the Complainants, and this was the case in this particular case.

3.2.11 In view of the preceding paragraphs, the action by the Claimant is tantamount to undermining due process and the lawful discharge of Constitutional powers vested on the Office of the Ombudsman."

Submissions by the Claimant

10. In response, the Claimant submitted that permission to commence judicial review herein was properly granted in that the Defendant did not have jurisdiction to inquire into the legality or procedural correctness of the appointment of Mr. Henry Kachaje because there was an available remedy through the judicial system to challenge such an appointment if it was done illegally. In the interest of parity of treatment, the submissions by the Claimant will also be reproduced in full:

"14.5Labour issues especially allegations of unfair labour practices, discrimination at place of work, unfair recruitment procedures are matters that ought to be dealt with by the Industrial Relations Court and not the Ombudsman. In the case of ***S (oao National Library Service Board) v the Ombudsman*** *Justice Chinangwa held that the Ombudsman has no jurisdiction over labour disputes that can be entertained by the IRC. She emphatically put it this way:*

> *15. It is this court's view having in mind section 123 of the Constitution that the complaints before the Ombudsman relating to unfair dismissal; unfair redundancy and unfair labour practices are claims which could have been addressed in the Industrial Relations Court as it has jurisdiction to deal with the same under section 57 of the Employment Act on dismissals. It is noted that the Industrial Relations Court has determined matters on transfers as in Jana v Attorney-General MLLR 391; unfair dismissals*

leading to reinstatements through unions and individuals as in 128 Trade Union Members v NSCM Milling Division MLLR 321; demotion as in Chinkondenji v Malawi Stock Exchange Ltd MLLR 379 just to mention a few. It is argued by the Ombudsman that these matters arose during the hearing as such they were dealt with in the manner in which they were dealt with. This court is of the view that the mere fact that a legal matter (which falls outside the jurisdiction of a tribunal or a court) uiir.r during the course of proceedings before the court or tribunal does not confer jurisdiction on such court or tribunal nor does it justify the tribunal or court to assume jurisdiction on such a matter and make decisions. Therefore' in this matter the Ombudsman could not assume jurisdiction over these matters for which the Ombudsman did not have jurisdiction simply because they arose during the course of the exercise of its Powers.

14.6 *She went on to hold that:*

Therefore, the court finds that the ombudsman has no jurisdiction over employment matters which arose during the proceeding which included unfair dismissal; unfair redundancy and unfair labour practices. The assumption of jurisdiction in this case was ultra vires and therefore nullified.

14.7 *The High Court decision in* ***The Ombudsman v Malawi Broadcasting Corporation*** *Misc Civil Cause Number 52 of 1999 delivered on October 6, 2000 (which was upheld by the Supreme Court of Appeal –the appeal therein being MSCA Civil Appeal Number 23 of 1999) supports the approach taken by Justice Chinangwa. The High Court and the Supreme Court of Appeal were of the view, inter alia, that the Ombudsman had no jurisdiction over labour related matters. The Courts thought such complainants had an alternative remedy to them namely suing in the Courts.*

14.8 *In the case of* ***Air Malawi Ltd v Ombudsman*** *(1 of 2000) [2000] MWSC 7 (17 April 2000), the Supreme Court of Appeal held that:*

But in our view the practice which the Ombudsman should develop should be that where there is a remedy reasonably available in Courts the complaint should be referred to the Courts as the proper body to whom the complainant should be advised to go. As Woolf LJ said in the case of R vs Local Commission ex Parte Croydon LBC [1989], 1ALL ER - 1033.

The Commission (in our case Ombudsman) should also have well in mind even when the holder of the office is a distinguished lawyer, as in this case here, that his expertise is not the same as that of a court of law. Issues whether an administrative tribunal has properly understood the relevant law and the legal obligations which it is under when conducting an inquiry

are more appropriate for resolution by the High Court than by a Commission however eminent."

14.9 In the current case the Ombudsman is an eminent lawyer. And she should have known that there were two hurdles to her proceeding with this case.

14.9.1 First, the matters complained of were labour or employment matters that could easily be resolved by the IRC.

14.9.2 Secondly, she was heavily conflicted; and thus could not hear or inquire into the matter without flouting rules of natural justice.

14.9.3 Finally, the matter was really frivolous and vexatious in that the complainant Mr Richard Chapweteka could not be said to have suffered injustice in that if it was for Mr Kachaje, the post would have gone to Mr Chikuni. And as for the civil society body, it is a busy body that has not suffered any injustice, unfairness or maladministration.

14.9.4 In other words it has no locus standi to lodge a complaint with the Ombudsman. Thus, she should have exercised her discretion not to hear or inquire into this matter."

11. The assertion by the Claimant that the Defendant was personally conflicted was elaborated on in the Claimant's skeleton arguments as follows:

*"**15. Breach of Rules of Natural Justice***

15.1 The Defendant applied for the job of the Chief Executive of MERA. She was not shortlisted; and thus could not be interviewed. Simply, put she had an interest in the post of CEO of MERA.

*15.2 To that extent, she had and has a personal interest in the outcome of this case. As Justice Mtalimanja remarked in the case of **Ruksana A. Waka & Anor. v Nazir Ahmed Waka & Anor. (Ruling)** (Commercial Case No. 101 of 2017) [2018] MWCommC 20 (10 December 2018)*

> *26. The Claimants argue, on the authority of the case of Ngilazi v Chimbende (trading as Titlwkoze Transport) 10 MLR 354) that the question is not whether the Firm will, as a matter of fact, use the information which they obtained from the 1st Claimant against her in furtherance of the Defendant's case, but whether the Firm is so connected to the Shop business in its partnership dispute as to be unfit to act as legal practitioner for one party against the other.*
>
> *27. In my considered view, the question of whether the Firm is conflicted transcends whether, as a matter of fact, there is indeed*

information that the Firm became privy to that can be used to the detriment of the 1st Claimant in these proceedings. As per Skinner CJ in the Ngilazi case (supra) citing Lord Hewart C.J in R. v Sussex JJ., ex p McCarthy (1924) 1 K.B at 259, justice should not only be done, but must also be seen to be done. Fmther, Skinner CJ held that applying this principle, a legal practitioner must decline or cease to act not only where the interests of a client are prejudiced if the legal practitioner continues to act for the other client but also where that client's interests might appear to be prejudiced.

28. Whilst it may well be that the Firm neither has nor became privy to confidential information through the earlier instructions that can be used to the detriment of the 1st Claimant, the mere possibility of this being so smacks of unfairness and invokes the conflict of interest concerns. Applying the principle that justice must not only be done but also be seen to be done, I find that it will be inappropriate for the Firm to act for the Defendant. Allowing the Firm to continue acting of the Defendant will, even to the objective person, conjure an impression of conflict of interest and consequently, injustice and unfairness to the 1st Claimant.

15.3 Rules of natural justice require that a judge or someone sitting in a quasi-judicial tribunal must not have an interest in the matter before her.

16. In view of her own interest in the post the Ombudsman clearly can be seen to have some interest in the matter; and therefore cannot sit in her own cause.

17 Her deciding to sit in this matter and conduct inquiry is tantamount to violation of the Claimant's right to fair administrative justice enshrined in section 43 of the Constitution.

18. Consequently her decision, it is submitted, is null and void as it is unconstitutional."

Analysis

12. I have considered this matter, including the sworn statements and the skeleton arguments filed herein by the parties and the oral submissions made by their respective counsel.

13. In considering the Application to Discharge Permission, I deem it imperative to warn myself at the outset of the danger of being dragged into delving into matters meant for determination at the substantive judicial review proceedings. To my mind, the all-important task for the Court at this stage is to examine whether in light of the

matters raised by the Defendant, the Claimant's case deserves, or does not deserve, to go to the stage of substantive judicial review proceedings.

14. It is also important at this juncture to backtrack and remember the matters that must obtain for an applicant to be granted permission to commence judicial review. It is trite that a court faced with an application for permission to commence judicial review has to be satisfied that (a) the person intended to be made a respondent is amenable to judicial review, (b) the applicant has sufficient interest in the matter to which the application relates, (c) the matters/issues raised in the application for permission to commence judicial review show a prima facie case fit for further investigations at the intended judicial review proceedings, (d) the application is made promptly, and in any event within three months of the date on which the grounds for the application first arose and (e) the applicant does not have an alternative remedy or avenue that would resolve his or her complaint: see **Malawi Communications Regulatory Authority v. Makande and Another, MSCA Civil Appeal No. 28 of 2013 (unreported), Ex-Parte CLC Forex Bureau and Others**, supra, **IRC v. National Federation of Self-Employed and Small Businesses [1982] AC 617** and **O'Reilly v. Mackman [1983] 2 AC 237**.

15. At the permission stage, there is no need for the court to go into the matter in depth. The essential burden of an applicant at this stage is as was enunciated by the Supreme Court of Appeal in the case of **Ombudsman v. Malawi Broadcasting Corporation [1999] MLR 329** at 333:

> *"The law applicable to an application for leave to apply for judicial review is very clear. Once the court is satisfied, after going through the material before it, that there is an arguable case, then leave should be granted. The discretion that the court exercises at this stage is not the same as that, which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application, se (IRC v Federation of Self Employed [1991] 2 ALL ER 93"* – Emphasis by underlining supplied

16. It is commonplace that the Court has discretion under its inherent jurisdiction to discharge permission. This was put beyond question in the **State v. Secretary to Treasury and Others, Ex-parte Mponda and Others [2005] MLR 454**, where Mkandawire J, put the point thus:

> *"Both the Attorney General and Counsel Kaphale have formidably submitted that leave for judicial review granted herein should be set aside. This Court has the inherent jurisdiction to set aside orders including orders granting permission to apply for judicial review, which have been made without notice being given to the defendant as was the case*

> herein. *The case authority in point is R v DPP ex parte Camelot PLC [1997] 10 Admin. L. Rep 93 – Order53.*
>
> *Practice note 53/1-14/34 is also very clear on this point that such an application has to be made promptly after the person had discovered the grant of leave. Thus the power of this court to set aside leave, already given for judicial review is covered in several case authorities from various jurisdictions."* – [Emphasis by underlining supplied]

17. However, the power to discharge permission to move for judicial review has to be sparingly used. This is how it ought to be: see **R v. Customs and Excise Commissioners ex-parte Eurotunnel PLC [1995] CLC 392** where the court said:

> *"It is obvious that the whole purpose of the leave stage would be violated if the grant of leave were to be regularly followed by an application to set aside"*

18. Permission to commence judicial will be discharged where (a) the application discloses absolutely no arguable case or (b) the applicant suppresses material facts: see **In Re: Ministry of Finance, Ex-parte SGS Malawi Limited, Miscellaneous Civil Application Number 40 of 2003** (unreported) wherein Mwaungulu J, as he was then, said:

> *"..where given, the other party may apply to have the leave set aside because the application discloses absolutely no arguable case (R v. Secretary of State for the Home Department ex parte Khalid Al-Nafeesi [1990] C.O.D. 306) or because the applicant has not frankly disclosed material facts or material aspects of the law. (R v. Jockey Club Licensing Committee ex parte Wright [1991] C.O.D. 306"* – [Emphasis by underlining supplied]

Arguable Case

19. Having examined the respective statements of case, the sworn statements and the submissions by Counsel, I have great difficulties to accept the contention by the Defendant that there is no arguable case. The different arguments raised by the Claimant and the Defendant are self-revealing. For instance, whilst the Claimant argues that section 123(1) of the Constitution does not vest the Defendant any authority to investigate a case where it is alleged that a person has suffered injustice but it does appear that there a remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy, the Defendant contends that irrespective of the fact that the Defendant lacks authority to investigate a particular matter, there is nothing that an aggrieved party

can do to seek an effective remedy regarding the lack of such authority other than wait until the Defendant renders her determination. The Defendant cited section 123(2) of the Constitution as being the authority for this proposition. One obvious question that such a proposition raises is whether the framers of the Constitution meant that provisions of section 123 of the Constitution supercede, override or trump section 41 of the the Constitution. Section 41 of the Constitution deals with access to justice and legal remedies and it, among other things, grants every person the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by the Constitution or any other law.

20. Is it to be understood that in so far as the exercise of the Defendant's powers under section 123 of the Constitution is concerned, it is only after the Defendant has made a determination that an effective remedy would arise for an aggrieved person irrespective of the nature of the complaint? In considering this question, two important matters have to be borne in mind. Firstly, it is a cardinal principle of law that one constitutional provision cannot abrogate another. In the words of Chikopa, J., as he then was, in **Hon. J. Z. U. Tembo and Kate Kainga v. Attorney General, HC/Mzuzu District Registry Civil Appeal Case No. 50 of 2003:**

> *"... But more than that the plaintiffs (like many people actually) seem to us to be laboring under the belief that one section of the Constitution can be used to abrogate another. This is not possible. See the* ***Press Trust Case*** *decisions both in the High Court and in the Malawi Supreme Court of Appeal. The latter court did also express similar sentiments in the* ***Fred Nseula*** *case."*

Secondly, section 41 of the Constitution is an entrenched provision: see section 196 of the Constitution as read with the Schedule to the Constitution. This being the case, the all-important question to consider is whether the right to an effective remedy can be limited by implication?

21. Further, the Claimant complains that the Defendant flouted rules of natural justice by hearing or inquiring into the matter since she was one of the persons that applied for the post of the Chief Executive of the Claimant. Surely, this is not an issue that can simply be brushed aside on the strength of an opinion held by the Defendant to the effect that the "*connection of the Ombudsman with the matter was not substantive nor material as to raise a prejudicial interest.*". The Court has to inquire into this issue by way of judicial review to determine whether or not the said opinion was legally grounded. This also applies with equal force to the contention by the Defendant that in its view the matter before it was one that did not have "a

remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy." Neither the Defendant's sworn statement nor the Defendant's skeleton arguments contain an analysis showing how the Defendant came to this conclusion.

22. In short, there are present in this case several cogent triable issues. Having established that, the Claimant has, so to speak, crossed the threshold; and the Court has then to proceed to address the substantive judicial review matter, unless it can be shown that the Claimant, in obtaining permission to commence judicial review, suppressed material facts.

Suppression of Material Facts

23. The issue of suppression of material facts is touched upon by the Defendant in paragraph 3.2.7 of the Defendant's skeleton arguments. The paragraph reads:

> *"The application for Judicial Review was therefore prematurely and wrongfully made, it was ill conceived and therefore tantamount to abuse of process. The Claimants also proceeded on suppression of material facts."* – Emphasis by underlining supplied

24. Material facts are those which it is material for the judge to know in dealing with the application as made and which are necessary to enable him to exercise his discretion properly: see **Third Chandris Corp. v. Unimarine SA [1979] Q.B. 645**. Materiality is to be decided by the Court and not by assessment of the partied or their legal advisors. Whether or not a fact complained of is of sufficient materiality depends on, on among other matters, the importance of the fact to the issues in the case: see **Brink's Mat Ltd v. Elcombe and Others (1988) 1 WLR 1350**.

25. In the present case, neither the sworn statement nor the skeleton arguments by the Defendant state the matters that are said to have been suppressed. That being the case, I do not understand how the Court would be expected to make a finding of suppression of material facts. I, accordingly, agree with the Claimant that it revealed all facts that were relevant and essential to the decision of the application for permission to commence judicial review.

26. In view of the foregoing and by reason thereof, I am very much persuaded and it is my decision that permission to commence judicial review was properly granted

and that the issues which the Court is being asked to determine can only be best addressed through judicial review and not otherwise. I see no merit in the Defendant's complaint against the said permission. The said permission to commence judicial review is, accordingly, sustained.

27. Now that the issue of permission to commence judicial review has been resolved, the Defendant has 7 days within the date hereof to file her Defence and a scheduling conference is set for 17th January, 2021 at 10 o'clock in the forenoon. It is so ordered

Interim reliefs

28. As already stated, the Claimant were granted interim reliefs subject to an inter-partes hearing. The Defendant is opposed to the continuation of the interim reliefs and reliance has been placed on a sworn statement by the Ombudsman. The contents of the said sworn statement are in all material respects the same as the contents of the Defendant's sworn statement set out above under paragraph 7 of this Ruling.

29. The main thrust of the submissions by the Defendant on the issue of interim reliefs is more or less the same as the submissions made in support of the Application to Discharge Permission. The relevant part of the submissions is couched in the following terms:

> *"3.11 From the reading of section 123(2) and how the Supreme Court interpreted the said section, one cannot apply for Judicial review for every step that the Ombudsman takes until the Ombudsman makes a determination on a case. The Claimants therefore cannot take for review the decision of the Ombudsman to commence an inquiry into the recruitment process of Mr. Kachaje and they cannot take for review the decision of the Ombudsman to hold Public Inquiries in order to obtain evidence that would enable the Ombudsman to fairly determine this matter. In effect, and as stated in the **Air Malawi Case** cited above, they can also not take for judicial review a concluded inquiry process until a determination and pronouncements thereof are made and released. It is only after the Ombudsman has come to a final conclusion in her determination and the same has been released, and the directives thereof pronounced, that those who are aggrieved and have sufficient interest can invoke section 123(2) of the Constitution of the Republic of Malawi and seek a review.*

3.12 *In embedding section 123(2) of the Constitution which stipulates on the exact time when determinations of the Ombudsman can be taken for review into the provisions that grant the Office of the Ombudsman its mandate and powers, clearly it was envisaged that the determinations of the ombudsman will be reviewable. However, as per the wording of section 123(2) such an action can only lie after the release of the Ombudsman's determination. Thus, to have a situation where the Office of the Ombudsman's case handling processes would be subjected to injunctions, restraining orders or judicial review as and when a party claiming to be aggrieved, deems necessary to make applications to the Courts for the same, before the determination and pronouncement has been made, would lead to absurdity and render the office of the Ombudsman non-functional. Such an approach would be tantamount to rendering the Ombudsman's investigative powers which are vested on the office by the Constitution inconsequential and a negation of the role of the Office of the Ombudsman in the constitutional scheme of things*

3.13 *In light of the above, when one considers the nature of the matter in which relief may be granted by a mandatory order, a prohibiting order or a quashing order; the nature of the person or institution against whom relief may be granted by such an order; and all the circumstances of the case, the present matter does not fall into the category of cases where such kind of orders can be granted at the time and in the circumstances the orders that Claimants sought were granted. The Claimant made his application and obtained the permission to commence judicial review and the attendant injunction before the period that is permissible by law. In addition, the Claimant suppressed the material fact that the inquiry process had been concluded and the release of the determination was set for the 10th November, the notice of which was served on, and duly received by the Claimants on 9th November."*

30. I have carefully perused all documents filed by the parties and listened to their counsel's submissions. Order 19, rule 21, of the CPR states that an application for a mandatory order, a prohibiting order or a quashing order can be made with an application to the Court for Judicial Review. Order 19 of the CPR further states, in rule 22, that an application for a declaration or an injunction may be granted by the Court where it considers that it would be in the interests of justice to do so, having regard to:

(a) the nature of the matter in which relief may be granted by a mandatory order, a prohibiting order or a quashing order;

(b) the nature of the person or institution against whom relief may be granted by such an order; and

(c) all the circumstances of the case.

31. As already observed in this Ruling, the case of the Claimant is that the Defendant did not have jurisdiction to inquire into the legality or procedural correctness of the appointment of Mr. Henry Kachaje because there was a remedy available through the judicial system to challenge such an appointment if it was done illegally. The Claimant has also raised the issue of likelihood of biasness of the Defendant in handling the complaint, being someone who expressed interest in the job that Mr. Kachaje emerged successful. Needless to say, these are very serious issues to be decided by the Court requiring the Defendant's challenged decisions to be in abeyance at the moment until the Court makes its final determination on the matter.

32. I am fortified in my view by the following case authorities. In **Films Rover International Ltd v. Cannon Film Sales Ltd [1986] 3 All ER 772** at 780–781, Hoffmann J, hit the nail on the head regarding the dilemma faced by a court in an application for interim reliefs:

> *"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."* – Emphasis by underlining supplied

33. The same point was forcefully made by Lord Bridge in **R v. Secretary of State for Transport, ex-parte Factortame (No.2) [1991] 1 All ER 70** (House of Lords) in the following terms:

> *"A decision to grant or withhold interim relief in the protection of disputed rights at a time when the merits of the dispute cannot be finally resolved must always involve an element of risk. If, in the end, the claimant succeeds in a case where interim relief has been refused, he will have suffered an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. The objective which underlies the principles by which the discretion is to be guided must always be to ensure that the court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised. Questions as to the*

adequacy of an alternative remedy in damages to the party claiming injunctive relief and of a cross-undertaking in damages to the party against whom the relief is sought play a primary role in assisting the court to determine which course offers the best prospect that injustice may be avoided or minimised. But where, as here, no alternative remedy will be available to either party if the final decision does not accord with the interim decision, choosing the course which will minimise the risk presents exceptional difficulty." – Emphasis by underlining supplied

34. In the Hong Kong Case of **Anglo Starlite Insurance Company Limited v. The Insurance Authority HCMP003845/1991**, the Court laid emphasis on the need to provide effective remedy. The issue was put thus:

". . . happy to reach the conclusion that the courts are able to direct such stays whenever it is appropriate so to do. Where a right may be made out, there should be preserved an effective remedy by which to enforce it if it is eventually made out. And it should be, and I trust will be, clearly understood that - the power to direct such stays being discretionary - the existence of the power will not paralyse administrative action rather it will ensure that such action conforms with the law. That is the essence of judicial review." – Emphasis by underlining supplied

35. Local cases on point are many but the following dicta by Kapanda J., as he then was, in case of **The State v DPP and LL CRM Court ex parte Chilumpha Misc Civ Cas. No 315 of 2005 (H.C)(P.R.)(Unrep.)** will suffice:

"Surely, in this court's considered opinion the balance of convenience would require that the stay order should be maintained. The short of it is that the law is clear that if leave for judicial review is granted the court is allowed to make an order staying inter alia, the decision itself and its implementation. As discussed earlier, the reason for this is that if the courts were to do otherwise that would amount to allowing the person or public body whose decision is to be reviewed the opportunity to implement the so called offending decision and render the substantive hearing of judicial review proceedings an academic exercise. It is for this reason that the court is of the view that the stay order granted herein should be, and is hereby, maintained. For the avoidance of any doubt the so called Temporary Order of injunctive relief against the Defendants will remain in place until the hearing of the substantive application for the judicial review. It is so ordered." – Emphasis by underlining supplied

36. In view of the foregoing and by reason thereof, it is my holding that the interests of justice tilt in favour of preserving the status quo in order not to render these proceedings nugatory. Accordingly, the application for the continuation of the interim orders granted by the Court on 10th November 2021 is allowed. The interim

orders shall be valid pending the hearing and determination of the substantive case of judicial review or until a further order of this Court. It is so ordered.

37. There is another compelling reason why the application by the Defendant to discharge the interim reliefs has to be dismissed. The Defendant holds the view that the principles applicable to the present case are those set out in Order 10, rule 27, of the CPR. Paragraphs 3.3.4 to 3.3.6 of the Defendant's skeleton arguments in support of her application to discharge the interim reliefs state as follows:

> *"3.3.4 Turning back to the issue of whether or not the interim injunction order was rightly obtained, the principles applicable to injunctions generally do apply in this case. The Applicable rules in our Courts (High Court)(Civil Procedure) Rules 2017 is Order 10 rule 27, which states that the Court may, on application, grant an injunction by an interlocutory order when it appears to the Court:*
>
> *(a) There is a serious question to be tried;*
>
> *(b) Damages may not be an adequate remedy; and*
>
> *(c) It shall be just to do so.*
>
> *3.3.5 In the case of American Cynamid Co. v Ethicon Ltd is the leading authority on the principles applicable in applications for interlocutory injunctions. The important dicta in that case was summarized by Tembo, J., in the case of Ian Kanyuka v Thom Chiumia & Others, wherein he said:*
> ...
>
> *3.3.6 The test is therefore threefold, in that three questions have to be answered, to wit:*
>
> *(i) is there a serious question to be tried? If the answer is 'yes', then a further question arises,*
>
> *(ii) would damages be an adequate remedy for a party injured by the court's grant of, or failure to grant, an injunction? If not*
>
> *(iii) where does the balance of convenience lie?"*

38. With due respect to the Defendant, the said submissions are legally flawed. The application by the Claimants for interim reliefs was brought under Order 19, rule 22 of the CPR: see paragraph 30 of this Ruling above for the text of the rule.

39. Needless to say, the requirements of Order 10, rule 27, of the CPR are different from the requirements of Order 10, rule 22, of the CPR: see **The State (On the Application of Prophet Shepherd Bushiri & Mary Bushiri v. The Director of Public Prosecutions & another, HC/ Lilongwe District Registry Judicial Review Cause No. 8 of 2021**. There is no doubt in my mind that had it been that the framers of the CPR had intended that applications under the two Orders should be governed by the same principles, the CPR would have provided to that effect with clarity and directness.

40. One of the distinguishing features between Order 10, rule 27, of the CPR and Order 10, rule 22, of the CPR which sticks out like a sore thumb is the issue of damages. Unlike Order 10, rule 27, of the CPR which requires that an applicant should show , among other things, that damages may not be an adequate remedy, Order 10, rule 22, of the CPR makes no express reference whatsoever to the issue of damages. I should think people well versed in human rights would not find this difference surprising. That damages constitute an adequate remedy (repeat "adequate") in respect of alleged violation of human rights has been seriously questioned: see, for example, the case of **The State v. The Attorney General (Inspector General of Police, Commissioner of Police (Central), Misc. Civil Case No. 49 of 2008 (unreported)** wherein Mzikamanda J, (as he was then) emphatically stated thus:

> *"As to whether damages can be adequate remedy for the alleged violation of human rights, I hasten to say that damages may not be an adequate remedy. Enjoyment of human rights cannot be quantified in monetary terms, and yet the enjoyment of those rights is a very fundamental aspect of our democracy"*

41. In the circumstances, the arguments by the Defendant that the interim reliefs were wrongly granted lacks merit in that the said arguments were based on wrong principles.

42. This aspect of the case shows why it is important that a lot of thought should be given to preparation of skeleton arguments. Order 20(1) of CPR requires that *"in all interlocutory applications the parties shall file and serve skeleton arguments to be relied upon at least 2 days before the hearing of the application"*. The rationale behind Order 20(1) of CPR is to remove the element of surprise.

Pronounced in Chambers this 27th day of December 2021 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE