

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CASE NO. 5 OF 2004

BETWEEN:

THE REPUBLICAN PARTY
(Representing its Members and all
of Mgwirizano Coalition Grouping)PLAINTIFF

AND

THE MALAWI ELECTORAL COMMISSION1ST DEFENDANT
THE UNITED DEMOCRATIC FRONT2ND DEFENDANT
THE ATTORNEY GENERAL3RD DEFENDANT

CORAM: Hon. Justice Chimasula Phiri
 Hon. Justice Twea
 Hon. Justice Potani
 C. Mhango, of Counsel for the Plaintiff
 K. Kaphale, of Counsel for the 1st Defendant
 S.D. Matenje assisted by
P. Kayira, } of Counsel for the 3rd Defendant
 UDF, Absent/unrepresented
 J. Nsomba, Official Interpreter
 J. Ngwale, Recording Officer

JUDGMENT

CHIMASULA PHIRI, J.

This is an expedited originating summons at the instance of the plaintiff in which the plaintiff seeks the determination by the Court of the following questions:

1. Whether the 1st defendant was correct in referring the issue of deployment by UDF of government resources to the Office of the President, instead of the 1st defendant taking steps to stop such deployment of public resources for campaigning purposes.
2. Whether or not the figure of 6,671,816 registered voters is probable and attainable for 2004 general election, regard being had to Malawi's population projection figures reported by the National Statistical Office.
3. Whether the period of verification from 26th to 30th April, 2004 satisfies the requirement for the purpose of verifying voters roll for all the polling centres throughout the country.
4. Whether the period after verification has not abridged the requirement that there should be twenty-one days from closure of the verification process to the first polling date, and if so, whether the abridgment of the twenty-one days is not unlawful.
5. Whether Malawi Electoral Commission's decision in effecting such abridgment has not affected the rights of the plaintiff and other stakeholders in view of the order of the Court in Miscellaneous Civil Application No. 29 of 1999 between **Gwanda Chakuamba and the 1st Defendant**.
6. Whether the decision by the Malawi Electoral Commission to designate monitors for independent candidates does not justify designation of additional monitors for every presidential candidate on each polling centre.
7. Whether the election will be free and fair without first addressing recent admission by the Chief Elections Officer Roosevelt Gondwe that the voters roll figure appears to be on the higher side and is likely to be reduced after a clean-up process does not demonstrate inefficiency and serious cause in the electoral process.

In the summons the plaintiff has sought reliefs that the Court do give the following or such orders, declarations and directions as may be just and expedient in the circumstances including:

- (i) An order that the 1st defendant's decision should fix time for inspection and verification for the period from 26th to 30th April as adversely affected the rights of the plaintiff and other stakeholders to inspect the voters register within twenty-one days from the date before the polling date.
- (ii) The abridgment of the twenty-one days from the end of the verification to the polling day occasioned by the 1st defendant in consideration of section 31 of the PPEA is unlawful.
- (iii) That the 1st defendant has failed to discharge his constitutional duty imposed by

section 76(2) paragraph (d) of the Malawi Constitution in that it has failed to comply with statutory provision of section (8)(i)(m) of the enabling Act.

(iv) An order that adequate time for verifying the voters rolls can be accorded to enable the plaintiffs exercise their rights to fully and completely verify voters rolls.

(v) An order requiring the 1st defendant to justify the figure of 6,671,816 for registered voters.

(vi) An order that time for presenting names and particulars of monitors to man the presidential candidates voting polling centre be designated.

(vii) A declaration that the Malawi Electoral Commission has failed to take measures and to do such other things as are necessary for conducting free and fair election.

(viii) The 2nd and 3rd defendants be ordered not do deploy government financial, material or human resources for promoting its interest or undermining the plaintiff during this campaign period.

The plaintiff relies on the affidavit of Garnet Thomas Ngubola Kamwambe sworn on the.....The 1st defendant is relying on the two affidavits in opposition sworn on 11th May, 2004 by Muhabi Lufu Chisi and Harris Potani. In his affidavit Mr Chisi has stated as follows under starting from paragraph 2:

“(2) I work for the Malawi Electoral Commission as an Information Technology Manager. I head the Information Technology Department at the Malawi Electoral Commission.

(3) I have read the affidavit of Garnett Kamwambe on the issue of the number of registered voters in relation thereto I depose as follows:

(4) I have noted the plaintiff is placing heavy reliance on the 1999-2023 population projection by the National Statistical Office (N.S.O.) much as N.S.O. is official public body responsible for population count and projections in the country it ought to be appreciated that the N.S.O.’s population figures can at best be estimates, and that its projections of population dynamics are largely opinions that may or may not be true at any specific period of time. Just for example I have in mind a 1999 elections where as a matter of fact the Malawi Electoral Commission registered more voters in the northern region of Malawi than were estimated by the N.S.O.

(5) Because of this problem with the N.S.O. projections and in order to avert the possibility of disenfranchising people the Malawi Electoral Commission place partial reliance on the N.S.O.’s figures and instead place greater reliance on the statistics received from the Returning Officers who oversaw the exercise in every district. The

exercise was duly witnessed by monitors.

(6) It is true that in February 2004, the Malawi Electoral Commission released interim registration figures for the 2004 general elections following the registration exercise which ran from 5th to 28th January 2004. The figures released were obtained from District Commissioners most of whom were the Electoral Commissions Returning Officers in the districts. The total figure nation wide was reported at 6,673,023. When releasing the figure was to be examined and was likely to be lower than that.

(7) On Thursday 6th May, 2004 the Malawi Electoral Commission released the computer count of 5,745,455 as the national count of registered voters.

(8) This new count was arrived at by counting all the forms that had been received by the Malawi Electoral Commission Information Technology Section.

(9) All planning for elections was done based on the 6,673,023 number of voters and the Commission ordered ballot papers with 15% mark-up for orders of ballots for presidential polls, and a 10% mark-up for parliamentary polls. The disparity exists because the donor community objected and could only fund the 10% mark-up for the parliamentary and presidential elections. More ballot papers than estimated voters were ordered to avert the possibility of the Commission running out of ballot papers thereby disenfranchising some people.

(10) As these figures of ballot papers are in the public domain there is a good ballot paper auditing system in place; further with the presence of party and candidate monitors is very far the electoral process it is clear that the country is better of ordering or having more ballots for polling day than having less. In any event even after the polls any interested party can undertake an independent ballot audit for both used and unused ballot papers to see if the system had been abused or not.

(11) The fears that there may not be free and fair elections due to voter number count or estimate is therefore unfounded. Even if there is an over-estimate, it is unlikely that this is going to lead to any fraud or unfairness in view of the monitoring process and the statutory safeguards that are in place.

(12) Regarding the issue of transferred voters, our system is such that registered voters that transferred to new centres would have to inform the new centre that they were registering on transfer, and then the new centre would get their vote certificates for the former registration centre. This information was processed by our Data Department and the computer made adjustments to the voter's old roll showing that one voter had moved

and was no longer one of the voters there, and would also show that at the new centre there was an additional voter due to the transfer.”

In his affidavit Mr Potani has stated as follows:

“(2) I am employed by the Malawi Electoral Commission as the head of the Electoral Commission Services, and I have due authority to swear this affidavit.

(3) The statements of facts that I depose to herein emanate from my personal knowledge whilst working for the Malawi Electoral Commission.

(4) I have read the originating summons in this action as well as the affidavit of Garnett Thomas Ngubola Kamwambe sworn in support thereof and I respond thereto in the following manner:

Allegation of use of public resources by the 2nd defendant:

(5) By Exhibit GK1 paragraph 6 in the affidavit of Mr Kamwambe, the plaintiff made very general allegations of abuse of public resources by the 2nd defendant for campaign purposes.

(6) The Malawi Electoral Commission responded to such general allegations through Exhibit GK1a in the affidavit of Mr Kamwambe especially in paragraph 1.9 thereof.

(7) The plaintiff again raised the issue in very general terms in Exhibit GK2, paragraph 2.14 in the affidavit of Mr Kamwambe. Again the Malawi Electoral Commission responded thereto through paragraph 5 of Exhibit GK3a through the affidavit of Mr Kamwambe.

(8) Faced with such broad and rather unspecified allegations I verily believe that the Malawi Electoral Commission did what it could within its legal mandate to address the above issue.

Figure of registered voters:

(9) All the interested groups and stakeholders to the elections, for example, political

parties, independent candidates and presidential candidates, are, by law, empowered to send monitors to observe the entire electoral process.

(10) The observation by the monitors starts during registration, and at the time of receipt of ballot papers at every polling station. The presiding officer and the monitors are supposed to come together with ballot papers that they have received and compare them to the number appearing on the manifest from the Electoral Commission. Further if the voting station has released ballot papers to other stations in need of such, or has received some from other stations such information is supposed to be well noted by presiding officers as well as representatives of their candidates or political parties.

(11) At the end of the voting a reconciliation of ballot papers is done and verified by the presiding officers as well as the monitors present.

(12) I hereby exhibit hereto and mark HP1A bunch of forms for official record and summary of results of the results of parliamentary elections. The most pertinent forms are MEC065(a)/3 and MEC065(a)/5 I further exhibit hereto and mark HP1B being a corresponding bunch of forms for presidential elections and I draw the Court's attention to forms MEC 065(b)3 and MEC 065(b)5.

(13) It is clear therefore, that there is an elaborate accounting system for ballot papers at every polling station, and with monitors that would check the number of people who turn up to vote at one direction. The possibility of fraud through usage of more ballots than there are voters that turn up to vote is reduced to zero.

(14) Further, at the end of the day, at the end of every voting the result of the count is supposed to be verified by the presiding officer and all monitors present as forms MEC 065(a)/4 and MEC 065(b)/4 to Exhibits HP1A and HP1B above would show. Every aggrieved person or monitor who has a complaint about the electoral process is supposed to put that complaint down in writing for the attention of the Electoral Commission using Form MEC 065 exhibited hereto and marked HP2, and such complaints are, under section 97 of the PPEA supposed to be dealt with by the Malawi Electoral Commission before the announcement of the results.

(15) Furthermore, under section 119 of the PPEA, The Malawi Electoral Commission is supposed to keep all electoral documents safe for a period of twelve months after taking the forms; which means that every aggrieved or skeptical person can have access thereto to verify the results.

(16) It would be seen therefore, that the issue of the estimated voters should not cause

unnecessary panic to the plaintiff and the electorate as there are enough safeguards to ensure accountability and transparency, and there is a very minimal if not entirely non-existent possibility that voters could use more ballot papers than one for a particular poll. Due to the use of indelible ink on voter's fingers it is also not possible for anybody to vote twice.

(17) It is my belief therefore, that the issue of misestimated number of voters is not one to be used in gauging whether a poll is going to be free and fair as is the allegation in this case. In any event there is no justification for the fear that the estimated number of voters figure may be used to the disadvantage of any of the stakeholders of the election.

(18) To the plaintiff's demand that the extra ballots turned over to custody of a third party, I believe that that is entirely unnecessary in view of the ballot auditing system, and also for the reason that the third party would have no statutory mandate to keep such. Further, inconvenience would result if the third party failed to release extra ballot papers to polling centres in need of them on the polling day. It ought to be borne in mind that polling centres are spread across the country and it is not known if such third parties would equally be spread out, being conveniently accessible to the Malawi Electoral Commission staff with relative ease on the material day.

Allegations of abridgement of period between verification and inspection of voters roll and polling day.

(19) I believe that the plaintiff is making a fundamental error of law in thinking that there must be a twenty-one day period between the end of the verification and inspection of the voters roll and the polling day. Section 31 of the PPEA merely makes provision for the Malawi Electoral Commission to make available to the voters for inspection and verification, and does not give a specific period for that.

(20) I believe the plaintiff's error arises from section 29 of the PPEA. The section provides that there must be a minimum period of fourteen to twenty-one days before the close of the period for registration of voters and the polling day. **The Gwanda Chakuamba and the Electoral Commission Case** No. 29 of 1999 was on that point because in 1999 the registration exercise had been extended in such a manner as to abridge that period. This year the situation is different as the registration of voters ended in January 2004.

(21) Actually since section 29 of the PPEA provides to a period of from between fourteen to twenty-one days between close of registration and polling day this means that the verification and inspection exercise can take place less than fourteen days before the polling day. The Commission has therefore, not committed any unlawful act in the circumstances.

(22) I have taken note of the few cited complaints of the irregularities in the voters roll in Exhibit GK4 and GK 4A. Actually the aim of the verification is to draw the Commission's attention to such anomalies. The anomalies cited in such exhibits have since been attended to.

Designation of monitors

(23) Though I am failing to comprehend the concern of the plaintiffs from this issue, I depose that the Malawi Electoral Commission on 20th March, 2004 and 26th April, 2004 flighted an advertisement through the mass-media calling for political parties and all candidates, presidential as well as parliamentary to send the lists of their monitors to the officers of District Commissioners to returning officers in every district. I exhibit here copies of press releases and mark them HP3A and HP3B respectively.

(24) In the content of the plaintiff's concerns in this action, and in view of the Malawi Electoral Commission's response thereto, it is my submission that the 2004 elections will be substantially free and fair."

The 2nd defendant never filed any affidavit and did not appear at the hearing. However, the 3rd defendant filed a general denial as follows:

"The 3rd defendant denies that government is deploying or has deployed its resources for use for campaigning purposes by a political party called the United Democratic Front, and brings the plaintiff to strict proof thereof."

The plaintiff filed an Affidavit in Reply to the Affidavit in Opposition. This Affidavit in Reply is sworn by the plaintiff's lawyer Mr C.C. Mhango. It is as follows:

1. **THAT** I have conduct of this matter on behalf of the plaintiff by way of a brief from Messrs Bazuka & Company and I am by reason thereof duly authorized to swear this affidavit on behalf of the above-named plaintiff.
2. **THAT** the statement of fact deposed to herein based on information received from the Vice President of the Republican Party Honourable Bazuka Michael Kalwefu Mhango, and I verily believe the same to be true.
3. **THAT** I have read the affidavits of Harris Potani and Muhabi Lufu Chisi sworn on 13th May, 2004 and I reply thus:

Figures and registered voters

4. I am informed that in relation to figures of registered voters while it is true that on 6th May, 2004, the 1st defendant announced the computer count of 5,745,455 as the national count of registered voters, the 1st defendant has failed to release or display the voters roll supporting the said figure of 5,745,455 voters for inspection by voters, representatives of political parties including the plaintiff's party or at all in contravention to section 31 of the PPEA.

5. Instead, the announcement of the new national computer count the 1st defendant has released two contradicting voter registers to various returning officers containing serious disparities in entries. There is now produced and shown to me sample copies of the two registers for Karonga District namely, the updated numbers of registered voters exhibited hereto and marked CCM1 and the voters region district, constituencies centres list exhibited hereto and marked CCM2.

6. For instance, as shall be seen clearly from Exhibit CCM1 Centre code 49 namely Mwenilondo, the home of Frank Tumpule Mwenifumbo of Alliance for Democracy in the UDF/AFFORD/NCD Alliance in Karonga Central Constituency the updated figure is 2,864 while in Exhibit CCM2 the same centre is registering the figure 5,630. Another bearing example is centre 57 called Chiwondo, the home of Du Mhango independent candidate. In the same constituency in CCM1 the update figure is 1,196 while CCM2 indicates the figure of 117 only.

7. There are numerous other instances of disparities between Exhibit "CCM1" and "CCM2" demonstrating that there are serious problems on the ground with the voters roll not only in Karonga, but nationwide.

8. I am further informed that the distribution of voting materials including Ballot Papers has been based on the figures in "CCM2" and such distribution is likely to cause unnecessary shortage of materials and crisis in centres like Chowondo resulting in disfranchisement of voters in such centres, constituencies, districts and or regions nationwide.

Inspection and Verification of Voters Roll

9. In relation to the 1st Defendant's contention that the period of verification of the voters rolls ought to be less than twenty-one days the 1st Defendant is making an error of law by reading Section 31 in isolation and independent of Sections 29 and 30 of the PPEA as the activities in these sections are supposed to be done within a specified time of thirty days and twenty-one days, and there has been occasioned an abridgement of the time for verification of the voters registers for the forthcoming general elections as to-date the voter registers have not been displayed for inspection.

10. The mandate of the 1st Defendant is to conduct a free and fair election and not a "**Substantially**" free and fair election. In light of the serious disparities between "CCM1" and "CCM2" and the serious flaws in the compilation of the voters register

there is need for adequate time for inspection and verification by the voters, representatives of the Plaintiffs and other political parties and international observers if the 1st Defendant is to conduct a free and fair election.”

In making submissions on behalf of the Plaintiff, Mr Mhango stated that the 3rd Defendant has been joined because of the allegation relating to use of official resources by the 2nd Defendant. Mr Mhango has relied on the fact that on 12th March, 2004 the Mgwirizano Coalition wrote to the 1st Defendant raising inter alia objection to the continued use of government funds and resources by the State President in the furtherance of interest of the 2nd Defendant and in particular campaigning for UDF candidates in respect of the forthcoming Presidential and Parliamentary General Elections slated for 18th May, 2004. The other aspect expressly raised in that letter touches on the use of vehicles from Statutory Corporations to carry people to the President’s political campaign rallies. Part of the response to this query by the 1st Defendant is contained in the letter dated 3rd April, 2004 which reads as follows:

“If any party is convinced that a particular stakeholder in the electoral process is breaking the electoral law has all the freedom to seek redress in the courts. The Commission will not prosecute any political party contesting the elections.

1.9 Use of official resources by the UDF Party

In the same vein, all persons have the right to challenge the use of public resources by the ruling party for campaign purposes. The Commission will not be the advocate of any aggrieved political party, person or organization. The exercise of the right should rest with the aggrieved parties by invoking Section 193(4) of the Constitution which prohibits use of public resources to promote the interests of a political party.”

It is the submission of Mr Mhango said that the 1st Defendant has wide powers in terms of Section 76(2)(c) and (d) of the Constitution as well as Section 8 of the Electoral Commission Act to determine electoral petitions as well as complaints arising from the conduct of any elections and to ensure compliance with the provisions of the Constitution and any other Act of Parliament. Mr Mhango submitted that particularly during the official campaign period, the 1st Defendant ought to have performed its constitutional and statutory duty and not shy away from its responsibilities. In the way the expectation of the Plaintiff that the 1st Defendant would take control of all the process for conducting a free and fair election, Mr Mhango has relied on Miscellaneous Civil Application number 29 of 1999 **Gwanda Chakuamba against The Electoral Commission** (unreported) in which I bemoaned the incompetence of the Malawi Electoral Commission at the time immediately before the 1999 presidential and parliamentary general elections were held. The reasons I had given in that case were that the Malawi Electoral

Commission then was not pro-active and had unlawfully abridged voter verification period. I still maintain my stand that I expect, to say the least, an Electoral Commission which is pro-active and independent, I also stand by my earlier statements made in Miscellaneous Civil Application No. 23 of 1999 **Brian Mungomo and Others -v- The Electoral Commission** (unreported) where I said:

“If the Electoral Commission performs very well during the remaining days before the polling date, i.e. it must be transparent enough that it is independent and in control of the electoral process, all citizens of goodwill shall accept the results of the general elections without any misgivings.”

As a face saver for the 1st Defendant Mr Kaphale submitted that the Electoral Commission referred the complaint by the Plaintiff to the Office of the President and Cabinet (OPC) because the Plaintiff had not specified the resources which were being abused and that the allegation was very broad and not specific. Mr Kaphale submitted that the matter was referred to OPC because under Section 193 of the Constitution, what is prevented is abuse of resources by public servants and that OPC would be a competent authority to refer such matters to the Civil Service Commission. Further, that the allegation against the President was broad and non-specific making it imperative for the Electoral Commission to make reference to OPC.

With respect, honestly, I do not share the views of Mr Kaphale. If one looks at Section 76(2)(c) and (d) of the Constitution which provides as follows:

“(2) The duties and functions of the Electoral Commission shall include:

(c) To determine electoral petitions and complaints related to the conduct of any elections.

(d) To ensure compliance with the provisions of this Constitution and any other Act of Parliament.

Section 113 of the Parliamentary and Presidential Elections Act, provides as follows:

“Save as otherwise provided in this Act, any complaint submitted in writing alleging any irregularities at any stage if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed, the Commission shall take any necessary action to correct irregularity and effects thereof.”

In the light of these provisions the 1st Defendant has very wide powers to make decisions

and not references to OPC. It was open to the 1st Defendant to call for further and better particulars from Plaintiff if the allegations were broad and non-specific. The response quoted above from the 1st Defendant demonstrates abdication of duty by the Electoral Commission. Advising the Plaintiff to refer the matter to Court was not an adequate answer because by law under Section 114(1) of the Parliamentary and Presidential Elections Act, the Plaintiff is entitled to appeal to the High Court against the decision of the Commission confirming or rejecting the existence of an irregularity. My view is that the Electoral Commission should have inquired into the complaint by the Plaintiff and then confirmed the existence of the irregularity and take necessary corrective steps or rejected the existence of the irregularity.

My finding on this issue is that the 1st Defendant was not correct in referring the issue of deployment by UDF of government resources to the OPC instead of the 1st Defendant taking steps to stop such deployment of public resources for campaigning purposes if it existed, and I so declare.

The next point pursued by Mr Mhango related to voter registration number of 6,671,816 and admission made by Chief Elections Officer Mr Roosevelt Gondwe that the voters roll figure appears to be on high side. Mr Mhango noted that there is a positive development that the number has dropped as on 6th May 2004 to 5,745,455 as released by the computer count. However, an issue of 7,339,900 requisitioned voting ballots was still pursued. It is clear from the affidavit of Chisi that based on the previous figure of 6,673,023 registered voters, the 1st Defendant ordered ballot papers with a 15% mark up for orders of ballots for Presidential polls and 10% mark up for Parliamentary polls. The Plaintiff has contended that even in accommodating the mark ups stated above, the 1st Defendant would need roughly about 6,000,000 ballot papers. The issue is what should happen to the extra 1,339,900 ballot papers? The plaintiff contends that since the winner is determined not by majority votes, but first past the post, there is need to take control that the extra ballot papers are not abused. Mr Mhango urges the Court to make a declaration about the extra ballot papers. Further, that the Court should be seized with the custody of the same.

In response to this prayer, Mr Kaphale stated that the issue of voter registration roll no longer exists because the Plaintiff's expectation has been met by the reduced figure released by the 1st Defendant. However, Mr Kaphale contends that the Court has no powers under the electoral law to take possession and custody of election materials. Mr Kaphale pointed out that Courts are not available in all polling centres and as such some registered voters may be disenfranchised if excess election material were handed over to the Court.

With respect to Mr Kaphale, I do not think that the argument of the Plaintiff is that the

Court should handle and administer elections materials. I take it that the Plaintiff is raising issue that it has fears that extra ballot papers may be abused. The question I would equally pause to the 1st defendant as Mr Mhango has done is this: “does the Electoral Commission require the excess ballot papers after already including the 15% and 10% mark ups in the known registered figures?” In my view if the answer is **Yes**, it would certainly raise unnecessary suspicion of rigging the elections.

For the sake of credibility and transparency of the forthcoming electoral process the Electoral Commission should do manual count of these extra papers. These should be deposited into a warehouse under the control of the Court. The reason for this decision lies in the fact that according to the Constitution it is provided in Section 103 that:

“(1) all courts and all persons presiding over courts shall exercise their functions, powers and duties independent of 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.”

In terms of Section 108 of the Constitution, the High Court has unlimited original jurisdiction to hear and determine any Civil and Criminal proceedings under any law. Further in terms of Section 41(3) of the Constitution every person shall have the right to an effective remedy by the court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law. The Court feels that by taking possession, custody and control of excess unrequired ballot papers the Court would be giving an effective remedy to the Plaintiff. There would be no interference with the duties and powers of the Electoral Commission in so doing. The keys for such a warehouse would have to be surrendered to the Registrar of the High Court. The Registrar may also have to put additional locking mechanism for which no other person or authority would have no duplicate keys. The warehouse must be sealed.

I have had the privilege of looking at the discourse by My Learned Brothers, to start with Justice Potani and as well as Justice Twea and I fully concur with their findings and the orders they are making in this judgment. So I ask Justice Potani to continue reading the following part of the judgment.

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(iii) That the 1st defendant has failed to discharge his constitutional duty imposed by section 76(2) paragraph (d) of the Malawi Constitution in that it has failed to comply with statutory provision of section (8)(i)(m) of the enabling Act.

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(6) It is true that in February 2004, the Malawi Electoral Commission released interim registration figures for the 2004 general elections following the registration exercise which ran from 5th to 28th January 2004. The figures released were obtained from District Commissioners most of whom were the Electoral Commissions Returning Officers in the districts. The total figure nation wide was reported at 6,673,023. When releasing the figure was to be examined and was likely to be lower than that.

(7) On Thursday 6th May, 2004 the Malawi Electoral Commission released the computer

count of 5,745,455 as the national count of registered voters.

(8) This new count was arrived at by counting all the forms that had been received by the Malawi Electoral Commission Information Technology Section.

(9) All planning for elections was done based on the 6,673,023 number of voters and the Commission ordered ballot papers with 15% mark-up for orders of ballots for presidential polls, and a 10% mark-up for parliamentary polls. The disparity exists because the donor community objected and could only fund the 10% mark-up for the parliamentary and presidential elections. More ballot papers than estimated voters were ordered to avert the possibility of the Commission running out of ballot papers thereby disenfranchising some people.

(10) As these figures of ballot papers are in the public domain there is a good ballot paper auditing system in place; further with the presence of party and candidate monitors is very far the electoral process it is clear that the country is better off ordering or having more ballots for polling day than having less. In any event even after the polls any interested party can undertake an independent ballot audit for both used and unused ballot papers to see if the system had been abused or not.

(11) The fears that there may not be free and fair elections due to voter number count or estimate is therefore unfounded. Even if there is an over-estimate, it is unlikely that this is going to lead to any fraud or unfairness in view of the monitoring process and the statutory safeguards that are in place.

(12) Regarding the issue of transferred voters, our system is such that registered voters that transferred to new centres would have to inform the new centre that they were registering on transfer, and then the new centre would get their vote certificates for the former registration centre. This information was processed by our Data Department and the computer made adjustments to the voter's old roll showing that one voter had moved and was no longer one of the voters there, and would also show that at the new centre there was an additional voter due to the transfer."

In his affidavit Mr Potani has stated as follows:

“(2) I am employed by the Malawi Electoral Commission as the head of the Electoral Commission Services, and I have due authority to swear this affidavit.

(3) The statements of facts that I depose to herein emanate from my personal knowledge whilst working for the Malawi Electoral Commission.

(4) I have read the originating summons in this action as well as the affidavit of Garnett Thomas Ngubola Kamwambe sworn in support thereof and I respond thereto in the following manner:

Allegation of use of public resources by the 2nd defendant:

(5) By Exhibit GK1 paragraph 6 in the affidavit of Mr Kamwambe, the plaintiff made very general allegations of abuse of public resources by the 2nd defendant for campaign purposes.

(6) The Malawi Electoral Commission responded to such general allegations through Exhibit GK1a in the affidavit of Mr Kamwambe especially in paragraph 1.9 thereof.

(7) The plaintiff again raised the issue in very general terms in Exhibit GK2, paragraph 2.14 in the affidavit of Mr Kamwambe. Again the Malawi Electoral Commission responded thereto through paragraph 5 of Exhibit GK3a through the affidavit of Mr Kamwambe.

(8) Faced with such broad and rather unspecified allegations I verily believe that the Malawi Electoral Commission did what it could within its legal mandate to address the above issue.

Figure of registered voters:

(9) All the interested groups and stakeholders to the elections, for example, political parties, independent candidates and presidential candidates, are, by law, empowered to send monitors to observe the entire electoral process.

(10) The observation by the monitors starts during registration, and at the time of receipt of ballot papers at every polling station. The presiding officer and the monitors are supposed to come together with ballot papers that they have received and compare them to the number appearing on the manifest from the Electoral Commission. Further if the voting station has released ballot papers to other stations in need of such, or has received some from other stations such information is supposed to be well noted by presiding officers as well as representatives of their candidates or political parties.

(11) At the end of the voting a reconciliation of ballot papers is done and verified by the

presiding officers as well as the monitors present.

(12) I hereby exhibit hereto and mark HP1A bunch of forms for official record and summary of results of the results of parliamentary elections. The most pertinent forms are MEC065(a)/3 and MEC065(a)/5 I further exhibit hereto and mark HP1B being a corresponding bunch of forms for presidential elections and I draw the Court's attention to forms MEC 065(b)3 and MEC 065(b)5.

(13) It is clear therefore, that there is an elaborate accounting system for ballot papers at every polling station, and with monitors that would check the number of people who turn up to vote at one direction. The possibility of fraud through usage of more ballots than there are voters that turn up to vote is reduced to zero.

(14) Further, at the end of the day, at the end of every voting the result of the count is supposed to be verified by the presiding officer and all monitors present as forms MEC 065(a)/4 and MEC 065(b)/4 to Exhibits HP1A and HP1B above would show. Every aggrieved person or monitor who has a complaint about the electoral process is supposed to put that complaint down in writing for the attention of the Electoral Commission using Form MEC 065 exhibited hereto and marked HP2, and such complaints are, under section 97 of the PPEA supposed to be dealt with by the Malawi Electoral Commission before the announcement of the results.

(15) Furthermore, under section 119 of the PPEA, The Malawi Electoral Commission is supposed to keep all electoral documents safe for a period of twelve months after taking the forms; which means that every aggrieved or skeptical person can have access thereto to verify the results.

(16) It would be seen therefore, that the issue of the estimated voters should not cause unnecessary panic to the plaintiff and the electorate as there are enough safeguards to ensure accountability and transparency, and there is a very minimal if not entirely non-existent possibility that voters could use more ballot papers than one for a particular poll. Due to the use of indelible ink on voter's fingers it is also not possible for anybody to vote twice.

(17) It is my belief therefore, that the issue of misestimated number of voters is not one to be used in gauging whether a poll is going to be free and fair as is the allegation in this case. In any event there is no justification for the fear that the estimated number of voters figure may be used to the disadvantage of any of the stakeholders of the election.

(18) To the plaintiff's demand that the extra ballots turned over to custody of a third

party, I believe that that is entirely unnecessary in view of the ballot auditing system, and also for the reason that the third party would have no statutory mandate to keep such. Further, inconvenience would result if the third party failed to release extra ballot papers to polling centres in need of them on the polling day. It ought to be borne in mind that polling centres are spread across the country and it is not known if such third parties would equally be spread out, being conveniently accessible to the Malawi Electoral Commission staff with relative ease on the material day.

Allegations of abridgement of period between verification and inspection of voters roll and polling day.

(19) I believe that the plaintiff is making a fundamental error of law in thinking that there must be a twenty-one day period between the end of the verification and inspection of the voters roll and the polling day. Section 31 of the PPEA merely makes provision for the Malawi Electoral Commission to make available to the voters for inspection and verification, and doesnot give a specific period for that.

(20) I believe the plaintiff's error arises from section 29 of the PPEA. The section provides that there must be a minimum period of fourteen to twenty-one days before the close of the period for registration of voters and the polling day. **The Gwanda Chakuamba and the Electoral Commission Case** No. 29 of 1999 was on that point because in 1999 the registration exercise had been extended in such a manner as to abridge that period. This year the situation is different as the registration of voters ended in January 2004.

(21) Actually since section 29 of the PPEA provides to a period of from between fourteen to twenty-one days between close of registration and polling day this means that the verification and inspection exercise can take place less than fourteen days before the polling day. The Commission has therefore, not committed any unlawful act in the circumstances.

(22) I have taken note of the few cited complaints of the irregularities in the voters roll in Exhibit GK4 and GK 4A. Actually the aim of the verification is to draw the Commission's attention to such anomalies. The anomalies cited in such exhibits have since been attended to.

Designation of monitors

(23) Though I am failing to comprehend the concern of the plaintiffs from this issue, I depose that the Malawi Electoral Commission on 20th March, 2004 and 26th April, 2004 flighted an advertisement through the mass-media calling for political parties and all candidates, presidential as well as parliamentary to send the lists of their monitors to the

officers of District Commissioners to returning officers in every district. I exhibit here copies of press releases and mark them HP3A and HP3B respectively.

(24) In the content of the plaintiff's concerns in this action, and in view of the Malawi Electoral Commission's response thereto, it is my submission that the 2004 elections will be substantially free and fair."

The 2nd defendant never filed any affidavit and did not appear at the hearing. However, the 3rd defendant filed a general denial as follows:

"The 3rd defendant denies that government is deploying or has deployed its resources for use for campaigning purposes by a political party called the United Democratic Front, and brings the plaintiff to strict proof thereof."

The plaintiff filed an Affidavit in Reply to the Affidavit in Opposition. This Affidavit in Reply is sworn by the plaintiff's lawyer Mr C.C. Mhango. It is as follows:

11. **THAT** I have conducted this matter on behalf of the plaintiff by way of a brief from Messrs Bazuka & Company and I am by reason thereof duly authorized to swear this affidavit on behalf of the above-named plaintiff.

12. **THAT** the statement of fact deposed to herein based on information received from the Vice President of the Republican Party Honourable Bazuka Michael Kalwefu Mhango, and I verily believe the same to be true.

13. **THAT** I have read the affidavits of Harris Potani and Muhabi Lufu Chisi sworn on 13th May, 2004 and I reply thus:

Figures and registered voters

14. I am informed that in relation to figures of registered voters while it is true that on 6th May, 2004, the 1st defendant announced the computer count of 5,745,455 as the national count of registered voters, the 1st defendant has failed to release or display the voters roll supporting the said figure of 5,745,455 voters for inspection by voters, representatives of political parties including the plaintiff's party or at all in contravention to section 31 of the PPEA.

15. Instead, the announcement of the new national computer count the 1st defendant has released two contradicting voter registers to various returning officers containing serious disparities in entries. There is now produced and shown to me sample copies of the two registers for Karonga District namely, the updated numbers of registered voters exhibited hereto and marked CCM1 and the voters region district, constituencies centres list

exhibited hereto and marked CCM2.

16. For instance, as shall be seen clearly from Exhibit CCM1 Centre code 49 namely Mwenilondo, the home of Frank Tumpule Mwenifumbo of Alliance for Democracy in the UDF/AFFORD/NCD Alliance in Karonga Central Constituency the updated figure is 2,864 while in Exhibit CCM2 the same centre is registering the figure 5,630. Another bearing example is centre 57 called Chiwondo, the home of Du Mhango independent candidate. In the same constituency in CCM1 the update figure is 1,196 while CCM2 indicates the figure of 117 only.

17. There are numerous other instances of disparities between Exhibit "CCM1" and "CCM2" demonstrating that there are serious problems on the ground with the voters roll not only in Karonga, but nationwide.

18. I am further informed that the distribution of voting materials including Ballot Papers has been based on the figures in "CCM2" and such distribution is likely to cause unnecessary shortage of materials and crisis in centres like Chowondo resulting in disfranchisement of voters in such centres, constituencies, districts and or regions nationwide.

Inspection and Verification of Voters Roll

19. In relation to the 1st Defendant's contention that the period of verification of the voters rolls ought to be less than twenty-one days the 1st Defendant is making an error of law by reading Section 31 in isolation and independent of Sections 29 and 30 of the PPEA as the activities in these sections are supposed to be done within a specified time of thirty days and twenty-one days, and there has been occasioned an abridgement of the time for verification of the voters registers for the forthcoming general elections as to-date the voter registers have not been displayed for inspection.

20. The mandate of the 1st Defendant is to conduct a free and fair election and not a "**Substantially**" free and fair election. In light of the serious disparities between "CCM1" and "CCM2" and the serious flaws in the compilation of the voters register there is need for adequate time for inspection and verification by the voters, representatives of the Plaintiffs and other political parties and international observers if the 1st Defendant is to conduct a free and fair election."

In making submissions on behalf of the Plaintiff, Mr Mhango stated that the 3rd Defendant has been joined because of the allegation relating to use of official resources by the 2nd Defendant. Mr Mhango has relied on the fact that on 12th March, 2004 the Mgwirizano Coalition wrote to the 1st Defendant raising inter alia objection to the continued use of government funds and resources by the State President in the furtherance of interest of the 2nd Defendant and in particular campaigning for UDF candidates in respect of the forthcoming Presidential and Parliamentary General Elections

slated for 18th May, 2004. The other aspect expressly raised in that letter touches on the use of vehicles from Statutory Corporations to carry people to the President's political campaign rallies. Part of the response to this query by the 1st Defendant is contained in the letter dated 3rd April, 2004 which reads as follows:

“If any party is convinced that a particular stakeholder in the electoral process is breaking the electoral law has all the freedom to seek redress in the courts. The Commission will not prosecute any political party contesting the elections.

1.9 Use of official resources by the UDF Party

In the same vein, all persons have the right to challenge the use of public resources by the ruling party for campaign purposes. The Commission will not be the advocate of any aggrieved political party, person or organization. The exercise of the right should rest with the aggrieved parties by invoking Section 193(4) of the Constitution which prohibits use of public resources to promote the interests of a political party.”

It is the submission of Mr Mhango said that the 1st Defendant has wide powers in terms of Section 76(2)(c) and (d) of the Constitution as well as Section 8 of the Electoral Commission Act to determine electoral petitions as well as complaints arising from the conduct of any elections and to ensure compliance with the provisions of the Constitution and any other Act of Parliament. Mr Mhango submitted that particularly during the official campaign period, the 1st Defendant ought to have performed its constitutional and statutory duty and not shy away from its responsibilities. In the way the expectation of the Plaintiff that the 1st Defendant would take control of all the process for conducting a free and fair election, Mr Mhango has relied on Miscellaneous Civil Application number 29 of 1999 **Gwanda Chakuamba against The Electoral Commission** (unreported) in which I bemoaned the incompetence of the Malawi Electoral Commission at the time immediately before the 1999 presidential and parliamentary general elections were held. The reasons I had given in that case were that the Malawi Electoral Commission then was not pro-active and had unlawfully abridged voter verification period. I still maintain my stand that I expect, to say the least, an Electoral Commission which is pro-active and independent, I also stand by my earlier statements made in Miscellaneous Civil Application No. 23 of 1999 **Brian Mungomo and Others -v- The Electoral Commission** (unreported) where I said:

“If the Electoral Commission performs very well during the remaining days before the polling date, i.e. it must be transparent enough that it is independent and in control of the electoral process, all citizens of goodwill shall accept the results of the general elections without any misgivings.”

As a face saver for the 1st Defendant Mr Kaphale submitted that the Electoral Commission referred the complaint by the Plaintiff to the Office of the President and Cabinet (OPC) because the Plaintiff had not specified the resources which were being abused and that the allegation was very broad and not specific. Mr Kaphale submitted that the matter was referred to OPC because under Section 193 of the Constitution, what is prevented is abuse of resources by public servants and that OPC would be a competent authority to refer such matters to the Civil Service Commission. Further, that the allegation against the President was broad and non-specific making it imperative for the Electoral Commission to make reference to OPC.

With respect, honestly, I do not share to the views of Mr Kaphale. If one looks at Section 76(2)(c) and (d) of the Constitution which provides as follows:

“(2) The duties and functions of the Electoral Commission shall include:

(c) To determine electoral petitions and complaints related to the conduct of any elections.

(d) To ensure compliance with the provisions of this Constitution and any other Act of Parliament.

Section 113 of the Parliamentary and Presidential Elections Act, provides as follows:

“Save as otherwise provided in this Act, any complaint submitted in writing alleging any irregularities at any stage if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed, the Commission shall take any necessary action to correct irregularity and effects thereof.”

In the light of these provisions the 1st Defendant has very wide powers to make decisions and not references to OPC. It was open to the 1st Defendant to call for further and better particulars from Plaintiff if the allegations were broad and non-specific. The response quoted above from the 1st Defendant demonstrates abdication of duty by the Electoral Commission. Advising the Plaintiff to refer the matter to Court was not an adequate answer because by law under Section 114(1) of the Parliamentary and Presidential Elections Act, the Plaintiff is entitled to appeal to the High Court against the decision of the Commission confirming or rejecting the existence of an irregularity. My view is that the Electoral Commission should have inquired into the complaint by the Plaintiff and then confirmed the existence of the irregularity and take necessary corrective steps or rejected the existence of the irregularity.

My finding on this issue is that the 1st Defendant was not correct in referring the issue of deployment by UDF of government resources to the OPC instead of the 1st Defendant taking steps to stop such deployment of public resources for campaigning purposes if it existed, and I so declare.

The next point pursued by Mr Mhango related to voter registration number of 6,671,816 and admission made by Chief Elections Officer Mr Roosevelt Gondwe that the voters roll figure appears to be on high side. Mr Mhango noted that there is a positive development that the number has dropped as on 6th May 2004 to 5,745,455 as released by the computer count. However, an issue of 7,339,900 requisitioned voting ballots was still pursued. It is clear from the affidavit of Chisi that based on the previous figure of 6,673,023 registered voters, the 1st Defendant ordered ballot papers with a 15% mark up for orders of ballots for Presidential polls and 10% mark up for Parliamentary polls. The Plaintiff has contended that even in accommodating the mark ups stated above, the 1st Defendant would need roughly about 6,000,000 ballot papers. The issue is what should happen to the extra 1,339,900 ballot papers? The plaintiff contends that since the winner is determined not by majority votes, but first past the post, there is need to take control that the extra ballot papers are not abused. Mr Mhango urges the Court to make a declaration about the extra ballot papers. Further, that the Court should be seized with the custody of the same.

In response to this prayer, Mr Kaphale stated that the issue of voter registration roll no longer exists because the Plaintiff's expectation has been met by the reduced figure released by the 1st Defendant. However, Mr Kaphale contends that the Court has no powers under the electoral law to take possession and custody of election materials. Mr Kaphale pointed out that Courts are not available in all polling centres and as such some registered voters may be disenfranchised if excess election material were handed over to the Court.

With respect to Mr Kaphale, I do not think that the argument of the Plaintiff is that the Court should handle and administer elections materials. I take it that the Plaintiff is raising issue that it has fears that extra ballot papers may be abused. The question I would equally pause to the 1st defendant as Mr Mhango has done is this: "does the Electoral Commission require the excess ballot papers after already including the 15% and 10% mark ups in the known registered figures?" In my view if the answer is **Yes**, it would certainly raise unnecessary suspicion of rigging the elections.

For the sake of credibility and transparency of the forthcoming electoral process the Electoral Commission should do manual count of these extra papers. These should be deposited into a warehouse under the control of the Court. The reason for this decision lies in the fact that according to the Constitution it is provided in Section 103 that:

“(1) all courts and all persons presiding over courts shall exercise their functions, powers and duties independent of 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.”

In terms of Section 108 of the Constitution, the High Court has unlimited original jurisdiction to hear and determine any Civil and Criminal proceedings under any law. Further in terms of Section 41(3) of the Constitution every person shall have the right to an effective remedy by the court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law. The Court feels that by taking possession, custody and control of excess unrequired ballot papers the Court would be giving an effective remedy to the Plaintiff. There would be no interference with the duties and powers of the Electoral Commission in so doing. The keys for such a warehouse would have to be surrendered to the Registrar of the High Court. The Registrar may also have to put additional locking mechanism for which no other person or authority would have no duplicate keys. The warehouse must be sealed.

I have had the privilege of looking at the discourse by My Learned Brothers, to start with Justice Potani and as well as Justice Twea and I fully concur with their findings and the orders they are making in this judgment. So I ask Justice Potani to continue reading the following part of the judgment.

POTANI, J.

I have had occasion to consider the views and findings of my two brother Judges on the issues they have dealt with and I concur with them.

The issue I have to deal with relates to the inspection and verification of the voters register. On this aspect, the plaintiff seeks the courts determination of three questions and prays for ancillary orders and reliefs. The three questions are contained in paragraphs 3, 4 and 5 of the originating summons and have already been articulated by my brother Judge. It is my inclination that all the three questions can conveniently be dealt with together as they are closely linked. Inspection and verification of voters register is provided for in section 31 of the Parliamentary and Presidential Elections Act. There can be no doubt that inspection and verification of voters register is one of the means for safeguarding against possible rigging in the electoral process as it gives interested parties the opportunity to check and verify or, where necessary, cause rectification of any entries in the voters register. Parties that have been given ample opportunity to verify the voters register are unlikely to cry foul over the election result on account of alleged errors, or irregularities or discrepancies in the voters register.

It is pertinent to observe at the outset that section 31 of the Parliamentary and Presidential Elections Act does not specify the time to be provided for inspection and verification of the voters register. Mr. Mhango for the plaintiff, however, entertains the view that the period for inspection and verification has to be at least 21 days before the polling day. This, according to counsel, can be discerned when section 31 is read together with sections 29 and 30. He argued with manifest conviction that reading the three sections in isolation results in absurdity. It is my view that even if one were to read the three sections together what comes out clearly is that all that the law requires is that there has to be least 21 days between the close of registration of voters and the first polling day which means the verification has to be done within that 21 days period in which case it may be for less than 21 days. It is my considered view that if the Legislators had intended the period to be 21 days as counsel suggests, either that could have been clearly provided for or it could have been clearly stated as a requirement in section 29, 30 or 31 that immediately after the close of registration, the registration officer or the Commission, as the case might be, should post the voters register for inspection at appropriate public places. This leads to the question whether the period of verification from April 20 to 20, 2004, satisfied the requirement for the purpose of verifying the voters roll for all polling centres throughout the country. Observably, the period provided for verification was 5 days and as already found, the law does not prescribe the number of days for verification therefore the law as it stands now, there is no basis on which the 5 day verification period can be faulted. It should, however, be stated that it would have been better if the law made a clear provision for a specific mandatory period for the verification of voters register to avoid situations in which those in charge of the electoral process would make available too short a time for the verification thereby denying interested parties ample time to inspect the register which would defeat the whole purpose of inspection and verification.

Having found that, the 5 day verification period never offended any law, the matter does not end there. It would be recalled that there are revelations that after the verification period of April 26 to 30, on May 6, the first defendant released an updated voters roll with 5,745,455 registered voters as opposed to 6,673,023 as at the time of the verification. Clearly, therefore, the voters register that is available now is not the one that was inspected. Obviously certain entries have been removed from the register and this necessitates affording interested parties another opportunity to verify the updated register. There can be no sure guarantee that the updated register contains correct entries. It is very possible that it might contain defects, discrepancies or errors which need to be rectified before polling day. Indeed, in paragraph 22 of his affidavit, the first defendant's Electoral Systems Manager seems to admit that there were discrepancies detected during the 5 day verification period. Therefore, it is likely that the updated register also has defects, irregularities or discrepancies. It is my considered view that it is only after interested parties have been afforded an opportunity to verify the updated voters register that a possible challenge of the election result on account of suspected discrepancies in the voters roll could be avoided. I am mindful that in terms of section 18 of the Parliamentary and Presidential Elections (Amendment) Act 1997, no application is to be made to this court for an injunction or an order restraining the holding of an election within 14 days immediately preceding the date of the election. This matter was brought

before the court on May 5, 13 days before the election day. The question that has greatly exercised my mind is whether an order for verification of the updated voters register would not have an injunctive effect restraining the holding of the elections due on May 18 and therefore offend section 18 aforesaid. In my view, such an order, so long it does not result in pushing the election day beyond the 7 postponement days permissible under the proviso to section 67(1) of the Constitution will be perfectly in order. The basis of such a view is that it appears the purpose of section 18 of the Parliamentary and Presidential Elections (Amendment) Act, 1997 is to avoid a situation whereby a lot of preparations and resources have been put in the preparation for an election and then have the election stopped indefinitely at the eleventh hour. In any case, the effect of an order for fresh verification would not amount to an injunction or an order restraining the holding of the elections. It would simply be an order for the postponement of the elections. Perhaps it should also be observed that the 1st defendant is to blame for this eleventh our controversy because it only released the updated voters register on May 6 after the 14 day period stipulated in section 18 aforesaid had started running. It would, therefore, be unfair to blame the plaintiff for bringing the matter in less than 14 days before the election day.

Regarding the question as to whether the period after verification has not abridged the requirement that there should be 21 days from closure of the verification process to the first polling date and if so whether the abridgement of the 21 days is not unlawful, as observed earlier, what the law requires from the reading of section 29, 30 and 31 of the Parliamentary and Presidential Elections Act is that there must be at least 21 days from close of registration (**not verification**) and polling day. **Emphasis supplied.** According to the affidavit of Muhabi Lifu Chisi, Information Technology Manager for the first defendant, registration closed on January 28. Simple computation of time would show that the minimum 21 days period between close of registration and polling day has been generously satisfied. All that is required is that between the close of registration, and polling there has to be inspection and verification. And as noted earlier, no definite period for verification is provided for. It can, therefore, not be said that there has been any abridgement of time in relation to verification. Reference has been made to miscellaneous civil application No. 29 of 1999 between Gwanda Chakuamba and the first defendant as being a case in point on the alleged abridgement of the verification period in this case. With respect, that case is distinguishable from the present one. In that case it was clearly established that the 21 day period between close of registration and polling day had not been satisfied which is not the position in this case.

In conclusion grounds 4 and 5 of the originating summons must fail. As for ground 3, for the reasons given earlier, it is declared that the verification process of April 26 to 30 falls short of satisfying the requirement for inspection and verification as provided for in section 31 of the Parliamentary and Presidential Elections Act. It is, therefore, ordered that fresh verification should take place from the date of this order to the close of business on May 19, 2004. This inevitably means that the polling date would have to be shifted or postponed as it were in which case it has to be no later than May 25, 2004. In order to accord with the proviso to section 67(1) of the Constitution. It is so ordered and

directed.

TWEA , J.

This matter was brought by way of Expedited Originating Summons by the plaintiff; the Republican Party; a political party, representing all members of the political parties in the Mgwirizano Coalition Group against the three defendants: the Malawi Electoral Commission, the United Democratic Front and the Attorney General respectively.

The plaintiff cited eight grounds for determination and eight reliefs in particular, that they sought to be granted. Be this as it may the chapeau to the relief' sought read as follows:

“The court do give the following or such orders, declarations and directions as may be just and expedients in the circumstances including.”

The eight specific reliefs are cited thereafter.

I have had the benefit of the referring to the opinions of my Brother Judges and I do concur with their findings and their directives. I will therefore, more particularly, consider the issues of commencement of the action and the citing of the parties.

To begin with let me point out that this matter was certified to be a matter substantially relating to and concerning the interpretation of the Constitution under Section 3(3) of the Court (Amendment) Act 2004 by the Honorable the Chief Justice on 7 May 2004. The central issue that calls for interpretation is Section 76 (2) (c) and (d) of the Constitution. This has been ably dealt with in this opinion of my Brother Judge Chimasula Phiri.

When this matter was called for hearing, only the first defendant had filed affidavits in reply. The second defendant did not file any affidavit or any document at all and did not, in fact, cause any appearance. The third defendant filed a general denial statement calling on the plaintiff to strictly prove the allegations made against it. None of the parties took issue with the mode of pleadings specifically. However, the first defendant and the third defendants in their submissions raised issue with the mode of commencement. All the parties that appeared had, in the course of hearing, acknowledged the difficulties that they had faced in the preparation of their case because of the time factor. This court appreciates the difficulties faced. However, having regard to the substantive issues raised, this court finds that any failure to comply with the rules could be curable under Order 2 rule 1 of the Rules of the Supreme Court. The matter was therefore proceeded with as an Expedited Originating Summons.

This court having so found, notes that the second defendant did not file any affidavit in opposition or file any denial or, indeed, cause an appearance. The second defendant is deemed to have admitted the issue raised by the plaintiff and judgment is entered against it accordingly. Any order of the court will affect them as such.

The second point that I will deal with is the citing of the parties.

The Honourable the Attorney General, as I said earlier, filed a general denial calling on the plaintiff to strictly prove the allegation made against the Government. To make this point more clear, I need to specifically refer to the said allegations:

It was deponed in the affidavit in support of the summons, sworn by Mr Kamwambe, in paragraphs 22 and 25; which read as follows:

“22. That I am further advised that it is a Constitutional requirement for MEC during elections time to ensure that no Government resources are deployed for the purpose of promoting or undermining any political party by the Government or any political party.

25. That although MEC is fully aware that UDF is using Government resources to promote its campaigns nevertheless MEC has taken no steps to stop the deployment of Government resources on political party campaigns”.

The plaintiff, as a result thereof, sought, as the last specific relief, that

“(viii) The 2nd and 3rd defendant (i.e. Attorney General) be ordered not to deploy or use financial, material or human resources for promoting its interests or undermining the plaintiff during campaign period”

The Attorney General in his submission argued that the plaintiff’s allegations lack specificity as to what resources, when or where they were so deployed or are about to be so deployed. Further he argued that the allegations were mere speculation not supported by facts. In any case, he argued, basing the argument on Section 193 of the Constitution was misconceived because, the said section, he said, merely guards the civil service and the civil servants’ independence from political influences. If there is any breach, he contended, the Civil Service Commission is mandated to take action and not the first defendant. The Attorney General however, acknowledged that the President is entitled to some benefits under the Presidents (Salaries and Benefits) Act. He contended that had the plaintiff particularised the resources deployed, he would have been in a position to

tell whether such resources are part of such benefits or not. The Attorney General attached a copy of the said Act to his skeletal arguments. Notwithstanding that this was not pleaded, I had occasion to examine the said benefits. I failed to find anything that would justify the conduct of the President that is being complained of.

The arguments by the Attorney General fail to recognize the contents of the exhibits attached to the affidavit of Mr Kamwambe. Paragraph 6 of Exhibit GK1 clearly stipulates that the President openly used and continues to use his official position to campaign for his party and its individual candidates contrary to the Constitution. The first defendant is accused of failing to stop such conduct, which is not only unconstitutional but also an offence under the Parliamentary and Presidential Elections Act. This has not been denied by any of the defendants. In Exhibit GK1A, a letter from the chairman of the first defendant, in paragraphs 1.8 and 1.9, this was also referred to by my Brother Judge Chimasula Phiri, the first defendant directed that any such complaints should be taken to court and that they would not be being dealt with by itself. Further it is admitted that the first defendant referred this complaint to the Office of the President and Cabinet. It was argued in this court for the first defendant that this was correct procedure, because this was an enquiry. Having regard to the contents of Exhibit GK1A, this was not by way of enquiry at all; it was an abrogation of authority and responsibility by the first defendant to make a decision. The Attorney General did not deny that this was so referred to the Office of the President and Cabinet, but contends that the issue raised in this court was directed at the first defendant and not the Government.

Let me pause, for a moment to look at the effect of what the first defendant and the Government did.

The first defendant is a creature of the Constitution. Its powers and functions are clearly spelt out in section 76 of the same. For our purposes the relevant parts are subsection 2 (c) and (d). These have been cited by my Brother Judge I need not refer to them again. The first defendant is given additional powers and functions under Section 8(1) of the Electoral Commission Act 1998. I will refer to paragraphs (l) and (m) in particular. These provide:

“8(1) In addition to the broad functions and powers conferred by the Constitution and, subject to the Constitution, the Commission shall exercise general direction and supervision over the conduct of every election and, without prejudice to the generality of such functions and powers, it shall have the following further functions –

(l) to perform the functions conferred upon it by or under any written law;

(m) to take measures and to do such other things as are necessary for conducting free and

fair elections.”

Section 113 of the Parliamentary and Presidential Elections Act, 1993 provides as follows:

“113 save as otherwise provided in this Act any complainant submitted in writing alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the commission and where the irregularity is confirmed the commission shall take necessary action to correct the irregularity and effects therefore.”

The Constitution and the statutes are clear. The power to determine any complaint on the electoral process is vested in the first defendant and not any other authority. The first defendant has no power to delegate this authority to the Office of the President and Cabinet or indeed, to any other third party. Where any party is aggrieved by the decision, and I emphasize the word “decision,” that party may appeal to the High Court under Section 76(3) of the Constitution or Section 114 of the Parliamentary and Presidential Elections Act, 1993, or can move for judicial review under section 76(5) of the Constitution.

The first defendant therefore must make a decision on the complainant and then the aggrieved party can choose how to proceed thereafter. When the first defendant fails to make a decision or refers the complainant to a third party, it creates a vacuum. The complainant remains unresolved and there is no redress. The first defendant is an independent institution: Section 76(4) of the Constitution. The Attorney General therefore should not accept referrals from it or give the impression that he can make decisions on its behalf. This has the effect of suppressing the rights of the complaints and delaying any remedial action that could have been taken by the first defendant or the courts.

In the present case had decisions been made on all issues raised, this Expedited Originating Summons would not have issued. It was issued because the first defendant was indecisive and wrongly abrogated its duties, and the 3rd defendant wrongly accepted a referral to which he has no jurisdiction or mandate to handle. With this in-mind, I totally agree with the plaintiff that the Attorney General was properly brought in and cited as a party.

Further in view of what was deponed in this case, if the third dependant had not been cited, he would have added as a party by court under Order 15 rule 6 (2)(b), see also: *The Attorney General vs the Right Honourable Justice Chimera Malewezi* , Civil Cause No. 370 of 2004(unreported). The court has power to add any party namely-

“(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

The issue here is the first defendant's failure to exercise its Constitutional and statutory mandate to determine electoral complaints and failure to stop abuse of office by the President in favour of his political party. It would have been in the interest of justice to hear the Government's views before the Court could decide on the matter. If the Attorney General had not been cited as a party therefore, this court would have added him as one.

The last issue raised by both the first and third defendant was that the plaintiffs' complaints lacked clarity and therefore could not be dealt with. As I already said, in respect of the third defendant's this argument ignores the contents of the exhibits attached to the affidavit of Mr. Kamwambe, further, this matter is not within his jurisdiction or mandate. The proper course to take by the Attorney General would have been to advise the first defendant to make a determination according to the Constitution and the electoral laws.

In respect of the first defendant, it cannot be heard to say it referred the matter because there was no clarity in the complaints. If there was no clarity, the first defendant should have directed the plaintiff to particularize the complaints so that they could be dealt with, as stated by my Brother Judge. It goes against the grain of common sense to seek a third party to respond to a matter which oneself does not comprehend. However, I found earlier, that this was not a referral, for purposes an enquiry, but abrogation of Constitutional and statutory duty, which clearly provide that democracy is not about winning an election, but winning in an open, free and fair democratic manner. The first defendant therefore should fulfill its duty to determine complaints one way or the other and remedy irregularities, even if it means ruling against the Government. This is the only way to achieve free and fair elections. From the facts of this case the first defendant clearly avoided making some vital decisions. The argument that the complaints lacked clarity therefore cannot hold.

Lastly, I have considered the issue of costs. I find that had the first defendant fulfilled its

Constitutional and statutory mandate and made decisions on all the complaints raised, the Attorney General would not have been a party to this action, because then, the aggrieved parties would have appealed the decisions or sought judicial review. The Attorney General therefore became a party by default. I will not therefore, make any order as to costs against the Attorney General. I condemn the first and second defendant to costs for this action.

Pronounced in open court this 14th day of May, 2004 at Blantryre.

Chimasula Phiri, J.

E.B. Twea, J.

H S B Potani, J.....