



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO. 36 OF 2022
(Before Honourable Justice Mambulasa)

BETWEEN:

**THE STATE (ON THE APPLICATION OF
DEMOCRATIC PROGRESSIVE PARTY)CLAIMANT**

-AND-

ELECTORAL COMMISSION.....DEFENDANT

-AND-

MR. ANDREW MPESI..... INTERESTED PARTY

CORAM: HON. JUSTICE MR. MANDALA D. MAMBULASA

Mr. Felix Tambulasi, Advocate for the Claimant

Mr. Bob Mabvuto Chimkango, Advocate for the Claimant

Mr. Thabo Chakaka Nyirenda, Attorney General for the Defendant

Mr. David Matumika Banda, Advocate for the Defendant

Mr. Justin Kusamba Dzonzi, Advocate for the Interested Party

Mr. Obet Chitatu, Court Clerk/Official Interpreter

RULING

MAMBULASA, J

Introduction

[1] The claimant has approached this Court seeking permission to apply or move for judicial review of the following decisions of the defendant:

1.1 appointing the interested party who is an unqualified person to be the Chief Elections Officer;

1.2 appointing the interested party who participates in partisan politics to occupy a public office;

1.3 failing to take into account relevant consideration that the interested party is an active member of Malawi Congress Party; and

1.4 all processes leading to the said decisions in subparagraphs (1.1), (1.2) and (1.3) above.

[2] If permission to apply or move for judicial review is granted, the claimant seeks the following reliefs:

- 2.1 a declaration that the interested party by being not apolitical was not a suitably qualified person to be appointed as the Chief Elections Officer of the defendant;
- 2.2 a declaration that the defendant's decision in appointing the interested party who was not a suitably qualified person is *ultra vires*, *void ab initio* and inconsistent with section 12 (1) of the Electoral Commission Act and therefore improper and illegal;
- 2.3 a declaration that the defendant's decision to appoint the interested party as the Chief Elections Officer was made without taking into account relevant consideration that he acts in a partisan manner by being involved in active partisan politics and therefore the defendant's decision was unreasonable;
- 2.4 a declaration that the defendant's failure to take into account the relevant consideration referred to in subparagraph 2.3 above undermines the neutrality, impartiality and independence of the defendant and therefore it is unconstitutional;
- 2.5 a like order to *certiorari* quashing the decision of the defendant;
- 2.6 an order of interlocutory injunction restraining the interested party from discharging duties of the Chief Elections Officer of the defendant until the determination of the substantive application;
- 2.7 an order for costs; and

2.8 any other order that the Court may deem fit to make in the circumstances.

- [3] If permission to apply or move for judicial review is granted, the claimant further seeks an order of interlocutory injunction restraining the interested party from discharging duties of the Chief Elections Officer of the defendant until the determination of the substantive application.
- [4] The application is brought pursuant to Order 19, rules 20 (3), 21 and 22 of the Courts (High Court) (Civil Procedure) Rules. It is supported by a sworn statement made by Mr. Francis Mphepo. The claimant also filed grounds for judicial review, form 86A and skeleton arguments in support of its application.
- [5] Upon perusal and consideration of the application, the Court directed that it should come by way of notice to the defendant and to the interested party pursuant to Order 19, rule 20 (4) of the Courts (High Court) (Civil Procedure) Rules.
- [6] The defendant and the interested party filed their sworn statements in opposition to the application as well as their skeleton arguments.

Issues for Determination

- [7] There are three issues to be determined by the Court at this stage.

- 7.1 First, is whether or not, the Court should grant permission to apply or move for judicial review to the claimant as sought and prayed for.
- 7.2 Second, if permission to apply or move for judicial review is granted to the claimant, whether or not, the Court should grant an order of interlocutory injunction restraining the interested party from discharging duties of the Chief Elections Officer of the defendant pending the determination of the substantive matter.
- 7.3 Third, which of the parties, depending on the determination of the above two issues, will be entitled to an order for costs.

The Claimant's Case

- [8] The claimant's sworn statement in support was made by Mr. Francis Mphemo who is its administrative secretary.
- [9] He depones that the claimant is a political party registered under the Political Parties (Registration and Regulation) Act.
- [10] That early in the year 2022, the defendant sought to appoint a suitably qualified person with relevant experience to be the Chief Elections Officer. A copy of the advertisement for the appointment was marked as exhibit, "FM 1".

- [11] That the advertisement expressly stated that the interested candidate must have some important personal attributes which, among others, was that the candidate must be apolitical.
- [12] That Mr. Francis Mphepo understands that the qualification of being apolitical means that the candidate must be politically neutral.
- [13] That by requiring that the candidate must be apolitical, the defendant knew that having a Chief Elections Officer who is not apolitical would compromise its constitutional mandate which is to exercise its powers, functions and duties independent of any directions or interference by any other authority or person.
- [14] That the claimant has an interest in the appointment of the Chief Elections Officer because the decisions that are made and would be made by the said Chief Elections Officer affect or would affect the claimant as a political party that ushers and sponsors candidates to contest the parliamentary, presidential and ward councillor elections organised and conducted by the defendant.
- [15] That the interests of the claimant, as a political party, are affected when the defendant appoints a Chief Elections Officer who is affiliated to a certain political party because the decisions and influence that would be made by the Chief Elections Officer would have an effect on the conduct and results of the elections that the defendant may organise.

- [16] That therefore, the qualification of being apolitical person is significant and a substantial requirement in appointing the Chief Elections Officer because it speaks of the impartiality and independence of the defendant in the exercise of its duties, powers and functions.
- [17] That on 4th August, 2022, the defendant confirmed the appointment of the interested party as its Chief Elections Officer for the next five years. A copy of the press release for the appointment of the interested party was marked as exhibit, “FM 2”.
- [18] That the defendant made the decision of appointing the interested party without considering that he is an active and enthusiastic supporter of Malawi Congress Party.
- [19] That the interested party has, on several occasions, made statements publicly showing and declaring his strong allegiance to Malawi Congress Party and passionate support to the leader of the Malawi Congress Party, Dr. Lazarus Chakwera. Copies of statements that he published were marked as exhibit, “FM 3”.
- [20] That in one of the publications of the interested party on 20th May, 2019, he wrote: “*I will vote and make Lazarus Chakwera President of Malawi tomorrow*”. This was a day before the presidential elections of the year 2019.

- [21] That in another publication on twitter (as X was then called) the interested party on 1st February, 2019 wrote as follows: “*MCP to field 193 parliamentary candidates. First since 1994. This is evidence of success.*”
- [22] That appointing the interested party as the Chief Elections Officer would compromise the impartiality and independence of the defendant because the interested party actively participates in partisan politics by supporting Malawi Congress Party and its leadership.
- [23] That the appointment of the interested party is illegal because the defendant is mandated to appoint suitably qualified person to be Chief Elections Officer. The failure of the interested party to meet a requirement of being apolitical means that he did not qualify to be appointed as a Chief Elections Officer of the defendant.
- [24] That the appointment of the interested party is also unreasonable because by appointing a person who is not apolitical, the defendant did not take into account relevant consideration of the qualifications of the candidate that it expressly put in the advertisement.
- [25] That therefore, the claimant prays for the Court’s permission to judicially review the decision that the defendant made in appointing the interested party.
- [26] That as a corollary and in the foregoing, the claimant also prays for an interim relief of an order of interlocutory injunction restraining the interested

party from discharging duties of the Chief Elections Officer pending the hearing and determination of the application for judicial review.

[27] That the claimant also makes an undertaking to pay any damages that may be incurred by the defendant due to the granting of an order of interlocutory injunction sought herein.

[28] That Mr. Francis Mphepo depones that the matter is of extreme urgency as the defendant has already confirmed the appointment of the interested party who is yet or has already started discharging his duties as the Chief Elections Officer, and if the defendant's decision is allowed to stand, the application for judicial review will merely be moot as the interested party will continue discharging duties despite being illegally appointed.

[29] That the damages that the claimant seeks to redress through these proceedings would be irreparable because the decisions and actions made by the interested party will not be quashed upon finding that the appointment was irregular.

[30] He thus prays that permission to apply or move for judicial review and an order of interlocutory injunction be granted restraining the interested party from discharging the duties of the Chief Elections Officer pending the hearing and determination of the substantive matter.

The Defendant's Case

- [31] The defendant filed a sworn statement in opposition to the application for permission to apply for judicial review as well as the interim relief by way of injunction sought by the claimant. The sworn statement was made by its chairperson, Honourable Justice Chifundo Jairus Kachale, PhD.
- [32] As chairperson of the Commission, he was also the chairperson of the interview panel that conducted the interviews of candidates for the post of Chief Elections Officer and other positions and he also presided over the entire recruitment process. He was very conversant with the conduct of the process.
- [33] The defendant verily believes that the claimant has failed to establish a cognisable right which has been breached by the Commission in appointing Mr. Andrew Mpesi as the Chief Elections Officer and therefore, has no *locus standi* to commence judicial review proceedings against the decision of the Commission.
- [34] The defendant states that the claimant has come to court without citing, identifying any decision or conduct in which the Chief Elections Officer has discharged his role in a manner that is not apolitical. At best, the claimant is simply fearing or anticipating that the Chief Elections Officer might not be apolitical and might be making decisions which could be politically adverse to the claimant.
- [35] The defendant verily believes that the authority to appoint the Chief Elections Officer of the Commission is exclusively or solely vested in the Commission by section 12 of the Electoral Commission Act, as amended.

The Commission is not mandated to discharge this responsibility in consultation with any other person or entity including political parties but is required to make the appointment through an, “open, transparent and competitive process”.

[36] The defendant believes that it has discretion to determine the terms and conditions for the appointment of the Chief Elections Officer as so provided under the Electoral Commission Act.

[37] The defendant verily believes that the only persons that would have *locus standi* against the recruitment of the interested party could either be the unsuccessful candidates in the recruitment process or candidates in the elections.

[38] The Commission conducted the entire recruitment process in strict compliance with the Electoral Commission Act and observed the statutory requirements of competitiveness and transparency using methods and processes deliberately devised for the purpose. Mr. Andrew Mpesi emerged the most suitably qualified candidate of all the candidates that were shortlisted, assessed and interviewed.

[39] Candidates were not nominated or drawn from political parties but were identified through an advertisement which was placed in newspapers of general circulation and also shared to all stakeholders through the Commission’s media and public relations platforms. Copies of the said newspaper advertisement and also one that was shared through electronic channels were marked as exhibits, “CJK 1” and “CJK 2”.

- [40] All shortlisted candidates went through a first-round session of interviews through which they were assessed using a set of tasks, questions and rating tools devised, formulated and adopted by the Commission with the assistance of recruitment consultants hired by the Commission for that purpose. Copies of the shortlisting and assessment tools were marked as exhibits, “CJK 3” and “CJK 4”.
- [41] Through the first-round session, 4 candidates, including Mr. Andrew Mpesi were further shortlisted to attend the final session of interviews. It is at the final session that Mr. Andrew Mpesi emerged the most successful candidate by attaining the highest aggregate score.
- [42] Throughout the process, the Commission was conscious about the requirement that the candidate to be appointed must be apolitical which was one of the important attributes listed in the advertisement. Just like the attributes of “*demonstrable reasoning and analytical skills, ability to work under pressure, communication skills, time management, planning and facilitation skills*” as listed in the advertisement, the candidates were assessed and rated on practical demonstration or explanation about these attributes.
- [43] Specifically, all candidates, including Mr. Andrew Mpesi were assessed on how they would ensure that they discharged the roles of Chief Elections Officer in a manner that is apolitical and also how they would manage perceptions of political bias at both individual and institutional level. Copies of the final interview questions and final rating form were marked as exhibits, “CJK 5” and “CJK 6”.

- [44] The Chief Elections Officer is the Chief Executive Officer of the Commission and serves under specific directions and supervisions of the Commission and therefore, does not set the agenda of the Commission and does not make any decisions on behalf of the Commission.
- [45] If, which is denied, the claimant has *locus standi* to commence judicial review proceedings, it can only challenge the decision-making process but not the merits of the decision.
- [46] Alternatively, the claimant's challenge would be limited to only conformity of the defendant's decision with the Constitution or any Act of Parliament.
- [47] The claimant is neither challenging the defendant's decision-making process, constitutional or statutory validity of the defendant's decision. The defendant's decision is, therefore, not amenable to judicial review.
- [48] The Commission is conscious to the requirements of the Electoral Commission Act that every individual member and employee of the Commission must perform the functions and exercise the powers of the Commission independently of the directions or interference of organs of government, political parties, candidates and any person whatsoever or organisation whatsoever.
- [49] If an individual or political party is aggrieved by the conduct of the Chief Elections Officer, the remedy is a direct recourse to the Commission to which he is responsible and answerable to.

- [50] The allegation that the interested party might have influenced the results in the local government by-elections held on 23rd August, 2022 is both legally and factually not accurate.
- [51] The determination of results of an election is the exclusive mandate of the Commission and not the Chief Elections Officer. This is a clear demonstration of lack of understanding on the statutory framework within which the mandate of the defendant is exercised.
- [52] The claimant's remedy to the allegations that the interested party might have influenced the results in the local government by-elections is not through a judicial review of the recruitment process.
- [53] The claimant ought to have lodged a complaint with the Commission on behalf of the candidates outlining how the Chief Elections Officer influenced or interfered with the results to the detriment of the candidates sponsored by the claimant and in favour of the candidates sponsored by the Malawi Congress Party.
- [54] In any case, and as a matter of fact, the Chief Elections Officer reported for duties on 22nd August, 2022 virtually and physically on 23rd August, 2022 and was not involved in any of the electoral processes.
- [55] The claimant has failed to demonstrate sense of duty to enquire from the Commission on how the entire process was conducted and the Commission would have explained to the claimant if it had indeed sought information on

the manner and processes leading to the recruitment of Mr. Andrew Mpesi. The claimant has not done so.

[56] As a matter of fact, the claimant has omitted mentioning in its application that through a letter dated, 8th August, 2022, the party demanded that the Commission should immediately rescind its decision of appointing Mr. Andrew Mpesi instead of making an inquiry regarding the appointment process. A copy of the said letter of demand from the claimant to the defendant was marked as exhibit, “CJK 7”.

[57] On 24th August, 2022 the Commission deliberated on the demand contained in the letter and resolved not to grant the demand for immediate rescission of the appointment of the interested party.

[58] The claimant was informed of this decision and the reasons through a letter delivered to the claimant on 31st August, 2022. The letter from the defendant was delivered to the claimant before the court process was served on the defendant. A copy of the Commission’s response to the claimant’s letter of demand was marked as exhibit, “CJK 8”.

[59] By making the demand requiring the defendant to rescind its decision of appointing Mr. Andrew Mpesi, the claimant is interfering with the operations of the Commission contrary to section 6 of the Electoral Commission Act.

[60] In addition to the demand contained in the letter dated 8th August, 2022, the claimant also issued a press statement dated 2nd September, 2022 signed by

its director of legal affairs making demands similar to the ones contained in the letter and to the reliefs being sought through the judicial review process.

[61] Such conduct is not only a direct interference with the mandate and operations of the Commission but is also intended to prejudice the court proceedings herein and should therefore not be entertained by the Court. A copy of the press statement dated 2nd September, 2022 released by the claimant and signed by its director of legal affairs was marked as exhibit, “CJK 9”.

[62] The claimant is not entitled to the reliefs it is seeking. Therefore, permission to commence judicial review proceedings should not be granted by the Court and this application should be dismissed with costs.

Interested Party’s Case

[63] The interested party, Mr. Andrew Mpesi, also made a sworn statement in opposition to the claimant’s application.

[64] He depones that he holds a Master of Arts (Political Science), Bachelor of Arts (Public Administration) and Postgraduate Diploma in Health Systems Management and that by these qualifications he is a professional political scientist. Copies of the qualifications were together marked as exhibit, “AM 1”.

[65] After graduating from the university, he has been employed as a lecturer in political science at the Catholic University of Malawi, part-time lecturer in the Department of Political and Administrative Studies at Chancellor

College, University of Malawi, and as an external assessor for Public Social Accountability Monitor (PSAM) examinations at Rhodes University, Republic of South Africa.

[66] In reference to the allegations made against him, the interested party deposes that he joined [Malawi] Assemblies of God in the year 2004 and since then he was its member during the time that its long-serving President, Rev. Dr. Lazarus Chakwera decided to join politics in or about the year 2013.

[67] That as a member of the [Malawi] Assemblies of God, he got to know Rev. Dr. Lazarus Chakwera who in turn knew of his political science background and in that capacity, he was one of the people that he consulted on his wish to join politics.

[68] Thereafter, he joined a group known as #TeamChakwera: Friends of Rev. Dr. Lazarus Chakwera for President.

[69] That the post exhibited as “FM 3” to the sworn statement of the claimant was made in this capacity, but he stopped being a member of this group in or about the year 2015 after Rev. Dr. Lazarus Chakwera lost the elections in the year 2014.

[70] It is clear from his post, dated 6th May, 2013 that he has neither been a member of Malawi Congress Party nor has he been involved in any party activities other than to provide occasional advice to Rev. Dr. Lazarus Chakwera.

- [71] In the year 2018, he decided to pursue his professional calling as a political scientist and he secured a job with the Centre for Multiparty Democracy on 14th March, 2018. A copy of his letter of employment was marked as exhibit, “AM 2”.
- [72] During his employment with the Centre for Multiparty Democracy he worked closely with all political parties in Malawi, including the claimant herein and its representatives such as Hon. Ben Phiri (then Director of Elections), Hon. Chimwemwe Chipungu (then Organising Secretary), and Hon. Khwauli Msiska and these officials know him personally and can be more credible witnesses to testify on his professional conduct in the discharge of his duties.
- [73] That during the year 2019 Tripartite Elections, he was engaged by Democracy Works Foundation to train political party representatives on various aspects of the elections including those from the claimant. Copies of lists of participants were marked as exhibit, “AM 3”.
- [74] Throughout the said training, there was no complaint from the claimant against him or the manner in which he conducted the training as proof of lack of political neutrality on his part.
- [75] On 10th October, 2019 he was employed by the United States Agency for International Development as a Governance Specialist where he worked until 19th August, 2022. A copy of his contract of employment was marked as exhibit, “AM 4”.

- [76] During his employment with the United States Agency for International Development (the Agency), he received 5 awards for professional conduct pertaining to how he steered the Agency through the 2020 Fresh Presidential Elections. Copies of the awards were marked as exhibits, “AM 5A”, “AM 5B”, “AM 5C”, “AM 5D” and “AM 5E” respectively.
- [77] There is sufficient evidence that since the year 2018, he has been employed in his professional capacity as a political scientist and has discharged his duties impartially and professionally to warrant being given high performance awards.
- [78] Whilst he was still employed by the Agency, in or about February, 2022 he saw an advertisement for the position of Chief Elections Officer, and he submitted his application on 22nd February, 2022. A copy of his application letter was marked as exhibit, “AM 6”.
- [79] On 3rd April, 2022 he received an e-mail from the Chairperson of the Electoral Commission asking him to provide more information which he did and on 8th June, 2022 he received an e-mail inviting him to attend interviews on 21st June, 2022. Copies of the said correspondence were marked as exhibits, “AM 7A” and “AM 7B”.
- [80] Following the said request from the Chairperson of the Electoral Commission, he provided the necessary documents which supported his employment track record to enable the Commission to verify the same should it deem it necessary.

- [81] On 11th July, 2022 he attended a second interview with three other candidates and on 3rd August, 2022 he received an offer of employment after being successful in the interviews which he accepted and committed to report for duties on August 22, 2022 in Blantyre. Copies of the offer letter and his acceptance letter were marked as exhibits, “AM 8A” and “AM 8B”.
- [82] Prior to reporting for duties on 22nd August, 2022 he was advised by the Chairperson of the defendant that since the Commission was conducting by-elections in the North and South [of Malawi], he should join the by-elections tally centre in Mzuzu on 23rd August, 2022.
- [83] Thus, officially, he reported for duties at Mzuzu by-elections tally centre and he never had a chance to visit any single polling station or play any role since this was largely his induction and decisions regarding the by-elections had already been made.
- [84] He only reported for duties two days prior to the conduct of the by-elections and as such it is practically impossible to influence the outcome of the elections.
- [85] Thus, the allegations made by the claimant against him are baseless and capricious aimed at tainting his professionalism in the face of a proven track record and this is proved even more accurately by the press release the claimant published on 2nd September, 2022. A copy of the press release was marked as exhibit, “AM 9”.

[86] The parties' cases end here. The Court shall now proceed to consider the applicable law.

The Law

[87] The High Court has original jurisdiction to review any law and any action or decision of the Government, for conformity with the Constitution. This is provided for in no lesser a law than section 108 (2) of the Constitution,¹ which is the supreme law of the land.

[88] More specifically, in relation to the Electoral Commission,² section 76 (5) (a) of the Constitution is to the effect that without prejudice to subsection (3), the High Court shall have jurisdiction to entertain applications for judicial review of the exercise by the Electoral Commission of its powers and functions to ensure that such powers and functions were duly exercised in accordance with the Constitution or any Act of Parliament.³

[89] In *Kaweche and Kaunda -vs- District Commissioner (Nkhata Bay) et al*⁴ the High Court (Ligowe, J sitting) observed as follows:

¹ Republic of Malawi (Constitution) Act.

² The law has since been amended by Parliament and it is now called, Malawi Electoral Commission. *See* for instance, Constitution (Amendment) Act, No. 4 of 2023 and Malawi Electoral Commission Act, No. 11 of 2023. *See* also section 2 of the Presidential, Parliamentary and Local Government Elections Act, No. 10 of 2023.

³ In this ruling however, the law is being cited as it stood in the year 2022 when the application was filed by the claimant.

⁴ Civil Cause No. 62 of 2013 (High Court of Malawi) (Mzuzu District Registry) (Unreported).

Judicial review is a process under which any law, and any action or decision of the Government is subjected before the High Court for conformity with the Constitution. *See* s. 108 (2) of the Constitution. At common law, judicial review lies against any person or bodies which perform public duties or functions. In Malawi, this is so because of the underlying principles upon which our Constitution is founded. That is:

- (i) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
- (ii) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
- (iii) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;
- (iv) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
- (v) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and
- (vi) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law. *See* s.12 of the Constitution

[90] Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules provides as follows:

(1) Judicial review shall cover the review of-

- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
- (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine-
 - (i) its lawfulness;
 - (ii) its procedural fairness;
 - (iii) its justification of the reasons provided, if any; or
 - (iv) bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

- (2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.
- (3) Subject to sub-rule (4), an application for judicial review shall be commenced *ex-parte* with the permission of the Court.
- (4) The Court may upon hearing an *ex-parte* hearing direct an *inter-partes* hearing.
- (5) Subject to sub-rule (6), an application for judicial review under sub-rule (3) shall be filed promptly and shall be made not later than 3 months of the decision.

(6) The Court may extend the period under sub-rule 5.

[91] From the above, it is worth-noting that there are a number of requirements that must be fulfilled by a claimant before they may be granted permission to apply or move for judicial review proceedings.

[92] As Justice Ruth Chinangwa noted in *The State (On application of Gertrude Hiwa, SC) and Office of the President and Cabinet and Secretary to the President and Cabinet*⁵ from Order 19, rule 20 quoted above, the Court has to consider the following requirements in an application for permission to apply or move for judicial review:

92.1 There must be a law, an action or a decision of the Government or a public officer for conformity with the Constitution where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened; or

92.2 There must be a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons provided, if any, or bad faith, if any, where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened;

92.3 A person making an application for judicial review should have sufficient interest in the matter to which the application relates;

⁵ Judicial Review Cause No. 42 of 2020 (High Court of Malawi) (Lilongwe District Registry) (Civil Division) (Unreported).

92.4 An application for judicial review should be filed promptly and shall be made not later than 3 months of the decision.

[93] In addition to the above requirements, case law has also developed other additional principles upon which permission to apply or move for judicial review is considered in our jurisdiction. For purposes of the present proceedings, one such relevant principle is that judicial review is not available in cases where there are other alternative remedies and the same have not been used or exhausted by a claimant.⁶

[94] In *R -vs- Inland Revenue Commissioners, ex-parte Preston*⁷ the court said:

...a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance.

[95] In *R -vs- Epping and Harlow General Commissioners, ex-parte Goldstraw*⁸ Sir John Donaldson MR stated that:

But it is a cardinal rule that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.

⁶ See *The State (On the application of Malawi Revenue Authority) -and- The Chairperson of the Industrial Relations Court and Roza Mbilizi*, Judicial Review Case No. 52 of 2021, (High Court of Malawi) (Principal Registry) (Unreported) and *State (ex parte Aero Plastic Industries Ltd -vs- Director of Environmental Affairs*, MSCA Civil Appeal No. 19 of 2019 (Unreported).

⁷ [1985] AC 835 at 852.

⁸ (1983) 3 AllER 257 at 262.

[96] It is not automatic that once there is an alternative remedy, then judicial review will not be available. The court must exercise its discretion in the particular case in light of the alleged alternative remedy. This is important because to give but one example, a tribunal may have been established under a statute but may not have been operationalised, and so, it cannot be said that an alternative remedy would be available. In that kind of case, a court would exercise its discretion in favour of granting permission for judicial review as the alternative remedy only exists on the statute book and not in reality.⁹

[97] An application for permission to apply or move for judicial review, like the present one, serves two purposes. First, it eliminates at an early stage, applications that are either frivolous, vexatious or hopeless. Second, it ensures that an application is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.¹⁰

[98] At the application for permission stage, there is no need for the Court to go into the matter in depth. If the Court is satisfied that there is an arguable case, then it follows that permission to apply for judicial review should be granted where all the other requirements have also been fulfilled by the claimant.¹¹

⁹ See for instance, *Centre for Environmental Policy (CEPA) et al -vs- Southern Region Water Board*, Miscellaneous Cause No. 9 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

¹⁰ *The State (On the application of Dr. Justice Michael Mtambo) -and- Judicial Service Commission and The President of the Republic of Malawi*, Judicial Review Case No. 25 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

¹¹ n5 above.

[99] Sufficient interest or *locus standi* is a condition precedent that must be satisfied by a claimant before they can obtain a remedy that they seek by way of judicial review proceedings. This is clear from Order 19, rule 20 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017.¹²

[100] This means that the Court must be satisfied that a claimant has sufficient interest at the permission stage as well as at the hearing stage. In other words, sufficient interest remains an enduring question throughout the judicial review proceedings. Locally, this proposition is exemplified by the decision of the Supreme Court of Appeal in *The State and Chaponda and another, ex-parte Mr. Charles Kajoloweka and others*.¹³

[101] It is also the law that a person who has no sufficient interest in a matter has no right to ask the court to give him a declaratory judgment. A case in point is *President of Malawi & Another –vs- Kachere & Others*.¹⁴

[102] In *Australian Conservation Foundation –vs- The Commonwealth*¹⁵ it was stated as follows:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a

¹² See also: *R -vs- Inland Revenue Commissioners, ex-parte National Federation of Self Employment and Small Businesses Limited* [1982] AC 617.

¹³ MSCA Civil Appeal No. 5 of 2017 (Unreported).

¹⁴ [1995] 2 MLR 616.

¹⁵ (1980) 146 CLR 493.

principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.

[103] The above case has been cited with approval by the Supreme Court of Appeal for Malawi in a number of cases including recently in *President of Republic of Malawi (Prof. Arthur Peter Mutharika) and Secretary to Cabinet (Justice Lloyd Muhara) –and- Human Rights Defenders Coalition, Association of Magistrates and Malawi Law Society*.¹⁶

[104] Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules provides as follows:

The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-

- (a) there is a serious question to be tried;
- (b) damages may not be an adequate remedy; and
- (c) it shall be just to do so,

and the order may be made unconditionally or on such terms or conditions as the Court considers just.

[105] Order 19, rule 22 of the Courts (High Court) (Civil Procedure) Rules also permits a claimant to apply for an injunction when making an application to the Court for judicial review. It is couched in the following terms:

¹⁶ MSCA Civil Appeal No. 05 of 2022 (Unreported).

An application for a declaration or an injunction shall be made with an application to the Court for judicial review and the Court may grant a declaration or injunction where it considers that it would be in the interests of justice to do so having regard to-

- (a) the nature of the matter in which relief may be granted by a mandatory order, a prohibiting order or a quashing order;
- (b) the nature of the person or institution against whom relief may be granted by such an order; and
- (c) all the circumstances of the case.

Application of the Law to the Facts, Arguments by the Parties and Determination of the Applications

[106] As correctly observed by Justice Ruth Chinangwa in the case cited in paragraph 92 above, it is noted from the reading of Order 19, rule 20 (1) (a) and (b) of the Courts (High Court) (Civil Procedure) Rules that a claimant need not satisfy both requirements. A claimant needs only satisfy one of them at any given point in time.

[107] As this Court noted in *The State (On the application of Riaz Jakhura) –and- Inspector General of Police and 2 others*,¹⁷ that is not to rule out the possibility that there may never be cases where a claimant may have to satisfy both requirements, where such cases have presented themselves.

¹⁷ Judicial Review Case No. 11 of 2023 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

[108] In the instant case, the most applicable one is Order 19, rule 20 (1) (b) of the Courts (High Court) (Civil Procedure) Rules, namely, that there must be a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened.

[109] The claimant in this application is questioning the decision of the defendant to recruit the interested party as the Chief Elections Officer principally on the ground that he is not apolitical.

[110] The first issue to be interrogated is: what right, freedom, interests or legitimate expectation of the claimant has been affected or threatened by the decision of the defendant to recruit the interested party? This question arises from the first requirement identified in paragraph 92 under subparagraph 92.2 above.

[111] In *President of Republic of Malawi (Prof. Arthur Peter Mutharika) and Secretary to Cabinet (Justice Lloyd Muhara) –and- Human Rights Defenders Coalition, Association of Magistrates and Malawi Law Society*¹⁸ the Supreme Court of Appeal for Malawi observed that Order 19, rule 20 specifically requires that a claimant must have sufficient interest in the matter to which the application relates **and further that it must be his or her right that is affected or threatened.**

¹⁸ n16 above.

[112] The Supreme Court of Appeal for Malawi stated as follows:

In our judgment, the rule brings into play two conditions which must be satisfied where a person is making an application for judicial review. **First, it must be the applicant's own right, freedom, interests or legitimate expectation which is affected or threatened by the law, decision, action, or failure to act, etc etc sought to be impugned.** Secondly, the applicant must have sufficient interest in the matter to which the application relates.¹⁹

[113] In the present application, the claimant contended that it was a political party registered under Political Parties (Registration and Regulation) Act and that it ushers in candidates to contest what it called national elections conducted and presided over by the defendant.

[114] As a political party, it therefore has interest on the conduct of the elections organised by the defendant. It is for this reason that sections 27, 31 and 56 of the Parliamentary and Presidential Elections Act²⁰ provide for the right of the political parties to monitor the registration of voters, to inspect the voters register and to campaign in an election respectively.

[115] The claimant also argued that the Chief Elections Officer being the one responsible for planning, organising and supervising electoral activities, among other responsibilities, he is likely to influence the decisions of the

¹⁹ As above.

²⁰ Cap. 2:01 of the Laws of Malawi, now repealed and replaced by the Presidential, Parliamentary and Local Government Elections Act, No. 10 of 2023.

defendant to be in favour of candidates of one political party and against other political parties.

[116] The claimant further argued that it is a rival party to Malawi Congress Party, and the interested party, being an active supporter of Malawi Congress Party and its leadership has been making statements against the reputation of the claimant.

[117] If the interested party remains on the position of the Chief Elections Officer in the next five years, the defendant's impartiality and independence will be put in question as he has already proved his support for Malawi Congress Party which is a political rival of the claimant.

[118] The claimant's interests, therefore, are affected by the appointment of the Chief Elections Officer especially when the appointee is affiliated to one political party. The claimant, therefore, has sufficient interest in moving the Court for permission to commence judicial review.

[119] On the other hand, the defendant argued that the claimant needed to locate a right that it has been enjoying that has been violated by the defendant following the appointment of the interested party for it to be said to have *locus standi* to commence judicial review proceedings.

[120] In this application, the claimant has not identified any right that it has been enjoying which has been breached by the defendant due to the recruitment or appointment of the third party. The sworn statement of Mr. Francis Mphepo relied upon in support of the application for permission for judicial review is

silent on the right that the defendant has violated, which it was previously enjoying. Thus, it was submitted that the claimant has not satisfied the requirements imposed under Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules.

[121] The defendant contended that the only persons who could be said to have been affected by the decision to recruit the interested party are the candidates who participated in the recruitment process and the candidates in the by-election.

[122] The claimant was never a candidate in the recruitment of the defendant's Chief Elections Officer. Further, the claimant was not also a candidate in the by-election.

[123] Even though Mr. Francis Mphepo averred in his sworn statement that the claimant sponsored candidates to contest the by-election which took place in three wards of Wenya in Chitipa, Lupembe in Karonga and Shire in Balaka, which the claimant lost, and two candidates sponsored by Malawi Congress Party won, this does not give the claimant *locus standi* to challenge the recruitment of the interested party.

[124] Thus, since the claimant has not shown that the defendant's decision has adversely affected it, the claimant does not have *locus standi* in the matter.

[125] Furthermore, the claimant having failed to identify any decision or action in which the Chief Elections Officer has discharged his role in a manner that is

not apolitical, the claimant does not have *locus standi* to commence these proceedings.

[126] The claimant is in this case merely fearing or anticipating that the Chief Elections Officer might not be apolitical and might be making decisions which could be politically adverse to the claimant. That, cannot grant *locus standi* to the claimant.

[127] The interested party argued that according to the sworn statement of the claimant made by Mr. Francis Mphepo, the claimant's challenge to the employment of the interested party is inchoate to the right of its future contestants in elections.

[128] Obviously, the right to contest any adverse decisions of the defendant during elections belong to the candidates and not the political party which sponsors them. As was pointed out by the Supreme Court of Appeal in a number of decisions, it is incumbent upon the claimant to show that it is his or her right or freedom that has been violated over and above others as a basis for taking up the judicial review proceedings.²¹

[129] Thus, it was submitted by the interested party that the claimant is attempting to sue on behalf of its prospective candidates in future elections and as such it does not have sufficient interest to challenge the recruitment of the interested party within the meaning of Order 19, rule 20 of the Courts (High

²¹ See for instance, *The State and George Chaponda and another, ex parte Mr. Charles Kajoloweka and others*, MSCA Civil Appeal No. 5 of 2017 (Unreported) and *Civil Liberties Committee –vs- Minister of Justice and another* [2004] MLR 55 (SCA).

Court) (Civil Procedure) Rules. The interested party prayed that the claimant's application be dismissed with costs for want of *locus standi*.

[130] The interested party also argued that judicial review cannot be invoked to determine the legality, irrationality or procedural impropriety of a decision which has not yet been made. The decision which the claimant fears that will adversely affect it, is not the recruitment of the interested party. It is the decisions which the interested party may make or influence the defendant to make in future elections in which the claimant's members may take part.

[131] The Court cannot be called upon to speculate what may happen in future. There is no current or past breach of statutory duty to form the basis of the present application. Judicial review should only ensue where the court is satisfied that there is a case fit for further investigation at the substantive hearing.

[132] In this application, there is none and the Court ought to dismiss the application. The interested party relied on the case of *The State (On the application of Zuneth Sattar) –and- The Director of Anti-Corruption Bureau and The Attorney General*²² in support of this argument.

[133] The point of departure is the averment by the claimant that it is a political party registered under the Political Parties (Registration and Regulation)

²² Judicial Review Case Number 68 of 2021, (High Court of Malawi) (Principal Registry) (Unreported).

Act.²³ That may well have been the case. However, as it transpired during the hearing, that piece of legislation was repealed by Parliament way back in the year 2018.²⁴

[134] As this Court noted in *Anglican Diocese of Upper Shire et al –vs-Church of Province of Central Africa et al*,²⁵ there is now a new piece of legislation in Malawi regulating the registration, financing and functioning of political parties and matters incidental thereto called, Political Parties Act.²⁶

[135] Section 46 of the Political Parties Act is on the status of political parties already registered. It is to the effect that subject to section 48, any political party which, immediately prior to the commencement of this Act, was registered under the Political Parties (Registration and Regulation) Act repealed by section 45 shall be deemed to have been registered under this Act.

[136] In view of this deeming provision, and as conceded by the claimant during the hearing of the application, the correct rendition by the claimant in its sworn statement in support should have been that it was a political party registered under the Political Parties Act, 2018.

²³ Cap. 2:07 of the Laws of Malawi [repealed], otherwise, *see* paragraphs 9 and 112 above.

²⁴ *See* section 45 (1) of the Political Parties Act, No. 1 of 2018.

²⁵ Civil Cause No. 328 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

²⁶ Act No. 1 of 2018.

[137] Reverting to the first issue for interrogation by this Court, has the claimant been able to locate any legally protected or cognisable right or freedom that it was enjoying before which has been infringed upon or violated by the defendant following the recruitment of the interested party as the defendant's Chief Elections Officer?

[138] The claimant argued that under section 12 of the Electoral Commission Act, the defendant is mandated to appoint a Chief Elections Officer and that the person should be a suitably qualified person. It also argued that the mandate to determine the qualifications are in the realm of the defendant. Among those, was that the candidate should be apolitical.

[139] In this case, the interested party is not apolitical as evidenced by the various posts that he made on social media platforms in support of Malawi Congress Party and its leadership. The claimant also argued that even the defendant in its sworn statement in opposition as well as the interested party himself did not deny that the posts were made.

[140] The claimant further argued that its interest arose from the fact that the defendant glossed over the qualification of the candidate being apolitical. In terms of academic qualification and experience, the interested party is impeccable, so the claimant contended.

[141] In this application, the Court is satisfied that the claimant has failed to demonstrate any specific injury or legally protected right which it was enjoying which has been infringed upon or violated by the defendant due to

the recruitment of the interested party as its Chief Elections Officer to warrant its involvement in this application.

[142] All the rights that the claimant had as a political party duly registered under the Political Parties Act, 2018 as provided for under sections 27, 31 and 56 of the Parliamentary and Presidential Elections Act have not been infringed upon or violated by the defendant due to its decision to appoint the interested party as a Chief Elections Officer. This means that the claimant has failed to satisfy the Court on the first requirement.

[143] Even though the failure by the claimant to demonstrate what right or freedom which it previously enjoyed has been infringed upon or violated by the decision by the defendant to recruit the interested party is singularly dispositive of the application, the Court will nonetheless consider the requirement on *locus standi* as they are intertwined.

[144] This Court agrees with the arguments by the defendant and the interested party that judicial review cannot ensue based on decisions that will be made in future by the interested party. This is clear from paragraphs 14 and 15 above. Indeed, the claimant has not cited or identified any decision taken by the Chief Elections Officer in which he acted in a manner that was not apolitical. The fears and concerns that the claimant has are therefore based on speculation.

[145] As correctly argued by the interested party, judicial review proceedings cannot be founded on speculation. The Court cannot be called upon to adjudicate on moot issues.²⁷

[146] Indeed, a belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.²⁸

[147] Similarly, Schiemann, J in *R –vs- Secretary of State for the Environment, ex parte Rose Theatre Trust*²⁹ stated that “not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision...”

[148] Thus, the Court also holds that the claimant has not satisfied the second condition or requirement of having sufficient interest or *locus standi* to bring this application as it did not demonstrate that it had a direct and substantial interest over and above others such as the candidates who applied and attended interviews for the post of Chief Elections Officer or those who contested in the three by-elections. In short, *ex facie*, the claimant is bereft of *locus standi*.

[149] This Court is bound by numerous Supreme Court of Appeal for Malawi decisions that have held that the doctrine of *locus standi* exists to ensure that

²⁷ n22 above.

²⁸ n15 above.

²⁹ 1 QB 504 at 520.

only those with a direct and substantial interest in a matter can invoke the court's jurisdiction. Put differently, a successful challenge to an adverse decision is possible if the right remedy is sought by the right person in the right proceedings.

[150] In this application, the claimant has not satisfied the first and even second requirement under Order 19, rule 20 of the Courts (High Court) Civil Procedure) Rules.

[151] There is therefore no need for this Court to consider the other requirements provided for under Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules as well as those developed by case law which the claimant had to satisfy the Court on, for it to be granted permission to apply or move for judicial review. The application by the claimant for permission to apply or move for judicial review is therefore dismissed.

[152] The application for permission to apply or move for judicial review having been dismissed, the application for an order of interlocutory injunction also falls away as it has no legs to stand on.

[153] Costs are awarded in the discretion of the Court.³⁰ Where the Court decides to make an order for costs, the general rule is that the unsuccessful party pays the costs of the successful party.³¹

³⁰ Section 30 of the Courts Act, Cap. 3:02 of the Laws of Malawi. *See* also Order 31, rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules.

³¹ Order 31, rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules.

[154] There does not appear any good reason why the Court should not follow this general rule. Costs for this application are therefore awarded to the defendant and the interested party. They shall be assessed by the Registrar of the Court if they shall not be agreed upon by the parties themselves.

[155] The delay in rendering this ruling is deeply regretted. Be that as it may, justice hurried is also justice denied.

[156] Made in chambers this 20th day of August, 2025 at Blantyre, Malawi.


M. D. MAMBULASA
JUDGE