Chisi v Electoral Commission Electoral Case No. 1 of 2014 (High Court) (Principal Registry)

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice D.F. Mwaungulu
Cause Number:	Electoral Case No. 1 of 2014 (High Court)
Date of Judgment:	April 04, 2014
Bar:	Mr. Tomoka, Counsel for the Petitioner Mr. Chalamanda, Counsel for the Respondent

Head Notes

Administrative Law - Alternative remedy – Where statutory remedies exist, judicial review is excluded.

Civil Procedure -Presidential Elections – Nomination Rejection – Jurisdiction – High Court lacks original jurisdiction to hear a complaint before the Electoral Commission makes a determination.

Statutory Interpretation Nomination – National Assembly vs Presidential – Section 40 of the Parliamentary and Presidential Elections Act applies only to National Assembly, not presidential, nominations.

Administrative Law -Quasi-judicial bodies – Jurisdiction – The Electoral Commission is a tribunal with jurisdiction to hear petitions and complaints before the High Court.

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Constitutional Law -Separation of Powers – Electoral Commission powers – The High Court’s jurisdiction over election matters is appellate or by judicial review, not original jurisdiction.

Summary

The Applicant, a presidential candidate, petitioned the High Court for a direction that the Electoral Commission accept his nomination papers after they had been rejected. The Applicant had initially presented his papers and they were accepted. However, the Electoral Commission subsequently wrote to the University of Malawi to confirm his employment status and, upon receiving a response that he was no longer employed by the university, rejected his nomination on the grounds that he held a public office. The Applicant's legal practitioners wrote to the Electoral Commission to proceed under section 40 of the Parliamentary and Presidential Elections Act, and the matter was brought before the High Court. The central legal question for the Court was whether it had original jurisdiction to hear the matter before a determination had been made by the Electoral Commission.

The application was dismissed. The Court held that it lacked the jurisdiction to entertain the matter because the Constitution, specifically section 76, establishes the Electoral Commission as a quasi-judicial body or tribunal with the primary jurisdiction to hear and determine electoral petitions and complaints. The High Court's role is supervisory and appellate, meaning it can only hear a matter on review or appeal *after* the Electoral Commission has first made a determination. The Court further reasoned that the Parliamentary and Presidential Elections Act must conform to the constitutional framework. The Court also noted that section 40 of the Act, which the parties had relied upon, is applicable only to candidates for the National Assembly, not

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to presidential candidates, and therefore, the procedure followed was incorrect. The Court ordered that the Applicant should first lodge a formal complaint with the Electoral Commission, as required by the Constitution, before seeking recourse in the High Court.

Legislation Construed

Statutes

Constitution of the Republic of Malawi, 1994 (ss 10, 75, 76, 108, 199)

Electoral Commissions Act (Cap 2:03) (s 6)

Parliamentary and Presidential Elections Act (ss 40, 41A, 49, 100, 113, 114)

General Interpretation Act (s 46)

Subsidiary legislation

Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules

Practice Direction No 2 of 2009: Abridgement of Time Periods in Cases of Election Petitions and other Complaints under the Parliamentary and Presidential Elections Act

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Ruling/Judgment

DIRECTIONS UNDER SECTION 40 OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT

Introduction

In this matter, Professor John Chisi, a presidential candidate in the general election slated for 10 April 2014, petitions this Court for direction that the Electoral Commission, a Returning Officer for presidential candidates under section 400 of the to accept his nomination as presidential candidate for his party. On 10 March 2014, after reading Counsels‟ skeleton arguments and listening to oral arguments, this Court, after reviewing the Constitution, the Courts Act, the Parliamentary and Presidential Elections Act, Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and Practice Direction No 2 of 2009: Abridgement of Time Periods in Cases of Election Petitions and other Complaints under the Parliamentary and Presidential Elections Act, concluded ordered it lacked jurisdiction unless and until the Electoral Commission, on petition or complaint to it, first determined the matter. This Court only exercises jurisdiction by way of review or appeal from a decision or determination from the Electoral Commission. Professor Chisi and the Electoral Commission relied on section 40 of the on matters from the Electoral Commission. That section, as we see shortly, only applies to rejection of nominations of candidates for election to the National Assembly; the section does not

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apply to presidential candidates. Moreover, even if the Electoral Commission correctly, proceeded under section 40 of the Parliamentary and Presidential Elections Act, the Professor‟s nomination remains valid. Professor Chisi complains against the Electoral Commissions exercise of its powers under the Constitution and the Act and generally about the Electoral Commission‟s conduct of the elections. The course open to him, as this Court ordered, is to petition or complain to the Electoral Commission first.

History

This is how this matter found itself in our courts. On 13 February 2014, after Umodzi Party on 1 February 2014 at Paradise Motel him as its presidential candidate, Professor Chisi presented and the Electoral Commission, a Reporting Officer for nomination of candidates for the office of President under section 49 (3) of the Parliamentary and Presidential Act, accepted his nomination papers as a candidate for the general elections slated for 20 May 2014. On 9 February 2014 the Electoral Commission wrote the University Registrar of the University of Malawi to confirm the employee status of Professor Chisi at the College of medicine. The Electoral Commission did not copy the letter to Professor Chisi. The University Registrar only responded on 20 February 2014 and informed the Electoral Commission that Professor Chisi is no longer in the University of Malawi employment since November 2013; that the University of Malawi granted Professor Chisi leave of absence; that the University of Malawi do not have Professor Chisi on and is no longer on the payroll.

It appears to this Court that when writing Professor Chisi on 20 February 2014 the Electoral Commission had not received the University Registrar letter of the same

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date. The letter from the Electoral Commission to Professor Chisi never referred to the University Registrar‟s letter. The letter is headed: „Notification of Rejection of your Presidential Nomination under Section 40 of the Parliament and Presidential Elections Act and Section 80 (7) (e) of the Constitution.‟ The Electoral Commission rejected professor Chisi‟s nomination because he was holding or acting in a public office. On 21 February 2014 Professor Chisi, through his legal practitioners, Chisanga & Tomoka, wrote the Electoral Commission, which it did, to proceed under section 40 (1) of the Parliamentary and Presidential Elections Act. Surprisingly, the Registrar, notwithstanding Practice Direction No 2 of 2009: (Abridgement of Time Periods in Cases of Election Petitions and other Complaints under the Parliamentary and Presidential Elections Act, only brought the matter to my attention, as Judge, on 5 March 2014. When I received the petition I acted suo motu for Counsel to address the Court on 10 March 2010. There were many cases in the pipe line. It was necessary to have Counsel address the Court before urgent and necessary applications in the electoral process bog down from procedural, technicality and jurisdictional issues. At the hearing, Messrs Tomoka and Chalamanda represented Professor Chisi and the Electoral Commission, respectively.

The Uniqueness of the Electoral Commission

The Constitution creates the Electoral Commission as an institution sui generis with a uniqueness that stands alone. It is singular and typical of Constitutions, while preserving individual rights and autonomy, to locate the centre of legal power (as belonging to the people); allocate legal power to institutions it creates for exercise of the power; and determine the process and procedure to fill those institutions. Concerning the latter, the Constitution, fully recognising that ultimate and authority,

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prescribes only one way of filling those positions, elections and, it is elections that are the basis of the appointive powers of elected officials. In that sense, appointive powers are exercisable by elected officials and, therefore, the legitimacy of appointed public officials derives directly from the people who clothed elected officials with the legitimacy and withal to appoint other public officials. Elections, and with them, the Electoral Commission, are the plenipotentiary process and authority for filling of constitutional positions, public offices. Indeed, the Constitution subjects this unique process and institution to checks and balances by the legislature (section 75 (4)), legislature (sections 75 (1), 76 (1), 76 (2) (e) and the Judiciary (sections 75 (1), 76 (3) and 76 (5) (a)). The domain, dominion, province and reach of the Electoral Commission, in this regard is contagious, pervasive and nulli secundus as confirmed by section 76 (4) of the Constitution and section 6 of the Electoral Commissions Act.

The Electoral Commissions Powers

Section 76 (2) (a) and (b) of the Constitution create administrative powers which are subject to legislative control under section 76 (5) (b). Section 76 (2) (e) creates general powers which are subject to judicial review under sections 76 (5) (a). Sections 76 (2) (d) and (e) create quasi judicial powers that are subject to appeal to the High Court under section 76 (3) of the Constitution.

The Electoral Commissions Juridical Powers

Under section 76 2 (c) and (d) the Constitution creates the Electoral Commission as a juridical institution to hear petitions and complaints related to the conduct of elections

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and ensuring compliance with provisions of the Constitution and any Act of Parliament. The exercise of this jurisdiction is only subject to appeal. Section 76 (2) (c) requires one to petition or complain to the Electoral Commission and the Electoral Commission to hear petitions and complaints: "[t]he duties and functions of the Electoral Commission shall include … to determine electoral petitions and complaints related to the conduct of elections." Section 76 (2) (d) requires the Electoral Commission „to ensure compliance with the provisions of this Constitution and any Act of Parliament." Section 76 (3) presupposes that one has actually petitioned or complained to the Electoral Commission on both sections 76 (2) (c) and (d) the Electoral Commission has determined or adjudicated on the matter: "Any person who has petitioned or complained to the Electoral Commission shall have a right to appeal to the High Court against determinations made under subsections (2) (c) and (2) (d). The Electoral Commission is in the nature of a tribunal.

That framers of the Constitution intended the Electoral Commission these quasi-judicial powers ahead of the Judiciary should be seen from what was in our Republican Constitution in 1966, the repealed Constitution. Section 31 and 32 of the Constitution clearly excluded the Electoral Commission from determining such matters. Only the High Court, and no appeal lay to the Supreme Court, had jurisdiction. What was supposed to be prescribed by an Act of Parliament in the 1966 Constitution was done directly and comprehensively by the 1994 Constitution splitting and streamlining the powers between the High Court and Electoral Commission.

High Court Jurisdiction

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Sections 76 (2) (c), 76 (2) (d), 76 (3) and 76 (5) (a), notwithstanding section 108, of the Constitution confers two jurisdictions to the High Court relating to the institution of the Electoral Commissions and subject matter and procedure relating to elections. Under section 108 (1) of the Constitution, the subject matter provision, the High Court can hear any matter, civil or criminal, under any law. Section 108 (2) of the Constitution empowers the High Court to review, for conformity with the Constitution, any law and any action or decision of Government. The High Court, under the same section, has additional jurisdiction and powers under the Constitution. An example par excellence of power conferred by the Constitution on the High Court is section 76 conferring the High Court review and appellate jurisdiction over election matters and the Electoral Commission. Moreover, the exercise of the High Court‟s jurisdiction is „save as otherwise provided by the Constitution.‟ In section 76, the Constitution prescribes a procedure and jurisdiction to which subservient legislation or laws must comply.

High Court Judicial Review Jurisdiction

Section 76 (2) of the Constitution(a) confers different powers for the Electoral Commission and the High Court and (b) creates rights for citizens to complain to or petition the Electoral Commission. Concerning the former, section 76, apart from section 76 (c), also creates other general powers. Concerning the latter, the only way to proceed is by way of judicial review. The power must mean that, notwithstanding section 76 (5) (b) concerning recourse to the legislature, this court can review boundary matters, not necessarily on the other powers of general review, but more especially on the principles of the right to be heard by those affected by the boundary decision, legitimate expectation and reasonableness principle in Associated Pictures

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Ltd v Wednesbury Corporation [1948] 1 K.B. 223. Section 76 (2) (d) however is more pervasive. The Electoral Commission has power to „ensure compliance with provisions of this Constitution and any other Act of Parliament. This duty conflates into two perspectives. The Electoral Commission has general police and plenipotentiary powers to ensure that, apart from itself, all and sundry comply with the provisions of the Constitution and an Act of Parliament. The Electoral Commission‟s exercise of such power over others is subject to judicial review. The second perspective is, therefore, where, like here, the challenge covers what the Electoral Commission decided. That, on reading of section 76 (3) depends on whether the citizen has petitioned or complained to the Electoral Commission or, on reading section 76 (2) (d), the subject matter can be construed as intended to ensure compliance with the provisions of the Constitution. Where the matter is without the two categories, therefore, the citizen should proceed by judicial review. The citizen cannot proceed by way of appeal.

Judicial Review Excludes All other Modes of Commencing Proceedings

In those cases where the citizen proceeds by judicial review, the citizen cannot proceed in any way other than by motion for judicial review. It is contrary to public policy, so much so that proceeding in any other way would be frivolous and vexatious. The citizen cannot proceed by petition or originating summons. The citizen must proceed by a motion for judicial review (O'Reilly v Mackman [1983] 2 A.C. 237).

The High Court Appellate Jurisdiction

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According to section 76, the primary way the High Court is seized of electoral matters from the Electoral Commission is by way of appeal. Section 76 (5) (a), dealing with judicial review, is without prejudice to section 76 (3) that invokes two circumstances for its exercise: sections 76 (2) (c) and 76 (2) (d). The right to appeal presupposes a hearing and a determination nius prius because the ordinary meaning of the words „Appeal,“ in relation to courts, connotes a hearing, on the facts and/or law, by the authority from which impugned decision is appealed from. The High Court, therefore, has no jurisdiction where, after a complaint or petition to it, the Electoral Commission has not heard the matter and made a determination.

The Constitution and the Parliamentary and Presidential Elections Act

Since section 76 of the Constitution confers on the Electoral Commission juridical powers and defines how the High Court is to be seized of electoral matters from the Electoral Commission certain provisions of the Parliamentary and Presidential Elections Act require scrutiny for consistency with the Constitution. Section 76 (1) of the Constitution provides:

“The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament.”

The use of the words „or“ in the subsection section may be problematic. This is a case where the word „or“ means „and“. It cannot have been the intention of the legislature that an Act of Parliament would undo or overdo what the Constitution itself provides.

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For under section 10 (1) of the Constitution, the Constitution is “in the interpretation of all laws and in the resolution of political disputes”, in its provision “the Supreme arbiter and ultimate source of authority. An Act of Parliament can adumbrate or expand a provision in the confines set in the Constitution for the provision. An Act of Parliament and indeed any law deriving from the Constitution cannot abrogate or arrogate a constitutional provision. Section 199 of the Constitution provides

“This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution”.

Juridical Model

The most significant departure of the Malawi Constitution 1994 from the Malawi Constitution 1966 is establishment of the Law Commission as a juridical body, a tribunal. Section 32 of the Malawi Constitution 1966, as we have seen, vested or juridical power, without a right of appeal to the Supreme Court, to the High Court. The Electoral Commission, because of sections 76 (2) (c), 76 (2) (d), 76 (3), and 76 (5) (a), is in the nature of a tribunal that receives and determines complaints and petitions and, therefore, subject to appeal under section 76 (3) and judicial review under section 76 (5) (a) of the Constitution. Like the judiciary, it has and deserves its own independence as stated in section 76 (4):

“The Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by other

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authority or any person”

As a tribunal, therefore, in exercise of its juridical functions, the Electoral Commission cannot be sued or made a party to any proceedings. There can only be judicial review or appeal on its determinations. There is no right of appeal to the Supreme Court where the High Court is exercising its appellate jurisdiction from the Electoral Commission. Consequently it might be useful to examine some procedures in the Parliamentary and Presidential Elections Act confirm and conform to the juridical model in the Constitution.

The intention of the Legislature was to allow the election process to proceed and let such matters, including eligibility to be challenged by the candidates after the election process. The procedures the Parliamentary and Presidential Elections Act, in accordance with sections 76 (2) (c), 76 (2) (d) and section 76 (3) of the Constitution, namely, direction procedure (section 40), petition procedure (section 100), complaint procedure (section 113) and appeal procedure (section 114), confirm that the legislature intended, notwithstanding the direction procedure in section 40 and complaint procedure113, that matters be resolved after the election.

Summary Procedure under section 40 of the Parliamentary and Presidential Elections Act

Section 40 of the Parliamentary and Presidential Elections Act provides a summary procedure which 40 only applies after the closing of nominations and before the polling day. The procedure only applies to nomination as candidate as a Member of

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the National Assembly and not to nomination for election for president Chisi v Malawi Electoral Commission (2014) Election No 1 (HC) (PR) (unreported). The procedure under it is created for the Electoral Commission to address irregularities and situations sections 40 (1) (a) to (g) mention. From a drafting perspective, there is no difference between section 40 (1) (a) and 40 (f) concerning qualification. The procedure is of a summary nature. It is at the aegis of the Electoral Commission through a Reporting Officer appointed by the Electoral Commission under section 34 of the Parliamentary and Presidential Elections Act. There is no time set for the action; the action must however be after the closing date of nomination and before the polling day. Where the Returning Officer intends not to publish a candidate‟s name under section 41 A of the Parliamentary and Presidential Elections Act, the action must be before expiry of fourteen days, subject to section 46 of the General Interpretation Act.

Section 40 of the Parliamentary and Presidential Elections Act conforms and confirms the juridical model. The action, as noted, does not commence with the candidate, the Electoral Commission is fulfilling its functions under section 76 (2) (d) of the Constitution. The Reporting Officer examines the document and forms an opinion and conjures reasons for such an opinion. The Reporting Officer sends the opinion and reasons to the candidate. If the candidate remains silent or accepts the opinion, the candidate deemed nominated under section 39 of the Parliamentary and Presidential Elections Act, is deemed not nominated under section 40 (2) of the Parliamentary and Presidential Elections Act. The candidate may, however, request the Reporting Officer to transfer the matter to the High Court for directions to the Electoral Commission. It is this action by the candidate that is a complaint to the Electoral Commission for purposes of section 76 (2) (c) or (d) of the Constitution and section 113 of the Parliamentary and Presidential Elections Act. Section 40 (1) of the Parliamentary and Presidential Elections Act requires the Returning Officer to examine the candidate‟s

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request and draw up and sign a statement of facts and make an opinion thereon. This opinion is the determination. The Reporting Officer will have examined the matter. Certainly, where the Reporting Officer agrees with the Candidate or does not request the Reporting Officer, there is no need to refer the matter to the High Court. Where the Reporting Officer does not agree with the candidate, the Reporting Officer must draw the facts. The Reporting Officer shall sign a statement. The Reporting Officer shall draw up an opinion. The Reporting Officer shall transmit the signed statement of fact and the opinion to the Registrar for the High Court to give directions to the Electoral Commission.

At the High Court, the Court can act on the papers. In other words, the High Court can make a determination just on the papers. If need be the High Court can ask for more information, not evidence. The High Court determines the matter. The High Court is not required to deliver a judgment. The High Court is required to give directions. The direction can only take two forms: the High Court can direct the Reporting Officer to accept the nomination; the High Court can direct the Reporting Officer to reject the nomination.

The Reporting Officer is then required to comply with the order. The section creates no right of appeal for either the candidate or the Reporting Officer. This is precisely because there are no parties to the matter in the referral in the High Court. The Reporting Officer acts suo motu. The issue is not initially at the aegis of a candidate. The candidate would have not raised the issue. The Parliamentary and Presidential Elections Act is creating in between nomination day and election a procedure of addressing irregularities and qualification issues. The procedure is of a summary nature.

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The question is whether the High Court acting under Section 40 (1) of the Parliamentary and Presidential Elections Act is acting under its appeal or review powers? The sequel question is whether section 40 (1) is a procedure sui generis and aliunde the appeal jurisdiction in sections 76 (3) of the Constitution and section 114 of the Parliamentary and Presidential Elections Act and review jurisdiction of this Court under section 76 (5) (a) of the Parliamentary and Presidential Elections Act or the complaint jurisdiction of the Electoral Commission under section 76 (2) (c) of the Constitution. The first point to consider is the nature of complaints raised in section 40 of the Parliamentary and Presidential Elections Act. All of them relate to the Electoral Commission‟s functions in section 76 (2) (d) of the Constitution. It is clear from the wording in section 76 (3) of the Constitution giving citizens to appeal to the High Court against the Electoral Commission‟s decisions that the citizen will already have had petitioned and complained to the Electoral Commission. It is obvious that the citizen querying the Electoral Commission‟s decision under section 76 (2) (d) in the section 40 procedure of the constitution must appeal to the High Court. Consequently, the judicial review procedure is an available to the citizen on matters under section 40 of the Parliamentary and Presidential Elections Act.

The second consideration is what was discussed earlier that the whole process in section 40 (1) of the Parliamentary and Presidential Elections Act fits in the juridical model of complaint to the Electoral Commission, appeal to the High Court and no appeal to the Supreme Court. Section 40 (1) of the Parliamentary and Presidential Elections Act procedure is, therefore, not sui generis and aliunde the appeal jurisdiction in sections 76 (3) of the Constitution and section 114 of the Parliamentary and Presidential Elections Act and review jurisdiction of this Court under section 76 (5) (a) of the Parliamentary and Presidential Elections Act or the complaint jurisdiction of

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the Electoral Commission under section 76 (2) (c) of the Constitution. The candidate‟s response and request as the case may be is the complaint to the Electoral Commission: the candidate questioning the decision of the Reporting Officer. The Reporting officer, performs a quasi-judicial function, on the facts and information from the candidate. The Reporting Officer has to examine the facts alone because there is no opposite party to the matter. No one complained.

Under this summary procedure, the Electoral Commission is acting as a court nius prius and, in so doing, is not prosecuting or litigating. The Electoral Commission, through a Reporting Officer, only seeks this Court, in the words of section 41 (4) of the Parliamentary and Presidential Elections Act, to direct either to accept or reject the nomination. As a tribunal seeking this Court‟s directions, the Electoral Commission, cannot appeal against the direction. This is because the Electoral Commission will not have rejected the nomination up to this point. There is nothing in section 40 that suggests that the Electoral Commission should reject the nomination. The assumption is that the nomination is valid according to section 39 and by sending the matter to the court the Electoral Commission wants the nomination rejected. It is the decision of this Court that constitutes the rejection of the candidate. The electoral Commission has no jurisdiction in the section to reject a valid nomination. The Electoral Commission, as a tribunal, is asking this Court to review its decision, it cannot, therefore, appeal against this Court‟s directions. The candidate cannot appeal either because, since in section 400, the High Court is invoking its appellate jurisdiction, as opposed to judicial review, the decision of this Court is final under section 114 (5) of the Parliamentary and Presidential Elections Act.

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Section 40 of the Parliamentary and Presidential Elections Act does not apply to Presidential Candidates

Sections 36 to 47 are in Part IV, Division 2 of the Parliamentary and Presidential Elections Act styled „Nomination of Members of the National Assembly.“ Sections 48 to 55 are in Part IV, Division 3 of the Parliamentary and Presidential Elections Act styled „Nomination for Election to the Office of the President.“ Section 49 (3) only applies sections 37 (2), 38 and 39 mutatis mutandis to nomination for election to the office of President. Section 40 of the Parliamentary and Presidential Elections Act does not, therefore, apply to nomination for President.

The Principle of Interpretation is Case expressio unius est exclusio alterius

If the Legislature had intended to apply section 40, which applies to nominations for members to the National Assembly, it would have, like it did with sections 37 (2), 38 and 39, included it in section 49 (3) of the Parliamentary and Presidential Elections Act. The fact that they did not comports that the Legislature never intended, to apply the procedure to presidential candidates in the first place. In Lewin v The Queen, 2011 DTC 1354 [at 1979], 2011 TCC 476, Bédard J., said;

“The Latin maxim "expressio unius est exclusio alterius", also known as the principle of implied exclusion, states that where the legislator causes a provision to apply to a number of categories but fails to include one that that could easily have been included, one may infer that the legislator intended to exclude that category from the application of the provision”.

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Casus Omisus

In my judgment, this is not a case where the Legislature by oversight overlooked providing for applying section 40 to the presidential candidates as already demonstrated the applied the sections in this part of the Parliamentary and Presidential Elections Act to the President. This was a case where the Legislature deliberately and deliberatively never intended to apply section 40 to presidential candidates.

Post Election Petitions under section 100 of the Parliamentary and Presidential Elections Act

Section 100 of the Parliamentary and Presidential Elections Act confers a right to (a) Claiming to have had a right to be elected at that election or (b) alleging himself to have been a candidate at such election to petition the High Court directly by „reason of irregularity or any other cause whatsoever‟ on a complaint alleging “undue return or undue election” election of a person as a member of the National Assembly or to the office of the president. The post election procedure under section 100 of the Parliamentary and Presidential Elections Act in many material particulars is incongruent with the juridical model. Its urgency and purport are germane.

Section 100 of the Parliamentary and Presidential Elections Act, in so far, as it suggest that there can be direct access to this Court other than by judicial review of or appeal

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from the Electoral Commission was passed without considering sections 76 of Constitution. If not, it was assumed from the words “by this Constitution or an Act Parliament“ in section 76 (1) of the Constitution comport that an Act of Parliament can override what the Constitution has already prescribed or proscribed. Moreover, as long as proceedings under section 100 of the Parliamentary and Presidential Elections Act are commenced by a petition other than a petition of appeal under section 114 (1) of the Parliamentary and Presidential Elections Act, they should, as a matter of course, be commenced under section 76 (2) (c) of the Constitution to the Electoral Commission. Sections 76 2 (c), 76 (2) (d) of the Constitution confers electoral issues in the domain of the Electoral Commission, not the Courts. Section 76 (3), on matters under sections 76 (2) (c) and 76 (2) (d), gives this Court appellate jurisdiction only. This section in so far as it suggests that a petition can lie directly to the High Court contradicts section 76 (3) as read with section 76 (5) (a) of the Constitution. As stated earlier, the scheme of the Constitution is to make the Electoral Commission a tribunal with power to determine complaints and petitions on conduct of elections and when ensuring compliance with the Constitution or any Act of Parliament. Sections 40 and 100 of the Parliamentary and Presidential Elections Act create a prosecution role.

Section 100 (2) of the Parliamentary and Presidential Elections Act still suggests that in matters under this section the commission should be joined as a respondent. This provision is clearly based on the 1966 Constitution and the Parliamentary and Presidential Elections Act passed under that Constitution. The juridical model of the Malawi Constitution 1994 makes the Electoral Commission a tribunal. The Electoral Commission cannot, as a quasi judicial institution, be dragged to court for matters within its juridical competence except maybe when certain matters in its other functions necessitate judicial review. To the extent that section 100 (2) of the Parliamentary and Presidential Elections Act suggest that the Electoral Commission

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can be included as a respondent undermines that the Electoral Commission is a tribunal whose decisions can only be reviewed or appealed from of course. The power under section 3 of the Electoral Commission‟s Act is a power of a different kind, conferring a corporate personality to an otherwise an independent functional and jurisdictional institution to be able to look and act as suggested in section 3 (c) of the Electoral Commissions Act. It is not a basis for suing the Electoral Commission or the Electoral Commission suing on decisions in its juridical competence.

This Court, therefore, faced with a section 100 of the Parliamentary and Presidential Elections Act, must reject it for want of jurisdiction because section 100 of the Act contravenes sections 76 (2) (c) of the Constitution. This rejection allows the candidate to have the Electoral Commission to examine the matter and correct it before it arrives to this Court. It should only be in those cases where the Electoral Commission has refused to act to the satisfaction of the parties that should be amenable to appeal. Section 76 (2) (c) of the Constitution provides that the duty of the Electoral Commission is „to determine electoral petitions and complaints related to the conduct of any election.‟ This power is expansive and intensive and only limited by judicial review and appeal. On either case the citizen for all matters, including disqualification of a candidate or postponement of an election, must go to and through the Electoral Commission before recourse to this Court.

The wording of section 100 of the Parliamentary and Presidential Elections Act are so blatantly contradictory to section 76 (2) (c) of the Constitution which states that the duties of the Electoral Commission shall include „to determine electoral petitions and complaints related to the conduct of elections‟ and section 76 (3) which provides that “any person who has petitioned or complained to the Electoral Commission shall have

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a right of appeal against determinations made under subsections 2 (c) and 2 (d)". Section 100 gives the right full throttle to the High Court: "A complaint alleging an undue return or an undue election of a person as a member of National Assembly or to the office of President by reason of irregularity directly to the High Court …"

Complaint procedure to the Electoral Commission under section 113 of the Parliamentary and Presidential Elections Act

This section conforms to section 76 (c) of the Parliamentary and Presidential Elections Act in that it sets out the original jurisdiction of the Electoral Commission under the Malawi Constitution 1994. The section is a cog in the juridical model. Unlike section 40 of the Parliamentary and Presidential Elections Act, it can be invoked at any stage of procedure. The Electoral Commission exercises this jurisdiction on "any" irregularity. There is an intersection, therefore, between the procedures in sections 40 and 113 of the Parliamentary and Presidential Elections Act where, for example, a reporting officer informs a candidate under section 40 (1) of the Parliamentary and Presidential Elections Act, the candidate who, instead of requesting registrar to refer the matter to the High Court, lodge a complaint with the Electoral Commission in order that the Electoral Commission examine it and decide where the irregularity should be one that it can correct without recourse to the High Court. The reasons for such actions would be to avoid the costs and delay. There could be another advantage in case the Electoral Commission decides differently in that to both the Electoral Commission and the candidate there has not to be an appeal to the Supreme Court as provided in section 114 (5) of the Parliamentary and Presidential Elections Act.

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Judicial review avails where a citizen has no other recourse or remedy. The complaint structure in sections 113 and 114 entail that there will be very few and specific occasions when this Court will use its judicial review jurisdiction.

Appeal procedure under Section 114

The appeal procedure set in section 114 of the Parliamentary and Presidential Elections Act conforms with and confirm section 76 (3) of the Constitution which gives appellate jurisdiction to this court over the Electoral Commission‟s decisions. This section does not suggest that the appeals to the High Court are those in section 113 of the Parliamentary and Presidential Elections Act. The appellate power in section 114 of the Parliamentary and Presidential Elections Act is, therefore, independent of complaints under section 113 of the Parliamentary and Presidential Elections Act. It would therefore cover referrals under section 40 of the Parliamentary and Presidential Elections Act where, through a summary procedure process, the High Court assumes appellate jurisdiction over the Electoral Commission‟s decisions. The powers of the court on appeal are pervasive they include the power of the High Court to re-examine the question whether a candidate was properly qualified or improperly rejected (section 114 (3) (e)). The hallmark of the appeal procedure is that under section 114 (5) of the Parliamentary and Presidential Elections Act, this Court Court‟s decisions are final. Consequently, under section 21 (c) of the Supreme Court of Appeal Act, an appeal never lies to Supreme Court against this Court‟s decisions.

The discrepancies between the Constitution and the various laws made under it and among the subservient laws themselves are only resolved in the supremacy of the

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Constitution over subsidiary laws. Where, therefore, there are diversions from or gross differences between the Constitution and the Courts Act, Parliamentary and Presidential Elections Act, Courts Act, Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and Practice Direction No 2 of 2009: (Abridgement of Time Periods in Cases of Election Petitions and other Complaints under the Parliamentary and Presidential Elections Act, the procedure in the Constitution must, as it must be, prevail. This is not a question of whether to declare a statute unconstitutional. This is just a question of a Court faced with distinct procedures, one under the Constitution and another under an Act of Parliament, in case of discrepancy, the Constitutional procedure must be adopted.

The juridical model is unique in its purpose and functioning. From a functional perspective, given that the Electoral Commission is deeply involved in a an enormous process where contestation is inevitable, while assuming this judicial role may seem an additional burden, inundating the High Court may be a serious distraction that slows, undermines, compromises and brings uncertainty to the process. The Electoral Commission has better and more insights on the process and those involved, candidates and electoral staff, than the High Court to arbitrate on complaints or petitions which to the Electoral Commission are elementary and routine. Moreover, the framers of the Constitution must have wanted the Electoral Commission to correct the error and filter it before resorting to this Court. Teleologically, the judicial model coheres with the overarching power the Constitution gives to the Electoral Commission as the sole and preeminent authority over elections and the electoral process. The Electoral Commission‟s independence is assured by minimal interference from the Courts.

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Applying these principles, for Professor Chisi, the Electoral Commission, from the letter 20 February 2014, proceeded under section 40 of the Parliamentary and Presidential Elections Act. For purposes of this case, the Electoral Commission, as A Reporting Officer, either acted inadvertently or acted beyond their powers in relation to publication of Professor Chisi‟s name. According to section 39 of the Parliamentary and Presidential Elections Act, Professor Chisi was deemed nominated and the nomination was valid: Professor Chisi is not dead; Professor Chisi never withdrew the nomination; and the Returning Officer did not fault the nomination based on the five matters in the section. Section 39 provides

“Where a nomination paper is delivered in conformity with this Part and it is not withdrawn, the candidate shall be deemed to stand nominated unless the returning officer is satisfied of the candidate’s death or decides that the nomination paper is invalid on one of the following grounds, but on no other grounds, namely—
(a) that the description of the candidate is insufficient to identify him;
(b) that the nomination paper does not comply with this Act;
(c) that the nomination paper was not tendered within the time prescribed;
(d) that any supporting document required to accompany the nomination paper has not been lodged with the returning officer; or
(e) that the evidence delivered to the returning officer under section 37 (3) is”

Since the Parliamentary and Presidential Elections Act does not apply section 40 to the nomination of President, the Electoral Commission could not act, in relation to Professor Chisi, under the guise of section 40 of the Parliamentary and Presidential Elections Act. Since, section 40 was the basis of the Electoral Commission‟s actions, it

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is unnecessary really to consider whether the Electoral Commission‟s Act could be saved by another provision, suffice to say that the Electoral Commission cannot correctly argue that it was acting under its general powers under section 76 (2) (d) to ensure compliance with the Constitution as to eligibility of a candidate. Section 76 (3) of the Constitution presupposes a complaint or a petition to the Electoral Commission even when the Electoral Commission is acting under powers in section 76 (2) (d) of the Constitution.

Consequently, when the Electoral Commission acted without considering whether section applied to Professor Chisi, there was an irregularity under the Act. The Electoral Commission as Returning Officer could not act under section 40 for a nominee for the office of President. Professor Chisi should have acted under section 113 and lodged a complaint with the Electoral Commission. Instead, his Counsel proceeded to require and the Electoral Commission obliged to proceed under section 40 of the Parliamentary and Presidential Elections Act. It should have dawned to both that section 40 of the Act does not apply to a presidential nominee.

At first, on analysis, I thought that judicial review was the way to go because certainly the Electoral Commission acted beyond their powers. That, however, should be considered an irregularity. Professor Chisi could not proceed by way of judicial review where sections 113 and 114 provided an alternative remedy. The only way to proceed, therefore, was by way of a complaint under section 113 of the Parliamentary and Presidential Elections Act complying with section 76 (2) (c) of the Constitution. This court could only then have been seized of the matter by way of appeal from the Electoral Commission‟s decision, if Professor Chisi was dissatisfied, to this Court under section 114 of the Parliamentary and Presidential Elections Act. I, therefore, directed

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that Professor Chisi should first complain to the Electoral Commission.

Made this 4th Day of April 2014

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