IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NUMBER 05 OF 2017

(Being High Court of Malawi Mzuzu District Registry, Misc Civil Cause No. 01 of 2017)

BETWEEN:

HONOURABLE DR. GEORGE CHAPONDA.....1st APPELLANT

THE STATE PRESIDENT OF MALAWI.....2nd APPELLANT

EX PARTE:

MR CHARLES KAJOLOWEKA.....1st RESPONDENT

THE REGISTERED TRUSTEES OFYOUTH AND SOCIETY.....2nd RESPONDENT

THE REGISTERED TRUSTEES OF CCAP SYNOD OF LIVINGSTONIA (CHURCHANDSOCIETYPROGRAMME).....3rd RESPONDENT

THE REGISTERED TRUSTEES OF CENTREFOR THE DEVELOPMENT OF PEOPLE.....4th RESPONDENT

CORAM: BEFORE HON. CHIEF JUSTICE NYIRENDA SC, JA,

HON. JUSTICE TWEA SC, JA,

HON. JUSTICE KAPANDA SC, JA,

Apoche Itimu; of Counsel for the Appellant/State

Victor Gondwe; of Counsel for the Respondents

Minikwa; Court Clerk

Judgments: Kapanda SC, JA (unanimous)

Date of Hearing of Appeal: 28 June 2017

Date of Judgment: 13 February 2019

Summary: For the reasons and on the grounds advanced in this judgment, we find and conclude that the grant of leave to move for judicial review be vacated. This Court also makes an order for costs here and in the court below against the Mr. Charles Kajoloweka personally.

Further, as for the 1st respondent,Mr. Charles Kajoloweka we observe that he put in an affidavit where in one breath he puts it as 'I' and then later he is talking of himself as 'we' as if he depones to facts on behalf of all respondents. Evidently the affidavit lacks connectivity between him and the other bodies (i.e.2nd, 3rd and 4th respondents)in this matter. It is our view that Mr. Charles Kajoloweka personally took the judicial review proceedings although he wants to put himself as a trustee. This Court questions the basis for his mandate as there is no general or special resolution of the Board of Trustees to take out the proceedings. We further observe that the Constitution of the organization is not available for us to confirm the basis upon which he proclaimed

himself as having the authority and mandate to take out the judicial review, the subject matter of this appeal.

It is this Court's view that the mandate of Mr. Charles Kajolowekais found lacking and worrying. Amongst other things, Counsel for Mr. Charles Kajoloweka put it as follows on being asked about the mandate of the said Mr. Charles Kajoloweka: "The first Applicant (Mr. Charles Kajoloweka) is the Executive Director of the 2nd applicant, Registered Trustees of Youth and Society but I am not aware of his connection to the 3rd and 4th applicant". We note nevertheless that in his founding affidavit he is speaking as if he is a trustee and yet the case is in the name of Registered Trustees of The Registered Trustees of Youth and Society; The Registered Trustees of CCAP Synod of Livingstonia (Church and Society Programme) and The Registered Trustees of Centre for the Development of People. We should have expected the mandate of the various trusts to bring up the matter. This should have come as a resolution of board or specific mandate of the Trustees on this issue. We do not have anything of that nature. Our concerns are raised further on reading the affidavit Mr. Charles Kajoloweka which is more of "I". But, this Court does not know if the board trustees mandated him to raise the concern of fellow trustees. As we understand it, it is necessary for an Applicant to judicial review proceedings to demonstrate to the court that somehow his rights will be affected. In this circumstance the second, second, third and fourth Respondents did not even file an affidavit in the proceedings in the lower court. The second, third and fourth Respondents did not file an affidavit in the lower court demonstrating or showing to the court a quo that they had any interest in this case.Thus, we are confusedas to how Mr. Charles Kajoloweka finds himself as representing the trustees of The Registered Trustees of CCAP Synod of Livingstonia (Church and Society Programme) and The Registered Trustees of Centre for the Development of People in this matter.

JUDGMENT

Judgment delivered by Hon. Chief Justice A. K.C. Nyirenda SC (concurring in the judgment):

Having had the privilege to read before now the judgment just read by my learned brother Justice of Appeal F.E. Kapanda SC, I am in entire agreement with him that this appeal be and is hereby dismissed. It is dismissed with cost here and below payable by Mr Charles Kajoloweka.

Judgment Delivered by Justice of Appeal E.B. Twea SC (concurring in the judgment):

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I allow the appeal. I set aside the judgment of the Court below. I abide by the order for costs contained in the aforesaid judgment.

Kapanda SC, JA: (with Chief Justice A.K.C Nyirenda SC and Justice of Appeal E.B Twea SC concurring):

FOUNDATION

The genesis of this case was that in around 2016 there was said to be a general scarcity of maize in the Agricultural Development and Marketing Corporation (ADMARC) depots. It was alleged that the stockpile of maize on the open market then started to escalate further. For this reason, the Government, through the Ministry of Agriculture and Food Security, in collaboration with ADMARC arranged to purchase maize from supplier in the Republic of Zambia. The arrangement for the procurement of the maize gave rise to allegations of corruption, against Honourable George Chaponda, then the Minister of Government responsible for the Ministry of Agriculture and Food Security. officials of ADMARC and other entities in the Republic of Zambia allegedly connected to the supply and procurement of the maize.The allegations generated debate in the public domain and there were accusations and calls on the Presidency, to

dismiss the Minister of Agriculture and Food Security and the official of ADMARC among other things, or that the Minister and the officials should resign or vacate their offices to enable investigations to be carried on without hindrance.

The President and the Minister declined to dismiss or resign respectively. The President however, issued a Commission of Inquiry, into the matter, under section 2(1) of the Commission of Inquiry Act. Amongst the Commissioners appointed was the Solicitor General and Secretary for Justice, Dr. Janet Banda and Mr. Isaac Kayira, a public accountant. This state of affairs caused the respondents to bring these proceedings.

The respondents brought these proceedings to move for Judicial Review against Hon. George Chaponda, the Attorney General and the State President.

INTRODUCTION

ThePresident issued a statutory notice of appointment of a Commission of Inquiry into all aspects of the procurement of maize by ADMARC from the Republic of Zambia.Membership of the Commission included Dr. Janet L. Banda SC and Mr. Isaac Kayira, who at the material time, were civil servants. The statutory notice of appointment of a Commission of Inquiry was made on 1st January 2017.

On 11th January 2017, the respondents lodged an ex parte application seeking leave to commence judicial review and an interlocutory injunction.On 12th January 2017, the High Court sitting at Mzuzu District granted leave to the respondents to move for judicial review. The court a quo also granted an injunction restraining the Attorney General as a party and the 1st Appellant (Honourable Dr. George Chaponda) from discharging his duties as cabinet minister until the finalisation of the investigations by the Commission of Inquiry or until a further order of the court below..

On 10th February 2017,Justice of Appeal Mwaungulu SC, sitting as a single judge, vacated the order of interlocutory injunction through an application made by the

Honourable the Attorney General. The detailed ruling should as well be on the Court file.

In the court below, the appellants lodged an application to discharge leave and remove the Attorney General as a party. On 31 January 2017, the High Court declined to discharge leave but removed theAttorney General as a party. On the same day, on 31 January 2017, the appellants lodged an appeal in this Court against the decision of the High Court. Leave to file the appeal was sought from and granted by Chirwa, J on the same day, 31 January, 2017, immediately following which, on the same day all the parties, through counsel, executed and had issued (by the Registrar) a Consent Order settling the record of appeal.

This appeal is therefore against the decision to refuse to vacate the grant of leave to move for judicial review. It is also an appeal against the refusal to remove the 2nd, 3rd and 4threspondents as parties to the case for lacking locus standi.

THE FACTUAL BACKGROUND

For a better understanding of the genesis of the matter before us, a brief background of the contents of the proceedings in the High Court that precede this appeal will be necessary. As we were able to gather from the record, the following were the salient contents of the proceedings.

The respondents (Mr. Charles Kajoloweka being the primary mover of the judicial review proceedings in particular) had sought for and had been granted leave to move for judicial review. In Form 86A (the formal application for leave to move for judicial review), the respondents stated that the judgments, orders, decisions in respect of which reliefs were being sought were:

(a) The decision of the 3rd respondent (The State President of Malawi) not to suspend the 1st respondent (Hon. Dr. George Chaponda) as a Minister of Agriculture pending the conclusion of investigations of an alleged maize

purchase corruption scandal involving Hon. Dr. George Chaponda and a Zambian Company;

(b) The decision of the State President to maintain Hon. Dr. George Chaponda as a line Minister when he allegedly was involved in a corruption scandal a being investigated by a Commission of Inquiry instituted by the 3rd respondent.

(c) The decision of the 3rdRespondent (The State President of Malawi) to appoint and constitute a Commission of Inquiry whose dome (sic) of its members namely, Dr Janet Banda and Mr. Isaac Kayira, are civil servants, therefore subordinate to the Respondent including Hon. Dr. George Chaponda who has not been suspended contrary to the safeguards of impartiality of commissioners of inquiry as per section 7 of the Commissioners of Inquiry Act and clear principles of justice and constitutionalism;

(d) Hon. Dr. George Chaponda's decision not to resign as a cabinet Minister pending the conclusion of the investigation by a commission of inquiry;

The reliefs sought in the judicial review application were as follows:

(a) A declaration that the State President's decision not to exercise his prerogative to suspend or remove Hon Dr George Chaponda pending the finalization of investigations by the Commission of Inquiry is contrary to the spirit of the Commission of Inquiry Act, especially section 7 which clearly requires members of a Commission of Inquiry to be impartial and that the said decision violates principles of natural justice especially one that clearly states that there should not be an appearance of bias by a decision maker and that it is also generally against principles of constitutionalism and therefore not supported by law;

(b) Likewise, a declaration that the decision of Hon Dr. George Chaponda not to resign to pave way for investigations into an alleged corruption scandal involving the said Hon. Dr George Chaponda and Zambian company in the purchase of maize (the investigations being carried out by the Commission of Inquiry some of whose members are subordinate to Hon Dr George Chaponda) creates an

appearance of bias and that it violates section 7 of the Commission of inquiry Act;

(c) A further declaration that Hon Dr. George Chaponda, being a line cabinet minister under the ministry that is being directly investigated, may interfere with the investigation;

(d) A like order to mandamus, compelling the State President to suspend Hon Dr. George Chaponda pending finalisation of investigations by the already constituted Commission of Inquiry;

(e) Alternatively, a like order of mandamus, compelling Hon Dr George Chaponda to resign pending the finalisation of the investigations by the Commission of Inquiry;

(f) Any other remedies the court may grant in its discretion;

(g) If leave to move for judicial review is granted, then the same should operate as an interlocutory injunction restraining Hon Dr George Chaponda from discharging his duties as a cabinet minister pending a further order of this court.

(h) An order for costs.

Basically, what was sought by the respondents to be reviewed in the judicial review proceedings before the court *a quo* were:

(a) The decision by the President not to suspend the Hon. Dr. George Chaponda as cabinet minister (and related to this, of the decision by Hon. Dr. George Chaponda not to resign) pending the finalization of Presidential Commission of Inquiry. The relief sought was a declaration that the failure to suspend Hon.Dr. George Chaponda as a cabinet minister was contrary to the spirit of the Commission of Inquiry Act, especially section 7, and a violation of principles of natural justice. We observe at the outset that no particular principle of natural justice was mentioned except that we guess it is something to do with bias as alluded to above. Further, on constitutionalismno particular section of the [illegible] or aspect of constitutionalism was mentioned.

(b) The decision by the President to have Dr Janet Banda (the ... Mr Kayira an auditor in government) the two being civil servants, as members of the Commission of Inquiry, contrary to safe guards of impartially under section 7 of the Commission of Inquiry Act.

(c) A declaration that Hon Dr. George Chaponda may interfere ... investigations. We must say that no factual basis was given on why it was thought thatHon Dr. George Chaponda might interfere with the investigations.

This Court notes that paragraph 1 and 3 of the grounds on which relief was sought, basically repeated the above information. In paragraph 4 of the grounds on which the relief was sought, it was stated that the 1st respondent was finding it hard to purchase maize at a local market due to scarcity of the commodity as well as the high prices prevalent on the market which prices could be attributed to the alleged corruption scandal. It was then stated in paragraph 5 of the grounds on which relief was sought that the rest of respondents are NGO's whose values, principles and mandate are to safeguard democratic and transparent governance of the Republic of Malawi and they sought, through the judicial review, to enforce these principles. It was further alleged that the acts of the appellants are unconstitutional and illegal as they were made without due regard to constitutional tenets as well as regard to the provision of the Commission of Inquiry Act, particularly section 7 of the said Act. Finally, it was alleged that the actions of the 1st and 3rd appellants were Wednesbury unreasonable and the decision was procedurally improper, illegal unreasonable and unconditional.

The Form 86A was supported by a Statement of facts and affidavit verifying facts. We will comment on the affidavit later.

The appellants filed an application in the court below where it sought the following reliefs:

(a) To vacate the grant of leave to move for judicial review on the ground that the Court did not have the jurisdiction in a judicial review of administrative action and also on the ground that the application did not disclose an arguable case or serious question fit for further inquiry.

(b) To remove the 2nd, 3rdand 4threspondents as parties to the application as they all did not have sufficient standing in the case;

It is the High Court ruling on that application that is now under appeal. This Court has noted that the High Court removed the Attorney General as a party to the proceedings, but refused to vacate the grant of leave for judicial review and also refused to remove the 2nd,3rd, and4th respondents.

A SUMMARY OF THE CASE FOR WHICH LEAVE FOR JUDICIAL REVIEW WAS SOUGHT AND GRANTED.

It is important that we now give a summary of the case for which leave for judicial review was sought and granted. The Court accepts that this has already been captured above. But we trust that it is necessary to repeat it here before we explore into the gravamen of our findings and conclusions on the appeal.

This is an Appeal by the Honourable the Attorney General on behalf of the Appellants against the decision of Justice J Chirwa dated the 31 January 2017.Essentially, the ruling dismissed the appellants' application to vacate leave for judicial review which leave was initially granted by the lower court ex parte. It is this ruling of 31 January 2017 that is being appealed against by the Appellants.

THE APPEAL BEFORE THIS COURT (THE GROUNDS OF APPEAL)

Six grounds of appeal have been filed by the appellants as follows:

1. The Judge erred in failing to contextualize the proceedings by (not) recognizing (i) the non-binding nature of Commission of Inquiry findings on the President and

   (ii) to also consider the powers (e.g. to summon witnesses and compel production of documents) and duties (e.g. of impartiality etc.) of members of Commissions of Inquiry vis a vis the allegation of potential interference in the Commission's work by the 1st appellant (Honourable Dr. George Chaponda) and, consequently, as there was no evidence on record of efforts to interfere with the Commission's work, to hold that there was necessity for the President to ask the [illegible] Honourable Dr George Chaponda) to resign from his office or for

the 1st appellant (Honourable Dr. George Chaponda) to voluntarily resign from his office pending the inquiry and that therefore, there was no triable issue fit for a full judicial review application raised by the proceedings;

2. The Judge erred in failing to find that though some executive [illegible] judicially reviewable under the new constitutional order, Presidential powers of appointment, suspension or dismissal of Ministers can only be reviewed on very narrow and limited grounds of legality and that the current judicial review proceedings raised no such issue;

3. The Judge erred in failing to find that there was no triable issue of the legality of the exercise of the Presidential powers of appointment or suspension (or failure to do so) of the 1st appellant that the respondent's Form 86A raised and which merited further inquiry in a main judicial review proceeding;

4. The Judge erred in failing to identify, in light of the law on the reviewability of Presidential powers of appointment or suspension of Ministers, and in light of the powers of Commissions of Inquiry and the duties of Commissioners, which issue or issues he found to be triable on a full judicial review application and why;

5. The Judge erred in failing to identify which constitutional provisions would be subject to judicial review in light of the facts so far disclosed, at the main judicial review hearing; and

6. Based on binding precedent from the Malawi Supreme Court of Appeal, and in view of the facts of the case disclosed in the application for leave for judicial review, the Judge erred in finding that the 2nd, 3rdand 4th respondents have locus standi to remain as parties to the judicial review proceedings.

What then are the issues for determination that arise and fall to be decided in the appeal under consideration by this Court?As we understand it, the main questions raised by the appeal are as follows:

ISSUES FOR DETERMINATION

As this matter came for a rehearing, the case for the respondents was that (i) the State President should have suspended Honorable Dr. George Chaponda or Hon Dr. George Chaponda should have voluntarily resigned) from exercising his functions as Minister responsible for Agriculture pending the Commission of Inquiry into the maize purchase because he may interfer with the investigations and (ii) Commissioners Banda (the Solicitor General) and Kayira (an Auditor in the Auditor General's office) who work for Government would be, by reason of their status as public servants alone, biased or be influenced by the then Minister of Agriculture (Hon Dr. George Chaponda).

Further, in so far as we were able to gather from the grounds, the appeal raises legal issues which this Court is being called upon to determine. The proceedings seem to raise the following questions viz: whether any court would be "satisfied" that the judicial review proceedings commenced by the applicants raise prima facie a "clearly arguable" case: is it a fact that a cabinet minister being investigated by a Commission of Inquiry would have (without evidence of intention or propensity and in the light of the powers and duties of Commissioners and witness under the Commission of Inquiry Act) interfered with inquiry proceedings so that he ought to have resigned from his office or be suspended pending the inquiry, purportedly in keeping with section 7 of the Commission of inquiry Act and constitutionalism?; would a cabinet Minister (Hon Dr. George Chaponda)responsible for Agriculture summoned to give evidence by a commission of inquiry comprising, among others, the Solicitor General and an auditor from the National Audit office, influence the two in the absence of any other facts leading to such conclusion but basing only on the fact that the two are public servants?

As regards the first question, it ought to be noted that no provision in the Constitution or any statute has been cited that compels a person under inquiry by a Commission of Inquiry to resign their office pending an inquiry. It furthermore has not been contended that there is at law a presumption of interference with investigations arising in fact or under any provision of any law. Thus, the question this court will grapple with, on this appeal therefore is whether or not, in view of the powers and duties of commissioners and witness under the Commission of Inquiry Act, the matter for which judicial review was sought and granted prima facie raises a "clearly arguable case" fit for further

inquiry to the satisfaction of the court.And, on the second issue, the question is whether any court would be "satisfied" that a prima facie "clearly arguable" case involving bias arises in any situation where public officers sit in a commission of inquiry involving a cabinet minister.

As we understand it further, the main questions raised by the appeal, following our reading of the grounds of appeal enumerated above, arise from the grounds of appeal. There are therefore basically four issues for determination before this Court. As this matter came for a rehearing, the parties were desirous of the following issues determined on this appeal viz.:Whether in the circumstances of the case and the facts before the lower court, the judge was justified to hold that the executive powers of the Appellants are reviewable;Whether in the circumstances of the case and the facts before the lower court the learned judge was justified to hold that the 2nd, the 3rdand 4th respondents (we will refer them to as 'the other respondents') have locus standi in the present proceedings.

For all intents and purposes, with regards to the issue of sustenance or vacation of leave to proceed with judicial review, the pivotal issue is whether or not the executive powers of the 2nd appellant (The State President), in the circumstances of the case at hand, are reviewable.

THE ARGUMENTS (THE PARTIES' POINTS OF CONTENTION)

This Court will now look at the arguments that have been raised by the parties in either support or opposition to these grounds of appeal and questions for determination arising from these grounds of appeal. We shall start with the appellants' arguments then move on to consider those put forward by the respondents.

The Appellants' Arguments

Respecting ground one, the appellants surmises that the Judge erred in failing to contextualize the proceedings by recognizing (i) the non-binding nature of Commission of Inquiry findings on the President and (ii) to also consider the powers of members of

Commissions of Inquiry when considering the allegation of potential interference in the Commission's work by the 1st appellant as there was no evidence on record of efforts to interfere with the Commission's work. Thus, he erred in holding that it was necessary for the President to ask the 1st appellant to voluntarily resign from his office or for the 1stappellant to voluntarily resign his office pending the inquiry. In the result, the argument continued, there was no triable issue fit for a full judicial review in the application raised by the proceedings.

It was further submitted by the appellants that the Judge failed to consider material given to him in oral arguments about the duties and powers of Commissioners under the Commissions of Inquiry Act and those of witnesses. Thus, he failed to consider the lack of evidence showing a strong probability (and not just a mere possibility) that Hon. George Chaponda would interfere with the Commission or that the two Commissioners would be biased in his favour.Appellants add that the judge failed to notice the absence of a law, statutory or constitutional that obliged resignations for officers under inquiry. It was then put to this Court that had the Judge considered all this, he surely should have come to the inescapable conclusion that an arguable case fit for judicial review had not been made out.

The appellants have argued grounds two, three, four as well as five together and put it thus:

First, the appellants argue that the Judge erred in failing to find that though some executive action may be judicially reviewable under the new constitutional order, Presidential powers of appointment, suspension or dismissal of Ministers can only be reviewed on very narrow and limited grounds of legality and that the current judicial review proceedings raised no such issue; secondly, it was the view of the appellants that the Judge erred in failing to find that there was no triable issue of the legality of the exercise of the Presidential powers of appointment or suspension (or failure to do so) of the 1st appellant that the respondents' Form 86A raised and which merited further [illegible] judicial review proceeding; thirdly, the appellants contended that the Judge erred in failing to identify, in light of the law on the reviewability of Presidential powers of appointment or suspension of Ministers, and in light of the powers of

Commissions of Inquiry and the duties of Commissioners. which issue or issues he found to be triable on a full judicial review application and why. Lastly, the appellants argue that the Judge erred in failing to identify which constitutional provisions would be subject to judicial review in light of the facts so far disclosed, at the main judicial review hearing.

Respecting ground six of the appeal, it is submitted by the appellants that based on binding precedent from the Malawi Supreme Court of Appeal, and in view of the facts of the case disclosed in the application for leave for judicial review, the Judge erred in finding that the 2nd, 3rd, and 4th respondents have locus standi to remain as parties to the judicial review proceedings.

It is for the above reasons that the appellants contends that the grant of leave to move for judicial review be vacated and that the 2nd, 3rdand 4th respondents lack locus standi in the case. It is also urged on the part of the appellants that the respondents be condemned in costs of this appeal as well as those of the Court below.

The Respondents Arguments

The respondents begins by contending that leave to proceed with judicial review was properly granted. It is then submitted by the respondents that at the stage of application for leave the requirement for an applicant to have leave for judicial review is to sieve out trivial cases and that a High Court judge's duty at this stage, to hear an ex parte application for leave for judicial review while sitting as a single judgedoes not have to dwell into the matter at depth but has to merely consider whether there is an arguable case. The Court's attention was then drawn to the dictum of Justice of Appeal Msosa in

Malawi Broadcasting Corporation v Ombudsman[1]to support the preceding argument that at this stage the court is not supposed to dwell in-depth into the substantive merits of the case. We are therefore urged to consider that the question at this leave stage should be whether the judge in the court below went into the inquiry of whether there are questions fit for further inquiry and not necessarily whether the appellant had raised a good case against the respondents claim. This Court's attention was further drawn tothe Zambian case of ***Chalwe v Attorney General***[2], where the Zambian High Court considered an application made under Order 53 of of the Rules of the Supreme 1965 to discharge leave for judicial review. It is said that the Court dismissed the application and advised that on applications to discharge leave for judicial review, especially those premised on the basis that the applicant has no arguable case, the application for discharge should only be granted under exceptional circumstances. Counsel for the respondents continued to submit that if anything the merits (the strength of a case) should be a matter for the substantive hearing. It is further argued that the test to be used in determining whether at this stage the respondents herein have an arguable case, therefore, is whether the respondents have reasonable grounds for believing that there has been breach, or threat or failure to perform a public duty and that the issues require further inquiry by the court. Counsel then concludes that the court *a quo*dwelt at length to discuss the issues that required further inquiry in terms of the arguments that were before it including the main argument, i.e.whether executive orders not to suspend a cabinet minister was reviewable. It is argued that the court below rightly concluded that all executive powers under contemporary constitutional law is reviewable. Thus, this being the main bone of contention on the question whether the Order for Leave for Judicial review should be sustained or not, it effectively meant that the appellant's case lacked the requisite legs to stand on and was meritoriously dismissed. In addition, the respondents submitted that the Court has the authority to review acts of the executive in cases where such executive actions have the propensity of being ultra vires constitutional law. It is therefore surmised that since the main question in this case is

[1] MSCA Civil Appeal No. 93 of 2013 (Unreported)

whether or not the 1st and 2nd appellants' action or/and inaction vis-a-vis the [illegible] alleged corruption scandal in the purchase of maize from Zambia are in compliance with Malawian Constitutional law as well as the Commission of Inquiries' Act, in particular section 7 of the Commission of Inquiries' Act, this is a question fit for further inquiry.

It is further our understanding of the respondents that this appeal is premised on the opinion that the powers of the 2nd appellant not to suspend a cabinet minister historically emanate from what were hitherto called royal prerogative powers and therefore historically not subject to judicial review. As an alternative or exception to the preceding argument, the respondents are of the view that the appellants are arguing that if at all reviewable, then the 2nd appellant's executive powers to appoint, suspend or dismiss a cabinet minister is so narrow and can only be on the basis of legality as laid down under section 94 of the Constitution and that the present case does not fall within this provision. The respondents are of the contrary view and submit that 'legality' in the context of exercise of the 2ndrespondent's powers encompasses a lot of issues. For example, this means whether the 2nd respondent followed section 7 of the Commission of Inquiries' Act by not suspending the 1st appellant pending the conclusion of the Commission of Inquiry. Further, they opine that by reading the Constitution as a whole, the 2nd appellant acted *utra vires* the Constitution by maintaining the 1st appellant as a line Minister in a Ministry which was being investigated in a gross corruption scandal with the likelihood of his interfering with investigations and also by putting the 1st appellant in a situation which would compromise the public trust bestowed on him.In fact, it is the respondents' argument that in comparable jurisdictions, the Courts have in times past reviewed the constitutionality of appointments, suspension and removal of Cabinet or Prime Ministers. In other words, suspension, removal appointments of Cabinet Ministers is a subject for judicial review. In sum, the respondents submits that at this stage, it is not necessary for them to go into the merits or demerits of its case except to point out that there is a serious question fit for further inquiry at judicial review hearing and that the court below had the authority to review the President's powers (not) to appoint or remove or suspend members of the Cabinet.Thus, the Court was referred to the Papua New Guinea case of *Re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41 where the Supreme Court of Papua

New Guinea considered the question whether the removal of the then Prime Minister and appointment of another Minister was legal and Constitutional within the Context of their Constitutional law and held that the Supreme Court of Papua New Guineahad the powers to consider such a subject. This Court was howevernot favoured with a copy of the decision or the Constitution of Papua New Guinea so as to allow us an opportunity to see if such authority could be used to interpret our own Constitution.[3]

The respondents also commented on the case of ***President of the Republic of South Africa v South African Rugby Football Union and others***[4] relied on by the appellants.It is submitted by the respondents that this case should be distinguished by this Court. The respondents submit that one of the questionsthe court was dealing with was whether the appointment of Commission of Inquiry amounts to an 'administrative action' reviewable under the South African Constitution. In the view of the respondents that under South African Constitutional law, 'executive actions' are distinguished from

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[3] Section 11 of the Malawi Constitution instructively provides as follows regarding how our Constitution should be interpreted :

"Interpretation

(1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.

(2) In interpreting the provisions of this Constitution a court of law shall—

(a) promote the values which underlie an open and democratic society;

(b) take full account of the provisions of Chapter III and Chapter IV; and

(c) where applicable, have regard to current norms of public international law and comparable foreign case law.

(3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.

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

[4] The case involved the challenge of presidential appointment of Commission of Inquiry in South Africa.

'administrative actions'. They continued to argue that under the South African Constitution only 'administrative actions' are subject of judicial review and not 'executive actions'. It is their further argument that this distinction made the Court arrive at the conclusions it arrived at in the case. Thus, distinguishable from Malawi where under our Constitutional law, every decision of the executive, whether classified as 'administrative' or 'executive' is reviewable by courts of law.

Regarding the issue of locus standi, the respondents begin by observing that the Attorney General had submitted that the court a quo erred by holding that the other parties have locus standi in the present matter notwithstanding the Supreme Court of Appeal position in ***Civic Liberties Committee v The Minister of Justice and Others***[5] ('the CILIC case') and subsequent High Court decision in ***Trustees, Women and Law (Malawi) Research and Education Trust v Attorney General***[6]('the WILSA case').

It is submitted by the respondents that theyagree with the Attorney General that the CILIC case is binding on the court *a quo* and that the CILIC case was actually followed by the lower court. The WILSA case on the other hand, they continued, was not binding on the court below and the court a quo had the discretion to depart from it.The respondents further argue that they agree with the Attorney General that the WILSA case is indeed one of the most recent decision on the issue of locus standi. However, they observe that the said decision is from a court of the same jurisdictional hierarchy as the one that made the decision, the subject matter of this appeal and therefore not binding on it. Further, the respondents submitted that in so far as the WILSA case held that an NGO cannot commence judicial review proceedings unless its own rights have been violated, then it was per *incuriam* the CILIC case and the constitutional right to access to justice.

It was further the submission of the respondents that the threshold set down in the CILIC case for NGOs is whether there is the presence of another NGO with a better claim than the NGO in question. They continued to note that the Supreme Court of

[5] MSCA Civil Appeal Number 12 of 1999.

[6] High Court, Principal Registry, Constitutional Case Number 3 of 2009

Appeal in the CILIC case held that the court should also look into the objectives of the Applicant NGO and see whether they fight for the ideals that are in issue. It is the argument of the respondents that all these points exercised the court a quo's mind when it held, inter alia, that it cannot be disputed that the 2nd, 3rdand 4threspondents are organisations concerned with the championing of the rule of law in Malawi; that it can also not be disputed that the application sought to enforce the rule of law; that it would thus seem to follow that there is a direct relationship between the said respondents and the subject matter of these judicial review proceedings; and that in answer to the question under discourse, the 2nd, 3rdand 4th respondents had sufficient standing or interest in theproceedings.

The respondents further submitted that CILIC case is not for the proposition that NGOs cannot bring up public interest cases. In their view the threshold is, among other issues, that there is an absence of other organisations that are better placed to take up the case. Thus, in their opinion at the hearing of the application the respondents herein demonstrated that for the subject matter, there are no organizations with better interest than the respondents herein and that theappellants did not raise any objection to this specific point. Accordingly, it is their submission that the decision of the court below was in line with the CILIC case which case was binding on it.

The respondents have invited this Court to note that the case at hand is very significant in vindicating the rule of law in that it would help to hold the executive to be more accountable and transparent. They went on to submit that in any case, the whole case is about whether the appellants acted within the law considering that both Appellants are members of the executive whose exercise of powers should always be checked by the Judiciary as part of checks and balances. It is further said the case raises very significant constitutional law issues as well as human rights questions as the rights of many Malawians to access basic staple food may be affected by the Appellants' decision. Further, it is the submission of the respondents that the matter raises the questionswhether and to what extent should the Judiciary check the powers of the executive branch of government. Thus, it is said that these questions are so important that they should move the Court to approach the issue of locus in a liberal way. The

respondents then further claim that no other NGO can claim a better nexus to the issues raised than the parties here at. In the alternative, the respondents submit that it is high time this Court overrules the CILIC case, ***Attorney-General v Fred Nseula***[7]***;Attorney-General v Malawi Congress Party***[8]and ***The President of Malawi and another v Kachere***[9] and adopt a more liberal approach to locus standi which is human-rights based and more aligned to Chapter IV of the Malawi Constitution and contemporary international human rights standards and depart from what the respondents term otherwise hitherto Supreme Court of Appeal position which they said can easily be interpreted as conservative and retrogressive.It is in this regard their view that the issue of *locus standi* is based on the interpretation of Order 53 of the RSC (or Order 54 of the CPR, 1998) read with Section 15 (2) of the Constitution, 1994 as most recently amended. They therefore submitted that section 15(2) of the Constitution read with section 46(2) should be interpretedmore broadly and purposively, giving more meaning to the right to access to justice and right to effective remedy as opposed to limiting it. The respondents then invited us to consider that in cases like the present one, the rural masses who are most likely to be the hardest hit by any scarcity of maize cannot easily take up cases like the present one. On the other hand NGOs like the 2nd, 3rdand 4th respondents have the resources to take up cases like the present one on behalf of the poor masses. The respondents also submit that in the context of this case and in the context of similar cases where NGOs take up cases on behalf people who cannot so easily stand for themselves, a limitation on access to justice based on a restrictive interpretation of standing amounts to unreasonable limitation of the right to access to justice. It is therefore submitted that a conservative and restrictive interpretation of standing laws easily violates their right to access to justiceand that such restriction cannot meet the standard of limitation allowed under section 44 of the Constitution.

The respondents then took us on a journey of international human rights law standards on locus standi which they invited us to follow in the matter on appeal. It was then

[7] MSCA Civil Appeal No. 32 of 1997

[8] MSCA Civil Appeal No. 22 of 1996

[9] MSCA Civil Appeal No. 20 of 1995

submitted by them that contemporary international human rights law has evolved to set standards that are more liberal and recognize the rights of civil societies to bring up action popularis. It was urged on behalf of the respondents that an 'open and democratic society' is one that allows for vibrant civil society and media with more flexible standing laws, especially for cases involving exercise of public authority. It is further argued that suchmore flexible standing lawshave been developed in 'more open and democratic societies'.

The respondents then concluded their submission on the issue of locus standi by saying that the difficulty in Constitutional challenges is that the negative effects of locus standi are most often not felt by a particular class of the society but by the public generally. Thus, in their view, restricting direct and personal effect on every public decision as a yardstick for standing in public law cases of the present nature would invariably kill the whole idea of checks and balances as practically there may be no one with interest 'over and above' that of the general public.

In sum, the respondents submit that the appeal herein should be dismissed with cost; and that this Court should give the necessary directions for an expedited hearing of the Motion for Judicial Review.**THE LAWAND DISCUSSION**

The Law

Supreme Court of Appeal Act[10]

Section 21 of the Supreme Court of Appeal Act provides for how civil appeals of the nature before this Court should be handled. The relevant parts of the said section 21 of the Supreme Court of Appeal Act states, inter alia, that:

> "An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:
>
> Provided that no appeal shall lie where the judgment ..... is—
>
> (a) an order allowing an extension of time for appealing from a judgment;

[10] Chapter 3:01 of the Laws of Malawi

(b) an order giving unconditional leave to defend an action;

(c) a judgment which is stated by any written law to be final.

(d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree"

Further, section 22 of the said Supreme Court of Appeal Act gives power to this Court. on the hearing of an appeal from any judgment of the High Court in a civil matter, to confirm, vary, amend, or set aside the judgment or give such judgment as the case may require. The said section 22 of the Supreme Court of Appeal Act is in the following terms as regards the powers that this Court can exercise on an appeal in civil matters:

"(1) On the hearing of an appeal from any judgment of the High Court in a civil matter, the Court—

(a) shall have power to confirm, vary, amend, or set aside the judgment or give such judgment as the case may require;

(b) may, if it thinks it necessary or expedient in the interests of justice—

(i) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;

(ii) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court, whether he was or was not called at the trial, or order the examination of any such witness to be conducted in manner provided by rules of court before any member of the Court or before any officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any deposition so taken as evidence before the Court;

(iii) receive the evidence, if tendered, of any witness (including any party) who is a competent but not compellable witness, and, if a party makes application for the purpose, of the husband or wife of that party;

(iv) remit the case to the High Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary;

(c) shall, if it appears to the Court that a new trial should be held, have power to set aside the judgment appealed against and order that a new trial be held;

(d) may make such other order as the interests of justice may require.

(2) Whenever the Court gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine every witness whose evidence is taken."

As it were, this Court, on the hearing of an appeal from any judgment of the High Court in a civil matter has wide powers. It can confirm, vary, amend, or set aside the judgment of the court a quo or give such judgment on appeal as a particular case may require. Section 22 of the Supreme Court of Appeal Act gives this Court unqualified capabilities to do justice according to the dictates of the law by either confirming, varying, amending, or setting aside the judgment of a court a quo or giving such a judgment on appeal as a particular case requires. So much about the powers of this Court on an appeal in civil matters. We shall now proceed to deal with issues arising and falling to be determined on this appeal.

Thus, respecting the applicable law in this matter, this Court will make reference thereto as we consider the various issues raised herein by the parties. This, we will be doing hereunder as follows:

Leave for judicial review

It will be recalled that leave to apply for judicial review together with an order of interlocutory injunction was granted to the respondents restraining the 1st appellant from discharging his duties as a cabinet minister. As it were, the case for the respondents was that (i) the State President must suspend Hon. George Chaponda or that Hon George Chaponda must resign) from exercising his functions as Minister responsible for Agriculture pending the Commission of Inquiry into the maize purchase. The premise

upon which such orders were sought was stated to be that it was feared that [illegible] George Chaponda may interfere with the investigations, and that (ii) Commissioner Banda (the Solicitor General) and Kayira (an auditor in the Auditor General's office) who work for Government would, by reason of their status as public servants alone, be biased or be influenced by the Minister of Agriculture (Honorable George Chaponda).

We would like to agree with the court below on its understanding of the law when it stated that "leave should be granted, if on the material then available the court thinks without going into the matter at depth, that there is an arguable case granting the relief claimed by the applicant[11]. The test to be applied in deciding whether the judge is satisfied that there is a case fit for further investigation at a full inter parties hearing for a substantive judicial review is also discussed in ***R v Secretary of State for the Home Department. Ex parte Rukshanda Begum***[12]. As we understand it, the key words in the above dicta are the words "an arguable case" and "if the judge is satisfied." What do these words import and what level of scrutiny must the material subjected tobefore the judge grants leave? Thus, in ***R.v Inland Revenue Commissioner, ex parte National Federation of the Self Employed and Small Businesses***[13]it was instructively put that the rightto refuse leave to move for judicial review is an important safeguard against courts being flooded and public bodies being harassed by irresponsible applicants for judicial review. Further, in the same judgment it was stated by Lord Diplock stated that the requirement of leave may prevent administrative action being paralyzed by a pending, but possibly spurious, legal challenge.[14] It is easy to understand that the aim of this requirement is therefore to "sieve out" proceedings which in the court's view, are spurious, and remain with those which the court is satisfied, are "arguable cases." The purpose for the requirement of leave is to eliminate at an early stage, any applications which are either frivolous, vexatious or hopeless and to ensure that an applicant is only

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[11] see R.v inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Limited [1982] A.C 617, 644

[12] [1990] COD 109 CA

[13][1982] A.C 617

[14]Ibid. 643

allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to prevent the time of the court being wasted by busy bodies with misguided complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. This is the essence of the judicial pronouncement in ***R.v Inland Revenue Commissioners ex parte National Federation of self-Employed and Small Businesses*** case above. Hence, the holding in ***Ex parte RukshandaBegum***, above that leave to proceed to judicial review should be granted only where the court is "satisfied" that there is a case fit for further enquiry. Thus, in ***R. vs the Legal Aid Bureau***[15], citing with approval ***Ex parte Rukshanda Begum case***,it was instructively held that before leave to move judicial review may be granted, the court must be satisfied that there is a prima facie case or an issue which is fit for further consideration by the court.

What then does the word "satisfied' used in the cases cited above import or entail? In ***R.v Liverpool City Justices, ex parte Grogan***[16], the meaning of the phrase "if a magistrate court is satisfied" occurring in the Magistrate Courts Act, 1980, is enlightening and throws some light. The court held that justices could only be 'satisfied' that a person who had been remanded was unable by reason of illness or accident to appear or to be brought before the court at the expiration of the period for which he had been remanded if they had solid grounds on which they could reasonably found a reliable opinion.

The ex parte Grogan case and the Legal Aid Bureau case entail, in our view, a requirement that where the grant of leave is challenged, the judge must of necessity demonstrate to the parties why "he is satisfied" that there is an issue fit for further inquiry at the main judicial review hearing, and obviously, the judge would do better to

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[15] [1998] 4 All E.R. 638

[16] [1991] COD 148

state the issue or provide an outline of it. In the Legal Aid Bureau case the court pointedly said:

> "This was an ex parte application. In such a case leave is or should only be granted if prima facie there is already an arguable case for granting the relief claimed. This is not necessarily to be determined on 'a quick perusal of the material' although clearly, a 'prima facie arguable' case in depth examination is inappropriate. Furthermore, a 'prima facie arguable' case is not established merely by the disclosure of 'what might on further consideration turn out to be an arguable case."

As we understand it therefore, it is only when there is undoubtedly an arguable case that leave should be granted ex parte. Equally, it is only when prima facie there is unmistakably no arguable case that leave should be refused ex parte.

In the discussion and analysis that follows, the Court will demonstrate that no arguable case was made out fit for judicial review. This finding and conclusion will be grounded on the fact that there was no viable ground for the judicial scrutiny of executive action disclosed by the respondents and also because largely, there was no arguable case for judicial review that was made out. It will also be noted that apart from putting it in handwritten ink on Form 86A that this was a case fit for judicial review and without stating any reasons why, the judge also failed, in the ruling under challenge in this appeal, to disclose any reasons satisfying the requirement that this case raised an arguable case fit for judicial review when challenged to do so at the application to discharge the grant of leave. This was on the alleged ground that he did not want to "delve" into the main issues. Did this bar the judge from at least identifying the issue he did not want to delve into and discuss in outline, why he was satisfied there was an arguable case for judicial review?

THE COURT'S VIEWS AND DETERMINATION

We must agree with the appellants as well as the respondents that this appeal raises very important questions of public law and public interest litigation. It is time that we

should as a nation address the issues that face the Malawi nation with a sober mind. The parameters of what the courts should delve into in judicial review proceedings need to be defined or refined.And, whether a case is fit for judicial review should not be based on popular opinion clothed with the courts blessing by merely saying 'we say so. This Court is alive to the fact that the public expect more from its judiciary. On the other hand, it is also important for the Courts to always remember the prescriptions of the Constitution in section 103 which provides for the independence and jurisdiction of the courts and the judiciary. The relevant parts of the said section 103 in subsection (1) and (2) instructively states that;

> "(1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.
>
> (2) The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence."

We must advise that if the courts are not careful and not apply the law but as it were render their decisions by a mere"we say so" premised on popular public opinion then there will be no room for the courts to act on challenges to the grant of leave for judicial review or refusals to grant leave. As a matter of fact, that will be abdication of our constitutional mandate or what the Constitution enjoins us to do at all times after we take our judicial oath of office i.e. to do justice to all manner of people without affection or ill will and only decide cases based on facts presented.[17]

The Judge erred in failing to properly identify which constitutional provisions would be subject to judicial review at the main judicial review hearing in light of the facts so far disclosed. This is reflected in the dictum of the judge when one reads the reason

[17] "...administer justice without respect to persons, and do equal right to the poor and to the rich, and faithfully and impartially discharge and perform all the duties incumbent upon us according to the best of our abilities and understanding, agreeably to the constitution and laws of the

advanced for granting leave for judicial review. The *ratio decidendi* of the court below on this point is captured in the following words:

> "The case of Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 is no longer valid law and so is the Mponda Mkandawire v Attorney General [1997] 2 MLR 1, case. This is on the basis of R v Home Secretary, Ex Parte Bentley [1994] QBD 394, Ex Parte Everette [1989] QB 811; Patson v AG, 2008 (2) BCLR 66. Prerogative powers are reviewable if they affect the rights of individuals. The President must exercise all powers according to the Constitution [Section 89(5) of the Constitution]. Hence, 'turning to the decisions complained by the applicants in Form 86A, the same being decisions which have, allegedly, been made by the Respondents in total disregard of their constitutional powers and obligations ought, no doubt, to be the subject of judicial review by the judiciary....' All constitutional powers whether you prefer to call them "executive powers" or "administrative powers" are a subject of judicial review."

First, it is well in this regard that we ought to be very cautious and careful here so as not to lose focus. Constitutional review is available against Presidential powers of appointment of Ministers or Commissions of Inquiry but it is very limited review, restricted to legality, at most. Secondly, and most importantly, it must be pointed out that no case has been established of any specific provision of the constitution impacting on the need to suspend Hon George Chaponda or affecting the two Commissioner's partiality that will be or will need to be examined in a full judicial review hearing.

In other words, having the powers to review is one thing. Having the matter or issue to be reviewed is a totally different matter altogether. Judicial review should only ensue where the court is satisfied that there is prima facie; a clearly arguable case fit for judicial review. In this Court's conclusion, there is no such arguable case on the issue of suspension of the Minister or the partiality or lack thereof of the Commissioner deserving further investigation by way of judicial review. The court did not delve deep into the question of identifying the questions fit for judicial review purportedly "out of fear of usurping the powers of the court which is to handle the substantive judicial review." This was wrong. At least on the challenge of the grant of leave, these issues ought to

have been identified for the challenger to be convinced that the court was "satisfied" of the existence of such issues. No such issues fit for further inquiry exist actually, and that could explain the failureby the court a quo to attempt to identify them, and in any case, as this Court willfurther demonstrate below, no arguable case exists.

Reviewability of Executive Action or Inaction

The court a quo reasoned that sections 4, 12 (1) (f) and 108 (2) of the Constitution gives it the power to review all decisions or actions of Government for conformity with the constitution. It further held that this review power is not limited to administrative action but extends to include executive decisions.

However, it must be pointed out there is no denying of the fact that limited powers to review 'executive actions' in the form of appointments of Ministers or Commissions of Inquiry exist. It was actually conceded by the appellants in the court below and was therefore not an issue. What was an issue and still remains so under this appeal are the circumstances under which the review arises but the court below did not discuss.

As we understand it, on the issue of the reviewability of executive action derived from prerogative powers, the appointment of Ministers and Commissions of Inquiry are not judicially reviewable being executive action. At first glance, this line of reasoningmight seem overboard but for the South African case of ***President of South Africa v South African Rugby Football Union***.[18]The case raises important questions of legal principle concerning the basis on which the courts may review the exercise of presidential powers. It makes it understandablethat Presidential powers derived from royal prerogatives which do not have any statutory or constitutional underpinnings or limitations or do not affect individual rights, are the ones that are not amenable to judicial review. Thus, other prerogative powers are reviewable. In other words, not every presidential power derived from prerogative is non-reviewable. Some are others are not. As it were, there is criteria for reviewability. It is subject matter and justifiability related and presidential powers of appointment of Ministers and Commission of Inquiry do not fit into the reviewability criteria. The following remarks of the South African

[18] www.saflii.org/za/cases/ZACC/1999/11.html last accessed on 5 September 2018

Constitutional Court in ***President of South Africa v South African Rugby Football Union*** are apt and instructive in this regard:

> "[145] All of the powers conferred by section 84(2) are original constitutional powers. They are concerned with matters entrusted to the state, subject in some cases and only for the initial transitional period, to an obligation to consult with the Deputy President. None of them is concerned with the implementation of legislation in any sphere of government. The exercise of some of the powers is strictly controlled by the express provisions of the constitution. For example, the responsibility conferred by section 84(2) (a)-(c) concerning the assenting to and signature of bills is regulated by section 79 of the Constitution...
>
> These are very specifically controlled constitutional responsibilities directly related to the legislative process and the constitutional relationship between the executive, the legislature and the courts. In exercising these responsibilities, the President is clearly not performing administrative acts within the meaning of section 33. Section 84(2)(d) and (e) which refer to the President's power to summon extraordinary sittings of Parliament and his responsibility for making appointments required by the constitution are similarly narrow constitutional responsibilities which are not related to the administration of legislation but to the execution of provisions of the Constitution.
>
> [146] The remaining section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of inquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no further action by the government: the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats, for example. It is readily apparent that these responsibilities could not suitably be subjected to section 33. In the case of the appointment of commissions of inquiry, it is well-established that the functions of

a commission of inquiry are to determine facts and to advise the President through the making of recommendations.11[3] The President is bound neither to accept the commission's factual findings nor is he or she bound to follow its recommendations.

[147] A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. It should, nevertheless, be emphasised again that this conclusion relates to the appointment of the commission of inquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter. ...

[159] ...It follows from our conclusion that the act of the President in appointing a commission under section 84(2)(f) of the Constitution does not constitute administrative action, that the "audi principle"[19] has no application to such appointment, whatever the source may be from which the obligation to observe it might otherwise arise."[20]

The above excerpt reflects the true position at law of the reviewability of presidential powers (executive action or inaction of the President). As we understand it, and we so find, not all presidential powers derived from royal prerogative can be judicially reviewed. Some can and others cannot. The reviewable power would have had statutory foundations or affect rights of individuals so as to render them justiciable. This position reflects the current universally accepted position. Those prerogative powers

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[19] This is a shorthand phrase referring to the audi alteram partem principle (the right to be given a hearing before a decision is made) and it was first adopted by Corbett CJ in Administrator, [illegible] and Others v Traub and Others [1989] ZASCA 90; 1989 (4) SA 731 (A) at 762F – 763J

[20] www.saflii.org/za/cases/ZACC/1999/11.html last accessed on 5 September 2018

that are reviewable would be those that are impacted upon by legislation or the Constitution or which affect individual rights. We must add that this shift in position first found full manifestation in England in ***Council for Civil Service Unions v Minister for Civil Service***[21] where Lord Roskill said the following:

> "In short the orthodox view was at that time that the remedy for abuse of the prerogative lay in the political and not in the judicial field.
>
> But fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality. To speak today of the acts of the sovereign as "irresistible and absolute" when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what Lord Atkin once called, albeit in a different context, the clanking of mediaeval chains of the ghosts of the past: see United Australia Ltd v Barclays Bank Ltd [1941] AC 1, 29. It is, I hope, not out of place in this connection to quote a letter written in 1896 by the great legal historian F. W. Maitland to Dicey himself: "the only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law": see Richard A. Cosgrove, The Rule of Law; Albert Venn Dicey; Victorian Jurist (1980), p.177. Maitland was in so stating a greater prophet than even he could have foreseen for it is our legal history which has enabled the present generation to shape the development of our administrative law by building upon but unhampered by our legal history.
>
> My Lords, the right of the executive to do a lawful act affecting the rights of the citizen, whether adversely or beneficially, is founded upon the giving to the executive of a power enabling it to do that act. The giving of such a power usually carries with it legal sanctions to enable that power if necessary to be enforced by the courts. In most cases that power is derived from statute though in some cases, as indeed in the present case, it may still be derived from the prerogative.

[21] [1984] UKHL 6, [1985] AC 374

In yet other cases, as the decisions show, the two powers may coexist or the statutory power may by necessary implication have replaced the former prerogative power. If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries. In reaching this conclusion I find myself in agreement with my noble and learned friends Lord Scarman and Lord Diplock whose speeches I have had the advantage of reading in draft since completing the preparation of this speech.

But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

The above case, popularly known as the GCHQ case was one where under prerogative powers, Margaret Thatcher's government prevented GCHQ civil servants from being members of trade unions. The unions sought judicial review of the decision. The question in court was whether prerogative powers could be made the subject of judicial review and the question was answered in the affirmative although the applicant lost the case in view of the national security nature of GCHQ. The court effectively held that although prerogative powers can be subject to judicial review, there are certain exceptions, one being whether the power is used in the interest of national security, as it was in theGCHQ case.

Further, the GCHQ case is therefore highly important for it holds that the application of judicial review is dependent on the nature of the government's powers, not their source. The case also shows that where the power sought to be reviewed is a political issue and not a legal one; it is not to be determined by a court. Thus, it ultimately depends on the justiciability of the use of the power. As their Lordships held, where there are statutory underpinnings to the use of the power or the use of the power affects rights of citizens, the use of the power is reviewable.

Following the GCHQ case, in ***R v Foreign Secretary, ex parte Everett***[22], a decision taken under royal prerogative whether or not to issue a passport was subject to judicial review, although relief was refused on the facts of the particular case. Taylor J summarized the effect of the GCHQ case as making clear that the powers of the court "cannot be ousted merely by invoking the word prerogative."The majority of their Lordships indicated that whether judicial review of the exercise of a prerogative power is open depends upon the subject matter and in particular whether it is justiciable. At the top of the scale of executive functions under the prerogative powers are matters of high policy, of which examples were given by their Lordships: the making of treaties, making war, dissolving parliament, mobilizing the armed forces. Obviously, those matters and no doubt a number of others, are not justiciable but the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision affecting the rights

[22] [1989] 1 QB 11

of individuals and their freedoms of travel. It raises issues which are justiciable, as for example, the issues arising in immigration cases.

The ***Ex Parte Everett*** decision, which dealt with the prerogative power to issue or refuse to issue a passport, is therefore in sync with the underlying reasoning in the GCHQ case to the effect that where a prerogative power has statutory underpinnings or affects individual rights or deals with a justiciable question, its exercise will be the subject of judicial review.The same can be said of the case of ***President of the Republic of South Africa v Hugo***[23] cited by the applicants (respondents) which dealt with the exercise of the prerogative of mercy (pardon). The Constitutional Court in South Africa found the exercise of such prerogative reviewable on the basis of its subject matter as affecting rights. In analyzing the reviewability of prerogative powers, the Constitutional Court of South Africa agrees with the English position above. Accordingly, Justice Goldstone stated as follows under paragraph 18 of the judgment of the court on the reviewability of prerogative powers:

> "In England, where the prerogative powers were historically beyond the reach of the courts, the exercise of some prerogative powers has been subjected to judicial review. In 1984, in Council for Civil Service Unions v Minister of the Civil Service (CCSU), a majority of the law lords held unambiguously that a decision making power derived from a common law and not a statutory source is not "for that reason only" immune from judicial review; and that is so in respect of prerogative powers. What determines whether the exercise of such a power is subject to the power of review is not its source but its subject matter...
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> Lord Scarman put it thus:
>
> 'If the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the

[23] President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) http://www.saflii.org/za/cases/ZACC/1997/4.html [sast accessed on 6 September 2018 last ber 2018

exercise of the power is subject to review in accordance with the principles developed in respect of the exercise of statutory power'

In R v. Home Secretary, ex parte Bentley [1994] QB 349, at 363 A-D Watkins, LJ said the following:

'The CCSU ([1985] AC 374) case made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are all ill-equipped to do so? Looked at in this way, there must be cases in which the exercise of the Royal Prerogative is reviewable in our judgment. If for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.

We conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not.

We do not think that we are precluded from reaching this conclusion by authority. Lord Roskill's (in CCSU) passing reference to the prerogative of mercy in CCSU case was obiter'".

We must add thatthe reviewability of the exercise of prerogative power depends on the subject matter was restated by the Privy Council in ***Reckley v Minister of Public Safety and Immigration and Others***[24], where Lord Goff of Chievely stated that the CCSU case:"recognized that the exercise of a prerogative power was not ipso facto immune from judicial review; but it certainly did not go so far as to suggest that every exercise of such a power was amenable to that jurisdiction."[25]

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[24] [1996] 1 All.E.R 562

[25] Ibid. 571

On the strength of these authorities, it is safe to conclude that, in contemporary English law, the exercise of a prerogative power may be reviewed if, and to the extent that, the subject matter thereof is amenable to judicial process. Further, having studied the South African constitutional law position and concluded that the courts would be given to review the exercise of presidential powers including prerogative ones like it obtains in England in most of the cases, Justice Goldman in the ***Hugo*** case, made the conclusion below relating to the overall reviewability of prerogative powers, which position ultimately, is no different from the Englishviewpoint:

> "[28]...However, it may well be that, because of the nature of a section 82(1) power or the manner in which it is exercised, the provisions of the interim constitution, and in particular, the Bill of Rights, provide no ground of an effective review of a presidential exercise of such a power."[26]

Hence, even in South Africa which is a comparable juridisdiction, some exercise of Presidential powers, may not be subject to judicial review. This then puts into perspective the holding in the Constitutional Court of South Africa judgment of ***President of South Africa v South Africa Rugby Football Union***, (decided in 1998, three years after Hugo) cited previously, which held that the Presidential powers to appoint or remove Ministers or Commissions of Inquiry are not judicially reviewable as they are not constrained by any statutory or constitutional provisions. They are what were called "executive actions" and the courts were ill-suited to judicially review them.

This reasoning would also help explain the reasoning in the Botswana case of **Patson v AG**[27] which was essentially an immigration issue dealing with the issuance of a passport and was for the proposition that theexercise of prerogative powers was reviewable at common law where the subject-matter of the prerogativewas justiciable,

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[26] President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) http://www.saflii.org/za/cases/ZACC/1997/4.html lsast accessed on 6 September 2018

[27] [illegible]

i.e. where it entailed the making of an administrativedecision which affected the rights of individuals.[28]

The cases cited above are far away from home but in jurisdictions like ours, commonwealth and common law jurisdiction. Thus, the case authorities are instructive and informed the Court. This we do having regard to the fact that England, South Africa and Botswana are comparable foreign jurisdictions. As for England it is a common law jurisdiction and its case law should be informative. We are alive to the fact that South Africa and Botswana apply Roman-Dutch law but have written Constitutions and are commonwealth countries. Understandably the court decisions from these countries are not binding on the courts in Malawi as they are not decisions of a court within the structure of the courts in Malawi. Nonetheless, since most of the commonwealth countries received English common law, recourse may be had to the decisions of the commonwealth countries applying the common law to see how a particular law has been interpreted. Actually, this Court in ***Kaipa v Reginam***[29] instructively said that where no English case authority is available for a proposition of law in issue, the courts in Malawi may have recourse to commonwealth authorities and where a large number of common wealth courts have come to a common conclusion the decisions of such courts will be highly persuasive. We shall therefore be guided accordingly by the decisions from England, South Africa and Botswana on reviewability of executive powers reposed in the President under the Republic of Malawi Constitution.

On evaluation of the cases cited above, it cannot therefore be correct to say that the courts in Malawi have unlimited power to judicially review every exercise of presidential power derived from royal prerogative. Judicial review of exercise of presidential will all depend on the subject matter and justiciability of the matter. Further, as demonstrated above, issues to do with ministerial appointments including the appointment of the

[28] The Botswana High Court applied the case of Council of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 All ER 935, HL (E) at p 956 and R v Secretary of State for Foreign and F Commonwealth Affairs ex parte Everett [1989] 1 All ER 655 (CA) at p 660 applied.

[29] 1964-66 ALR Mal. 142

Commission of Inquiry, which have no statutory or constitutional underpinnings are by and large not amenable to judicial review. Thus, one would therefore have expected that the applicants (respondents), at leave stage, would have demonstrated why the issue of Ministerial appointment or suspension or the appointment of Commissioners of Inquiry would have qualified for review in light of numerous instructive authority precedent pointing the other way. Actually, the court should have asked itself the important question why it thought the matter would fit a billing for further inquiry at a full inter parte judicial review hearing in view of the plethora of authorities of which cases are fit for judicial review from comparable jurisdiction where the subject matter concerns exercise of Presidential Executive powers.

It is accepted that Hon George Chaponda was suspected of participating in some maize scam. But then it was well to consider that he was just a suspect and or an accused person and entitled to be presumed innocent until proven guilty by a competent court of law.[30] If same person were to be brought for trial, the court would have already adjudged him and prejudice the presumption of innocence. The questions that then arise and fall to be determined are: would one have to be suspended as a Minister or even resign their position, simply for being a suspect or even as an accused person? Considering that Hon George Chaponda was to be presumed innocent in terms of the Constitution, who between appellant and the respondents is in need of protection by courts?

As we understand it, the courts would be promoting executive paralysis and chaos if they were to set a precedent that all it takes to have a Minister suspended from office, is merely to 'suspect' him/her of a crime. Further, would the courts not paralyze and destabilize the execute arm of government if we simply allowed that if a Minister is suspected of committing an offence, a suspension should inexorably and unfailingly follow? Are we as courts not the bulwarks of civilization and social and political order, that we need to look at the bigger picture in our decision making? These questions have exercised our minds and will inform our decision on this appeal.

In the instant case this Court has noted that the respondents failed to demonstrate that the court below had jurisdiction, either by reference to the Constitution

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[30] Section 42(2) (f) (iii) of the Constitution

or precedent from comparable jurisdiction, to subject the power to appoint a Minister or a Commission of Inquiry to judicial review. As it were, no constitutional or statutory underpinnings to the appointments have been shown. And no law that anyone suspected of a crime must resign or be suspended, has been cited. We can well understand, that when serious criminal allegations are leveled against senior public officer, it is only wise and morally prudent that such officer should step aside their offices to allow for what would be seen as unimpeded investigation. That is a course and practice we would all expect and encourage. But it is a practice that courts cannot enforce as it is a practice outside our legal, statutory or constitutional frame.

For all that we have discussed we conclude that there is virtually no legal, statutory or constitutional basis to the prayers in the judicial review application. On the other hand, this Court has read dicta from England, South Africa and Malawi demonstrating the opposite. As we understand this dicta, the power to appoint Ministers and Commissions of Inquiry is simply non-reviewable. It is for this reason that this Court finds and concludes that the respondents failed to put up a case fit for further review in a judicial review hearing.

Section 94 read with 95 of the Constitution

We wish to go further than what this Court has observed above and note that even if this was to be taken as a section 108 review, section 94 of the Constitution (dealing with appointment of cabinet ministers) and section 89 of the Constitution dealing with the power to appoint commissions of inquiry) have not in any way been violated by the President or Hon George Chaponda or any of the commissioners. It is not before us that Hon George Chaponda failed for appointment as Cabinet Minister or has fallen foul of any of the disqualifying factors under section 94 of the Constitution. Under section 94(3) (c) nothing short of a conviction for a crime of dishonesty would serve as a disqualifying factor for appointment and, of course, a fortiori, and continuation in office. Merely being a suspect does not, anywhere in the Constitution, serve as a disqualifying factor for appointment as cabinet minister. Therefore, merely being a suspect cannot lead to loss of office, or suspension.

Further, it is our understanding of these sections that when read together they do not provide for removal of a Minister if there is an appointment and it later turns out that there is a criminal allegation against such Minister. Section 94 of the Constitution provides for the qualification for one to be appointed a cabinet minister as follows:

"94. (1) The President shall have the power to appoint Ministers or Deputy Ministers and to fill vacancies in the Cabinet.

(2) A person shall not be qualified to be appointed as a Minister or Deputy Minister unless that person—

(a) is a citizen of the Republic who upon taking office, has attained the age of twenty-one years;

(b) is able to speak and to read the English language; and

(c) is registered as a voter in a constituency.

(3) Notwithstanding subsection (2), no person shall be qualified to be appointed as a Minister or Deputy Minister who—

(a) owes allegiance to a foreign country;

(b) is, under any law in force in the Republic, adjudged or otherwise declared to be of unsound mind;

(c) has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude;

(d) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in the Republic;

(e) holds or acts in any public office or appointment;

(f) belongs to, and is serving in the Defence Forces of Malawi or in the Malawi Police Service;

"(g) has, within the last seven years, been convicted by [illegible] any violation of any law relating to election of the President or election of the members of Parliament."

Section 95

Section 95 (2) of the Constitution gives discretion to the President to remove a Minister and provides as follows:

"95.....

(2) The President shall have the power to remove Ministers or Deputy Ministers from their posts."

These are specific powers given in the President and in the ordinary exercise of state powers he/she is allowed to exercise them. If we were to allow that courts should intervene or interject by way of review, that would be judicial overreach. This should be distinguished from where the President acted contrary to what the Constitution provides, then obviously he will be challenged for infringement, if that fits the billing in terms of section 94 and 95 of the Constitution. It is well to remember that we do not question the President where he uses his powers in reverse. If for example he wants to remove somebody as a Minister it iswithin his discretion, but we cannot compel him to remove a Minister. It is overbearing and overreaching the constitutional mandate of the court.

The legal presumption is that the President would in good faith and in good conscience act within the law. Yes, he might fall below expected level but where he is within the law do we substitute his decision with ours? In a democracy his choice of the people he wants to work with could be faulty but where the law is not infringed and even where his judgment could have been better, should the court really come in and dictate his choices of who should be in cabinet. Is that really to be determined by the court or any other person or body? Indeed, the President makes these decisions based on politics and that is not a matter for the courts.

We add that issues of constitutional policies which were made reference to by the respondents in advancing their case are just a matter of preamble and introduce the policies; but later on the constitution delineates what the President should or should not do. It goes further to say certain decisions will be left to be decided by the President and the basis of those decisions are provided. This is where section 94 rules. We are not entitled to go outside section 94 and look for sense elsewhere? This would be like asking the President to go outside section 94 of the Constitution. You cannot judge the President's compliance with the Constitution by going outside the Constitution itself which is the realm of the law.

We have looked at the record and this Court simply does not have before it even a faint outline or mosaic of an argument that cites a constitutional provision that the President has offended by keeping Hon George Chaponda in office and or that Hon George Chaponda has offended by staying in office that the court would have to grapple with on review, if at all.Further, this Court does not see any justification in allowing the respondents proceed to a full inquiry either under section 108 of the Constitution or under Order 53 of the Rules of the Supreme Court.

It is important to be reminded that in Form 86A, the respondents did not mention any constitutional provision that the President may have offended by keeping Hon George Chaponda in office after he was suspected of an offence. Further, the respondents did not mention any constitutional provision thatHon George Chaponda would have offended by remaining in office. In this Court's viewthe respondents had a duty to show a provision of the Constitution that would have necessitated further inquiry at a judicial review hearing. None is cited and as the Court has shown above none exists. As seen earlier, the qualifying criteria for ministerial appointment is under section 94 of the Constitution. It was not cited by the respondents but comes close to mind in so far as qualifying factors are concerned and clearly that section has not been violated.It is the understanding of this Court that mere citation of the word "constitution" without more, is not enough to bring a case up for further inquiry in a full judicial review setting. We are further of the view that where nothing or no provision was mentioned at permission stage no permission ought to have been granted by the court. Mere mantra of a

possible infringement of constitutionalism should not lead to the grant of permission for judicial review. It is advisable that specific provisions of the Constitution which would merit further inquiry ought to have been cited and a prima facie argument based on constitutional provisions fit for further in depth inquiry ought to have been provided.What we have is that the Constitution is just being thrown in without particular reference to the provision of the constitution that brings up the issue of constitutionalism.

It is noted further that section 7 of the Commissions of Inquiry Act has been cited. This section talks about the duties of commissioners to be impartial. It does not discuss any duty of the person being investigated to resign his office. It cannot therefore be argued logically that there is or that there was an arguable case for judicial review based on section 7 of the Commissions of Inquiry Act. This section does not demand that whoever is being investigated must be suspended from office. It speaks to the duty of commissioners to be impartial. There is no relationship at all between the two so as to lead the court to order a further inquiry by judicial review.And, as already noted, the duty was on the respondents to show how the commissioners would not have been independent or impartial beyond mere speculation.

In sum, this Court is not saying that all prerogative powers are not reviewable. As this Court understands the law, some prerogative powers are reviewable. The law is that presidential prerogative powers of appointment or suspension of Ministers and Commissioners are notreviewable under judicial review proceedings. Indeed, the appointment of Minister is at the pleasure and discretion of the President. Courts should not start questioning decisions of the President as to who he wants to be in his cabinet.[31]

Secondly, section 7 of the Constitution of Inquiry Act does not specify who can be appointed to a Commission of Inquiry. We take judicial notice, as a matter of fact, that most commissions of inquiry in our jurisdiction comprised of civil servants and or public servants. Most of them were chaired by serving Judges or Justices of Appeal. That is a political decision that the President has to make and manage the consequences politically.

[31] Para 5.31 of the red book Mark be Blackin judicial review 2nd ... publications

Thus this Court concludes that grounds 2, 3, 4, and 5 of the grounds of appeal must succeed.

Whether the 2nd; 3rd; and 4th respondents have locus standi in the case

As O' Regan J correctly observed in ***Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and others*** 1996 (1) SA 984

> "[E]xisting common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation."

Now, regarding ground six of the appeal, this Court finds and concludes that based on binding precedent from this Court, and in view of the facts of the case as disclosed in the application for leave for judicial review, the Judge in the court a quo erred in finding that the 2nd 3rd; and 4threspondents have *locus standi* to remain as parties to the judicial review proceedings.The court a quo had reasoned as follows to find that the 2nd; 3rdand 4th respondent all of whom are non-governmental organizations, have *locus standi*:

"The 2nd, 3rd and 4th Applicants before the Court are organizations concerned with the championing of the rule of law in Malawi and the application at hand seeks to enforce the rule of law, it being alleged that the Respondents have not properly exercised their constitutional powers, it would seem to follow that there is a direct relationship between the said Applicants and the subject matter of the judicial review proceedings to give them locus standi"

As we see it, the court a quo deliberately chose to depart from binding precedent and did not explain its reason for doing so. In ***Civil Liberties Committee v Minister of Justice and Anor***[32], the Supreme Court of Appeal in this country held that for an applicant for judicial review to show that he has sufficient interest in the matter, he or she must show that it is his or her right or freedom that has been violated as a basis for taking up the action. Justice of AppealTambala in that case instructively said:

"...[I]n the field of public law, a private plaintiff can establish standing to bring an action if he can show that the conduct of the defendant adversely affects his or her legal right or interest. A strong belief or conviction that the law generally or a particular law should be observed, or that conduct of a particular kind should be prevented is not sufficient to ground standing. They also establish that an ordinary member of the public who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. The two cases further express the view that a strong desire to enforce public law as a matter of principle or as part of an effort to achieve the objects of a particular organization and to uphold the values which it was formed to promote is not sufficient to establish locus standi to commence an action. Finally, the two cases

[32] [2004] MLR 55 or (MSCCivil Appeal No. 12 of 1999) [2004] MWSC 1 (decision of 8 April 2004) https://malawilii.org/mw/judgment/supreme-court-appeal/2004/1 last accessed on 10 September 2018

from the countries of the Commonwealth support the view that, in public law, locus standi is a jurisdictional issue."[33][Emphasis supplied by us]

The High Court has persistently and consistently upheld this decision in **Trustees, Women and Law (Malawi) Research and Education Trust v Attorney General**[34] and very recently in **The State and Attorney General, ex parte Lameck Mtoza and other ex-employees of Malawi Savings Bank.**[35]As stated earlier, the court a quo chose to depart from binding precedent and did not explain its reason for doing so. In this regard what Dr. McNight R.E. Machika observed in his book entitled***The Malawi Legal System: An Introduction***[36] perhaps should help all courts in the conduct of business that comes before it:

"Broadly stated, the common law doctrine of precedent is to the effect that each court in the hierarchy of courts is bound by the principles established by prior decisions of courts above it in the hierarchy and the courts of equal standing are, with certain qualifications, bound by their own prior decisions. In a practice statement the Lord Chancellor of England announced modification in the Practice of the House of Lords. Though the House continues to regard its previous decisions as normally binding, it now feels free to depart from any decision "when it appears right to do so." A marked relaxation in the practice of the court of Appeal too has been noted.

One can say very little against judges paying the greatest attention to earlier decisions of their colleagues in an effort to decide cases as they have always been decided. Human nature ensures this and justice according to law demands no less. But more is demanded by the English doctrine than this. It is that when a judge is faced with decision binding on him because it was delivered either by a court above him in the hierarchy or by one of co-ordinate jurisdiction, in theory he

[33] [2004] MLR 55 or (MSCCivil Appeal No. 12 of 1999) [2004] MWSC 1 (decision of 8 April 2004) https://malawilii.org/mw/judgment/supreme-court-appeal/2004/1 last accessed on 10 [illegible]

[34] High Court Principal Registry, Constitutional Case Number 3 of 2009 (unreported)

[35] High Court Principal Registry, Judicial Review Case Number 39 of 2015] decision of 15 April 2015 by the High Court

[36] Law Department Chancellor College, ZOMBA 13th October 1983. (1983)

is bound to apply the principle laid down there though to his mind it is clear that the principle is wrong or incorrect.

The doctrine of precedent is used interchangeably with the principle of stare decisis, which means to stand by decisions and not to disturb settled matters. The principle of stare decisis is of ancient origin and the reasons for it were stated to be stability and certainty in the law, convenience, and uniformity of treatment of all litigants. The idea was that a system of law which lacks certainty and stability would be faulty and undesirable. It would be impossible for a lawyer to give any dependable advice to a client. The result would be that the judge would apply to each particular case his own personal views and would substitute the desires of the law by his own desires. The decision of the court would lose all semblance of justice. As Spenser Wilkinson, C.J. explained in Kharaj v. Khan [1923-1960] ALR Mal. 381the result would be that the law will fall into confusion. In this state of confusion confidence in the honesty and integrity of the courts and in their impartiality would not be maintained. Uncertainty in the law would lead to chaos and a breakdown of organized society."[37] [Emphasis supplied by us]

As it were, the authorities above remain the position on locus standi until departed from for reasons given.

The situation in the instant case is that the 2nd; 3rdand 4th respondents have actually not sworn any affidavit supported by a Statement of facts. No facts on record showing any interest in the case other than a mere assertion that they are there to uphold their foundational aims and objectives under their respective constitutional documents. We have not seen their respective Constitutions. They were not placed before the court below. As stated earlier, the respondents submit that the issue of locus standi is based on the interpretation of Order 53 of the RSC (or Order 54 of the CPR, 1998) read with Section 15 (2) of the Constitution, 1994 as most recently amended. They therefore submitted that section 15(2) of the Constitution read with section 46(2) should be interpreted more broadly and purposively, giving more meaning to the right to access to justice and right to effective remedy as opposed to limiting it. The respondents then

[37]Page 43

invited us to consider that in cases like the present one, the rural masses who are most likely to be the hardest hit by any scarcity of maize cannot easily take up cases like the present one. On the other hand NGOs like the 2nd, 3rd and 4th respondents have the resources to take up cases like the present one on behalf of the poor masses. The respondents also submit that in the context of this case and in the context of similar cases where NGOs take up cases on behalf people who cannot so easily stand for themselves, a limitation on access to justice based on a restrictive interpretation of standing amounts to unreasonable limitation of the right to access to justice. It is therefore submitted that a conservative and restrictive interpretation of standing laws easily violates their right to access to justice and that such restriction cannot meet the standard of limitation allowed under section 44 of the Constitution.

The respondents then took us on a journey of international human rights law standards on locus standi which they invited us to follow in the matter on appeal. It was then submitted by them that contemporary international human rights law has evolved to set standards that are more liberal and recognize the rights of civil societies to bring up action popularis. It was urged on behalf of the respondents that an 'open and democratic society' is one that allows for vibrant civil society and media with more flexible standing laws, especially for cases involving exercise of public authority. It is further argued that such more flexible standing laws have been developed in 'more open and democratic societies'.

The respondents then concluded their submission on the issue of locus standi by saying that the difficulty in Constitutional challenges is that the negative effects of locus standi are most often not felt by a particular class of the society but by the public generally. Thus in their view, restricting direct and personal effect on every public decision as a yardstick for standing in public law cases of the present nature would invariably kill the whole idea of checks and balances as practically there may be no one with interest 'over and above that of the general public.

The above sentiments, we observe, are matters of law and their opinion of how the law of locus standi should be interpreted and not sworn statements (affidavit evidence) in support of Form 86A.

The fact remains, the case for the 2nd, 3rd and 4th respondents is not supported by facts. It was not and it is not for this Court to find the facts for the respondents. We believe that the court below did not notice this vacuum in the respondents' case. If it had, surely the court would not have upheld the case for the 2nd, 3rd and 4th respondents. The court takescognizance that there was allegedlya serious concern in the country on the availability of maize at the time this case was brought up. But, if there were factual situations around that matter, the basis upon which a case is brought to court which relies on such facts situation, courts will require the facts to be presented in a prescribed manner. This was not done. Thus, we are not able to confirm the constitutional mandate of the 2nd, 3rd and 4th respondents for lack of evidence of their respective constitutions and further we have no factual basis whatsoever upon which to evaluate the three respondents' contentions. Our courts rely on tangible facts and tangible evidence.

This takes us to the case for the 1st respondent, Mr Charles Kajoloweka. For this purpose, which we might as well have done earlier, it will be instructive if we go back to the grounds upon which reliefs are sought in statement of facts and the affidavit verifying the facts relied upon in the application in support of the 1st respondents case on the question of locus standi.

As we shall be familiar by now, the genesis of the matter is the issuing of a commission of inquiry into the arrangement to purchase maize from Zambia and allegations of corruption around it against the first appellant (Dr. George Chaponda). According to paragraph 4 of the grounds upon which reliefs are sought:

> "The alleged corruption scandal directly affects the rights of the 1st Applicant who is finding it hard to purchase maize at the local market due to scarcity of the commodity as well as the high prices prevalent on the market which high prices will be attributed, at trial, to the alleged corruption scandal."

In the statement of facts, it is said, in selected paragraphs:

1. "That the 1st Applicant is a middleclass citizen of Malawi who has been struggling to purchase maize at the local depots of ADMARC (Agricultural Development and Marketing Corporation of Malawi)."

2. That since the subject matter of this judicial review revolves around issues that directly affect the 1st Applicants access to maize, his staple food, and to governance issues the 1st Applicant has locus standi.

10. That the allegations go further to suggest that as a result of the said scandal, there is scarcity of maize in most state owned ADMARC depots and that the little available corn is going at exorbitant prices"

At this point we should set out the affidavit verifying facts relied upon in the application. Itstates:

"Affidavit verifying facts relied upon in this application

I, CHARLES KAJOLOWEKA, of C/O John Tennyson &Associates, Private Bag 79, Mzuzu in the Republic of Malawi, make oath and state as follows:

1. **THAT** I am the Applicant in this matter, of full age and therefore competent to swear this Affidavit on my own behalf.

2. **THAT** the matters deponed to herein are from our personal knowledge, information and belief.

3. **THAT** the statements contained in all paragraphs of the Statement of Facts, marked "A" and both exhibits attached to the said Statement are true to the best of our knowledge, information and belief.

4 THAT I seek to challenge the decision of the Respondent contained in Form 86A filed herewith and I seek reliefs also contained in the said Form 86A.

5. THAT I make this declaration conscientiously knowing the contents hereof to be true to the best of our knowledge, information and belief and by virtue of the Oaths, Affirmations and Declarations Act.

SWORN by the said Deponent at Mzuzu) .....
CHARLES KAJOLOWEKA

This .....day of .....2017)"

The affidavit above is puzzling and troubling. It is not clear what the deponent, Mr Kajoloweka , who is the sole signatory, is trying to do or say. In the first paragraph, the affidavit is made on his own behalf. Immediately, in the second paragraph, he draws in others, presumably the 2nd 3rd and the 4th respondents. He continues to do so by paragraph 3. As he gets to paragraph 4, the 2nd, 3rd and 4th respondents are dropped. Paragraph 5 is a combination of "I" and "our." He eventually signs alone. We could not answer the simple question as to whose affidavit this is, is it for Kajoloweka alone or for all the respondents. These matters were raised during the hearing of this appeal. There was no clarification at all. We must recall that the statement of facts cannot stand on its own without an affidavit confirming the veracity thereof. We are not clear whether the court below read the affidavit and made sense out of it. The issues in this matter had far- reaching implications. Both the applicants and the court were duty bound to exercise extra care and due diligence. What we see is a shameful laxity and lack of clarity in the case for the respondents that should not find itself in the High Court.

We should nonetheless look at the statement of facts. Again the approach is too casual. In the first paragraph there is no attempt made to specify which ADMARC depots might have been visited by the applicants. To make it even more difficult for the court, paragraph 10 talks about "allegations go further to suggest that as a result of the said scandal, there is scarcity of maize....."

We have already stated earlier, that there was said to have been a general outcry about shortage of maize in the country during the period referred to in the matter. However, if

we are to institute and premise proceedings around such a matter, we should not expect a court of law to be moved by "allegations that go further to suggest." In fact it is quite apparent to us that Mr Kajoloweka realised that he needed to do more. That is why in paragraph 3 of his affidavit he refers to "..... both exhibits attached to the said statement of facts....." The statement of facts does not refer to any attachments and in fact, none were attached.

The orders that were made by the court below drew on and accepted the affidavit of Charles Kajoloweka. It is the same affidavit that allowed the rest of the respondents to be granted leave to seek judicial review.

We are unable to draw any clarity from the reliefs that are being sought as read with the statement of facts and the affidavit in support. On this basis we would again not uphold leave for judicial review.

While we are on the issue of standing, we wish to briefly revive one point, as put in ***Malawi Human Rights Commission v. Attorney General***[38]it was emphasised that human rights, by the expression are bestrode in human beings. It is therefore human beings who are intended beneficiaries of human rights. When human rights are threatened or violated, it is human beings whose rights will have been threatened or violated. That as a priority where human beings affected can be ascertained, they should be allowed the opportunity to vindicate their rights. The justification for this by human rights defenders is roofed in lack of opportunity of the victims in approaching the threshold of courts for various reasons. That it would be wrong, dangerous and unfair, if it became the practice of human rights defenders to snatch away cases from individuals who themselves are quote capable of complaining or bringing up actions in courts for redress. Obviously of the dangers is taking away the individuals' right to sue or to make an informed choice not to take any action.

Related to these considerations is that it then becomes imperative that the human person or group on humans whose rights are alleged to have been violated be identified with some particularity. It is unlikely that an action that refers to "the public [illegible] would succeed. Even a "public" would have some classification as opposed to the general public. This is primary because, for the reasons we advance earlier, the public in general, would encompass individuals who have adverse interest or might have take informed decision not to take any action.

In any case human rights defenders would invariably be taking up representative action. It is a primary requirement in representative action that the group or groups being represented be identifiable. It would not be in the interest of particular human beings just as it is not to deal with cases whose litigants are at large, falling short of being unknown.

The Commission of Inquiry

Finally, we should address the issuing of the Commission of Inquiry further to the observation that we have earlier made. Form 86A cited the Commission of Inquiry Act.[39]Indeed, the whole judicial review proceedings arise within the context of a commission of inquiry appointed by the President under the Commission of Inquiry Act. What is of concern is that going through the arguments by the Attorney General, is the issue of non-binding nature of the commission of inquiry report.It was suggested by the appellants that Commissions of Inquiry are not legally binding on Presidents or on anybody and the public is still entitled to take action they may wish that contradicts the findings of a Commission. Further, the appellants contended that the findings of a Commission are not self-executing. Hence, even where one is found culpable of a crime by a Commission or liable civilly, a criminal proceeding or a civil suit will still have to be taken to establish guilt or civil liability to finally settle the matter. As a matter of fact, it was submitted that neither our Constitution nor Commissions of Inquiry Act talks about the legal significance of a Commission of Inquiry's findings.

[39] Chapter 18: 01

We need to point out at the outset that if we adopt the position that a commission of inquiry report could be disregarded by the President it would be sad. If the inquiry establishes a fact showing impropriety, a President, for reasons of good governance, cannot just ignore the findings and recommendations of the commission of inquiry. It would be acting in bad faith if the President was toignore the findings and recommendations of the commission of inquiry.

Now turning to the issue of lack of impartiality or disqualification raised by the respondents, this Court would like to comment as follows:

First, it is well to note that section 7 of the Commissions of Inquiry Act imposes a legal duty of impartiality on Commissioners. Thus, this Court is not satisfied that an arguable issue existed, in the absence of any evidence that Hon. George Chaponda intended to interfere with the Commissioners. We also do not subscribe to the view that section 7 of the Commissions of Inquiry Act imposed a duty on the State President to suspend him pending the Commission of Inquiry findings in order to foster the impartiality of the Commission. By accepting to serve on a commission of inquiry, the Commissioners were under the obligation to comply with section 7 of the Commission of Inquiry. He who alleges that a particular commission will compromise his duty must bring forth reasonable grounds in support of such allegations. These are allegations that go to the personal integrity of the commissioners which cannot be lightly accepted.

It would therefore be unreasonable for the court to be "satisfied" that there is, here, an issue fit for further judicial inquiry on the facts and law as presented in Form 86A. This Court holds the same view respecting the two Commissioners. As we said earlier, it would be stretching the imagination to say that any court could be "satisfied", considering the Commissioner's duty of impartiality and the fact that none of them worked directly under the Minister in question, to suggest that a "clearly arguable case" had arisen or had been raised that the two would be impartial at the hearing. In sum, the Commissions of Inquiry Act does not disqualify any person working in the public service to be a member of a Commission of Inquiry.There is no provision that says that public or civil servants cannot be appointed members of a Commission of Inquiry.

The power of the President to issue a Commission of inquiry emanates from section 89 (g) of the Constitution. We wish to draw attention to section (2) (1) of the Commission of Inquiry Act which authorizes the President to issue a Commission of Inquiry and authorize it to inquire into any matter concerning public welfare. This section does not limit the President in respect of whom he or she may appoint, whether from the public or private sector. Secondly, as this Court understands it, aCommission of Inquiry once it establishes a fact which points to irregularity or inappropriate behavior, the President cannot proceed to ignore the findings. The President would be acting in bad faith if he disregarded the findings of a Commission of Inquiry which he established himself through a statutory instrument. Itshouldfurther be appreciated that the powersof the President to issue a Commission of Inquiry is not in substitution to the powers of any state organ or agencies to investigate as we discuss earlier.

FINDINGS AND DETERMINATION AS WELL AS CONCLUSIONS OF THE APPEAL

For the reasons set out above, the appeal should succeed and leave for judicial review is discharged. In summary and specifically we determine as follows:

First, it is the position of this Court that it is not court's business to go as far as suggesting who should be appointed, removed or suspended from the office of Minister. We cannot force a cabinet Minister to resign from office as that is a political decision for an individual Minister to make where the individual Minister is embroiled in a scandal. Indeed, where a Minister qualified under Section 95 of the Constitutionto be put in cabinet the Minister holds the office at the pleasure and displeasure of the President. Apart from the displeasure of the President, theConstitution, in particular Section 95 thereof, provides for disqualifying factors that may lead to his or her removal. The Minister will be removed if he or she doesnot qualify in terms of this section.[40]No judicial act can be employed to remove a Minister from cabinet.

it is the finding of this Court that Commissioners Dr Banda and Mr Kayira were duly lawfully appointed to the Commission of Inquiry.

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[40] See section 95 (3) of the Constitution.

It is finally the finding of this Court that all the respondents have not established sufficient factual basis to be accorded locus standi in this matter.

Therefore, the appeal herein succeeds on all grounds. It is hereby allowed while discharging the grant of permission to apply for judicial review made by the court a quo on 12 January 2017.

ORDER

The appeal is allowed. The order of the court below is set aside. There was no arguable case fit for judicial review. We alsowish to point that there was no resolution of trustees put before Court to show that the Board of Trustees decided to take out the judicial review proceedings. The costs should therefore be borne personally by Mr. Charles Kajoloweka.We make an order for costs before this Court and the court below against Mr Charles Kajoloweka.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Lilongwe on 13 February2019.

Signed: .....

HONOURABLE CHIEF JUSTICE A.K.C. NYIRENDA SC

Signed: .....

HONOURABLE JUSTICE E.B.TWEA SC, JA

Signed: .....

HONOURABLE JUSTICE F.E. KAPANDA SC, JA