IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC ELECTION PETITION NUMBER 5 OF 2014

BETWEEN:

MALAWI ELECTORAL COMMISSION **REFERRING AUTHORITY**

AND

MATHEWS NGWALE **RESPONDENT**

Coram: Justice M.A. Tembo,

Chalamanda, Counsel for the Referring Authority

Chisanga and Tomoka, Counsel for the Respondent

DECISION AND DIRECTIONS

This is this court's decision containing directions to the Malawi Electoral Commission on the referral by the Malawi Electoral Commission of its decision rejecting the nomination of the respondent as a parliamentary candidate for the United Democratic Front for Chiradzulu West constituency in the forthcoming tripartite elections. The referral, the decision and directions of this Court are made in line with section 40 of the Parliamentary and Presidential Elections Act. The question for the decision and directions of this Court is whether the respondent is a person who held or acted in a public office and who, in terms of section 51 (2) (e)

of the Constitution, is required to resign from his public office before he can contest as a parliamentary candidate in the forthcoming tripartite election.

This Court heard both the Malawi Electoral Commission and the respondent. Both the Malawi Electoral Commission and the respondent filed skeleton arguments and affidavits which were helpful to this Court.

The background to this matter is that the respondent is a lecturer in the University of Malawi at the Kamuzu College of Nursing, which is a constituent college of the University. The University of Malawi is created by statute namely the University of Malawi Act.

The respondent applied for leave of absence from his employment in line with the terms and conditions of his employment particularly clause 21 (c) of the said conditions which allow for leave of absence of members of staff. The respondent applied for the leave of absence to commence on 1st February 2014. The respondent had not yet received a formal response from his employer but for all intents and purposes he is on leave of absence given that he has experienced the consequences of such leave of absence in that he has not been paid any salary or benefits since the effective date of his leave of absence. The finding of this Court is therefore that the respondent is on leave of absence from his employment with the University of Malawi.

The fact that the respondent is on leave of absence does not entail that he has resigned his position as a lecturer. This fact is confirmed by a letter from the University to the Malawi Electoral Commission to that effect. Additionally, as rightly pointed out by the referring authority, a reading of the provision on leave of absence in the terms and conditions of employment for the respondent, particularly clause 21 (c) of the said conditions which allow for leave of absence of members of staff, clearly show that he still remains in employment although for the duration of the leave of absence the respondent will practically be cut out from the activities of the University. The leave of absence is for a specified duration and may be extended. Failure to report for duty at the lapse of the leave is deemed to be abscondment from work which is a misconduct.

In these circumstances the respondent presented his nomination papers to the Malawi Electoral Commission to contest as a parliamentary candidate for the

United Democratic Front for Chiradzulu West constituency. The Malawi Electoral Commission upon receiving the respondent's nomination rejected his nomination. The grounds for rejecting the respondent's nomination are captured in the Rejection Nomination Form given to the respondent by the Malawi Electoral Commission returning officer and is the following terms

> During the time of submission of nomination papers you were still serving as public servant of Malawi. Attached is a letter from your office. This is against the law as provided in section 51 (2) (e) of the Constitution of the Republic of Malawi.

The respondent contends that he did not hold or act in a public office and therefore is not required to comply with the dictates of section 51 (2) (e) of the constitution. Section 51 of the Constitution is in the following terms

> (1) A person shall not be qualified to be nominated or elected as a member of the Parliament unless that person—
>
> (a) is a citizen of the Republic who at the time of nomination has attained the age of twenty-one years;
>
> (b) is able to speak and to read the English language well enough to take an active part in the proceedings of Parliament; and
>
> (c) is registered as a voter in a constituency.
>
> (2) Notwithstanding subsection (1), no person shall be qualified to be nominated or elected as a member of Parliament who—
>
> (a) owes allegiance to a foreign country;
>
> (b) is, under any law in force in the Republic, adjudged or otherwise declared to be mentally incompetent;
>
> (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, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment or where that person resigns from that office or appointment in order to stand;

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

(g) has, within the last seven years, been convicted by a competent court of any violation of any law relating to election of the President or election of members of Parliament or local government elections.

(3) For the purposes of subsection (2) (e), an appointment as a Minister or Deputy Minister in accordance with section 94 (1) shall not be construed to be an appointment to a public office or to be a public appointment.

The respondent contended that he did not hold or act in a public office on account of the decision of the Malawi Supreme Court of appeal in the case of *Nseula v Attorney General and another* [1999] MLR 313 (MSC). In that case the Malawi Supreme Court of Appeal considered the definition of 'public office' as used in the Constitution and concluded that 'public office' as used in the Constitution connotes public office in the civil service and not otherwise. The Supreme Court of Appeal reasoned that

> We must now consider the meaning of the word "public office" as used in the Constitution. We must look at the use of the word in the whole Constitution in order to discover what was the real meaning which Parliament intended to ascribe to it. A number of provisions were cited in the lower court where the word "public office" was used. The lower court held that the provisions of section 88(3) were unambiguous in making the President and other members of the Cabinet public officers. We find some difficulty in following the judge's reasoning in coming to that conclusion, because we have searched in vain and neither section 88(3) nor any provision in the Constitution makes members of the Cabinet public officers.

The Supreme Court of Appeal then went further and reasoned that

> We have considered the Constitution as a whole and have looked at the use of the word "public office" where it appears in several sections. We are satisfied that having regard to the tradition and usages which have been given to the meaning of the word "public office" the interpretation which should be given to its use in the Constitution is in the strict sense of "public office" in the civil service. The "public office" does not connote "any public office of whatever description" as the Judge in the lower Court finds. It is too wide and it is not correct and certainly it is not in the manner in which it is used in the Constitution.

The respondent contended further that this decision of the Supreme Court of Appeal was referred to in the same Court's decision in the *Presidential Referral Appeal No. 44 of 2006.*

In view of the foregoing, the respondent contends that on being a member of the University he is not in the civil service. The respondent reasoned that his employment is not subject to the Public Service Act which governs the employment of the civil service. Rather that the University Act is the relevant statute to the respondent's employment. Consequently, that he cannot be considered as holding or acting in a public office for purposes of section 51 (2) (e) of the Constitution. The respondent submitted that this Court is bound by the decision of the Supreme Court of Appeal in this matter.

The Malawi Electoral Commission conceded that this Court is bound by the decision of the Supreme Court of Appeal on the matter of definition of a public office. However, the Malawi Electoral Commission took the view that the Supreme Court of Appeal did not define the term civil service. Further, that the term civil service as defined in the Blacks' Law Dictionary (6th edition) relates to all functions under the Government except the military. Further, that the University of Malawi as created by statute is one of the functions of Government particularly under the Ministry of Education and therefore it is civil service and members of staff of the University of Malawi including the respondent are in civil service. The Malawi Electoral Commission argued that, it follows therefore, that the respondent holds public office since he is in the civil service and he ought to have resigned to comply with section 51 (2) (e) of the Constitution before submitting his nomination papers.

The respondent countered that there is no authority provided by the Malawi Electoral Commission to show that the University of Malawi is under Ministry of Education. Further, that in the *Black's law Dictionary* (8th edition) civil service is defined as the administrative branches of government or the group of people employed by these branches. The respondent further understands civil service to mean the executive branch of Government in view of the provisions in the Constitution in chapter XX which provide for the Civil Service Commission. The respondent also submits that the civil service is governed by the Public Service Act which is in sharp contrast to the University Act which governs the respondent as a

lecturer. Consequently the respondent submits that he is not in the civil service at all.

The view of this Court is that indeed it is bound by decisions of the Malawi Supreme Court of Appeal including the one cited in this matter of *Nseula v Attorney General and another* [1999] MLR 313 (MSC). The reason why the Supreme Court of Appeal decisions have binding authority on lowers courts were clearly stated by the Supreme Court of Appeal as rightly pointed out by the respondent in the same decision of *Nseula v Attorney General and another* [1999] MLR 313 (MSC) as follows

> The question of whether the office of the President was public office was considered in the case of the *President of Malawi and the Speaker v R B Kachere* MSCA Criminal Appeal No. 20 of 1995. It was held in that case that the office of the President and that of the Speaker was a political office and not a public office. We have been informed by Counsel for the first respondent that he cited that case in the court below. The learned Judge made no reference to that case in his judgment. It was binding on the learned Judge in the court below. It was a decision of the final Court of Appeal in the country and he was bound to follow it, although he would have been entitled to express any reservations he might have about it or could have distinguished it if he could from the case which was before him. It is important that the principle of stare decisis should be followed for it creates certainty in the law and also provides an orderly development of the law.

This Court concludes in agreement with both the respondent and the Malawi Electoral Commission that it is bound to find that the word public office when used in the Constitution connotes public office in the civil service as decided by the Malawi Supreme Court of Appeal in its decision that has binding effect on this Court. The next question then is whether the respondent, a university lecturer, is a person in the civil service. That question would best be answered upon defining what is the civil service that the Malawi Supreme Court of Appeal referred to, given that the Supreme Court did not define the said word as rightly observed by the respondent and the Malawi Electoral Commission.

On the civil service question normally various ports of call would assist in defining the word the civil service. Unfortunately the first port of call, the Constitution itself, does not define what the civil service is. The General Interpretation Act would be the next port of call but regrettably it also does not contain a definition of the civil service.

The Malawi Electoral Commission and the respondent each contend a different definition of the civil service. The *Black's Law Dictionary* (6th edition) definition which says the civil service relates to all functions under the Government except the military is the one brought up by the Malawi Electoral Commission. The respondent brought up a definition from the same *Black's Law Dictionary* (8th edition), which says the civil service is defined as the administrative branches of government or the group of people employed by these branches. This Court checked the *Collins English Dictionary* (2009) which defines civil service as the service responsible for the public administration of the government of a country. It excludes the legislative, judicial and military branches.

One can see that the first definition is too wide and does not represent the state of affairs in Malawi as the legislature which is not in the civil service might be caught as part of the civil service under the definition preferred by the Malawi Electoral Commission. The other latter two definitions appear to be more representative of our situation. The last definition is especially more representative of the situation in Malawi as to the usage of the word the civil service.

The question is whether the University of Malawi is an administrative branch of government. It appears not. It must therefore not be part of the civil service.

There are indications that the word civil service is narrower in scope than the word public service. This Court got that indication when this Court had occasion to look at *Constitutional and Administrative Law* by De Smith and Brazier (1998) (8th edition) at 202 where they say that

> A civil servant is a Crown servant (other than the holder of a political or judicial office or a member of the armed forces) appointed directly or indirectly by the Crown, and paid wholly out of funds provided by Parliament and employed in a Department of Government. The definition of a civil servant has not yet given rise to serious legal problems; the meaning of the term 'Crown Servant' (which may include bodies corporate) has posed bigger problems.

A further similar indication was found by this Court in *Constitutional and Administrative Law* by Jackson and Leopold (2001) (8th edition) at 379-380

> All civil servants are Crown servants, but not all Crown servants are civil servants, for the term is not applied to Ministers, the Parliamentary Secretaries and Parliamentary Secretaries Private Secretaries, or other holders of political offices, nor to members of the

> armed forces. Local government officers and the employees of public corporations are not civil servants, although the nature of their work and their conditions of employment bear many similarities.

From these immediate foregoing passages, it can be seen that the membership of the civil service is restricted to Departments of Government. Clearly, the University of Malawi is not a Department of Government for one to consider its members of staff as civil servant or service in the University of Malawi as civil service. I would add that by analogy one would consider a Crown servant to be akin to a public servant employed by the State in Malawi and holding public office. Within the category of public servants holding public office we have a sub category of civil servants in the civil service. Employees of the University of Malawi may be public servants holding public office, being servants of a public body, but they cannot certainly be called civil servants or be considered to be in the civil service.

The immediate foregoing conclusion is supported in this case, by the scenario submitted on by the respondent, that the Civil Service Commission which has jurisdiction over the civil service in terms of section 187 of the Constitution does not have authority over the University of Malawi which is governed by the Council of the University under the University of Malawi Act. Had it been that the University of Malawi was part of the civil service it surely would have been included as falling under the jurisdiction of the Civil Service Commission. It is not. Section 187 of the Constitution is the following terms

> (1) Subject to this Constitution, power to appoint persons to hold or act in offices in the civil service, including the power to confirm appointments, and to remove such persons from office shall vest in the Civil Service Commission.
>
> (2) The Civil Service Commission shall, subject to this Constitution and any Act of Parliament, exercise disciplinary control over persons holding or acting in any office to which this Chapter applies.

As further pointed out by the respondent, the Malawi Electoral Commission has also not shown the authority in support of its contention that the University of Malawi is under the Ministry of Education.

In these premises, this Court agrees with the respondent that the University of Malawi is not part of the civil service as the Electoral Commission submitted.

In the final analysis, this Court is constrained from finding that the respondent as a University of Malawi employee is in the civil service. This entails that the respondent did not hold or act in a public office for the purposes of section 51 (2) (e) of the Constitution since the definition of public office as contained in section 51 (2) (e) was limited to public office in the civil service in the decision by the Malawi Supreme Court of Appeal in the case of *Nseula v Attorney General* [1999] MLR 313 (MSC). The respondent was therefore not required to resign from his employment with the University of Malawi before presenting his nomination papers to the Malawi Electoral Commission.

The Malawi Electoral Commission was therefore not justified in its grounds for rejecting the respondent's nomination as a parliamentary candidate in the forthcoming tripartite elections.

This Court consequently directs the Malawi Electoral Commission to accept the respondent's nomination as a parliamentary candidate for the United Democratic Front for Chiradzulu West constituency. The acceptance should be done within the next three days.

This Court wishes to hear the parties at chambers on a date to be set on the prayer for costs that the respondent sought in the event of success at this hearing. The respondent shall file the relevant notice in this Court within the next three days.

Made in open court at Blantyre this 24th day of March 2014.

M.A. Tembo

JUDGE