REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

SITTING AT LILONGWE

MSCA CONSTITUTIONAL APPEAL NO. 1 OF 2020

(BEING HIGH COURT (LILONGWE REGISTRY) CONSTITUTIONAL REFERENCE NO. 1 OF 2019)

BETWEEN

PROFESSOR ARTHUR PETER MUTHARIKA ....1ST APPELLANT

THE ELECTORAL COMMISSION.............................. 2ND APPELLANT

10 **AND**

DR. SAULOS KLAUS CHILIMA....................................1ST RESPONDENT

DR. LAZARUS McCARTHY CHAKWERA.....................2ND RESPONDENT

CORAM: HONOURABLE A.K.C. NYIRENDA, SC, CJ

HONOURABLE E.B. TWEA, SC, JA

HONOURABLE R.R. MZIKAMANDA, SC, JA

HONOURABLE A.C. CHIPETA, SC, JA

HONOURABLE L.P. CHIKOPA, SC, JA

HONOURABLE F.E. KAPANDA, SC, JA

HONOURABLE A.D. KAMANGA, SC, JA

Tembenu, SC, and Mbeta of Counsel for 1st Appellant,

Chokhotho and Banda of Counsel for 2nd Appellant

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10

JUDGMENT

Nyirenda, CJ

Introductory matters

Malawi is a sovereign state, with rights and obligations under the Law of Nations. As a sovereign state, we have chosen to be a constitutional democracy for the wellbeing and protection of our people. Section 4 of our Constitution provides that "*the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of*
20 *Government and all the people of Malawi are entitled to the equal protection of the Constitution and laws made under it*". Pursuant to our constitutional and democratic

obligation, on 21st May, 2019 Malawians of appropriate age of eligibility went to the polls for the election of Councilors, in Local Government elections, and members of the National Assembly and the President, in general elections. Since these elections are conducted simultaneously, they are now commonly referred to as tripartite elections.

Under our Constitution, supported by the Electoral Commission Act, the Parliamentary and Presidential Elections Act and the Local Government Elections Act, the Electoral Commission, the second appellant in this case, whom we shall refer to only as the "Commission" because of the numerous times that we will refer to it, is established and empowered to conduct the elections. While the Constitution in section 75 establishes the
10 Commission and goes on, in section 76, to lay out some of its powers and functions, it is in the Electoral Commission Act, the Parliamentary and Presidential Elections Act and the Local Government Elections Act, that more detailed and specific powers and functions of the Commission are set out.

It is cardinal at this stage to state that under section 76 (2) (d) and (e) of the Constitution, the Commission is enjoined to ensure compliance with the provisions of the Constitution and Acts of Parliament in the performance of its duties and functions. The Electoral Commission Act in turn provides, in section 8, for the functions and powers of the Commission in this way-

> *"(1) In addition to the broad functions and powers conferred on the*
> 20 *Commission by the Constitution and, subject to the Constitution, the Commission shall exercise general direction and supervision over the conduct of every election and, without prejudice to the generality of such functions and powers, it shall have the following further functions –*
>
> … …

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

The Commission, therefore, has the singular duty under the Constitution as well as under all relevant statutes, to conduct elections that are ultimately free and fair. Free elections basically denote the right to take part in an election; and fairness denotes conducting elections by the rules of engagement.

In the case before us, the first respondent and the second respondent challenged the outcome of the Presidential election of 21st May, 2019, on account of what they perceive to be irregularities in the manner that the Commission conducted the election. The details
10 of their respective electoral petitions will be set out later in this judgment.

The Court below found for the petitioners (now respondents) and nullified the election. The Court went on to make consequential orders, including ordering that a fresh election for the office of President be held within one hundred and fifty days from the date of the judgment. This appeal is against the whole of the judgment of the Court below. We will look at the grounds of appeal and what is specifically in contention in due course.

While we are at this stage, it is imperative that we underscore the importance and relevance of elections in a constitutional democracy on which our system of government is premised. In that respect, there are two considerations. First is to ask what are elections and, secondly, why are elections important in a democracy that is affirmed on
20 constitutional supremacy. It will probably be easier to approach the two questions together.

An election relevant to a constitutional democracy is explained in the words of ***Said Adejumobi,*** in his article '***Elections in Africa: A Fading Shadow of Democracy***?' International Political Science Review, Vol. 21, No. 1 59-73 at p 60-

"Conceptually, elections symbolize popular sovereignty and the expression of the 'social pact' between the state and the people which defines the basis of political authority, legitimacy and citizens' obligations. It is the kernel of political accountability and a means of ensuring reciprocity and exchange between the governors and the governed ...... Further, elections typify the representation of popular demands and a basis for leadership recruitment and socialization ... Renewal in democratic systems usually occur via elections. Any political system which does not undergo such, will ultimately atrophise and suffer decay. In other words, elections constitute perhaps, the most important element in the conception and practice of liberal democracy".

On the same subject, ***Staffan Lindberg***, in his book "***Democracy and Elections in Africa***", The John Hopkins University Press, Baltimore, 2006, 1 says-

"While there are many views on what democracy is - or ought to be - a common denominator among modern democracies is elections ... But elections are also and more importantly an institutionalized attempt to actualize the essence of democracy: rule of the people by the people. Every modern definition of representative democracy includes participatory and contested elections perceived as the legitimate procedure for the translation of the rule by the people into workable executive and legislative power...".

Like everywhere else, elections are central to our constitutional and democratic order; particularly relevant to spur the trust and confidence of those that our Government serves. Indeed, our Constitution is founded upon, among others, the underlying and fundamental principle that "*all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the Constitution solely to*

serve and protect their interests.". (see: section 12 (1) (a) of the Constitution). It is emphasized in section 6 of the Constitution that-

> "*Save as provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this Constitution in a manner prescribed by an Act of Parliament*".

Elections define the roadmap and lifeline of a society, in that the elected few become responsible for the welfare and the wellbeing of the rest of the society. We should therefore avoid, at any cost and on any account, ushering leadership into office through
10 an electoral process that is flawed because the chances are that such a process will not reflect the will of the people. And yet, when people have spoken through the ballot, properly exercised, such exercise of their will and choice must be respected and remain consecrated even before courts of law, after all, the courts themselves are bound by the constitutional order under section 4 of the Constitution.

In order to vindicate our resolve to uphold the supremacy and sanctity of our Constitution and what it stands for, and in order to accord the people of this country realistic participation in the governance of their nation, the Constitution has specifically accorded our people the right to participate in the political agenda under section 40 of the Constitution, which states-

20 "*(1) Subject to this Constitution, every person shall have the right –*

> *(a) to form, to join, to participate in the activities of, and to recruit members for, a political party;*
>
> *(b) to campaign for a political party or cause;*

(c) to participate in peaceful political activity intended to influence the composition and policies of the Government; and

(d) freely to make political choices.

(2) The State shall, provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency.

(3) Save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for any elective

10 *office.".*

The nature of this matter

The first appellant, the first respondent and the second respondent, were among the contestants for the office of President in the 21st May, 2019 general election. On 27th May, 2019, the Commission declared the first appellant the winner in the elections. As we state earlier, the first and the second respondents were dissatisfied with that outcome. For that reason, they separately petitioned the Court below, under section 100 of the Parliamentary and Presidential Elections Act. Their respective petitions are set out in full a little later in this judgment.

The first respondent's petition was placed before Justice Mrs. Chinangwa, while the

20 second respondent's petition was placed before Justice Mr. Mkandawire. The two petitions related to the same election and would most likely follow the same path in court. For that reason, the two petitions, were consolidated. Upon further scrutiny of what the Court was being called upon to deal with, the Court, at the onset, found that the consolidated petitions expressly and substantially related to, or concerned the

interpretation or application of the provisions of the Constitution. Upon that finding the Court referred the matter to the Chief Justice, for certification, in accordance with section 9 (2) and (3) of the Courts Act, which states-

> "*(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.*
>
> *(3) The Chief Justice shall certify that a proceeding is one which comes within the ambit of subsection (2), and the certification by the Chief Justice*
10 *shall be conclusive evidence of that fact*".

The consolidated matter was indeed certified by the Chief Justice as a constitutional matter. As a result of that certification, the Court below comprised of five Judges. It is important that we keep this development in mind for what is to follow.

In the Court below, the issue of pleadings became contentious. The controversy has continued in this appeal but we think it need not, for the observations we now make. As we state above, there were two electoral petitions in this matter which the Court below consolidated and further the Court referred the consolidated matter to the Chief Justice for certification upon finding that there were substantive constitutional questions that required to be determined. Upon certification of the matter as constitutional, the petition
20 procedure, as a process, ceased to exist, but the issues that were raised in the petitions survived, which issues would give context and form the basis of the issues that would further assist in the interpretation and application of the constitutional questions raised in the referral. It is apparent to us that all the parties acknowledged that the matter would proceed as a constitutional referral and, therefore, that the petition procedure was no longer the *modus operandi*. Upon that acknowledgment, the parties proceeded to a

scheduling conference where a number of directions, including directions for discovery, were given. The parties also proceeded to file sworn statements, in which further issues were introduced. Therefore, the subject matter and the issues for determination by the Court below and which must be before us, are circumscribed by the petitions and the constitutional questions that were identified by the Court below. This has been the practice in constitutional referrals (see: ***The Attorney General Ex- Parte Abdul Pillane***, Constitutional Case No. 6 of 2005 (Unreported) and ***Lisineti Gremu and Davie Charles Kanyoza***, Constitutional Case No 1 of 2012 (unreported).

The Petitions and the Referral

10 At this point, and for ease of reference, we proceed to set out, in full, the two petitions and the constitutional questions in the referral.

The Petition of Dr. Saulos Klaus Chilima, the first respondent in the matter before us, states, as it is-

> "*1. The Petitioner is the immediate past State Vice President of the Republic of Malawi and was the Presidential Candidate of UTM in the Tripartite Elections of 21 May, 2019 (The elections).*
>
> *2. UTM is a political party registered under the Political Parties (Registration and Regulation) Act (now repealed) on 21 September, 2018.*
>
> *3. The Respondent is a public institution established under section 75 of*
> 20 *the Constitution and section 7 of the Electoral Commission Act.*
>
> *4. On 27 May, 2019, the Respondent declared the following results of the elections:*
>
> *a) Lazarus McCarthy Chakwera 1, 781, 740 votes*

b) Saulos Klaus Chilima 1, 018, 369 votes

c) Arthur Peter Mutharika 1, 940, 709 votes

5. The Respondent proceeded to declare Arthur Peter Mutharika, who contested in the elections as a presidential candidate under the ticket of the Democratic Progressive Party, the winner of the presidential elections.

6. The elections were marred by a plethora of irregularity.

7. The count, audit, transmission of the results from polling stations to tallying centres, and the tallying of the aggregated vote at the Respondent's main tally centre in Blantyre, in the Republic of Malawi was replete with

10 *(a) Intimidation of election monitors;*

(b) Bribing of election monitors;

(c) Presiding officers and other staff of the Respondent influencing voters on the choice of candidates;

(d) Presiding officers and other staff of the Respondent tampering with tally sheets in order to alter the result of the vote at a particular polling station or tally center;

(e) Unauthorized persons being found with ballot papers and ballot boxes;

(f) Arrests of Persons, at various places in the said Republic, for
20 *offences relating to breach of the country's electoral law; and*

(g) Failure to deliver the ballot papers under conditions of absolute security.

8. There have been blatant cases of irregularity in all the twenty-eight (28) districts of the said Republic. These cases relate to both the Parliamentary and the Presidential Elections.

UNDERTAKING AS TO DAMAGES OR COSTS

9. The Petitioner states that he commits to bearing all the costs of the nullification of the Tripartite Elections in the event that the Court determines this Petition in favour of the Respondents.

THE PETITIONER PRAYS FOR

10.1 A Declaration that the elections are null and void ab initio

10 *10.2 An Order for costs for the Petitioner.*".

The Petition of Dr. Lazarus McCarthy Chakwera, the second respondent in the instant case, states, as it is:

"*This humble amended Petition of DR. LAZARUS MCCARTHY CHAKWERA showeth:*

A. THE PARTIES

1. THAT the Petitioner is a citizen of the Republic of Malawi and President of the Malawi Congress Party, a political party deemed to be duly registered in accordance with the Political Parties Act.

2. THAT the Petitioner was a presidential candidate, for Malawi
20 *Congress Party, in the tri-partite General Elections which were held on the 21st May 2019.*

3. THAT the Petitioner is entitled to bring the present petition directly to the High Court for a declaration in respect of the undue election or undue

return of the President of the Republic of Malawi in terms of Section 100 of the Parliamentary and Presidential Elections Act.

B. VOTER REGISTRATION

4. THAT the 2nd Respondent opened registration of voters for the Tripartite Elections for President, Members of Parliament and Councillors under a new registration system at various centres in the three districts of Dedza, Kasungu and Salima in the Central Region on 29th June 2018 designed for 14 days as determined by the 2nd Respondent.

5. THAT the 2nd Respondent planned that after Phase 1, the next phase of voter registration which would be Phase 2 would also take place in four Central Region districts of Nkhotakota, Ntchisi, Dowa and Mchinji, and that the third phase would also be in the Central Region, covering the remaining two districts of Lilongwe and Ntcheu.

10

6. THAT this way it meant that by the time voter registration starts in the other Regions of Malawi, the 2nd Respondent would know the number of people in the Central Region, which is a stronghold of the Malawi Congress Party, registered to vote.

7. THAT the Phase 2 of voter registration opened at various centres in the Central Region districts of Nkhotakota, Ntchisi, Dowa and Mchinji on 13th July 2018 for 14 days.

20

C. PROBLEMS WITH VOTER REGISTRATION

Technical Issues

8. THAT the registration process in both phases was marred by different challenges at the various centres in all these districts including

malfunctioning biometric voter registration machines, non-functioning solar panels partly due to cloudy weather because of the season and in some cases due to inherent defects of the solar panels, unavailability of fuel for generators and in some cases unavailability or late arrival of officials of the 2nd Respondent or of the National Registration Bureau. Some of these problems particularly those to do with malfunctioning machines, non – functioning solar panels and lack of fuel for generators forced the 2nd Respondent's officials in some centres to turn people away because no registration was taking place, or in some cases people left on their own upon seeing that no registration was taking place.

Civic Education

9. THAT the other major and common problem was lack of, or inadequate civic voter sensitization about the registration. This led to a low turnout because people were not aware of the need to register to vote as most people thought that National Identity Registration which they did previously with the National Registration Bureau qualified them to vote without having to specifically register again to vote. The duty to promote awareness among citizens of Malawi to register to vote is with the 2nd Respondent under Section 17 of the Parliamentary and Presidential Elections Act.

Concurrent Registrations

10. THAT furthermore whether by design or coincidence, there was also the problem of other registrations taking place simultaneously with voter registration. These were registrations for mosquito nets and registrations for fertilizers which had the potential of confusing people and dividing their attention.

Registration Period and Statutory Time Frames

11. THAT according to Section 29 of the Parliamentary and Presidential Elections Act, the period of 14 days for registration of voters which the 2nd Respondent set is only the minimum period since Section 29 provides that such period shall not be less than 14 days expiring not less than 21 days before the first polling day. This means the period may not be less than 14 days but it can be 14 days or more, so extension or re - opening of the registration centres affected by the irregularities or challenges stated above to beyond the previous 14 days would not be unlawful under the Parliamentary and 10 *Presidential Elections Act.*

12. THAT as a result of these challenges or problems, thousands of eligible and potential voters were excluded and thereby disenfranchised which is an infringement of their right to vote and make their own political choices.

COMPLAINTS AND RESPONSES OF THE COMMISSION

13. THAT these concerns or complaints were duly brought to the attention of the 2nd Respondent by the Malawi Congress Party both in writing on 5th July, 2018 and later verbally at a meeting with the Chairperson of the 2nd Respondent which was held in Blantyre on 12th July, 2018, but the 2nd Respondent has still not made any decision on the complaints and request to 20 *re- open or extend the registration. Instead it gave all indications that it was not prepared to re - open registration in these 7 pilot districts where these problems were experienced.*

14. THAT at the meeting of the National Elections Consultative Forum (NECOF) on 17th July 2018 between the 2nd Respondent and other

stakeholders, the 2nd Respondent maintained its attitude of not wanting to do anything about the problems reported to it by the Malawi Congress Party.

THE ADMINISTRATION OF THE PRESIDENTIAL ELECTIONS

15. THAT the Republic of Malawi is administratively divided into 28 districts and for election purposes:

15.1. each of the districts has a District Commissioner which is an office established under the Local Government Act and the person who occupies the said office is the head of the secretariat at every District Council.

15.2. the 2nd Respondent divided the geographical area of each district into
10 *electoral constituencies and there is a total of 193 constituencies in Malawi.*

16. THAT the electoral system in Malawi is organized in a pyramidal structure as follows:

16.1. at the bottom are the polling stations which are found within each constituency where the voting actually takes place;

16.2. in the middle are the Constituencies to which polling stations results are submitted at the Constituency Result Centres;

16.3. above the Constituency Centres come the Districts to which Constituency Results are submitted at the District Results Centre;

16.4. at the top is the National Tally Centre of the 2nd Respondent which for
20 *this election was housed in the city of Blantyre at Chichiri International Conference Centre also known as COMESA Hall.*

Unique Identification Codes

17. THAT unique bar codes and Centre numbers were allocated for:

17.1. each polling station;

17.2. ballot papers for each polling station;

17.3. constituency Centres and Constituency Result Sheets;

17.4. District Results Centres and District Result Sheets.

17.5. Each Constituency Result Centre was allocated a unique bar code and Constituency results Sheets generated at each Constituency Tally Centre bore the Centre's bar code

Compilation and Aggregation of Results

18. THAT the results for each polling station are aggregated into one
10
original Result Sheet which is signed by the Presiding Officer, who heads the polling station, and by leading election monitors from every political party participating in the elections.

19. THAT the original Result Sheet from each polling station is then physically taken by the Presiding Officer to the Constituency Tally Centre and each leading monitor from the participating political parties, is given a carbon copy of the original. Once the original Result Sheet has been submitted to the Presiding Officer heading the Constituency Tally Centre, the mandate of the officers at the polling station in relation to the Result Sheet terminates.

20. THAT the Constituency Tally Centre receives Results Sheets from all
20
the polling stations within the constituency and quantitatively aggregates the said results to form one original result sheet for that constituency. The Constituency Result Sheet is then signed by the Presiding Officer at the Constituency Tally Centre and also by election monitors from all political

parties, at the constituency level, taking part in the elections in confirmation of the results.

21. THAT a scanned copy of the original Constituency Result Sheet is then electronically sent to the National Tally Centre and the District Tally Centre simultaneously and the original Constituency Result Sheet is physically taken to the District Tally Centre by the Presiding officer.

22. THAT the District Constituency Tally Centre receives constituency results sheets for all the constituencies within the district and then, the results are quantitatively aggregated to produce an original District Results Sheet
10 *which is transmitted to the National Tally Centre both electronically and physically. Throughout the process is witnessed by the monitors from all participating political parties and the said monitors are supposed to be given a carbonated copy of the said original District Constituency Tally Centre.*

23. THAT at the National Tally Centre all the results from all District Result Sheets and Constituency Result Sheets for the whole country are quantitatively aggregated from which final results are derived and thereafter announced by the 2nd Respondent in accordance with the time periods prescribed by elections law.

24. THAT all genuine Result Tally Sheets must bear the bar code unique to
20 *each sheet.*

Defects in the Electoral Process.

25. THAT the 2nd Respondent did not conduct the electoral processes in accordance with the Constitution and the electoral laws in the following respects:

25.1. accepting and using duplicate Results Tally Sheets as a primary record of the votes polled in place of the original results tally sheets without any plausible justification whatsoever in clear disregard of its own procedure and acceptable international accounting standards.

25.2. accepting and using Results Tally Sheets defaced with a substance popularly known as Tippex as a record of the polled votes, in place of the original results tally sheets with no tippex on them, without any plausible justification whatsoever and in disregard of the acceptable set standards and international accounting standards.

25.3. accepting and using results recorded on fake results tally sheets without paying any particular regard to such anomalies like signatures of election monitors, barcode and center numbers.

25.4. altering, varying and transmitting submitted results in clear disregard of the altered figures recorded on the Results Tally Sheets.

25.5. failure to detect alterations and variations in terms of the votes recorded in the system and the corresponding results tally sheets, or not minding the same.

25.6. disregarding or transferring of missing votes into null and void without any verification whatsoever as to which presidential candidate the votes belonged to.

25.7. adopting, accepting and using results from a stream as representing the total results for a polling center.

25.8. accepting and using results tally sheets from centers where the total number of votes cast exceeded the total number of registered voters.

25.9. accepting and using results tally sheets from centers where the total number of the votes of the candidates is not balancing with the total number of the valid votes cast.

25.10. accepting and using results tally sheets from centers where the total sum of used and unused ballot papers is lower than the ballot papers issued.

25.11. delaying in transmitting results from particular areas in Salima, Dowa, Mchinji and Lilongwe and uploading the same after alterations.

25.12. Announcing the final Presidential Election results before results from some Polling Centres particularly from the Central Region had been
10 *uploaded into 2nd Respondent's system.*

25.13. not observing processes set by law, for example, by allowing delivery of ballot papers and other election materials without security contrary to the requirements of the law, which demands that such material should be delivered under conditions of absolute security against loss, tampering or interference.

25.14. Failure by the Presiding Officers to prepare a brief summary of the final result Record of the polling process and to furnish a copy of the duly signed summary of the final result at each polling station to each political party representative as provided for in the Parliamentary and Presidential
20 *Elections Act.*

26. THAT further to the above enumerated irregularities, the conduct of the 2nd Respondent in managing the elections was utterly unjust and unconscionable:

26.1. The 2nd Respondent's Presiding Officer for Mpatsa Tally Centre in Nsanje District was caught with three ballot boxes stuffed with already marked ballots in favour of the 1st Respondent. The Presiding Officer was arrested by the Malawi Police.

26.2. The 2nd Respondent's Chief Returning Officer for Nsanje Central Constituency, Mr. Fred N Thomas, was on 23rd May 2019 found tampering with Results Sheets, and this was still within the period for transmission of results.

26.3. The 2nd Respondent's Presiding Officers at some of the polling centers
10 *refused to furnish the Petitioner's monitors with copies of the tally sheets contrary to the 2nd Respondent's Polling Station Voting Procedure Manual, and Results Management System Processes outlined by the 2nd Respondent.*

26.4. The 2nd Respondent proceeded to announce the contaminated results without taking heed to appreciate the genuineness and the validity of the said results.

26.5. The 2nd Respondent proceeded to announce the said results without conducting a thorough audit and verification of the results and in disregard of the several complaints lodged by the 2nd Petitioner through Malawi Congress Party.

20 *27. THAT the 2nd Respondent has committed the following wrongs in the conduct, control and administration of the elections which amounts to a gross and unjustifiable dereliction of its constitutional duty under section 76 of the Constitution of the Republic of Malawi to ensure that the elections are carried out, in accordance with the provisions of the Constitution, the Electoral Commission Act and the Parliamentary and Presidential Elections Act:*

27.1. The 2nd Respondent has been generally negligent in its control and administration of the elections by failing to electronically collate, tally and transmit results accurately as required by law; failing to ensure that the relay of results from the polling stations was secure, accountable, accurate and verifiable; and failing to ensure that the result sheets were originals signed by the candidates' agents or monitors and if not that they indicated the reason for refusal to sign.

27.2. There has been massive tampering and irregularities in connection with the recording, counting, transmission and tabulation of votes during the said election which the 2nd Respondent was aware or ought to have been aware of if it had exercised reasonable care and professional diligence commensurate with its constitutional and statutory powers· and duties. Despite the said existence of the said tampering the 2nd Respondent went ahead to announce the results of the elections, including that the 2nd Respondent had been duly re-elected into the position of the President of the Republic of Malawi, without holding any or any sufficient audit to verify the election results.

27.3. The 2nd Respondent has acted and omitted to act in a manner which grossly and unjustifiably infringes on the 2nd Petitioner's and the citizens' political rights under section 40 of the Constitution and breaches the 2nd Respondent's constitutional duties under sections 76 and 77 of the Constitution

27.4. Further instead of responding to the said 2nd Petitioner's complaints and before addressing the problems highlighted by the 2nd Petitioner and without waiting for the remaining results from polling centres whose results

had not yet been uploaded into its system the 2nd Respondent proceeded to announce the final Presidential results.

27.5. the 2nd Respondent declared the 1st Respondent as duly elected President of the Republic of Malawi with 1,940, 709 votes representing 38.57% of the votes cast while the 2nd Petitioner was declared to have polled 1,781,740 votes representing 35.41 % of the total votes cast.

27.6. The 2nd Respondent failed and neglected to act with due diligence in the control, management and administration of the 21st May 2019 elections and failure to properly respond to the written communication urging it to address the complaints lodged and conduct an audit of the election amounted to biased conduct and gross and unjustifiable dereliction of its constitutional duties under Sections 76 and 77 of the Republic of Malawi Constitution.

27.7. All in all the 2nd Respondent showed great bias for the 1st Respondent and against the 2nd Petitioner thereby failing in its duty to act impartially as its position requires it to in the administration and management of an election.

28. THAT the irregularities mentioned herein affect the votes as follows:

28.1. Votes from Duplicate Tally Sheets

28.2. Result Tally Sheets defaced with "Tippex"

28.3. Counterfeit or Fake Tally Sheets

28.4. Tally Sheets with alterations

29. THAT from an analysis of results from 78 constituencies as at the date hereof the irregularities mentioned herein affected in excess of 1,412,105 votes as follows:

(a)	*Duplicate Tally Sheets. in excess of*	*523*
(b)	*Tippexed Tally Sheets in excess of*	*176*
(c)	*Counterfeit or Fake Tally Sheets in excess of*	*70*
(d)	*Tally Sheets Altered in excess of*	*634*

30. THAT from the time that the 2nd Petitioner was seen to be leading, votes that were cast for him were not being added to the tally of votes by officers of the 2nd Respondent. The effect of this was that his total result was not rising significantly whilst that of the 1st Respondent, who was lagging behind, was rising.

10 *31. THAT the 1st Respondent could not have been declared as duly elected as President of the Republic of Malawi had the 2nd Respondent acted with due diligence in the control, management and administration of the said elections.*

32. THAT the 2nd Respondent was in fact party to the rigging or tampering with the results of the election in that it acquiesced in the acts of its employees, servants or agents of altering and tippexing results recorded on tally sheets by accepting them as official results.

33. THAT thus, the 2nd Respondent unduly and unlawfully declared the 1st Respondent as having been elected as President of the Republic of Malawi.

20 *THE PURPOSE OF THE PETITION*

34. THAT the purpose of this Petition is to seek the reliefs set out in the "Reliefs" paragraph below and essentially the Petitioner challenges the purported exercise by the 2nd Respondent of its constitutional power to

announce and declare that the 1st Respondent had been elected into the position of President following the May 21, 2019 elections in light of the massive evidence of irregularities and gross negligence in the conduct, control and administration of the said elections by the 2nd Respondent.

RELIEFS SOUGHT:

35. WHEREFORE, the 2nd Petitioner respectfully prays for the following declarations, orders and reliefs:

35.1. A declaration that the failure by the 2nd Respondent to remedy the non-compliance, irregularities and improprieties in the conduct of the May 2019
10 *elections amounts to grave violation of Section 76 of the Constitution;*

35.2. An order and declaration that the 21st May 2019 Presidential Election was not conducted in accordance with the Constitution, the law and principles and procedures governing the conduct of free and fair elections, and the 2nd Respondent's own set procedure for the elections.

35.3. An order that the 1st Respondent was not duly elected as President of the Republic of Malawi as he did not truly obtain a majority of the votes polled;

35.4. An order and declaration that the 1st Respondent was not validly declared as the President of the Republic of Malawi and that the declaration
20 *is null and void;*

35.5. An order for the nullification of the May 21, 2019 Presidential Elections on account of substantial and significant irregularities which rendered the election no election at all

(a) A consequential order directing the 2nd Respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the Parliamentary and Presidential Elections Act.

35.6. Any Other Order that the Honourable Court may deem just and fit to; and

35.7. An order that costs of the Petition be for the 2nd Petitioner.".

The Referral by the Court below was-

"*(a) whether the [2nd] Respondent breached its duty under section 76 of the Constitution of the Republic of Malawi;*

10 *(b) whether the [2nd] Respondent breached its duty under section 77 of the Constitution of the Republic of Malawi; and*

(c) whether the [2nd] Respondent infringed on the Petitioners' and citizen's political rights under section 40 of the Constitution of the Republic of Malawi." (sic).

Powers of the Supreme Court of Appeal on appeal

The grounds of appeal are set out and are discussed later in this judgment. At this stage, it is important that we explain how we will deal with this appeal as an appellate court based on the principles of law and procedure that regulate our appellate jurisdiction.

The powers of this Court on appeal in civil matters are contained in section 22 (1) of the
20 Supreme Court of Appeal Act which, among others, states-

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

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

Order III rule 2 (1) of the Supreme Court of Appeal Rules provides that appeals to this Court shall be by way of rehearing. What this means has been discussed in a number of instances by our courts and beyond. The role of an appellate court is not to retry a case, but to determine whether there was a reviewable error made by the Court below or trial court. The nature of an alleged error will determine whether and how an appellate court is permitted to interfere with the trial court's decision. As to what, by way of rehearing connotes, was eloquently explained by this Court in ***Steve Chingwalu and DHL***
10 ***International v Redson Chabuka and Hastings Magwirani*** [2007] MLR 382 at 388 as follows-

"Finally, we bear in mind that an appeal to this Court is by way of rehearing which basically means that the appellate court considers the whole of the evidence given in the court below and the whole course of the trial; it is as a general rule, a rehearing on the documents including a record of the evidence. The case of ***Msemwe v City Motors Limited*** *15 MLR 302 is to that effect. In the case of* ***Coghlan v Cumberland*** *(1898) 1 Ch 704, cited by Counsel for the respondents, Lindsey MR, stated:*

'Even where... the appeal turns on a question of fact, the court has to
20 *bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge, with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.'".*

The common practice is that appellate courts interfere with decisions of trial courts on four types of errors: (i) error of law; (ii) error of fact; (iii) error of mixed fact and law; and (iv) error in exercising discretion.

On matters of law, an appellate court can reverse trial courts findings if the law was misapplied to the found facts. Questions of law are questions that deal with the scope, effect and application of a legal rule or test to be applied in determining the rights of the parties. These questions will be reviewed by appellate courts using the standard of review of "correctness". That is to say, a trial court's order must be correct in law. Where a legal error can be demonstrated by an appellant, the appellate court is at liberty
10 to replace the opinion of the trial judge with its own.

In contrast, questions of fact deal with what actually took place between the parties. These questions will call for the standard of review of "palpable and overriding error". This accords a high standard of deference towards findings of the trial judge. An appellate court may only intervene on a question of fact where the error is obvious and had an effect on the outcome of the case. Again it was put more appropriately in the ***Chingwalu*** case as follows at page 388-

> "*The position of the law regarding appeals involving issues of fact is that this Court is slow to interfere with findings of fact made by a tribunal properly mandated to make decisions on disputes of facts, unless there exists some*
> 20 *misdirection or misreception of evidence or unless the decisions are of such a nature that, having regard to the evidence, no reasonable man could make such a decision*".

In ***Kenya Airports Authority v Mitu-Belle Welfare Society and 2 Others*** [2016] eKLR, the Supreme Court of Kenya explained-

"In our consideration and determination of this appeal, we remind ourselves that there are issues of fact and points of law that have been argued before us. This Court, as an appellate court, will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judge has misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he/she should have taken into consideration and in doing so arrived at a wrong conclusion."

It is further instructive to look at the cases of ***Mlamwa v Kamwendo*** [1961-63] MLR 565; ***Chitakale Plantations Ltd v Mary Woodworth and Another*** [2010] MLR 61;
10 ***Mahommed v Leyland Motors Corporation*** (Mal) Ltd, [1990] MLR, 204; ***Limbe Leaf Tobacco v Chikwawa and others,*** [1996] MLR, 480. In ***Msemwe t/a Tayambanawo Transport v City Motors Ltd*** [1992] 15 MLR 302, at 307 this Court stated-

"This is an appeal from the decision of the High Court sitting as a Court of first instance. The jurisdiction of this Court is, therefore, to rehear the case. We have borne in mind that in the course of rehearing the case, this Court is entitled to interfere with the findings of fact made by the trial judge in the event that such findings are disputed, provided always that the advantage which the trial court had in seeing the witnesses testifying before it and assessing their general demeanor and credibility, is fully appreciated".

20 Questions of mixed fact and law involve the application of a set of facts to a legal standard or principle. It requires a trial judge to determine the appropriate standard, which is a question of law, and apply the particular facts of the case to that legal standard. The appropriate standard of review for questions of mixed fact and law falls somewhere on a sliding scale between correctness on one end and palpable and overriding error on the other.

Lastly, on the role of appellate courts in matters involving the exercise of discretion by courts below ***R. P. Keran***, in his book '***Standards of Review Employed by Appellate Courts***' (Edmonton: Juriliber Limited,1994) at 124-126, explains-

> "*One can lump the "discretion" cases roughly into two sub-groups: the first are those cases involving the management of the trial and the pre-trial process; the second are those where the rule of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them.*".

Appellate courts are most likely reluctant to interfere with the exercise of a trial judge's
10 discretion. Generally, appellate courts will only interfere with a trial court's exercise of discretion where the trial judge has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. Thus, in ***Witkamp v Sittig*** [1971-72] MLR, 246 at 248, this Court stated-

> "*A court of appeal will not interfere with an order of a judge in chambers setting aside a judgment and imposing terms in his discretion, unless it is clear that he has exercised his discretion wrongly in principle. ...*".

A similar position was held in ***Willy Kamoto v Limbe Leaf Tobacco Company Limited*** [2010] MLR 467 at 470, where this Court remarked -

> "*It is here that the court's discretion becomes critical; but that could not mean*
> 20 *a court must be pin point accurate in measuring the amount of compensation. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of compensation. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below*".

Furthermore, in ***Kamwamba v JM Njala and Sons*** [1971-72] MLR 75 the Court explained, very simply, that an appellate court will be slow to interfere with a trial judge's exercise of a judicial discretion but it will not hesitate to do so where the order made causes injustice to one or both parties.

In the case before us, the issues that the Court below was called upon to determine cut across considerations of law, facts, and mixed facts and law. The Court was also called upon to exercise its discretion on some issues. All the principles that we discuss above will therefore avail us in our determination of the appeal.

It is also appropriate at this stage to remind ourselves that in the final determination of
10 the case, the Court below found, at the helm of its findings, that there was an undue return and undue election. The Court proceeded to nullify the Presidential election, and ordered a fresh election. In the judgment of the Court at paragraph 1479-

> "*In view of the findings that we have made above, we are satisfied that the Petitioners' complaints in their petitions, alleging an undue return and undue election during the said elections, have been made out both qualitatively and quantitatively. Consequently, in terms of section 100 (4) of the PPEA, we hold that the 1st Respondent was not duly elected as President of the Republic of Malawi during the 21st May, 2019 elections. In the result, we hereby order the nullification of the said presidential elections. We further order that a*
20 *fresh election to the office of the President be held in accordance with the PPEA and pursuant to the consequential directions that we make hereunder.*"

The appeal before us materially turns on the findings above, among other grounds that we will consider necessary to deal with, in our disposal of the matter. We are also mindful that the Court below made a number of consequential orders that are being questioned in this appeal. We will deal with those issues as well.

Going back to the petitions, from the way they were drawn, especially that of the second petitioner, the whole electoral process was put in question. However, at the hearing in the Court below the matter proceeded only in relation to events from the polling day to the determination of the results of the election. This development would surely have a bearing on the orders that the Court below was to make. We will get back to this point later in our judgment.

The burden and standard of proof in election cases

We have earlier underscored the significance and paramountcy of an election in a constitutional democracy. As we consider the burden of proof and the related standard
10 of proof in an election challenge, we should highlight the fact that elections are perhaps the most visible, eventful and concrete expression of democracy in a democratic society. For that reason, a case challenging an election cannot be an ordinary venture. More so, a case challenging the election of a President. It challenges the very core of any representative democratic system.

We must also acknowledge, as the Court below did, that conducting an election is a complicated and intricate process. It is an extremely demanding exercise. Elections are not a mere spectacle or just another game with rules. The contestants to an election might be few, but the game players are usually in their millions and from all walks of life from the society in question. Elections are, unfortunately, characterized by misunderstandings
20 and emotions; sometimes extreme reactions throughout the process. Such occurrences will manifest more in presidential elections. In ***Tsvangirai v Mugabe and Others*** CCZ 20/17 at pp. 24-26 of the cyclostyled judgment, the court remarked-

> "*Every constitutional democracy sets great value on the office of President in the distribution of the powers of the State. By the Constitution, the people in the exercise of their sovereign authority designated the office of President as*

one of the most important offices. They assigned to the office of the President powers by the lawful exercise of which they committed themselves to be governed in accordance with the conditions they prescribed. An election of a President is therefore a central institution for securing democratic self-government. By the election, the people choose the person who will exercise the powers of self-government for their benefit ....

An election of a President in Zimbabwe is a popular affair, in that every citizen registered on a voters roll at ward and constituency level countrywide is eligible to vote for a President. ... Once chosen in a free, fair and credible election, a President assumes an office with enormous powers which he or she is required to exercise in accordance with the Constitution or any other law.

....

An election of a President is bound to generate profound public interest, not necessarily measured by the number of votes cast in the election. Stakes are very high and political tensions may rise to levels that threaten public order and national security.".

For these reasons and more, it is generally acknowledged that it would not be realistic to expect electoral commissions to get every aspect of an election right. As long as the election was conducted substantially in terms of a Constitution and all the governing laws, it would have reflected the will of the people (see: ***George Mike Wanjoni v Steven Kariuk and Two Others*** Petition No. 2A of [2014] KLR (Supreme Court of Kenya) and ***Nana Addo Dankwa Akufo Addo and Two Others v John Dramani Mahama and Two Others,*** Writ No. J1/6/2013 (Supreme Court of Ghana).

An election result is therefore not lightly nullified both as a matter of principle and in recognition of practical realities. It should not be for the courts to decide elections; it is

the electorate that should do so. Generally, therefore, the duty of the courts is to strive, in the public interest, to sustain that which the people have expressed as their will.

However, in a constitutional democracy, nothing perches itself above and beyond legal scrutiny, judicial review and such other relevant processes that are intended to ensure the supremacy of the very constitutions and laws upon which democratic values are affirmed. Thus, while aiming at protecting the sanctity of an election, it might become compelling that society be protected from what might be a semblance of an election. This will require a fine and yet delicate balance in protecting the ballot cast by the voter, the interest of the aggrieved candidates and those that they represent, as well as the
10 integrity of the electoral system. It is precisely on account of all these considerations that election petitions are *sui generis* in nature and further that the usual questions about the burden of proof and the standard of proof are suddenly not easy to answer. This became evident as we searched around for clues on the subject from jurisdictions around and beyond.

Before we attempt to answer who has the burden of proof and what the standard of proof is, it might be relevant that we comment on the scheme of our electoral process. From sections 75 and 76 of the Constitution, section 8 of the Electoral Commission Act and several sections of the Parliamentary and Presidential Elections Act that we would have cared to cite, what is evident is that the primary duty to conduct elections that are in full
20 compliance with the law, elections that are ultimately free, fair and credible, is on the Commission.

Section 17 of the Parliamentary and Presidential Elections Act places a duty on the Commission to promote awareness among the citizens of Malawi on the need to register as a voter for the purpose of an election and the need for their full participation in the election. Under section 67 of the Act, the Commission shall establish polling stations

throughout the Republic. Sections 70, 76, 78 of the Act require the Commission to ensure the acquisition of sufficient material, including ballot papers and ballot boxes, in readiness for an election. In between, the Act has provisions that regulate the voting process and maintenance of a proper record of the election. We will refer to these provisions later when they become specifically relevant. Ultimately, section 119 of the Act provides that at the end of its functions, the Commission shall deposit all documents forming the official record of an election with the Clerk of Parliament.

The role of political parties is also defined in several sections of the Parliamentary and Presidential Elections Act. Section 27 of the Act provides for the right, through

10 designated representatives, to monitor the registration of voters. Section 28 of the Act places a duty on the party representatives to avoid unjustified interference with the registration process and to refrain from submitting complaints, in bad faith, with the purpose of paralyzing the registration process. Under section 73 of the Act the duty of political party representatives is the same, that is, to act conscientiously, objectively and co-operate with the polling station officers and refrain from interfering unjustifiably and in bad faith, with the duties of the polling station staff and to maintain secrecy of the ballot.

We refer to all these provisions of the Constitution, the Electoral Commission Act and the Parliamentary and Presidential Elections Act, for the purpose of confirming that the

20 primary duty to conduct and manage elections is on the Commission. It is also to demonstrate that it is the Commission that has custody and control of all the official material that has been generated in the course of conducting the election. We think that these factors should have a bearing on questions of burden of proof and the standard of proof in elections litigation in our jurisdiction.

The principle that runs across most civil as well as criminal litigation is that he who alleges must prove. Conventionally, in electoral petitions, the burden of proof is on the one alleging irregularities, to establish how the irregularities affected the integrity of the elections or the outcome. Looking at cases from a number of jurisdictions, though not in the clearest of terms, there seems to be acceptance that the petitioner bears the burden of proof, see, among them, the decisions of the Supreme Court of Uganda in ***Amama Mbabazi v Yoweri Kaguta Museveni and Two Others***, Presidential Petition No. 01/2016; (2016) UGSC 3; of the Constitutional Court of Zimbabwe in ***Chamisa v Mnangagwa and Twenty Four Others*** CCZ 42/18; of the Supreme Court of Nigeria in
10 ***Abubakar v Yar'adua*** [2009] ALL F WLR (PT. 457) ISC; of the Supreme Court of Kenya in ***Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others***, (Petitions 5,3 and 4 of 2013) [2013] e KLR; ***Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Two Others***, Presidential Petition No. 1 of 2017 [2017] e KLR, and, finally, of the Supreme Court of Canada in ***Opitz v Wrzesnewskyj*** 2012 SCC55.

In ***Amama Mbabazi v Yoweri Kaguta Museveni and Two Others,*** (supra) at page 6 the Supreme Court of Uganda said-

> *"An electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner to place credible evidence before the*
> 20 *Court which will satisfy the Court that the allegations made by the petitioner are true. The burden is on the petitioner to prove ... non-compliance with election law but also that the non-compliance affected the result of the election in a substantial manner. Once credible evidence is brought before the court, the burden shifts to the respondent and it becomes the respondent's responsibility to show either that there was no failure to comply with the law*

or if there was any non-compliance, whether that non-compliance was not so substantial as to result in the nullification of the election".

The Supreme Court of Kenya, in ***Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others*** (supra) adopted a similar principle and said at paragraphs 195 and 196-

"*There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which*
10 *he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.*

We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary".

At this stage reference to Malawian cases on this topic becomes important. We will look
20 at three election cases that have been before this Court. In the case of ***Gondwe and Another v Gotani-Nyahara*** [2005] MLR 121 (SCA) at p. 131 the Court stated that-

"*The burden would be on the respondent as petitioner to establish that the alleged irregularity affected the election result, especially, as happened in this case the irregularity could not be blamed on the 1st appellant. That burden has not been discharged by the respondent…*".

From the above statement, it is clear that the Court recognized that primarily the burden of proof lies on the petitioner. However, the Court indicated that to discharge the burden the petitioner must give evidence that will "establish" the petition. No mention was made about whether or not the burden of proof then shifts.

In ***Electoral Commission and Another v Mkandawire*** [2011] MLR 47 this Court again pointed out that it is the petitioner who bears the initial burden of proving the petition, before it can be considered that the burden has shifted to the respondent. This Court at page 54 said-

> "*It was up to the respondent to establish what is wrong with voting at a polling station where the person voting is not registered. The respondent would probably allege, for example, that the persons did not have registration certificates or proper voter transfer and proceed to prove the allegation. The respondent appears to take the position that it is for the 1st appellant to prove on a balance of probabilities that the 300 persons had proper voter transfers. That is not the way to prove your case in court. You do not just allege and the other party is compelled to prove its innoce*nce."

It becomes clear from a complete reading of this case that in ***Electoral Commission and Another v Mkandawire*** (supra) this Court heavily relied on the authority of ***Gondwe and Another v Gotani-Nyahara*** (supra). The Court, in addition, made the point that a petitioner must first establish his allegation before he can expect the respondent to assume any burden to answer back or explain itself.

The case of ***Bentley Namasasu v Ulemu Msungama and The Electoral Commission*** MSCA Civil Appeal No. 8 of 2016 (SCA) (unreported) also discussed this subject. It confirmed the position that the petitioner bears the initial burden of proof. It then made it very clear that the moment the petitioner gives ample evidence in support of his

grievance, the burden of proof definitely shifts to the respondent to give an explanation in answer.

From the foreign jurisdiction cases and the Malawi cases we have referred to, what is commonly agreed is that in election cases a petitioner must bear the initial burden to support his petition with evidence.

As to the standard of proof, courts have not used consistent terms. The ***Amama Mbabazi v Yoweri Kaguta Museveni*** (supra) case talks about the petitioner presenting credible evidence before the burden of proof shifts to the respondent. The ***Raila Odinga and Five Others v Independent Electoral and Boundaries Commission and Three Others***, (supra) case talks about the burden of proof shifting to the respondent depending upon how effectively the petitioner discharges his burden, while the ***Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and Two Others*** (supra) advocates a balance of probabilities test. Also, as seen, the Malawian cases of ***Gondwe and Another v Gotani-Nyahara*** (supra) and ***Electoral Commission and Another v Mkandawire*** (supra) talk about the petitioner establishing his petition by way of discharging that burden, but they do not indicate whether the level of proof required is merely that of a *prima facie* case or on a balance of probabilities. In ***Bentley Namasasu v Ulemu Msungama and The Electoral Commission*** (supra), we notice that well apart from definitively confirming the shifting of the burden of proof, more attention was placed on what is expected of the respondent once the burden has so shifted.

It appears to us that much as it must be acknowledged that conducting and managing elections is a difficult exercise and that minor infractions in compliance with the requirements of the law cannot be ruled out, sight should not be lost that in Malawi both the Constitution and electoral statutes demand strict compliance. We need also to bear in mind that elections touch on people's human rights as section 40 of the Constitution

will serve to demonstrate. Setting the standard too high for a petitioner to substantiate his grievance in such a matter might well impinge on the average Malawian's right to access justice when his constitutionally based rights have been violated.

We are aware that there are jurisdictions where the position of law is that the petitioner must prove his case on a balance of probabilities before the burden of proof shifts to the respondent. The Supreme Court of Kenya in ***Odinga and Anor v Independent Electoral and Boundaries Commission and Others,*** (supra) at para 148 advanced the following standard-

> "*The purpose of election laws is to obtain a correct expression of the will of the voters. Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reason of their sui generis nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions.*"

Whereas other jurisdictions might advocate different levels of standard of proof, in our considered view, having particular regard to how our Constitution views and guards the human rights of the people (see: section 44 of the Constitution), and further bearing in mind the heavy duties both the Constitution and electoral statutes place on the Commission, we do not believe that it could have been the scheme of the law to saddle a petitioner with an onerous burden of proof in the discharge of the initial burden of

proof. In our view, to the extent that the three Supreme Court of Appeal cases, namely, ***Gondwe and Another v Gotani-Nyahara*** (supra) and ***Electoral Commission and Another v Mkandawire*** (supra) and ***Bentley Namasasu v Ulemu Msungama and The Electoral Commission*** (supra) did not come out clear on the issue of the burden and standard of proof, our position is that the petitioner should discharge this initial burden of proof with a *prima facie* standard of proof, before the burden shifts to the Commission as a duty bearer. Once the burden so shifts, owing to the powers, functions, and duties the Constitution and the electoral statutes have conferred on the Commission, the Commission must discharge the burden of proof in rebuttal of the petitioner's allegations
10 on a balance of probabilities.

Grounds of Appeal

The formulation of grounds of appeal for determination by this Court is governed by Order III rule 2 of Supreme Court of Appeal Rules which provides as follows-

> "2. (1) *All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the Registry of the Court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought... ...*
>
> 20 (2) *If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.*
>
> (3) *The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without argument or narrative and shall be numbered consecutively.*

> *(4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent. ... ...*".

In ***Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd*** MSCA Civil Appeal No. 6 of 2013 (unreported), this Court emphasized that grounds of appeal must conform to the requirements of Order III rule 2 of Supreme Court of Appeal Rules. The Rules require that the grounds must be precise and concise; they must not be argumentative; and that
10 the grounds of appeal must state clearly whether they are based on law or fact, so that this Court and the other party (or parties) to the proceedings are able to appreciate precisely what the appellant is appealing against. This Court also emphasized that grounds of appeal that do not comply with Order III rule 2 of Supreme Court of Appeal Rules may be struck out by the Court on its own motion or on application by a respondent in the proceedings.

The first appellant's grounds of appeal can easily be categorized as those that are for his own appeal and those that have been raised on behalf of the second appellant. Grounds 1, 2, 3, 4, 5, 15 and 16 in the first appellant's notice of appeal relate to the first appellant's own appeal, while grounds 6 to 14 and 17 relate to the second appellant's appeal.
20 Grounds 14, 15 and 16 are argumentative. It is not competent for a party in a case to appeal on behalf of another party. Such a practice would be strange and unknown to law.

We notice though that the issues in the grounds of appeal that the first appellant raises, which relate to the second appellant, are also raised by the second appellant in its grounds of appeal. We will, therefore, deal with those issues as raised in the second appellant's grounds of appeal.

The second appellant filed 132 grounds of appeal, 15 of which are on pleadings, and many of these grounds of appeal are repetitive and argumentative. Some of the grounds split a point. Some of them are extremely confrontational and they make unwarranted and baseless allegations, including allegations of bias, against the Court below. Allegations of bias, especially against a court, should not be lightly made, but must be based on concrete and provable evidence. The second appellant did not point to any evidence of bias; on the contrary the record shows that the Court below bent backwards to accommodate the second appellant. We have to say some of the grounds were not just fictitious, but clearly unprofessional and distasteful. We have struggled to make sense
10 out of the grounds of appeal in the second appellant's notice of appeal. We have found them to be unnecessarily numerous, convoluted and embarrassing.

These numerous grounds of appeal go against the overriding objective of the rules which, inter alia, is aimed at saving expenses for the parties; ensuring that parties are on an equal footing; and saving time spent on the hearing and determination of the appeal. These grounds would not pass the test in the ***Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd*** (supra).

Although, the first respondent, in his skeleton arguments, raised issue with the second appellant's grounds of appeal, no notice of preliminary objection was filed and the matter was not pursued. Furthermore, although this Court has power to strike out the grounds
20 which do not comply with the rules and the test set out in ***Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd*** (supra), we have resisted taking that route principally because it would have technically terminated the second appellant's appeal. That in turn would have deprived this Court the opportunity to consider and determine crucial and important constitutional issues in the matter before us. We thought it imperative that the far reaching issues in this case be disposed of on merits rather than on a technicality. In this

regard the case ***Longwe and Others v Attorney General*** [1993] 16 (1) MLR 256 is instructive. In that case the Court at 262 stated-

> "... *The application affects a matter of great national importance. It concerns the freedom and right of an individual to participate in effecting peaceful change in the political system of this country. The decision of such application must, in my view, depend on the substance and merits of the application, and not on a procedural technicality. The notice of motion clearly shows that the applicants seek, among other things, an order for a declaration. The affidavits in support of the application also show that the applicant seeks the order. The*
> 10 *respondent cannot complain that the granting of such order would take them by surprise.*".

The issues for determination on appeal

There were two broad questions before the Court below. On the one hand was the question whether or not the first appellant was duly elected or returned. On the other were the three constitutional questions set out by the High Court and duly certified by the Honorable the Chief Justice. The Court below answered the first question in the negative. The Court below also found that the second Appellant's conduct amounted to a breach of sections 40 (3), 76 and 77 (5) of the Constitution as a consequence of which various orders/directions were made.

20 Having appealed to this Court we are of the view that the issues are much the same. We will therefore decide on whether the second appellant's conduct amounted to a breach of the Constitutional sections set out above and secondly whether the first appellant's return/election was due or not.

In determining these broad issues, this Court will have regard to the following specific questions-

(a) whether or not the Court below erred to find that there were irregularities, and in any case, such irregularities could not have changed the results;

(b) whether or not the Court below erred to find that the proper interpretation of majority is 50% + 1 votes of the voters who voted in the election;

(c) whether or not the Court below erred to find that the Commission could not delegate its functions; and

(d) whether or not the Court below erred to order that the Attorney General should not have represented and should no longer represent the
10 Commission.

Depending on whether we will agree or disagree with the Court below we shall have occasion to examine, for propriety, the consequential orders made by the Court below.

Evidence in the Court below

As discussed earlier in this judgment, the general principle is that appeals in this Court proceed by way of rehearing as guided by the grounds of appeal (see: Order III rule 2 of the Supreme Court of Appeal Rules). We will proceed likewise in this case.

Evidence in the Court below was by affidavit. The Court below however had a chance to observe the witnesses as they were examined. This Court, on the other hand, only went by the record of such testimony. As a matter of general principle, therefore, this Court,
20 like all appellate courts, should be slow to depart from findings of fact by a trial court unless on a proper consideration of the case it is clear that the factual conclusion arrived at by the trial court is untenable or clearly perverse.

In this appeal the appellants raised issues about the evidence and conclusions the Court below arrived at. We will not for now go into the details of the evidence. We will instead

only make reference to specific pieces of evidences when, and if necessary, to decide and determine a specific issue.

The appellants contended that the Court below erred in concluding that there was use of tippex, use of altered tally sheets, use of "duplicate" tally sheets, use of fake tally sheets, use of uncustomised tally sheet, use of reserve tally sheets and failure by presiding officers to sign tally sheets. They further contended that even if such use and failure were proven, which they denied, it was not tantamount to irregularities as defined in the Parliamentary and Presidential Elections Act.

Is there reason on the facts or evidence to depart from the findings of the Court below on the use of tippex, altered tally sheets, duplicate tally sheets, fake tally sheets, uncustomised tally sheets, reserve tally sheets and failure by the presiding officers to sign off the tally sheets? The answer is in the negative. This was not denied in the evidence of Messrs. Munkhondia, Malunga Phiri and Alufandika and several presiding officers called by the second appellant. The question, therefore, is whether such use of tally sheets or failure to sign amounts an irregularity or irregularities?

An irregularity is defined in section 3 of the Parliamentary and Presidential Elections Act as, in relation to elections, non-compliance with the Act. Meaning that the question now is whether the instances spoken of above amount individually or cumulatively to noncompliance.

We have looked at the alleged irregularities from three perspectives. First are documents whose contents were altered by either the use of tippex, a manual crossing out of the original content or overwriting on the original document. Then there are those that have introduced completely new documents. In other words, documents that were never at all submitted by the polling station. Examples are the duplicate, fake, reserve and uncustomised documents. The third category are the unsigned documents. These are also

a new class of documents in that all election documents are supposed to be signed off. To the extent, therefore, that they were not signed off they are new documents.

We agree with the Court below that there is no authority for any person or officer to alter electoral documents. Similarly, the law does not allow for results to be determined by resorting to documents other than those that were submitted by the polling stations. Nor to using documents that were not signed. To illustrate this point, we will set out the results determination process from the polling stations up to the National Tally Centre as provided for in the Parliamentary and Presidential Election Act.

Determination of results of the election

10 ***Unused ballot papers***

Section 90 of the Act deals with unused ballot papers and states -

> "*At the close of the poll at any polling station, the presiding officer shall proceed by first collecting together and separately all unused ballot papers and placing them in a separate envelope provided to him for the purpose and then sealing the envelope and initialing or stamping it over the sealed area.*".

It should be clear that unused ballot papers are vulnerable to abuse by ballot box stuffing or ballot stuffing or substitution during counting. The risk is eliminated once these documents have been safely stored away under seal.

Classification of votes cast

20 Section 91 of the Act deals with classification of votes cast and states-

> "*For the purposes of determining the results of the election at a polling station and, in particular, in counting the votes thereat, the votes cast at a polling station shall be separately classified into-*

(a) null and void votes;

(b) votes for each of the candidates for election as members of Parliament;

(c) votes for each of the candidates for election to the office of the President.".

Opening of ballot box and counting of votes

Section 92 of the Act deals with opening of ballot boxes and counting of votes and states-

"*After the close of the poll at any polling station, and only thereafter, the presiding officer shall, in the presence of other polling station officers and*
10 *representatives of political parties, if any be present, open the ballot box and order the counting of votes to proceed separately according to a procedure entailing the polling station officers-*

(a) picking out of the ballot box one paper and displaying the ballot paper to all present and announcing aloud the classification of the vote as specified in section 91;

(b) recording on a sheet of paper provided to the polling station officers for that purpose, showing the classification of votes, the votes cast for each classification;

20

(c) displaying the already announced ballot papers and separating them into lots corresponding to each classification; and

(d) announcing, through the presiding officer, the number of votes cast at the polling station under each classification.".

The process described in this section is very clear. The polling station staff must be provided with paper on which to record the classification and counting of votes cast. After opening the ballot boxes, votes cast are identified according to the classification in section 91, collectively, by the presiding officers, other polling station officers and political party representatives. The initial count separates null and void votes from valid votes. The second count under paragraph (c) separates the votes cast into separate lots corresponding to each classification. Again this is done collectively. The last process is announcing the number of votes cast and their classification. The section provides that the votes should be counted at least twice. Furthermore, it is open to count the votes
10 more than twice.

What should at all times be borne in mind is that the process of counting votes is done on special paper provided for that purpose under section 92 (b) of the Parliamentary and Presidential Election Act. It goes without saying that the counting and classification of votes will stop when all are satisfied that the count is correct. After sealing the ballot boxes according to the classifications in section 91 of the Act, as provided for in section 92 (b) of the Act, the presiding officer and the other polling officers proceed to record the polling station results.

This process enables the Commission, at the National Tally Centre, to carry out its mandatory responsibility of examining all null and void votes without disturbing the
20 classification of the votes for each polling station as provided for in section 97 of the Act.

Record of the polling process

The process to be adopted after polling is in section 93 of the Parliamentary and Presidential Elections Act which states-

"(1) The presiding officer shall cause to be prepared by the polling station staff-

(a) a record of the entire polling process at his polling station containing-

(i) the full particulars of the polling station staff and the representatives of political parties;

(ii) the total number of voters;

(iii) the total number of votes for or under each classification of votes;

10

(iv) the number of unused ballot papers;

(v) the number of ballot papers which have been the subject of complaints, if any;

(vi) the discrepancies, if any, between the votes counted and the number of votes;

(vii) the number of complaints and the responses thereto, and the decision taken thereon by the polling station officers;

(viii) any other occurrence which the polling station officers consider to be important to record; and

(b) a summary of the final result,

20

and such record and summary shall be legibly signed by the presiding officer and each of the other polling station officers and, if any be present, at least one representative of each political party.

(2) Representatives of political parties at a polling station shall be entitled to a copy of the duly signed summary of the final result of the poll at the polling station.

(3) The presiding officer shall post at the polling station a copy of the duly signed summary of the final result of the poll at that polling station".

According to section 68 (2) of the Parliamentary and Presidential Elections Act the Commission must post to each polling station a minimum of five officers one of whom will be designated as presiding officer. The presiding officer will cause the polling station record to be compiled by him and his officers in accordance with section 93 (1) of the Act. At this point in time counting is finished and ballot boxes have been sealed. The record should, among other things indicate discrepancies, if any, between votes counted and number of voters, complaints and responses thereto and any occurrence of
10 significance worth recording: section 93 (1) (a) (vi), (vii) and (viii) of the Act, respectively, and a brief summary of the results. This record will be signed by the presiding officer who caused it to be prepared, other polling station officers and political party representatives if any be present. Political party representatives are entitled to a copy of the record.

Delivery of ballot papers, etc.; from polling station to office of District Commissioner

Section 94 of the Parliamentary and Presidential Elections Act deals with the delivery to the office of the District Commissioner, under conditions of absolute security against loss, tampering or interference, of ballot papers and other election materials.

"(a) the record prepared under section 93;

20 *(b) all ballot paper collected in separate lots corresponding to the classification under which they were counted;*

(c) all unused ballot papers; and

(d) all voters registers and other work items provided to that polling station.".

This section is critical in the process of result determination. The presiding officer must ensure that unused ballot papers, null and void votes, ballot papers(votes) cast for each candidate are in separate boxes and all the work items including the record sheets issued for purposes of counting the vote under section 92 (3) of the Act are secured against loss, tampering, or interference and delivered to the returning officer or the District Commissioner.

Compilation of district results

Section 95 of the Act states-

"*(1) On receipt of the records from polling stations, the Returning officer or*
10 *an officer of the Commission duly authorized in that behalf shall, at the office of the District Commissioner, compile the result of the election in his district on the basis of duly signed summaries received with such records and shall prepare, on appropriate sheets in the prescribed form provided by the Commission, a record in respect of each constituency in the district and also in respect of the entire district showing-*

(a) the total number of persons who registered as voters;

(b) the total number of persons who voted;

(c) the total number of votes for or under each classification of votes in accordance with section 91;

20 *(d) the discrepancies, if any, between the votes counted and the number of persons who voted; and*

(e) the complaints, if any, received by him and his decision thereon

(2) Representatives of political parties duly designated for that purpose shall be entitled to observe the entire procedure followed at the office of the

District Commissioner in compiling the district result of the elections under subsection (1).

(3) The record prepared under subsection (1) shall be legibly signed by the returning officer or other officer supervising the compilation thereof and, if any be present, by at least one representative of a political party which shall in addition, be entitled to receive a copy of the record.

(4) The returning officer or an officer of the Commission duly authorized in that behalf shall publicly announce the result of the election in each constituency and in the entire district in accordance with the record prepared
10 *under subsection (1).*

(5) The returning officer or an officer of the Commission duly authorized in that behalf shall, with all dispatch, deliver to the Chief Elections Officer under conditions of absolute security against loss, tampering or interference-

(a) the record prepared under subsection (1); and

(b) all items received from all the polling stations in the district concerned".

The returning officer will compile the results of each constituency and the whole district based on the submissions and records from the polling stations. The returning officer will then prepare a record which shall contain discrepancies, if any, between votes
20 counted and number of persons who voted and complaints, if any, received and the decision thereon. Political party representatives are entitled to observe the process and to receive a copy of the record.

Thereafter the records he received are sealed and results are announced. The returning officer must deliver the records that he or she has compiled and all the items received

from the polling stations under conditions of absolute security against loss, tampering or interference, to the Chief Elections Officer at the National Tally Centre.

Determination of the national result

Section 96 of the Act deals with the determination of the national results of a general election and states-

> "*(1) The Commission shall determine and publish the national result of a general election based on the records delivered to it from the districts and polling stations.*
>
> 10 *(2) The determination of the national result of a general election shall begin immediately after the Commission has received records from all the districts and shall, subject only to subsection (3), continue uninterrupted until concluded.*
>
> *(3) If a record from any district or other element necessary for the continuation and conclusion of the determination of the national result of the election is missing, the Chairman of the Commission shall take necessary steps to rectify the situation and may, in such case, suspend the determination for a period not exceeding seventy-two hours.*
>
> 20
>
> *(4) Representatives of political parties designated in writing to the Commission shall be entitled to observe the determination of the national result of the election.*

> *(5) Subject to this Act, in any election the candidate who has obtained a majority of votes at the poll shall declared by the Commission to have been duly elected".*

Before the Commission begins to determine the national result, in accordance with section 96 of the Act, it must comply with section 97 of the Act. The Commission must take a decision on any matter that was subject to a complaint and examine all votes classified as null and void which it may confirm or correct. This entails an examination of the records of the polling station and of the returning officers at the office of the
10 District Commissioner. This confirms the position taken by the Court below, which we hereby confirm, that the final authority to determine all electoral complaints rests in the Commission and no other person. It also confirms that no one, not even the Commission, has the authority to alter electoral records as recorded at the polling station or by returning officers. The decision of the Commission under section 97 of the Act is without prejudice to the right to appeal under section 114 of the Act.

Analysis of complaints, etc; prior to determination of the national result- resolution of complaints

Section 97 of the Act requires that-

> *"At the beginning of the of determination of the national result of a general*
> 20 *election, the Commission shall take a decision on any matter which has been a subject of a complaint and shall examine the votes which have been classified as null and void, and may confirm or correct the determination thereof at the polling stations and at the offices of District Commissioners, but without prejudice to the right of appeal conferred by section 114."*

Records of the national result of a general election

Section 98 of the Act requires that-

> "*The Commission shall summarize its determination of the national result of a general election in a written record indicating-*
>
> > *(a) the national result of the election as determined;*
> >
> > *(b) the complaints and responses thereto and the decisions taken on them,*
>
> *and the Chairman of the Commission shall legibly seal the national result of the election by signing the summary and every political party shall be entitled*
10 *to receive a signed copy of the summary*".

Publication of national result

Section 99 of the Act deals with the publication of the national result of elections and states-

> "*The Commission shall publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national result of an election within eight days from the last polling day and not later than forty - eight hours from the conclusion of the determination thereof and shall, in such publication, specify-*
>
> > *(a) the total number of voters registered for the election;*
> >
> 20 *(b) the total number of voters who voted;*
> >
> > *(c) the total number of null and void votes; and*
> >
> > *(d) the total number of valid votes cast for each classification of votes as specified in section 91.*"

Although the summary of the determination of the national result of a general election is prepared by the Commission, the national result is signed off and sealed by the Chairperson. The national result must indicate all complaints recorded in relation to the elections, the responses thereto and any decisions taken about them. A copy of the results is thereafter then made available to each political party as of right. It is at this juncture, and only then, that the national results should be published.

It is important that a record of the results indicating the complaints received, the responses thereto and decisions taken on them and copies of the results are distributed to political parties. This safeguards the right of the parties, under section 97 of the Act,

10 to appeal. It is in cognizance of the fact that a candidate's right and remedies under the Act change on the publication of the national result by the Commission.

Reading through the above provisions it is clear that the law has provided a strict procedure as to how each part of the voting process should be handled and recorded. Each stage has its own documentation. The process entails that the polling station staff's obligation terminates on the completion of documentation of results, including the preparation of the record. If there is an error, it is not for the officers to alter the documents. Their responsibility in such instances is to record the errors and any incidents of significance in the manner provided for in section 93 (1) (a) (viii) of the Act. If the record and documentation is from a polling station it goes to the returning officer at the

20 office of the District Commissioner. If it is from the District such records and documentation, and any unresolved complaints are, in the manner provided for in the Act, passed on to the Commission at the National Tally Centre for its appropriate action, subject to the right to appeal under section 114 of the Act.

The alteration of results sheets at any stage is, therefore, unlawful. The use of tippex or alteration and over writing on results sheets was a gross irregularity. As we have

indicated above not even the Commission itself can alter the results under section 113 of the Act under the guise of correcting and resolving complaints. The Commission must instead keep the original documents as received and resolve any complaints on a separate record.

Further, it is clear that the electoral process does not provide for introduction of new documents beyond those supplied in accordance with section 70 of the Act and generated after being duly signed by the presiding officer and other polling officers at the polling station, returning officer at the office of the District Commissioner and the National Tally Centre. Bringing into the electoral process any new documents was a gross irregularity.
10 The use of duplicates, uncustomised, reserve, and improvised tally sheets was a gross irregularity.

Similarly, use of tally sheets that were not signed by presiding officers was irregular. It was mandatory for presiding officers to validate the result sheets by their signature. It is important that we refer to the record of the Court below, in respect of the evidence of Malunga Phiri, at paragraph 580 of the judgment of the Court below, where he said that in spite of the meetings organized by the second appellant about the electoral processes, there were several challenges during elections, including failure of officers to understand terminologies. The second appellant was making and implementing changes to the electoral systems as the election progressed, which was irregular. It is clear to us that
20 this caused confusion, as found by the Court below, which took the process out of the realm of regularity.

We, therefore, wish to reiterate our position above and agree with the Court below that the use of tippex, altered tally sheets, duplicate tally sheets, duplicate tally sheets, fake tally sheets, uncustomised tally sheets, reserve tally sheets and unsigned tally amounted

to an irregularity as defined in section 3 of the Act in that it did not comply with the dictates of the said Act.

Political party representatives

The appellants contended that because the candidate's monitors did not file complaints, the poll was regular. Further, that the first appellant not only won the presidential election but also that the Court below erred in concluding that the Presidential election was flawed or that the first appellant's return was undue.

To begin with, the so called monitors should be called by their legally given name, namely, political party representatives. Secondly, it should be noted that whereas the
10 Parliamentary and Presidential Elections Act acknowledges the role of political party representatives right through the electoral process from voter registration (see: sections 27, 28, 35 and 72 of the Act), they are in fact not mandatory. The references to political party representatives in sections 93 (1) and (2) and 95 of the Act do not make their presence mandatory. In point of fact, the legislation acknowledges firstly, the possibility that they may not, for whatever reason, be present and secondly that their absence does not affect the validity of the polls.

However, as we have pointed out earlier, once they are registered certain rights accrue to them. These include the right to identity documents and entitlement to a copy of the results sheet irrespective of whether or not the party representative signed the results
20 sheet. This is in accordance with sections 27, 72, 93 (2) and (3), 95 (3) and 98 of the Act.

The situation should be contrasted with that of the second appellant and its officers. Throughout the Constitution, the Act and the Electoral Commission Act it is clear that it is the Commission's duty to run credible, cogent, free and fair elections in Malawi. Some of its duties might be delegated to District Commissioners (see: section 34 (2) and 95 of the Act). The staffing levels and job descriptions at the polling stations also bear this out.

There must be a minimum of 5 Commission staff at every polling station. (See section 68 (2) of the Act). The signing of documents and determination of complaints, is done by the Commission's staff. The political party representative's signature is not necessary. They sign only if they be present.

Therefore, while we agree that party representatives have an obligation towards the integrity and credibility of elections, we are of the further view that such obligation does not go beyond that of an ordinary citizen. The only difference with them is that they also have the interests of the candidate in relation to whom they are party representatives. The fact that there are party representatives around does not therefore absolve the
10 Commission of its duties *vis a vis* the elections. The fact that a party representative says an election was fair, free, credible does not necessarily mean that it was. Neither, in our judgment, is an election not free, fair or credible merely because a party representative has said so. Their signatures at the very most only signify their presence when the document was signed and not the correctness of the arithmetic therein.

In all instances it remains for the Commission, funded from the public purse as they are to, in accordance with their constitutional and statutory mandate, not only ensure that elections are conducted in accordance with the Constitution and statues but also, where necessary, show that such was indeed the case.

The appellants' arguments to the effect that a lack of complaints from political party
20 representatives meant that the election was without blemish is baseless. We do not find any reason for departing from the finding of the Court below.

Constituency Tally Centres

We agree with the Court below that the Constituency Tally Centres were unlawful. They were not a creature of statute. Their creation was at the convenience of the second

appellant and the stakeholders. They are unlawful for effectively being an unlawful amendment of the Parliamentary and Presidential Elections Act.

While it may be admitted that the Constituency Tally Centres were created to enhance operational efficiency, it is obvious that they operated outside the law. Stakeholders brought them in a bid to improve the conduct of the elections. They transmitted results to the National Tally Centre. This was not supposed to be. Results to the National Tally Centre, in accordance with section 95 (5) of the Act, come from the returning officer at the office of the District Commissioner. We also noted that returning officers delegated some of their functions to the Constituency Tally Centre. This was also illegal as no
10 effectual delegation could have been made to an illegal entity. It is only the legislature that can change the structures in the electoral system. The consensus or agreement with stakeholders could not substitute the power and authority of Parliament. We agree with the conclusion of the Court below that Constituency Tally Centres were unlawful.

We also noted that the Commission and stakeholders purported to amend statutory forms which in many respects did not meet the requirements of the statute. These forms were used in place or in substitution of the statutory forms. The Commission did not have authority, or indeed power to amend the statutory forms.

Let us also comment on the *Polling Station Voting Procedure Manual* on elections management system. It was a good idea. Unfortunately, its contents were changed by the
20 Commission, acting in concert with stakeholders to include, in material particular, processes contrary to what is mandated by the Parliamentary and Presidential Elections Act. The *Polling Station Voting Procedure Manual*, in other words, reflected what Commission and the stakeholders agreed and not what the statute decreed. An example is the variation of the definition of null and void in section 88 of the Act. This was also an irregularity. In fact, the record will show that one of the first appellant's witnesses

Malunga Phiri acknowledged that the Commission changed the electoral process as we have referred to earlier in our judgment.

Therefore, we find that the appeal against the decision of the Court below in relation to the creation of the Constituency Tally **Centres** has no merit whatsoever.

Results management and determination

We have gone through the process of results determination from polling station to National Tally Centre. The determination is under section 96 of the Parliamentary and Presidential Elections Act. Under subsection (1) of that section, the Commission determines and publishes the results on the basis of results and records delivered to it
10 from districts and polling stations. As we said earlier, such results must be delivered to the National Tally Centre without any loss, tampering or interference from the polling stations and at the office of the District Commissioner. Before determining the national results, the Commission must comply with section 97 of the Act. The Commission at the National Tally Centre is obliged to take a decision on any complaint registered in the electoral process from the polling stations upwards. It is also obliged to examine all votes classified as null and void and to affirm or correct the determination as reported by the polling stations or the District Commissioner. The determination of the complaints and of the null and void votes is without prejudice to the right to appeal by the parties under section 114 of the Act.

20 In our examination of the judgment of the Court below, we find that the Court adequately dealt with the question of noncompliance with the statutory requirements, namely, the nonresolution of all complaints before releasing results, and on complaints handling. The record shows that the Commission did not comply with the requirements of the law on complaint handling. In some cases, the complaints were not resolved. In other cases, the complaints were not resolved to finality. The second respondent particularly refers to

this at pages 93 and 95 paragraphs 27.4 to 27.6 of the record. This was also particularly clear during cross-examination of Messrs. Alufandika and Munkhondia, both of whom were the second appellant's own witnesses.

Ground of appeal 3.14 from the second appellant, is therefore, without merit.

Mr. Alufandika suggested, during cross-examination, that the Commission had resolved all complaints before the determination of the results. There was, however, no proof of this fact. No report was submitted, as required by statute, regarding the complaints received and the Commission's response thereto or determinations thereon in accordance with section 97 and 98 (b) of Parliamentary and Presidential Elections Act.

10 It is not enough in our view for the Commission to say that letters were written to the complainants about their complaints. That is not equal to compliance with the strict language of section 97 and 98 of the Act.

It is equally clear that no report as required by sections 97 and 98 of the Act was given to the parties on the determination of the complaints and determination of the final result. There was no explanation why this was so. The fact of the matter though, is that there were outstanding complaints from the petitioners which remained unresolved at the publication of the results.

We observe that the obligations which the Act places on the Commission are necessitous, crucial and mandatory, and the Commission should therefore take these obligations
20 seriously, especially the quasi-judicial obligations. The suggestion that the Commission had a committee to resolve complaints or that some complaints were resolved by the Chief Elections Officer courtesy of a purported delegation of powers is for us a cause for serious concern. The matter at hand was the election of the President of this country. It does not appear to us that the Commission seriously considered this aspect of its

mandate when it delegated its quasi-judicial powers to this committee or the Chief Elections Officer. It smacks of irresponsibility, if truth be told.

The law envisages that all complaints about the electoral process would be, for as long as they remained unresolved, scaled up the ladder up to the Commission at the National Tally **Centre** where they would be resolved before the results are determined and published. The grounds of appeal in relation to complaint handling, namely, grounds 3.14 to 3.16 from the second appellant have no leg to stand on.

Complaints handling

Section 89 of the Act, which deals with doubts and complaints, states -

10

> *"(1) In addition to the representatives of political parties, any voter present at a polling station may raise doubts and present in writing complaints relating to the voting at the polling station and shall have the right to obtain information from the polling station officers and from relevant documents available at the polling station.*
>
> *(2) No polling station officer shall refuse to receive a complaint presented to him under subsection (1) and shall initial every such presentation and annex it as part of the official record of the polling station.*
>
> *(3) Any presentation received by polling station officers under this section shall be deliberated upon among, and be resolved by, the polling station*

20

> *officers who may, if necessary in their opinion, postpone such deliberation or resolution until the end of voting process to enable the process to proceed."*

Section 113 of the Act deals with the role of the Commission to decide complaints and states-

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

Section 114 of the Act deals with Appeals to the High Court and states-

"(1) An appeal shall lie to the High Court against a decision of the Commission confirming or rejecting the existence of an irregularity and such appeal shall be made by way of a petition, supported by affidavits of evidence,
10 *which shall clearly specify the declaration the High Court is being requested to make by order.*

(2) On hearing an application under subsection (1), the High Court-

(a) shall, subject to subsection (3), make such order or orders as it thinks fit;

(b) in its absolute discretion, may or may not condemn any party to pay costs in accordance with its own assessment of the merits of the complaint.

(3) An order of the High Court shall under subsection (2) not declare an election or the election of any candidate void except on the following
20 *grounds which are proved to the satisfaction of the court-*

(a) that voters were corruptly influenced in their voting contrary to any provision of this Act; or had their ballot papers improperly rejected, or voted more than once;

(b) that persons not entitled to them were improperly granted ballot papers;

(c) that persons entitled to them were improperly refused ballot papers:

Provided that the court shall not declare an election void, after proof of any ground in paragraph (a), (b) or (c), if it is satisfied that the number of votes involved could not have affected the result of the election;

(d) non- compliance with this Act in the conduct of the
10 *election:*

Provided that, if the court is satisfied that any failure to comply with this Act did not affect the result of the election, it shall not declare the election void;

(e) that the candidate was at the time of his election a person not qualified for election or that he was not properly nominated, or that a duly qualified candidate had his nomination improperly rejected by the returning officer.

(4) The court shall have power to direct scrutiny and recount of votes if it is satisfied, during the proceedings, on an elections petition,
20 *that such scrutiny and recount are desirable.*

(5) At the conclusion of a trial of an election petition the court shall determine whether the member whose nomination or election is complained of, or any other and what person was duly nominated or elected, or whether the election was void, and shall report such

determination to the Commission. Upon such report being given such determination shall be final.

(6) No application shall be made to the High Court for an injunction or for an order restraining the holding of an election within fourteen days immediately preceding the date of an election.

(7) Notwithstanding subsection (6), the High Court shall have power, subsequent to the holding of an election, to declare void the election if, upon hearing the application referred to in subsection (1), the High Court is satisfied that there are good and sufficient grounds
10 *for declaring void the election.".*

Section 113 of the Act anticipates that there will be complaints at any stage of the electoral process. From demarcation of wards and constituencies up to the conduct of the polls themselves. The Act has, therefore, provided for complaint entry points at "lower levels of authority" of the Commission. These "lower levels of authority" are defined and are identifiable throughout the Act. For example, at registration there is a registration officer. For the actual polls there are the presiding officers and returning officers. Not all employees of the Commission, however, are authorized to handle complaints. If the designated officers have not satisfactorily handled or resolved the complaints, then the complaint will be examined and resolved by the Commission itself.
20 There is no delegation of the authority to handle complaints. The Complaint Resolving Committee created at the National Tally Centre and the Chief Elections Officer, therefore, had no authority to deal with complaints.

The Act has set out the procedure both at first instance i.e. entry point and appeals. In respect of the election section 70 (h) of the Act provides for work items for use during elections which include a log book for logging complaints made under section 89 of the

Act; it is an offence for a polling station officer to refuse to log a complaint. The law, therefore, places a duty on polling station officers to ensure that complaints are resolved.

Section 89 of the Act also provides for the manner a complaint is dealt with by polling station officers; they can resolve it, defer their decision or pass it on to the next level. In all instances they should record it in all aspects. The complaint must, however, be resolved before the results are published.

Auditors' role

We are only dealing with this because it was raised in the grounds of appeal. Otherwise it is a non-issue.

10 In grounds of appeal 4.1 for the first appellant and 3.46, 3.47 and 3.48 for the second appellant, the appellants queried why the Court below was willing to accept the appointment of auditors, and not the creation of the Constituency Tally Centres. The appellants argued that the appointment of the auditors, like the creation of the Constituency Tally Centres, should be held illegal and that the testimony of the auditors be of no effect.

While we agree that there is no specific mention of auditors and their role in the Parliamentary and Presidential Elections Act and related legislation, the appointment of auditors is an entirely different issue. The auditors were appointed to enhance compliance with statutory requirements, transparency and accountability in the electoral

20 process. They never, while doing that, tampered with the legislative framework in the way that the introduction of the Constituency Tally Centres did. To put our conclusion in perspective we would equate their presence as being the same as the introduction of the electronic result management system or a movement, let us say, from manual counting to an electronic counting of votes. The engagement of the auditors did not take away any of the Commission's powers, nor did it change any of the structures introduced

by statute. The auditors did not exercise any of the Commission's powers. They were only there to confirm that the electoral processes were followed. The engagement of the auditors, therefore, was lawful.

Delegation of powers and functions of the Commission

Section 9 of the Electoral Commission Act states that -

> "*The Commission may delegate to any of its committees, the Chief Elections Officer or any other employee of the Commission all or any of its powers and functions.*".

The Court below at paragraph 1116 of its judgment held that-

10

> "*...The provision grants the Commission very wide discretionary powers. Discretion exists where there is a power to make choices between courses of action, or where, though the end is specified, a choice exists as to how it should be reached. When taken to its extreme, section 9 of the ECA provides for the Commission to delegate to the Chief Elections Officer all or any of its powers and functions of the Commissioners. It could also delegate all or any of its powers functions to any other employee of the Commission. In such an extreme scenario, the overly wide discretion, as envisaged in section 9 of the ECA, would have the effect of allowing the Chief Elections Officer or any other employee of the Commission, when so delegated, to render the role of the Commissioners under the ECA ineffectual. Worse still, such delegation would amount to a blatant abdication and abrogation of functions and powers that are specifically vested in Commissioners under the Constitution. Delegation as envisaged in section 9 is therefore unreasonable, absurd and unconstitutional to that extent*".

20

The second appellant faults this decision of the Court below, and in this regard has filed a number of very specific grounds of appeal in relation to delegation of powers and functions of the Commission, some of which are repetitive. These grounds of appeal are set out in the second appellant's notice of appeal, and include paragraphs-

> "*3.9 The court erred in law by finding that Commissioners were material witnesses and that the failure to call them as witnesses compromised the Electoral Commission's case;*
>
> *3.10. The court erred in law by dealing with the issue of the power of the Commission to delegate tasks to staff including the Chief Elections Officer as this issue was never raised in any of the petitions or supporting sworn statements;*
>
> *3.11 The court erred in law by finding that the Chief Elections Officer was not a competent witness to give evidence on what the Commissioners had decided and to explain or report to the complainants and give evidence in court as to why the Commissioners took particular decisions, despite the fact that the Chief Elections Officer testified on matters based on his knowledge;*
>
> *3.12 The learned judge[s] erred in law by effectively holding that for constitutional bodies, evidence in court must only be given on their behalf by the holders of the constitutional office and not staff working under them, even if the staff would have first- hand knowledge of the proceedings of the holders of the constitutional offices;*
>
> *3.13 The learned judges erred in law by finding that the Commissioners never gave complainants an audience to determine their complaints, when this issue was never raised in any petition or in any sworn statements and the finding is not supported by the evidence;*

3.14 The learned [judges] erred in law by failing to consider that in administrative law, a hearing can consist of a consideration of letters and supporting documents only, and need not always comprise a face to face audience or a literal "hearing";

3.18 The court erred in law by holding that the Commission cannot delegate its officers the power to hear and determine electoral complaints;

3.21 The court erred in law by holding that the appearance of the Chief Elections Officer before the court to represent Commissioners was supposed to be evidenced in writing;

10 *3.55 The court erred in fact and in law by finding that complaints were resolved by the Chief Elections Officer;*

3.56 The court erred in law by finding it as an irregularity that the Commission could delegate staff to perform some tasks including conflict and complaint resolution and also finding that it was not legitimate for the Chief Elections Officer, as Secretary of the Commission, to communicate the decisions of the Commission to stakeholders; and

3.57 The learned judges erred in law by faulting the Chief Elections Officer's act of writing letters, on behalf of the Commission, communicating decisions on complaints.".

20 We will consider and determine the identified grounds of appeal together. We recognize that any meaningful discussion and consideration of the delegation of the powers and functions of the Commission, particularly in the context of resolution of complaints which is central to the second appellant's identified grounds of appeal, must start with a

consideration of section 9 of the Electoral Commission Act which must be read with sections 68, 97, 98 and 113 of the Parliamentary and Presidential Elections Act.

It is also important to distinguish the delegation of judicial or quasi-judicial powers and functions of the Commission and the administrative powers and functions of the Commission, particularly in so far as they relate to the Chief Elections Officer and employees of the Commission, who seemingly played a central role in the resolution of complaints in the disputed 21st May, 2019 elections. In this regard it is important to stress that while the Commission may delegate its administrative powers and functions, it most certainly may not, and cannot, delegate its quasi-judicial powers and functions.

10 As already indicated earlier in this judgment, under section 68 of the Act the Commission may appoint presiding officers for the purpose of administering proceedings at polling stations, including more particularly the casting of votes, and to count the votes cast at polling stations and, under sections 93 and 95 of the Act, returning officers are designated for purposes of compilation of the district results of the election.

Section 68 of the Act states-

> "*(1) The Commission shall appoint polling station officers in its service whose duty shall be to administer the proceedings at polling stations, including more particularly the casting of votes, and to count the votes cast at polling stations.*

20

> *(2) The Commission shall post at every polling station at least five polling station officers one of whom the Commission shall designate as the presiding officer for that polling station and at least one of whom shall be a person able to speak the language commonly spoken in the area of the polling station.*"

Section 94 of the Act deals with the delivery to the office of the District Commissioner, under conditions of absolute security against loss, tampering or interference-

> "*(a) the record prepared under section 93;*
>
> *(b) all ballot paper collected in separate lots corresponding to the classification under which they were counted;*
>
> *(c) all unused ballot papers; and*
>
> *(d) all voters registers and other work items provided to that polling station.*"

Section 95 of the Act states that-

10

> "*(1) On receipt of the records from polling stations, the returning officer or an officer of the Commission duly authorized in that behalf shall, at the office of the District Commissioner, compile the result of the election in his district on the basis of duly signed summaries received with such records and shall prepare, on appropriate sheets in the prescribed form provided by the Commission, a record in respect of each constituency in the district and also in respect of the entire district showing-*
>
> > *(a) the total number of persons who registered as voters;*
> >
> > *(b) the total number of persons who voted;*
> >
> > *(c) the total number of votes for or under each classification of votes in accordance with section 91;*
> >
> > *(d) the discrepancies, if any, between the votes counted and the number of persons who voted; and*
> >
> > *(e) the complaints, if any, received by him and his decision thereon*

20

(2) Representatives of political parties duly designated for that purpose shall be entitled to observe the entire procedure followed at the office of the District Commissioner in compiling the district result of the elections under subsection (1).

(3) The record prepared under subsection (1) shall be legibly signed by the returning officer or other officer supervising the compilation thereof and, if any be present, by at least one representative of a political party which shall in addition, be entitled to receive a copy of the record.

(4) The returning officer or an officer of the Commission duly authorized
10 *in that behalf shall publicly announce the result of the election in each constituency and in the entire district in accordance with the record prepared under subsection (1).*

(5) The returning officer or an officer of the Commission duly authorized in that behalf shall, with all dispatch, deliver to the Chief Elections Officer under conditions of absolute security against loss, tampering or interference-

(a) the record prepared under subsection (1); and

(b) all items received from all the polling stations in the district concerned."

Lower level officers, namely, presiding officers and returning officers (and not the Chief
20 Elections Officer) have been given specific statutory duties to resolve complaints at polling station and district level. This is clear from section 113 of Act which provides that-

"Save as otherwise provided in this Act, any complaint submitted in writing alleging an irregularity at any stage, if not satisfactorily resolved at a lower

level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed the Commission shall take necessary action to correct the irregularity and the effects thereof".

The law thus gives presiding officers and the returning officers authority to manage elections at polling station and district levels, and the law empowers them to resolve complaints at polling station level or district level, as the case may be.

We also wish to highlight sections 97 and 98 of the Parliamentary and Presidential Elections Act. Section 97 of the Act requires that –

"*At the beginning of the determination of the national result of a general* 10 *election, the Commission shall take a decision on any matter which has been a subject of a complaint and shall examine the votes which have been classified as null and void, and may confirm or correct the determination thereof at the polling stations and at the offices of District Commissioners, but without prejudice to the right of appeal conferred by section 114*."

Section 98 of the Act requires that-

"*The Commission shall summarize its determination of the national result of a general election in a written record indicating-*

(a) the national result of the election as determined;

(b) the complaints and responses thereto and the decisions taken on them,

20 *and the Chairman of the Commission shall legibly seal the national result of the election by signing the summary and every political party shall be entitled to receive a signed copy of the summary*".

It is clear from sections 97 and 98 of the Act that the power to finally determine election complaints vests in the Commission as defined in section 3 of the Act, namely, the

Commission established under section 75 (1) of the Constitution consisting of "*a Chairman who shall be a Judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may be appointed in accordance with an Act of Parliament.*". The Chief Elections Officer and other employees are clearly not part of the Commission.

We observe that the power of the Commission to resolve complaints is a judicial or quasi-judicial power. Judicial or quasi-judicial powers cannot be delegated; and in this case the power to resolve electoral disputes under the Act, including sections of 97, 98 and 113, may not, and cannot, be delegated by the Commission to its Commissioners,
10 the Chief Elections Officer or any other employee of the Commission. This power may not be delegated, not even for the purposes of asking the petitioners or any complainant to show or indicate to the Commission, through the Chief Elections Officer or any other employee of the Commission, what their complaint was all about or, from the Commission, to inform the petitioners or any complainant how the Commission has handled or dealt with any complaint.

During the hearing of the appeal herein on 15th April, 2020, the second appellant produced a copy of the Parliamentary and Presidential Elections (Elections Complaints and Petitions Handling Procedures) Regulations, 2019 (G.N.11/2019) (the "Regulations") to show, as we understand it, that in accordance with section 9 of the
20 Electoral Commission Act, the Commission had formally delegated, or may delegate, its powers with respect to determination of complaints to "its Committees, Chief Elections Officer and employees of the Commission".

The Regulations were promulgated by the Minister of Justice pursuant to section 121 of the Act. We note that although section 121 of the Act expressly states that the Minister may make regulations for the better carrying out of the provisions of the Act on the

recommendation of the Commission, the Regulations do not expressly state that they were made by the Minister on the recommendation of the Commission.

We also note that regulation 3 of the Regulations deals with the powers of the Commission in determining complaints and states-

> *"3. (1) The Commission shall, in accordance with the Constitution, determine complaints and petitions related the conduct of elections.*
>
> *(2) The Commission may delegate to its Committees, the Chief Elections Officer or any employee of the Commission, its powers and functions under these Regulations in accordance with the Electoral*
>
> 10 *Commission Act. ...".*

We wish to make following observations on the Regulations. First, the Minister cannot, through subsidiary legislation, generally confer on the Commission power to delegate to its Committees, the Chief Elections Officer or any employee of the Commission, powers and functions under Regulations, "*in accordance with the Electoral Commission Act*", and specifically powers and functions of the Commission with respect to the determination of complaints and petitions related to the conduct of elections, as stipulated in regulation 3 (2) of the Regulations. The power of the Commission to delegate its power and functions must be in principal legislation and, as matter of fact, such power is already provided in section 9 of the Electoral Commission Act

20 Secondly, to the extent that the Parliamentary and Presidential Elections Act expressly provides for a complaints resolution scheme and expressly designates who shall determine or resolve complaints, the scheme provided for in the Regulations, in so far it relates to the complaints which are the subject of this appeal, is *otiose*. The scheme for resolution of complaints provided in the Act cannot be amended and replaced by a new

scheme in subsidiary legislation promulgated by the Minister pursuant to section 121 of the Act. The Act certainly cannot be amended by subsidiary legislation.

Thirdly, as already indicated in this judgment, notwithstanding the breath of section 9 of the Electoral Commission Act, the Commission cannot delegate its quasi-judicial power or function of determining complaints; that power or function must finally be exercised by Commission itself and cannot, and must not, be delegated by the Commission to its Committees, the Chief Elections Officer or any employee of the Commission.

The exercise of judicial or quasi-judicial power entails the use of the principles of natural justice and such power must be exercised judiciously. Therefore, the exercise by the
10 Commission of the quasi-judicial power in sections 97 and 113 of the Act must be in accordance with principles of natural justice.

The Court below diligently dealt with the issue of delegation of quasi-judicial powers and functions at paragraphs 1090 to 1127 of its judgment. We have carefully analyzed and reviewed the determination of the Court below in that regard, and we find no basis to fault the determination of the Court below. The determination of the Court below is, therefore, confirmed. For the avoidance of doubt, we hold that paragraphs 3.9, 3.10, 3,11, 3.12, 3.13, 3.14, 3.18, 3.21, 3.55, 3.56 and 3.57 of the second appellant's grounds of appeal are without merit, and we dismiss them accordingly.

Quantitative and qualitative approaches and the cases

20 The Court below, at paragraph 24.4 of its judgment was to determine whether or not, under section 100 of the Parliamentary and Presidential Elections Act, the Court applies a quantitative test, a qualitative test or both. At paragraph 1059 of its judgment, the Court observed that two divergent theories were advanced in regard to the proof of claims in petitions filed under section 100 of the Act. The Court noted that the petitioners (now respondents) were advancing the qualitative test whereas the respondents (now

appellants) were of the view that it is the quantitative approach or test that must be used in determining the petitions filed under section 100 of the Act.

After a thorough discussion of decisions from within and outside the jurisdiction, the Court came to the conclusion that when determining electoral petitions under section 100 of the Act the Court was well informed to use both the qualitative and quantitative tests in coming to a conclusion whether the numbers, and the processes as managed by the second appellant affected the outcome of the elections the subject matter of the proceedings that were before it.

For a start, it is well to explain what the two terms (quantitative and qualitative) mean.
10 As we understand it, in literal sense, quantitative relates to or denotes measuring by the quantity or numbers whereas qualitative pertains to or concerns measuring or measured by the quality of something. Thus, the distinction between the two is that quantitative means looking at numbers of votes and qualitative deals with integrity of the electoral processes and compliance with the constitutional and statutory requirements. The number of votes (quantitative) involved are used in determining whether or not the election was affected when determining in final results. In qualitative test the Court looks at the effect of irregularities, non-compliance with constitutional and statutory requirements and other complaints, then determines whether or not the election was affected. As we continue with the discussion of the law on the use of quantitative and
20 qualitative approaches, this Court would like to point out that the law on elections is developing, and will continue to develop both within the jurisdiction as well as outside the jurisdiction where the electoral law is comparable to our electoral law. Thus, since the law on elections is developing this Court will be mindful that it will not be restrained in its approach as was put and recognized in ***Gondwe and Another v Gotani Nyahara*** (supra) where this Court instructively stated-

"It is safe to state that the law on elections in this country is developing and therefore other rules and principles guiding Courts when considering election disputes are likely to emerge in future".

Accordingly, this Court will now explore and exhaustively discuss as well as analyze the case authorities that have a bearing on the application of quantitative and qualitative approaches. Thereafter, this Court will take a position as regards the test to be used on election petitions founded on section 100 of the Parliamentary and Presidential Elections Act.

The grounds of appeal that are raised on the issue of quantitative and qualitative approach
10 are to be found at paragraph 3.1 of the first appellant's grounds of appeal which states as follows-

"The Learned Judges erred in law in abandoning settled principles of law governing the annulment of a disputed election or effect of an irregularity on the overall result of an election."

There are also numerous grounds of appeal on the subject of quantitative and qualitative approaches in respect of the second appellant. These include the following paragraphs of the grounds of appeal-

"...

3.7. The learned judges erred in law by failing to observe and find that
20 *breach of section 98 of the PPEA was not specified in any of the petitions or supporting sworn statements and even if it had been, they failed to find that failure to follow its dictates to the letter materially affected the result of the election;*

3.8. The learned judges erred in law by failing to observe that breach of section 119 of the PPEA was not pleaded by any of the petitioners or stated in any of their supporting sworn statement and even if it had, they erred in law by failing to find that its alleged breach did not affect the result of the election;

… …

3.26 The court erred in fact and in law by finding that the use of duplicates, altered forms or reserve tally forms had affected the result of the election qualitatively or quantitatively goes against the express statements made by petitioners and their witnesses during cross-examination and the court erred in law by finding that the issue was proven on a balance of probabilities on the available evidence;

10

………

3.33 The learned judges erred in law by failing to discuss persuasive case authorities cited to them that pronounce on the effect of alterations on ballot (and not vote) data on an election result;

3.34. The learned judges erred in fact and in law by finding that the alterations to ballot data materially affected the result of the elections;

…

20

3.52 The learned judges erred in fact and in law by failing to find that the results data that was announced using Form 66C's was not materially contaminated.

…

3.72 The court erred in law by finding that constituency tally centres were unlawfully constituted when there was evidence that they had been delegated upon by District Returning Officers. Even if it was found to be correct that they were an irregularity, it has not been proven that their use affected the result of the election and the court erred in law by failing to make this important finding.

...

3.76 The court erred in law by failing to find that use of reserve tally sheets or undesignated tally sheets per se could not have affected the result of the election and that no valid vote data on any reserve tally sheet had been assailed by any petitioner or monitor.

10

....

3.85 The court erred in fact and in law by ignoring the evidence in re-examination of Mr. Munkhondia on the issue of the number of votes affected by irregularities and erroneously finding that this cross-examination was not challenged.

3.86. The court erred in fact and in law by finding that incompletely filled result sheets affected the result of the election;

....

20

3.88 The court erred in fact and in law by finding that the 2nd Respondent failed to detect alterations before the determination of the results and further failed to find that any alterations did not materially affect the results;

....

3.91. The court erred in fact and in law by not quantifying the total number of votes from tally sheets where the vote data on Form 60C and Form 66C was discrepant, failing to observe that the alleged vote data discrepancies affected all candidates and failing to observe that the total figure of votes affected was so low and insignificant or immaterial and that in all such cases, the discrepant Form 66C had been given to party monitors who could have questioned the figures before the announcement of the results;

....

10 *3.93. The court erred in law by ignoring the fact that the first petitioner had not pleaded the issue of effect of irregularities on any number of votes.*

3.94. The court erred in fact and in law by failing to come up with any discussion as to how ballot alterations could lead to a conclusion that any number of votes was affected and hence erred in finding that the number of votes affected by the alterations are substantial and affected the national result.

....

3.96 Having found that no data was compromised during transmission in the Results Management System, the court erred in fact and in law by holding that 20 *the Result Management System was one of the qualitative flaws in the election and in failing to find whether and if so, how this affected the election at all;*

....

3.99 The court erred in fact and in law by failing to show how results uploaded after alterations could have affected the results of the elections;

....

3.101 The learned judges erred in law by first of all finding that constituency tally centres were illegal as having not been sanctioned under the PPEA and in the same judgment, making negative findings of a qualitative nature against the Commission based on the report of auditors, who were also not sanctioned by the PPEA and thus treating similar evidence differently.

....

3.104. The court erred in law by not finding that any breach of section 119 of the PPEA may not have affected the result of the election.

10 ... ...

3.106. The court erred in fact and in law by failing to demonstrate how failure to provide all record log books within the very limited time specified, could have affected the result of the election when all data on votes that was in the log books was also with monitors and could be compared to the published form 66C data.

....

3.125 The court erred in law by failing to take into account the fact that all stakeholders had agreed on and did not question the forms to be used, their contents and other procedural steps taken or to be taken in the management

20 *of the election result and that the petitioners never at all pleaded or raised most of the issues that the court has used to make a finding on the quantitative aspects of the election."*

Other grounds of appeal by the second appellant and dealing with the quantitative and qualitative approaches are in paragraphs 3.2, 3.23, 3.25, 3.27, 3.28, 3.30, 3.31, 3.38, 3.39,

3.41, 3.44, 3.50, 3.51, 3.60, 3.66, 3.69, 3.70, 3.75, 3.76, 3.107 and 3.108 of the second appellant's notice of appeal.

This Court is alive to the fact that it is rare that elections are set aside on light or trivial grounds considering what goes on in the preparation for elections. (See: ***Col (Rtd) Kizza Besigye v Yoweri Kaguta Museveni and Electoral Commission*** 2001 Election Petition No. I of 2001 (Supreme Court of Uganda) (unreported). Accordingly, this led the courts to develop a legal philosophy that even if there is non-compliance as long as results are not affected the results of the election will not be annulled. (See: The Zimbabwean case of ***Chamisa v Mnangagwa and 24 Others*** (CCZ 42/18) [2018] ZWCC (24 August 2018). That philosophy suggests that whatever level of non-compliance with the Constitution and electoral laws and howsoever serious electoral irregularities may have been committed, an election will be allowed to stand as long as the petitioners do not demonstrate that the non-compliance or irregularities affect the number of votes in the election. This is the quantitative approach to resolving electoral disputes in the courts.

The Zimbabwe case of ***Chamisa v Mnangagwa and 24 Others*** (supra) seems to suggest that as a general rule an election will not be annulled if a breach of the law did not affect the election result. We have doubts that this would be a good approach, particularly where serious breach of the law is involved. What if the numbers themselves are as a result of an inaccurate counting, intimidation, fraud or corruption? Surely, for an election to be truly free, fair and credible it must be conducted in full compliance with the constitution and applicable electoral laws.

Overtime, the courts have progressively interpreted relevant provisions of the constitution and electoral laws in a way that views elections not just as an event but as a process. The integrity of the entire electoral process has been recognized to have

an important bearing on what happens at the polls. An election can only be free, fair and credible if it fully complies with the dictates of the constitution and applicable electoral laws as well as principles of transparency and accountability. Electoral laws have gone to great lengths to prescribe for all stages of the electoral process to ensure that the final results in the votes are credible. There are other jurisdictions that insist on requiring the electoral bodies to absolutely comply with the rules for elections to reflect the will of the people. This is referred to as a qualitative approach to resolving electoral disputes. We further note that there are then those jurisdictions that take a middle line approach, that is to say, they use a combination of both the quantitative and qualitative tests. The so called middle line approach is rather complicated as it leans both ways. A good example here are decided cases from Uganda and Kenya. (See: ***Col. Dr. Kizza Besigye v The Attorney General*** Constitutional Petition Number 0013 of 2009; from Kenya see ***Raila Amolo Odinga and Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission, H. E. Uhuru Muigai Kenyatta and Others*** (supra).

In ***Col. Dr. Kizza Besigye v The Attorney General*** (supra) the Constitutional Court in Uganda said the following-

> *"The various decisions discussed here provide evidence that section 59 (6) (a) is in keeping with a global trend not to lightly deal with monumental political events such as presidential elections. Indeed, a case study of election petitions in various jurisdictions world over reveals that courts have maintained the approach inherent in Section 59 (6) in deciding whether a court should or should not annul Presidential election results on grounds of irregularities. There is a common thread in the foregoing comparative jurisprudence that it is not enough for the petitioner to prove that the election law and rules were violated, the petitioner must also prove/satisfy the court that the results were thereby affected in a substantial manner. The trend exists*

in jurisdictions which have primary legislation equivalent to Section 59 (6) (a) as well as those where no such provision exists. Section 59 (6) is in line with the principle enunciated in the Ghana case that compliance failures do not automatically void an election; unless explicit statutory language specifies the election is voided because of the failure. Uganda's Section 59 (6) provides 3 grounds which if proved can lead to annulment of an election but only one is pegged to the need for proof that the anomaly had substantial effect on the results.... The import of section 59 (6) (a) is that it enables the court to reflect thus: did the proved irregularities affect the election to the extent that the ensuing results did not reflect the choice of the majority of voters envisaged in Article 1 (4)? Did the non-compliance distort the results to the extent that the result does not represent the people's electoral intent/ the intent of the majority? Did the non- compliance negate the voters' intent? As expressed in the Zambian decision of ***Anderson Kambela Mazoka and 3 Others v Levy Patrick Mwanawasa,*** *(supra), it is important that court asks the question "given the national character of the exercise where all voters in the country formed a single constituency, can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the true will of the majority of voters?"*

10

20

The court here was advocating the use of both the quantitative and qualitative tests. Further, in ***Col (Rtd.) Dr. Besigye Kizza v Museveni Yoweri Kaguta and Electoral Commission)*** (supra) the Court observed that -

"The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial. In this petition, the Petitioner has proved that there was non-compliance with the provisions and principles of the Act in quite a number of

instances. There is no doubt that these irregularities and malpractices had some effect on the results one way or the other. If we take the result of the election as indicated on Form B, there is no evidence adduced to show how the non-compliance with the provisions and principles of the Act affected the results of each candidate, including the Petitioner. No adjustments or calculations based on those irregularities were done even taking into account the factor of intimidation or absence of conditions of freedom and fairness in some instances."

From Kenya, the case of ***Raila Amolo Odinga & Stephen Kalonzo Musyoka v*** 10 ***Independent Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission, H. E. Uhuru Muigai Kenyatta and Others*** (supra) is instructive on how the courts in Kenya approach election petitions in regard to the application of qualitative or quantitative test. It observed thus-

"An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution. It is one where the winner of the presidential contest obtains "more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties" as stipulated in Article 138(4) of the Constitution. In addition, the election which gives rise to this result must be 20 *held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principles in the Constitution which we have enumerated that govern elections, Section 83 of the Elections Act requires that elections be "conducted in accordance with the principles laid down in that written law." The most important written law on elections is of course the Elections Act itself. That is not all. Under Article 86 of the Constitution, IEBC is obliged to ensure, inter alia, that:*

'Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.' ...".

Further, the court in the said ***Raila Amolo Odinga and Stephen Kalonzo Musyoka v* Independent *Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission, H. E. Uhuru Muigai Kenyatta and Others*** (supra) instructively continued to put it thus-

10

> *"Additionally, the Court of Appeal analysed the qualitative and quantitative tests in order to determine whether the non-compliance affected the result. It referred to two cases in which the Court in Uganda and the Supreme Court in Kenya referred to the qualitative and quantitative tests. In the Ugandan case of* ***Winnie Babihuga v Masiko Winnie Komuhangi and Others*** *HCT-00-CV-EP.0004-2001, it was stated that the quantitative test is the most relevant where the numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair.*

20

> *The principle was reiterated here in the Supreme Court in the case of* ***Ali Hassan Joho and Another v Suleiman Said Shahbal and 2 Others,*** *Supreme Court Petition No. 10 of 2013, in which the Court held-*

> > *"Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore,*

> *that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser (s) in an election, are."* (emphasis added)"

In Malawi there are a number of cases that inform the discussion on which test to use in an election petition, that is to say whether it must be quantitative or qualitative approach or both. The case of ***Gondwe and Another*** **v** ***Gotani Nyahara*** (supra) advocates a quantitative approach. Thus, looking more at whether or not any irregularities affected the result. This Court in ***Gondwe and Another v Gotani***
10 ***Nyahara*** put it thus-

> *"The law in this country with regard to disputed elections is simple. It goes like this: An election will be invalidated if the irregularity, mistake or error complained of did affect the result of the election: See the case of* ***Gama v Omar and Malawi Electoral Commission*** *MSCA Civil Appeal No. 24 of 1999.".*

A close analysis of the relevant statutory provisions reveals that the position taken in the ***Gondwe and Another*** **v** ***Gotani Nyahara*** is narrow and simplistic, especially in the context of a monumental event such as the election of a President. It may account for increased electoral malpractices over the years, where little attention is
20 given to prescriptions of the law; the focus being on maximizing the numbers by whatever means, without complying with the law.

As rightly observed by the Court below, in ***Ulemu Msungama v The Electoral Commission***, Miscellaneous Case Number 8 of 2014 (unreported) (HC) the Court "takes the position that, on their own, glaring irregularities can affect the result of an election. Thus, a court may annul the results of an election on account of irregularities arising from non-compliance with provisions of an electoral law". This Court in ***Bentley Namasasu v Ulemu Msungama and The Electoral Commission*** MSCA Civil Appeal 8 of 2016, said the following which is instructive-

"The second ground, cumulatively, which the appellant pleaded was that there was no irregularity or that the Court did not find that the irregularity could affect the result. The appellant in his submission sought to impress on this Court that "irregularity" should be read to mean ***"non-compliances with the Act" as*** *defined in section 3 of the PPEA. Despite our invitation that he should address us on the full import of the section 100 of PPEA... ...*

That is, that a complaint could be filed ***"by reason of irregularity or any other cause whatsoever",*** *counsel declined to do so. We therefore, do not find any justification for limiting the reasons for filing a petition under*
10 *section 100 of the PPEA. Further, we find that the appellant did not refer to the four reasons, among others, that the Court below found would not allow it to make a determination. The appellant only criticized the Court below for relying on the affidavit of the former Chairperson of the second respondent; late Justice Mbendera SC, than that of Mr. Lellie Longwe. We therefore find that although the Court below did not establish the differences in votes between the parties it found that there were glaring irregularities that could have affected the results. The difference in the vote count and conclusion thereon were not material to the decision of the Court below. We would go further, that even if we take the argument*
20 *of the appellant to its logical conclusion, we find that both he and the second respondent only relied on vote count based on re-computation of the available documents. They did not, at all, refer to the votes that were allegedly wrongfully declared null and void. Their affidavits only averred that the ballot boxes were destroyed by fire. In their submissions both submitted that the onus was on the second respondent to prove or establish that the irregularity complained of affected the results. Their case was that the second respondent failed to establish that the irregularities affected the results... ...*

The lost evidence was in the custody of the second respondent. It had a statutory duty to preserve all the electoral materials and deposit them with the Clerk of Parliament: section 119 of PPEA. It was therefore under a duty to explain what happened, in so far as it could ascertain, for the purposes of this case. It did not. The Court below therefore had no basis on which it could exercise its discretion in favour of the second respondent. In the circumstances, the second respondent cannot claim that the first respondent failed to establish that the irregularities could have affected the results of the election.... In this case the first respondent never got to see the ballot boxes which were in the custody of the second respondent. The second respondent and, by necessary extension, the appellant cannot claim that he has failed to establish that the irregularities could have affected the results of the election. It was not enough for them to allege destruction of ballot boxes in a fire. These are security documents which had to be kept secure for twelve months: section 119. It was incumbent on the second respondent to show that the destruction was not due to any fault on its part.

The statutory requirement for the preservation of the ballot boxes and electoral materials, is to ensure fairness to the parties in the event of a dispute over election results. This is fundamental to safeguard the integrity of the vote and the electoral system. It is our judgment therefore, that the finding of the Court below that there should be a re-run of elections in this Constituency be upheld and confirmed."

This Court has thoroughly considered the process of conducting an election in Malawi. If what we have laid down as a process of conducting or managing an election has been largely compromised, as is suggested above, it will be hard for a

court in Malawi to uphold such an election. This is more so when one considers that the resulting vote numbers might come about as a result of irregularities or the flouting of the electoral law. However, it is well to note that this Court does not advocate the idea that a court should completely ignore the result, but that where that result is from a largely flawed process it cannot be upheld. Further, whether to apply the qualitative or quantitative test will largely depend on the manner the petition has been framed. Accordingly, where the petition is principally challenging figures then the quantitative approach may be used. Where the petition is challenging quality then the qualitative approach may be used. If the petition is raising issues of both
10 quality and quantity, then the Court should be able to use both. We so find and conclude.

In ***Gondwe and Another*** v ***Gotani Nyahara*** (supra) the position of this Court was that-

> *"The law in this country with regard to disputed elections is simple. It goes like this: An election will be invalidated if the irregularity, mistake or error complained of did affect the result of the election:"*

This Court further stated that-

> *"It is safe to state that the law on elections in this country is developing and therefore other rules and principles guiding courts when*
> 20 *considering election disputes are likely to emerge in future."*

The dicta in ***Gondwe and Another*** v ***Gotani Nyahara*** (supra) tell us that the Court did not close the door for the development of the law in election dispute resolution. Further, that case referred to some jurisprudence around the region supporting the position at law that irregularities can affect results.

The decision in ***Gondwe and Another v Gotani Nyahara*** (supra) was made 10 years after our new Constitution came into force. We have had a fresh look at the relevant legal provisions and comparable case law. We find that our electoral laws provide for both quantitative and qualitative approaches to resolving electoral disputes.

Section 100 of the Parliamentary and Presidential Elections Act states-

> *"(1) A complaint alleging an undue return or an undue election of a person as a member of the National Assembly or to the office of President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within seven days,* 10 *including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person—*
>
> > *(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.*
>
> *(2) In proceedings with respect to a petition under subsection (1), the Commission shall be joined as respondent.*
>
> *(3) If, on the hearing of a petition presented under subsection (1), the High Court makes an order declaring—*
>
> > *(a) that the member of the National Assembly or the President,* 20 *as the case may be, was duly elected, such election shall be and remain valid as if no petition had been presented against his election; or*
> >
> > *(b) that the member of the National Assembly or the President, as the case may be, was not duly elected, the Registrar of the High*

Court shall forthwith give notice of that fact to the Commission which shall publish a notice in the Gazette stating the effect of the order of the High Court.

(4) Pursuant to an order of the High Court under subsection 3 (b) declaring that the member of the National Assembly or the President, as the case may be, was not duly elected, a fresh election for the seat of the member of the National Assembly or to the office of President, as the case may be, shall be held in accordance with this Act.

(5) A declaration by the High Court under subsection (3) (b) shall not
10 *invalidate anything done by the President before that declaration."*

Section 100 of the Act, on its clear reading, is largely about quality. However, there will be situations where quantity will be for consideration under the part of the section talking about "*any other cause.*". Therefore, the section leaves it open to the court to employ either the qualitative or quantitative approach depending on the manner in which the petition has been presented. The petitions and the referral in this matter were premised on both qualitative and quantitative considerations.

The meaning of majority under section 80 (2) of the Constitution

In this appeal the first appellant contends in paragraph 3.5 of his grounds of appeal that "*the learned judges erred in law and in fact in holding that the first appellant*
20 *did not obtain a true majority of the votes and was not therefore properly declared the winner in the Presidential Elections on the basis that the first appellant did not obtain a 50%+1 of the votes*".

The second appellant contends in paragraph 3.80 of its grounds of appeal that "*the court below erred in law in delving into the issue of the interpretation of section 80 (2) of the Constitution on the meaning of the term majority of the electorate when*

the issue was not argued by the Petitioners and consequently the Respondents never addressed it in their arguments as it was deemed abandoned".

In ground of appeal 3.81, the second appellant states that the Court below also "*erred in law by departing from a binding Malawi Supreme Court of Appeal precedent on the issue of the meaning of majority of the electorate*".

In ground 3.82 the second appellant states that the High Court's finding on the meaning of the term "*majority of the electorate*" was erroneous.

In his skeleton arguments, the first appellant argued that in holding that he did not obtain the majority of votes and was not properly declared winner in the elections
10 on the basis that he did not obtain 50%+1 of the vote the Court below acted contrary to the constitutional order and established legal principles laid down by this Court in ***Chakuamba and Others v Attorney General and Others*** [2000-2001] MLR 26 (SCA). It is argued that the Court below departed from the legal principles without power to do so, and made a holding on an issue which the petitioners and the respondents never pursued, and on which they were not heard.

It was also argued that the parties were never invited to address the court on the definition and import of section 80 (2) of the Constitution; according to the appellants the same was a foregone conclusion based on the definition of ***Chakuamba and Others v The Attorney General and Others*** (supra) which gave an
20 interpretation of section 80 (2) of the Constitution.

The Court below duly acknowledged that it had no power to overrule the Supreme Court of Appeal decision. It nevertheless departed from the position of the Supreme Court of Appeal by demonstrating that the decision was made *per incuriam* and held that word majority as defined in Black's Law Dictionary means 50%+1 of the votes of the electorate. The first appellant cited the case of ***Civil Liberties Committee v***

Ministry of Justice and Another MSCA Civil Appeal Cause number 12 of 1999 (unreported) where this Court admonished a High Court Judge for not following decisions of the Supreme Court of Appeal on a given point. The first appellant argued that the Court below should have used the literal rule on interpretation to find the ordinary and natural meaning of the words used in legislation. According to the first appellant the rule will in most cases produce reasonable interpretation of the statute. The first appellant further argued that the Court below was also bound by the doctrine of precedent and stare decisis as was affirmed in ***George Chaponda ex parte Charles Kajoloweka*** MSCA Civil Cause Number 5 of 2017 (unreported). That
10 the Court must follow precedent is a principle that was also reaffirmed in ***Electoral Commission and Another v Mkandawire*** (supra). On statutory interpretation, the first appellant also cited the case of ***Blantyre Water Board and Others v Malawi Housing Corporation*** [2008] MLR 28 in support.

According to the first appellant the decision of this Court in ***Chakuamba v Attorney General and Others*** (supra) settled on the meaning of the words "a majority of the electorate". It was argued that the decision of the Court below, in departing from the meaning as ascribed to the word majority by this Court would be tantamount to judicial legislation which is contrary to the principle of separation of powers amongst the three arms of Government. The first appellant argued that the Court
20 below erred when it held that the decision on the meaning of majority in ***Chakuamba and Others v Attorney General and Others*** (supra) was *per incuriam* the decision of the Supreme Court of Appeal in ***Attorney General v Malawi Congress Party and Others*** [1997] 2MLR 181 where it had previously been held that the meaning of majority means 50%+1 of the votes on passing bills in Parliament. He argued that even if the Supreme Court of Appeal had considered the case of ***Attorney General v Malawi Congress Party*** (supra) on the meaning of majority it would not have

changed its interpretation of the majority in view of the exhaustive discussion of the subject it was engaged in.

It was further argued that in ***Chakuamba and Others v Attorney General and Others*** (supra) this Court also considered constitutional provisions on the election of Speaker and the passing of bills where there was a requirement of majority which does not mean 50+1% votes. (see: sections 53 (1) and 73 (3) of the Constitution).

The second appellant's skeletal arguments are that the finding that the Commission erred in pronouncing the first appellant winner of the elections with a majority of the votes of the electorate as per section 80 (2) of the Constitution was wrong and must

10 be reversed. It was contended that the petitioners never argued the issue in their arguments just as the respondents never dealt with it in their arguments. According to the second appellant the issue was effectively abandoned by its proponents and, therefore, the Court below was wrong to have recourse to it and make a finding on it in its judgment.

The second appellant further argued that the issue was already settled by the Supreme Court of Appeal in ***Chakuamba and Others v Attorney General and Others*** (supra) which was binding on the Court below.

According to the second appellant the decision ignored reference to section 96 (5) of the Parliamentary and Presidential Elections Act, and that a reading of that section

20 and section 80 (2) of the Constitution lead to a contrary result. It further argued that the decision of the Court below never made reference to sections 53 (1) and 73 (3) of the Constitution and how those provisions affect the meaning of the term 'majority' in section 80 (2) of the Constitution. Further still, it argued that the Court below never bore in mind the significance of the absence of a run-off election or second election provision in the Constitution or the Parliamentary and Presidential

Elections Act in the event of 50%+1 votes not being achieved at the first election. According to the second appellant that absence is a strong pointer to the meaning that the framers intended on the term "majority" in section 80 (2) of the Constitution which meaning is the same as the one that is envisioned under section 96 (5) of the Parliamentary and Presidential Elections Act. It was argued that the Court below relied on a general dictionary definition, without any case law cited and without being informed by any constitutional materials.

The first respondent contends in his skeleton arguments that in order for the Court below to determine the question of undue return and undue election, it is inescapable to deal with whether the declared winner has been elected by the majority of the electorate through direct universal and equal suffrage. It was argued that the court below engaged the parties during oral submissions as a purely legal point although the court noted that the parties dealt with it lightly. According to the first respondent the matter was raised in substance and the parties were invited by the court below to make representations. The interpretation of the words 'majority the electorate' by the Court below should stand as the court demonstrated how the earlier Supreme Court of Appeal decision on the meaning of majority was unsupported by the language of the Constitution.

The second respondent argued in his skeleton arguments that the decision in ***Chakuamba and Others v Attorney General and Others*** (supra) on the meaning of the term majority of the electorate failed to recognize the qualification of majority as being of the electorate when it rejected the meaning of majority as being 50%+1 of votes. The skeleton arguments quoted the prayer by the second respondent as being for an order that the first appellant was not duly elected as President of the Republic of Malawi as he did not truly obtain a majority of the votes polled. It was argued that since the issue of majority of the electorate concerned a determination

on a point of law the Court below was within its mandate to render its decision, and in this regard the second respondent cited ***The State v Minister of Finance and Another ex parte Bazuka Mhango*** (supra). The second respondent also cited the case of ***Kayambo v Kayambo*** [1990] 13 MLR 175 for the proposition that a High Court is not bound by a decision of the Supreme Court which was decided *per incuriam*. It was argued that this is a proper case in which this Court may revisit its earlier decision **in *Chakuamba and Others v Attorney General and Others*** (supra), and in support of that submission the second respondent cited the cases of ***Anwar A Gani v M Y Chande*** [2006] MLR 25[SCA] and ***Hon L K Mangulama and Another v Speaker of the National Assembly and Another*** [2007] MLR 139 [SCA].

The second respondent argued that the Court below correctly constructed the term majority of the electorate to mean 50%+1 of the votes cast as truly representative of the will of the majority of the people. It is also argued that it is a fundamental principle in democratic societies that the majority rules while interests of the minority are respected and that whenever the Constitution intends to mean anything greater than majority it will expressly state so. It was further argued that had the ***Chakuamba and Others v Attorney General and Others*** (supra) taken the time to compare all the sections in the Constitution that have the word majority in them it would have come to the conclusion that majority means 50%+1 of the votes at the poll. Again it is argued that had this Court in ***Chakuamba and Others v Attorney General and Others*** (supra) considered its earlier decision on the meaning of majority it may not have reached the decision it did on the meaning of majority.

We have considered the judgment of the Court below and its treatment of the question of majority of the electorate under section 80 (2) of the Constitution. We have also examined the relevant parts of the record of appeal. We have examined relevant case authorities cited on the matter. We will take these into account in

addressing the question of majority of votes at the polls and section 80 (2) of the Constitution.

Our starting point is to address the question whether the question of majority of the electorate in terms of section 80 (2) of the Constitution fell for consideration in the court below. We recognize that the matter at hand is about the election of the President which took place on 21st May, 2019 and about who the winner in that election was. The determination of who the winner of a presidential election is governed by section 80 (2) of the Constitution. That section states-

> "*The President shall be elected by a majority of the electorate through*
10 *direct, universal and equal suffrage*".

Winning a presidential election under the Constitution is by majority of the electorate. The question whether or not a particular candidate won a presidential election must trigger the further question whether the candidate who claims to have won the election got a majority of the votes of the electorate. We agree with the observation by the Court below that whether or not a particular candidate obtained a majority of the votes at the polls is a legal question that goes to the very heart of our political system regarding the election of a President. On that ground the question of majority of the electorate fell for consideration before the Court below.

Further, in determining whether the question of majority of the electorate was before
20 the court below for consideration, we have been guided by the petitions and the fact that the matter became a constitutional referral. The petition of the second petitioner shows that he sought an order that the first appellant was not duly elected as President of the Republic of Malawi as he did not obtain a majority of the votes polled. We agree with the court below that this relief sought by the 2nd Petitioner directly required the court to make a decision on what constitutes a majority of the

votes polled. The word majority with respect to presidential elections appears in section 80 (2) of the Constitution and section 96 (5) of the Parliamentary and Presidential Elections Act. The Court below could not have answered the question whether the first appellant truly obtained majority of the votes at the polls without making reference to the relevant law. We noted earlier that the law need not be pleaded in a case where there must be pleadings. We also noted that in the constitutional referral the main question was whether the elections of 21st May, 2019 were conducted in compliance with the Constitution and the applicable laws. In that regard, the question whether section 80 (2) of the Constitution was pleaded or not
10 does not arise. We are aware that the petitions informed or formed the basis of the three constitutional questions that the High Court referred for certification. In all these circumstances, we are satisfied that the question of the meaning of a majority of the votes at the polls was before the Court below for its consideration.

The third aspect in determining whether the question of a majority of the votes at the polls was before the Court below for consideration lies in the conduct of the proceedings. We observe that in the course of the proceedings the Court below drew the attention of the parties on the need for the parties to address it on the meaning of "majority of the votes at the poll" in relation to the presidential election. Despite the Court putting the matter to the parties, and asking them to address it, the parties paid
20 scanty regard to the call for them to address the Court below. Our examination of the record shows that the issue of a winner getting a majority of the votes at the poll in the Presidential contest was live throughout the trial. We fail to understand why the appellants now argue that the parties had abandoned the issue. There is nothing in the record to suggest that the issue of what majority of the votes at the polls was abandoned as the appellants indicate in their skeleton arguments. In particular, we observe that the matter of the majority of the electorate being 50% + 1 of the votes

appears early in the record in the parties' submissions at pages 4253 and 4254. It is indeed regrettable that the parties gave very scanty regard to the issue as the Court below observed, but that is not a reason to suggest that the important question of the meaning of majority of electorate under section 80 (2) of the Constitution was not up for consideration.

Finally, on this point, although the Court below did no come out clearly, there are two conflicting decisions of this Court on the meaning of majority. The first is the earlier case of ***Attorney General v Malawi Congress Party and Others*** (supra) which interpreted majority to mean 50% + 1 of the votes. That case interpreted
10 majority in the context of quorum in the National Assembly under section 50 (1) of the Constitution and the votes of members of Parliament in passing Bills or taking other decisions in the National Assembly. The second is ***Chakuamba and Others v Attorney General and Others*** (supra) which declined to interpret majority to mean 50% + 1 of the votes. The case was concerned with the interpretation of majority in the context of the election of a President under section 80 (2) of the Constitution. The differences in the interpretation of the word majority by this Court in the two cases presented some difficulty to the Court below which is bound by decisions of this Court. The lack of clarity in the meaning of the term majority in the Constitution made it imperative for the Court below to deal with the issue of the meaning of the
20 term.

For all the reasons stated above, we affirm that the issue of the interpretation of the term 'a majority of the electorate' in section 80 (2) of the Constitution was before the Court below. It is an important issue that raises the question of legitimacy of political leadership at the level of President.

We observe that the Court below acknowledged that the issue of interpretation of "a majority of the electorate" in section 80 (2) of the Constitution was important in the

context of a Presidential election and was addressed by this Court in the case of ***Chakuamba and Others v Attorney General and Others*** (supra). The Court below stated that it was fully alive to the fact that the decision in ***Chakuamba and Others v Attorney General and Others*** was of a superior Court, that it will be the last to sound or be seen as being irreverent to the decisions of the Supreme Court of Appeal. Without a doubt, the Court below is bound by decisions of this Court in accordance with the doctrine of precedent and stare decisis. The Court below cannot overrule a decision of this Court even if it disagrees with its decision. However, it is open for the Court below to distinguish the case before it in relation to a decision of this Court
10 on a point it intends to depart from.

In this matter, the Court below exhaustively discussed the case of ***Chakuamba and Others v Attorney General and Others*** which declined to ascribe to the term majority a meaning of 50% + 1 votes, and the earlier case of ***Attorney General v Malawi Congress Party and Others*** (supra) which ascribed to the term majority a meaning of 50% + 1 votes. The Court could easily have distinguished the two cases and the one before it before settling for a meaning it found to be correct as a process of judicial or legal reasoning without chastising this Court in the manner it did.

We have carefully considered the wording in section 80 (2) of the Constitution as well as the wording in section 96 (5) of the Parliamentary and Presidential Elections
20 Act. Section 80 (2) of the Constitution states-

> *"The President shall be elected by a majority of the electorate through direct, universal and equal suffrage."*

Section 96 (5) of the Parliamentary and Presidential Elections Act states-

"Subject to this Act, in any election the candidate who has obtained a majority of the votes at the poll shall be declared by the Commission to have been duly elected."

We have decided to revisit the interpretation of the term "a majority of the electorate" under section 80 (2) of the Constitution as made in ***Chakuamba and Others v Attorney General and Others*** (supra). The context in that case was similar to the context in this case. The ***Chakuamba*** case was an appeal from the High Court in the same way this case is an appeal from the High Court sitting on a constitutional referral. The appellants were Presidential candidates in the June 1999 elections and

10 issued a petition challenging the results in the same way the two respondents in this case were Presidential candidates who issued petitions challenging the results of the May 2019 elections. In both cases, section 80 (2) of the Constitution fell for consideration regarding the proper meaning of the term majority.

In the ***Chakuamba*** case the preliminary issue dealt with before the High Court was that the Commission unlawfully declared elected as President a candidate who obtained a majority of votes at the polls instead of a majority of the electorate. The petitioners prayed for an order to nullify the Presidential election. The issue raised was solely directed at the true and proper interpretation of section 80 (2) of the Constitution and section 96 (5) of the Act. The appellants contended that the

20 requirement for electing the President of the Republic by a majority of the electorate is satisfied by a candidate who obtained more than 50% + 1 of the registered voters and not merely of the voters who cast their votes at the polls.

Having set out the appropriate and applicable principles of constitutional interpretation, and having conducted a detailed analysis of the provisions of section 80 (2) of the Constitution and section 96 (5) of the Parliamentary and Presidential Elections Act where the word majority is used, and having made comparisons with

other provisions in the Constitution where the term is used, along with an analysis of some foreign case law, the Court declined to ascribe 50% + 1 votes as the meaning of the term "a majority of the electorate" in section 80 (2) of the Constitution. The Court defined the term "electorate" at page 42 thus-

> *"It is our considered view that the word 'electorate' as used in section 80 (2) can only mean those electors who have directly taken part in the process of an election. Any other interpretation would produce the absurd result that people can still be considered of having taken part in an election even though they did not bother to cast their vote and such result in our view would not promote the values of a democratic society..."*

10

The Court correctly defined "electorate" as the electors who actually take part in the election. It declined to ascribe a meaning to the word majority that is 50% + 1 votes on the basis of a comparison with the use of the word in other constitutional provisions. The Court again said at page 42 of that-

> *"We have looked at other sections in the Constitution where the word 'majority' is used and in particular we have looked at section 49 (1), (2), 53 (1) and 73 (3). The appellants did not contend that the use of the word 'majority' in these sections means fifty percent plus one. If that is their position why should the word 'majority' in section 80 (2) mean something different. We have already observed that provisions in the Constitution must be interpreted in a manner which sustain rather than destroy each other. We find that the word 'majority' as used in the Constitution mean' the greater number or part' and that is the general sense in which the word is used in the Constitution."*,

20

and at page 43 the Court said-

"It is our judgment that the meaning to be ascribed to section 80 (2) as presently stated and the context in which that word is used in other parts of the Constitution and having regard to the general purpose of the Constitution can only mean that the word 'majority' means "a number greater than" a number achieved by any other candidate."

We observe that this interpretation of the term "majority" in ***Chakuamba and Others v Attorney General and Others*** (supra) was greatly influenced by the manner in which the issue was placed before the Court. The relevant paragraph of the petition stated -

10 *"The Commission unlawfully declared to have been elected President a candidate who obtained a majority of the votes at the poll instead of a majority of the electorate."*

It is significant to note that section 80 (2) of the Constitution uses the phrase 'a majority of the electorate' while section 96 (5) of the Parliamentary and Presidential Elections Act uses the phrase 'a majority of the votes at the poll'. The Petitioners were clearly intent on convincing the Court that the two phrases carry different meanings.

A close analysis will show the real focus of the issue in the ***Chakuamba and Others v Attorney General and Others*** (supra) was on what "electorate" in section 80 (2)
20 of the Constitution meant as opposed to the term 'votes at the poll' in section 96 (5) of the Parliamentary and Presidential Elections Act and whether these terms mean the same thing or different things. That appears to be what the real issue was in the ***Chakuamba*** case and a resolution of that issue appears to have influenced the meaning that the Court conveniently ascribed to the term 'majority' in section 80 (2) of the Constitution. The Court could probably have been misled on what the real

issue before it was as the Petitioners seemed to have no real difficulty with the term majority. Their difficulty was on the question 'majority of what?' as a deciding factor in a Presidential election.

The approach taken by this Court in the ***Chakuamba and Others v Attorney General and Others*** (supra) is in sharp contrast with that taken by the Court in ***Attorney General v Malawi Congress Party and Others*** (supra) regarding the meaning of the word majority when used in respect of section 50 (1) of the Constitution. The case concerned the manner of passing the Press Trust (Reconstruction) Act. The passing of the relevant Bill in the National Assembly was challenged by the first respondent
10 who claimed ownership of the Trust although Government viewed it as a public trust. The first respondent claimed that the Bill was hurriedly and irregularly introduced in the National Assembly. It contended further that the Bill was discussed and passed without the necessary quorum in the National Assembly, and that in any event, the Act that resulted was tantamount to arbitrary deprivation of property and was discriminatory. A number of declarations were sought, one of which, and relevant to this discussion, was that sections 50 (1) and (2) of the Constitution require that there be a quorum in the House for competent business to commence and for continuation of such business. The High Court found for the Respondents, but that judgment was overturned on appeal to the Supreme Court of Appeal. The Supreme
20 Court of Appeal took time to discuss the term 'majority' with respect to passage of Bills in the National Assembly and observed at page 187 of the judgment that-

> *"There are three parties currently represented in the National Assembly. The United Democratic Front(UDF) has the largest number of members of Parliament, followed by the Malawi Congress Party (MCP) and Alliance for Democracy (Aford). The party in Government, that is the UDF, does not command an absolute majority to enable it pass*

legislation with simple majority. An alliance was, therefore, formed with Aford to redress this situation. However, even with this alliance, the UDF and Aford could not constitute two thirds of the members entitled to vote as required by certain provisions of the Constitution and Standing Orders, except that the alliance created numerical advantage to pass legislation by simple majority.".

It is axiomatic that voting to pass legislation in the National Assembly requires a 'yes' and 'nay' response. It should not be difficult to see, therefore, that simple majority means 50% + 1 votes of those present and voting. Thus, although the UDF had the largest number of members of Parliament, of the three parties in Parliament at the material time, it could not get a simple majority required to pass legislation. The alliance it had with Aford would have enabled it to get legislation passed by simple majority, that is to say 50% + 1 votes, although not with two thirds majority. The Court made it clear at page 222 of the judgment that any question to be decided by the National Assembly shall be decided by a majority of the votes of members present and voting unless the Constitution or any Act of Parliament provides otherwise.

It is observed that the case of ***Chakuamba and Others v Attorney General and Others*** (supra) never made reference to, and never discussed, the approach to the meaning of majority taken in ***Attorney General v Malawi Congress Party and Others*** (supra). The two cases were not distinguished. Both section 50 (1) and section 80 (2) of the Constitution have a bearing on the term 'majority'.

We affirm the definition of the term "electorate" in section 80 (2) of the Constitution as ascribed to it in ***Chakuamba and Others v Attorney General and Others*** (supra). We have taken occasion to reflect further on the meaning of "majority" in section 80 (2) of the Constitution. We have re-examined the approach taken in the

Chakuamba case. We do not fail to acknowledge that the ***Chakuamba*** case engaged in a detailed discussion before declining to ascribe 50% + 1 vote as the meaning of majority. We note that it was observed in the ***Chakuamba*** case that the absence of run-off provisions in the Constitution is an indication that it was never the intention to ascribe a 50% + 1 votes meaning to the word majority. We think that this reasoning ignores the real possibility that a Presidential contender may obtain the 50% + 1 votes first time without the necessity for a run-off. While the Court may observe inadequacies in the constitutional provisions on an aspect, that of itself should not make the Court find a convenient meaning that covers or clothes the
10 inadequacies. The Court has a duty to bring the inadequacies it observes in the law to the attention of the legislature to address them and not seek to ascribe a convenient meaning to words used in the Constitution. It is observed that even if the meaning of the word "majority" is taken as was said in ***Chakuamba*** case, there is no provision for a situation where two top Presidential contenders get exactly the same number of votes at the polls - a distinct possibility in the current situation. Again, the ***Chakuamba*** case did not consider a situation involving large numbers of Presidential contenders who share among them the votes at the polls, as has happened in the recent past. There is a real possibility that the highest vote could be as little as 10% of votes at the polls. It would be absurd to imagine that 10% percent
20 of the votes at the polls would be said to be majority vote for the election of a person to the high office of President. Further still, it would undermine the very principle of majority rule in democratic governance. It would raise the question of legitimacy of an elected President in a democratic setup. We are in no doubt that the correct meaning to be ascribed to the word 'majority' in section 80 (2) of the Constitution is 50% + 1 votes of the voters who voted in the election. We hold that this is the correct meaning of majority, and we depart from the meaning assigned to the word by the case of ***Chakuamba and Others v Attorney General and Others*** (supra). It is

an interpretation that would not lead to any absurdity in so far as Presidential election under section 80 (2) of the Constitution is concerned. This interpretation also safeguards principles of transparency, accountability, honesty and integrity in the conduct of elections to the high office of President. It would guard against the manipulation of vote and the creation of numerous surrogate parties or Presidential contenders designed to spread the vote to benefit a particular contender at the expense of other strong contenders.

The role of the Attorney General in relation to constitutional matters generally and the present matter specifically

10 The second appellant faults the decision of the Court below with respect to the involvement of the Attorney General in the proceedings in the court below. The second appellant, in paragraph 3.132 of its grounds of appeal, contends that "*the court erred in law by finding that the Attorney General could not appear in the case on behalf of the [second appellant]*".

It is pertinent to observe that the office of Attorney General is established under the Constitution. Section 98 (1) of the Constitution provides that "*there shall be the office of the Attorney General, who shall be the principal legal adviser to the Government*". The Attorney General is also a Law Officer and head of the bar.

In his or her capacity as principal legal adviser to the Government, including the
20 Legislature and the Judiciary, and as a Law Officer, the Attorney General provides legal advice to Government on matters of law, and in the discharge of that constitutional responsibility the Attorney General must always ensure the promotion and protection of the rule of law, and the upholding of constitutionalism.

We note that, in practice, the Attorney General does not ordinarily appear in court in person except in very high profile cases, which tend to be very rare. This is

certainly the practice in most Commonwealth countries; and the practice is in keeping with the unique position of the Attorney General as principal legal adviser to the whole of Government, as Law Officer and as head of the bar.

In considering the position taken by the Attorney General in the proceedings in the Court below, we acknowledge that section 20 of the Electoral Commission Act provides that the Commission may instruct the Attorney General or any legal practitioner to provide legal representation to the Commission in any court proceedings concerning appeals against its decisions on complaints about any aspect of the electoral process or to provide general legal advice to the Commission. We note that the scheme under section 20 of the Electoral Commission Act, is not mandatory; the provision is permissive or merely enabling, indicating what the Commission may do and not what the Commission must do. While we appreciate the practical usefulness of the provision, we do not think that the Attorney General is the first point of call in respect of legal representation for the Commission, considering that the Attorney General is principally a legal adviser to Government.

We also note that Order 19 rule 8 of the Courts (High Court) (Civil Procedure) Rules provides that every process relating to matters under the Constitution shall be served on the Attorney General, whether or not the Attorney General is a party to the proceeding. The Attorney General thus becomes a party to the proceedings, and is expected to assist the court in resolving the issues before the court.

As previously observed in this judgment, the proceedings in this matter were commenced by way of two separate petitions in the High Court where the second appellant (Electoral Commission) was the second respondent. The second appellant (Electoral Commission) instructed the Attorney General and other legal practitioners to represent it. After the two petitions were consolidated and became a Constitutional referral the Attorney General continued to represent the second appellant in the

Court below. We hold that although the Attorney General was properly appointed to represent the second appellant, in terms of section 20 of the Electoral Commission Act, at the commencement of the proceedings in the court below, when the matter became a Constitutional referral the Attorney General, as a Law Officer number one and custodian of the Constitution, should have stepped back and ceased to represent the second appellant. The Attorney General, having withdrawn from representing the second appellant, should have taken up the role of assisting the Court below to resolve the three constitutional issues on matters of law which had been referred to the Court.

10 We observe that at the commencement of the hearing of the constitutional referral proceedings, on 19th June, 2019, both petitioners made an application in the court below to stop the Attorney General representing the second appellant in the matter on the ground that the Attorney General was "conflicted". We are perturbed to observe that the Attorney General opposed that application, and that the Court below indicated that it would determine that application at a later time. Meanwhile, the Attorney General was allowed and continued representing the second appellant throughout the hearing of the constitutional referral. The Court below only pronounced its disapproval of the Attorney General in representing the second appellant at the time it delivered its judgment on 3rd February, 2020. We are of the
20 firm view that the Court below should have made its decision in that regard sooner than later, and ideally at the time the application was made, and should not have postponed that decision until the conclusion of the hearing of the proceedings.

It is obvious to us, as it should have been to the Court below, that the Attorney General must have been aware that he could, and should, have continued participating in the proceedings only in his capacity of Attorney General and Law Officer to guide the Court below on matters of law in resolving the three

constitutional issues, as opposed to representing or taking sides with the second appellant. Page 362 of the record clearly indicates that the Attorney General was representing the second appellant; and that is why when he was asked by the Court below, as head of the bar, to introduce the bar, the Attorney General indicated that the office of the Attorney General was represented by Dr Kayuni and other officers. The record of appeal shows as follows-

> *"HON JUSTICE POTANI: Let me welcome Counsels present in these proceedings .... But before I proceed let me recognize the Honourable Attorney General and also let me recognize Senior Counsel Modecai*
10 *Msisha. Perhaps it would be appropriate if the Honourable Attorney General can introduce the bar. You will be head of the bar.* "
>
> *"ATTORNEY GENERAL: Thank you very much, Your Lordships (Bar introduces as per the Coram) with the addition of Counsel Chakhala representing Times Group, Malera representing Zodiak, Chinkwezule representing Women Lawyers Association; Songeya Charles Mhone; Larry Nita representing 2nd Petitioner, Dr Kayira representing Attorney General Chambers; Counsel Mmeta representing 1st Respondent, Counsels Chisiza and Loness Khembo from the Attorney General's Chambers."* (sic).

20 The Attorney General clearly knew, or should have known, that he was supposed to participate in the Constitution referral proceedings in his capacity as principal legal adviser to Government and as a Law Officer, and not as Counsel for the second appellant. It is regrettable that the Court below left its decision on the issue of the Attorney General representing the second appellant in a constitutional referral until the end of the proceedings; it was unjustifiable for the Court below to delay making its decision in that regard; and it is also regrettable that the Attorney General

continued to represent the second appellant after the consolidated petitions had been certified and became a constitutional referral. At that point the Attorney General was clearly compromised when he conducted the defence case as opposed to advising the Court on matters of law as a custodian of the Constitution.

We note with regret that the record is littered with instances of evidence that the Attorney General was conflicted and compromised. As a consequence of the conflicted and compromised position that the Attorney General took, he ended up dominating the proceedings for the defence - defending both appellants, and speaking first, although he was on record as Counsel for the second appellant in the
10 proceedings in the Court below. The record also shows instances of emotional confrontation and otherwise inappropriate conduct on the part of the Attorney General in the course of the proceedings.

In general, it is clear to us that the conduct of the Attorney General in the proceedings in the Court below was not consistent with his constitutional duty and responsibility as principal legal adviser to Government and as a Law Officer, to provide legal advice to Government on matters of law, and in the discharge of that constitutional responsibility to ensure the promotion and protection of the rule of law, and the upholding of constitutionalism.

The case of ***Kafantayeni and Others v Republic*** Constitutional Case No 12 of 2005
20 (unreported) is an illustration of proper conduct of an Attorney General in a constitutional matter. In that case the Attorney General, as a custodian of the Constitution, joined in the matter on own application in order to guide the Court on matters of law regarding the Constitution. The case of ***Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*** (supra) is another good example of the role of the Attorney General in litigation in constitutional matters, and in circumstances similar to this case. In that case the

Attorney General was joined in the proceedings as the *amicus curiae*, and in his *amicus curiae* brief delineated the specific questions for the court to consider in resolving matters that were to be determined by the court, and made specific submissions in relation thereto (see: paragraphs 101 to 119 of the judgment).

Turning to the specific ground of appeal by the second appellant that "*the court erred in law by finding that the Attorney General could not appear in the case on behalf of the [second appellant]*", we observe that the Attorney General himself has not filed any complaint, which he would have done in separate proceedings. We believe that the Attorney General is aware that by representing the second appellant
10 in a constitutional referral he took a wrong turn and that is why he did not take issue with it. The order barring the Attorney General from further appearances on behalf of the second appellant in a constitutional referral cannot be regarded as an order against the second appellant. Thus, the second appellant has no basis for raising the issue on behalf of the Attorney General. We see this ground of appeal as an attempt by the second appellant to reverse roles of representation where the second appellant is now seeking to represent the Attorney General who represented it in the same matter in the Court below. That is inappropriate, as the second appellant is not competent to speak for the Attorney General. The ground of appeal on this point cannot be entertained and it stands dismissed. For the avoidance of doubt, the order
20 made by the Court below against the Attorney General will not be disturbed, and is affirmed, by this Court.

Determination

We have taken time to examine both appeals by the first appellant and the second appellant. We have made a critical analysis of all the grounds of appeal and made the best we could of the numerous grounds of appeal for the second appellant. We have given due attention to the skeletal arguments in support of both appeals and in

opposition to the appeals. We have examined critical parts of the record of appeal placed before us, including the petitions and the constitutional questions that were certified for the determination of the matter. We have analyzed relevant constitutional provisions and the provisions of the Parliamentary and Presidential Elections Act and other laws that have been called into question. We have critically studied the judgment of the Court below. We are satisfied that we are ready to state our full and final determination on both appeals. We have taken a unanimous position on all the aspects that must necessarily lead us to fully dispose of the two appeals.

10 This matter commenced with two separate electoral petitions containing specific prayers. The High Court Judge before whom the petitions were brought consolidated them and identified three constitutional questions that needed to be certified and addressed for the purpose of disposing of the consolidated petitions. When the Judge referred the matter for certification, it was duly certified and converted into a constitutional referral disposable by a panel of not less than three High Court Judges in accordance with section 9 of the Courts Act. A panel of five High Court Judges was duly constituted. The Court dealt with the matter to finality, disposing of the three constitutional questions and all the issues that formed the basis of the referral. It was open for the panel of five Judges to deal with all the issues in the matter, 20 beyond the three constitutional questions in the referral, without referring it back to the single member who made the referral for final disposal of the consolidated petitions.

The petitioners had the initial burden of proving a *prima facie* case on the allegations in their petitions. Upon the Petitioners establishing their respective cases, the burden of proof shifted to the second appellant as the primary duty bearer in the conduct and management of the elections. The duty was to conduct and manage the elections in

full compliance with the Constitution and applicable laws. The second appellant who was by law the custodian of all electoral materials was under obligation to act in a transparent and accountable manner and to produce all the materials that would have assisted the Court below in determining whether the election was conducted in full compliance with the Constitution and applicable laws.

We are in full agreement with the holding by the Court below that the petitioners' complaint alleging undue return and undue election of the first appellant in the election of 21st May, 2019 were made out both qualitatively and quantitatively. We find the litany of irregularities in the Presidential election revealed by the record of appeal not only serious but also troubling. The numerous irregularities involved widespread use of correction fluid called "tippex" on tally sheets, illegal alteration of a large number of tally sheets, the use of numerous duplicate tally sheets where originals inexplicably went missing among the many other irregularities established in the Court below. These irregularities seriously undermined the credibility, integrity and fairness of the return of the President during the general election.

There was ample material before the Court below, including evidence through examination of witnesses, confirming the breaches of sections 97, 98, 113 and 119 of the Parliamentary and Presidential Elections Act. These breaches also undermined the duty placed on the Commission under section 76 (2) (d) of the Constitution and further grossly violated the rights of the voters to elect a leader of their choice under sections 40 (3) of the Constitution.

Having ascribed to the term "a majority of the electorate" in section 80 (2) of the Constitution the meaning of 50% + 1 votes of the voters who voted in the election, we hold that none of the candidates in the Presidential election of 21st May, 2019 obtained a majority of the votes cast.

We agree with the Court below that the conduct of the second appellant in the management of the 21st May 2019 general election which resulted in gross violations and breaches of the Constitution and applicable laws demonstrated serious incompetence and neglect of duty on the part of the Electoral Commissioners in multiple dimensions. Going through the record of appeal, we are astounded by the Commissioners' lack of seriousness and incompetence towards their duty. The level of lack of seriousness and incompetence of the Commissioners poses a serious danger to the conduct of elections and the institution of democracy in this country.

We find that the grounds of appeal in respect of the appeals of first appellant and
10 second appellant have not been made out and we dismiss both appeals in their entirety.

We have seriously considered the issue of the second appellant's right of appeal, and whether the second appellant can, and should, appeal in a constitutional referral or constitutional matter where its conduct is found to have fallen short of compliance with the Constitution and electoral laws. This issue arises from the position of the second appellant as a duty bearer in constitutional matters, election matters and under human rights provisions. It is difficult to comprehend how the second appellant would appeal as a duty bearer in a constitutional matter. The scheme of the law is that the second appellant takes the position of a referee in an election and
20 would continue to play that role even in proceedings in court relating to electoral challenge. In section 100 of the Parliamentary and Presidential Elections Act, the second appellant is joined to the court proceedings to assist the court with material that will be used to establish whether there were irregularities or not but not to take any sides in the matter. In section 114 of the Act, the second appellant only features as a quasi-judicial tribunal whose decision is appealed against. In that regard, it cannot be on the side of any party in a contested election. In the present matter, we

hold that the second appellant should not have appealed and appear as if it is siding with one of the contestants in a challenged election. Similarly, the first appellant should not have attempted to appeal on behalf of the second appellant as some of his grounds of appeal suggested.

The Court below proceeded to nullify the election of the first appellant as President in the following words at paragraph 1480 of its judgment-

> *"Consequently, in terms of section 100 (4) of the PPEA, we hold that the 1st Respondent was not duly elected as President of the Republic of Malawi during 21st May, 2019 elections. In the result, we hereby order*
10 *the nullification of the said presidential elections. We further order that a fresh election to the office of the President be held in accordance with the PPEA and pursuant to the consequential directions that we make hereunder".*

A declaration that the President was not duly elected is made under section 100 (3) (b) of the Parliamentary and Presidential Elections Act while section 100 (4) of the Act provides for the holding of a fresh election of the office of the President which shall be held in accordance with the Act. The Court below made a finding of undue return and undue election of the President. When it came to making the consequential orders the Court below erroneously nullified the Presidential election.
20 In accordance with section 100 (3) and (4) of the Act, the Court below should instead have used the language of the statute and simply have made an order that the first appellant was not duly elected to the office of President. We, therefore, find that the first appellant was not duly elected to the office of President of the Republic.

We find that the order made by the Court below that fresh elections for the office of President be conducted in accordance with the Parliamentary and Presidential Elections Act to be proper and we uphold it.

We note that in its consequential directions, the Court below stated in paragraph 1483 (c) of its judgment thus-

> "*The fresh elections herein shall be held within one hundred and fifty (150) days including Sundays, Saturdays and public holidays, from the date hereof*".

This order or direction took effect on the date it was pronounced, being 3rd February,
10 2020. We observe that in fixing 150 days within which to hold the fresh election, the Court below acted in exercise of its discretion in the circumstances as it saw them. We are aware that electoral matters are urgent matters and electoral disputes must be resolved expeditiously. We hold that a long delay in holding fresh elections for the office of President in the event of a declaration of an undue return under section 100 of Parliamentary and Presidential Elections Act is not justifiable under law and is not desirable in the interest of democracy and good governance. The law envisages that a by-election or a fresh election shall be conducted in the shortest possible time after the occurrence of the event that necessitates it. Section 63 (2) (b) of the Constitution in relation to a vacancy in the seat of a member of the National
20 Assembly states-

> "*any by-election to fill a vacancy that occurs shall be held within sixty days after the seat of the member becomes vacant or, if in the opinion of the Speaker the circumstances do not so admit then as expeditiously as possible after the expiry of that period; ...*"

It is significant that the by-election must be conducted within sixty days or where necessary as expeditiously as possible after the expiry of the intervening event. Of particular relevance to this case is section 85 of the Constitution which states-

> "*If at any time both the office of President and First Vice-President become vacant then the Cabinet shall elect from among its members an Acting President and an Acting First Vice-President who shall hold office for not more than sixty days, or where four years of a Presidential term have expired, for the rest of that Presidential term.*"

The Constitution thus provides for circumstances where both the office of President
10 and First Vice-President may be vacant. Those circumstances are not spelt out and are not closed. In the event of there being an Acting President and an Acting First Vice-President, elections for a President must be conducted within sixty days if it is within four years of a Presidential term.

It is for good reason that a period of sixty days within which to conduct by-election or fresh elections is provided for in the Constitution. It is consistent with the principle that electoral disputes must be resolved expeditiously. It is also consistent with the view that preparations for a by-election or a fresh election do not take the same form as preparations for a general election. A declaration of an undue election is a result of a challenge. The party that succeeds is entitled to an effective remedy. The right
20 to an effective remedy accrues only to those whose rights are affected. These are the voters, the candidates and their supporters who voted for them and of course, the electoral system, as we have said earlier in this judgment. In this regard, it is the same voters' roll as was used in the general election that should be used in a by-election or fresh election. From a rights point of view, it is those voters who voted and those contestants who contested in the immediate past general elections whose rights were violated or injured by the impugned conduct of the Commission, or by

the wrong decisions of the Commission who must be given a second chance to vote. The law does not envisage registration of new voters in a by-election or a fresh election because such voters were never wronged in the first place by the impugned decision of the Commission.

In our view in the matter at hand, the fresh elections for the office of the President should have been held within sixty days from the date the Court below made a declaration of undue return and ordered fresh elections, being 3rd February, 2020. We are, nevertheless, mindful that the Court below exercised discretion in setting 150 days within which to hold the fresh election. We would not overturn that period
10 merely because we would have ordered differently. We reluctantly uphold the period of 150 days ordered by the Court below, within which the fresh elections for the office of President should be held.

Consequential Directions and Recommendations

It was proper for the Court below to make consequential directions and recommendations following the determinations it had made. Indeed, where there are breaches of constitutional provisions and human rights provisions, the Court has a duty to provide an effective remedy and enforce the human rights. The Court below's reference to sections 41 (3) and 46 (3) of the Constitution in its endeavor to provide an effective remedy and enforce human rights was appropriate. We hasten to add
20 that section 46 (3) of the Constitution should be read with section 46 (2) of the Constitution.

Section 41 (3) of the Constitution provides for access to justice and legal remedies in the following manner:

"Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law."

Section 46 (2) and (3) of the Constitution states-

"(2) Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled—

(a) to make application to a competent court to enforce or protect such a right or freedom; and

(b) to make application to the Ombudsman or the Human Rights
10 *Commission in order to secure such assistance or advice as he or she may reasonably require.*

(3) Where a court referred to in subsection (2) (a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated."

Where a court notes legislative gaps or inadequacies the court may recommend to
20 the legislature to make appropriate redress. It is perfectly proper for a court to make a strong recommendation to the legislature to take legislative action to address a gap or inadequacies in the legislation, provided it remains a recommendation. A court must recognize that the legislature is a deliberative forum and the time honoured principle of checks and balances among the three branches of state ought to be respected.

The Court below, at paragraph 1483 (b) of its judgment, stated –

> *"We are also mindful that the under section 80 (1) of the Constitution, a Presidential election has to take place concurrently with the general election for members of National Assembly as prescribed by the section 67(1) of the Constitution. The Court appreciates the significance of the certainty in our democratic process which is brought about by the fixing of the date of general election under section 67(1) of the Constitution. In view of this position, we are of the view that it is appropriate that such certainty be preserved. In the circumstances, we hold the view that Parliament should take appropriate legislative measures to ensure that such certainty is preserved whilst at the same time ensuring that whoever is elected President of the Republic during the fresh election herein is allowed to serve the constitutionally prescribed five-year term. One of the options that Parliament might consider is to extend the term of the incumbent members of Parliament and shift the election date from May to July in order to ensure the preservation of such electoral concurrency."*.

The Court was entitled to hold the view that Parliament needed to take appropriate legislative measures to ensure that certainty regarding the electoral calendar, and the tenure of the President and members of the National Assembly, is preserved. It remained open to the legislature to do more than this recommendation on legislative action to ensure orderly fresh Presidential elections and better managed future Presidential elections.

It is important that Parliament fixes the date of a fresh election. By the terms of the order of the Court below that there be a fresh election for the office of the President within 150 days, it is a legal requirement that a President must be elected and duly

returned and sworn in by the commencement of the 151st day from the date of the judgment of the Court below.

It is further recommended that in view the 50% + 1 votes interpretation of a majority of the electorate in section 80 (2) of the Constitution, the Legislature should expeditiously put in place the necessary legislation that will ensure smooth implementation of the constitutional provision.

As we have earlier found, we direct that only the parties whose rights were injured by the impugned conduct of the Commission on the 21st May, 2019 should participate in the fresh election. The Commission must use the voters' registers that
10 were used in that election. New entrants on the voters' registers must not take part in the election. Further, only Presidential candidates who competed in the 21st May 2019 General elections are eligible to compete in the coming fresh election.

Costs

The general principle in litigation is that costs follow the event. Whether to award costs or not is a matter in the discretion of the court. This matter is public interest litigation and the first appellant was entitled to exercise his right of appeal and fight for his space. Although the first appellant is not successful in his appeal to this Court, he will not be condemned to pay other parties' costs. He will pay his own costs.

With respect to the second appellant, we agree with the Court below that the
20 Commission is a duty bearer and not a holder of rights seeking to vindicate legal rights. We have made observations and findings that reflect negatively on the conduct of the Commissioners in handling the general election of 21st May 2019. We want to observe that the conduct of the Commission in the Court proceedings here and below left much to be desired, resulting in loss of colossal sums of money through litigation, to say nothing about the injury to our democratic processes as

well as general and unquantifiable suffering of the people of this country. The truth of the matter is that all that loss and suffering could have been avoided had the second appellant conducted itself prudently as a duty bearer and assisted the Court early in the litigation of the matter rather than take sides.

We were minded to order that the Commissioners personally pay costs to the first and second respondents in this matter here and below. We are, however, content to sternly warn that any future wasteful and inappropriate conduct on the part of the Commissioners will attract costs to be paid personally by them.

In the present matter we order that the second appellant pays the first and second
10 respondents' costs for this litigation here and below.

Further, we have checked the coram in the Court below, and we do not understand how so many legal practitioners could have represented the parties in these proceedings. We order that both party and party costs, and solicitor/lawyer and own client costs should be taxed by the Registrar.

Twea, JA

Having considered the consequential directions that were given in this case by the Court below I wish to give a further opinion.

The consequential directions in issue are in paragraph 1483 of the Judgment of the Court below, and state as follows-

20 *"As a necessary consequence of the determination herein, and having in mind section 41(3) of the Constitution which grants all persons in our jurisdiction the right to an effective remedy by a court of law; as well as section 46(3) of the Constitution which gives the Court the power to make any orders that are necessary and appropriate to secure the enjoyment*

of the rights and freedoms which the court finds to have been violated, we order the following-

(a) For the avoidance of doubt, the declaration that we have made that the 1st Respondent was not duly elected during the 21st May, 2019 Presidential election, and therefore that the said elections were invalid, it consequentially follows that the status in the presidency, including the status of the office of the Vice President, reverts to what it was prior to the declaration of the presidential results on the 27th of May, 2019. As per section 100 (5) of the PPEA, the declaration herein does not invalidate anything done by the President [or Vice President] before the declaration of invalidity herein.

10

(b) We are also mindful that the under section 80(1) of the Constitution, a Presidential election has to take place concurrently with the general election for members of the National Assembly as prescribed by section 67(1) of the Constitution. The Court appreciates the significance of the certainty in our democratic process which is brought about by the fixing of the date of general election under section 67(1) of the Constitution. In view of this position, we are of the view that it is appropriate that such certainty be preserved. In the circumstances, we hold the view that Parliament should take appropriate legislative measures to ensure that such certainty is preserved whilst at the same time ensuring that whoever is elected President of the Republic during the fresh election herein is allowed to serve the constitutionally prescribed five-year term. One of the options that Parliament

20

might consider is to extend the term of the incumbent members of Parliament and shift the election date from May to July in order to ensure the preservation of such electoral concurrency.

(c) The fresh election herein shall be held within one hundred and fifty (150) days including Sundays, Saturdays and public holidays, from the date hereof;"

The above directive, in my view purports to find that-

(i) the Presidency of the previous general election reverts when the Court finds that there is undue return of election of the President, under section 100 of Parliamentary and Presidential Elections Act;

(ii) the Court below had jurisdiction to extend the presidency of the previously elected Government;

(iii) the Court below had the discretion to determine the time frame for the ensuing fresh elections; and

(iv) the presidential term is affected by presidential elections.

I am aware, as this Court is, that none of the parties raised this on appeal although it has left open in the arguments and had been subject of several applications on stay and extension of the time for elections by the second appellant.

This Court, under Order III rule 2, (1) determines appeals by way of re-hearing. I do not wish to belabour this. However, it is trite that this Court's duty is not to retry the case. It will only subject the evidence of the Court below to a fresh scrutiny. The Court will review the decision of the Court below only if it finds that there was an error of law, error of fact, error of mixed fact and law or that the court below exercised its discretion wrongly. Considering the issues I raised earlier, I find that

there was an error of law. Had the Court below considered the totality of the circumstances, it would have come to a different conclusion.

I will therefore consider three major circumstances under the Parliamentary and Presidential Elections Act, which provide for election of the President other than by general election, namely sections 54, 114 and 100 of the Act. To illustrate this point let me begin with section 81 of the Constitution. Section 81 of the Constitution provides that-

> *"(1) Before a person elected to be President or First Vice President or appointed to be First Vice President or Second Vice President take office that person shall take the following oath which shall be administered in public by the Chief Justice.*
>
> ....
>
> *(3) A person elected to be President or appointed to be First Vice President or Second Vice-President shall be sworn into office, in accordance with subsection (1), within thirty days of being elected or appointed.*
>
> *(4) The President and First Vice-President shall hold office until such time as his or her successor is sworn in."*

The import of this section is clear. The President or First Vice President elect will assume office only after being sworn. Further that the swearing must be administered within thirty days after the Electoral Commission declares a return to the office of the President and First Vice President. When the President elect and First Vice President elect are sworn in the previous holders of offices of the President and First Vice-President, or Second Vice President, if there be any, cease to hold office. The swearing in of the President elect and First Vice-President elect, and the attendant military ceremony signify succession to the offices.

After swearing in the President would then proceed to appoint ministers and form a cabinet: see: sections 92 and 93 of the Constitution. Section 81 (1) therefore signifies the handing over and taking over of the Presidency; the democratic succession of the Presidency. The old presidency ceases to exist in whatever form after that.

The scheme for the elected part of the Government is provided for in section 67 of the Constitution. Section 67 (1) of the Constitution provides as follows

> *"(1) The National Assembly shall stand dissolved on the 20th of March in the fifth year after its election, and the polling day for the general election for the next National Assembly shall be the Tuesday in the third week of May that year:*
>
> *Provided that where it is not practicable for the polling to be held on the Tuesday in the third week of May, the polling shall be held on a day, within seven days from that Tuesday, appointed by the Electoral Commission..."*

10

Under section 80 (1) of the Constitution, the President, during a general election, is elected concurrently with members of the National Assembly. This Constitutional provision is also reflected and provided for under section 32 (4) of the Parliamentary and Presidential Election Act, which states-

20

> *"Subject to this Act, in a general election, the poll for election of members of the National Assembly may be taken simultaneously with the poll for election to the office of President."*

When the National Assembly is dissolved the institutions of governance that subsist are the President, as "Head of State" under section 49 (1) of the Constitution, and the Judiciary. Section 67 (4) provides that the President can reconvene the National

Assembly in case of a constitutional crisis or emergency. The reconvened National Assembly will only transact the business for which it has been reconvened. In any case, however, it would stand dissolved on the date of the general election. Clearly, the National Assembly of the previous Government does not survive beyond the general election.

After the general election Electoral Commission will determine the national result in accordance with sections 96, 97, 98 and 99 of the Parliamentary and Presidential Elections Act, which this Court has referred to in the judgment. Members of the National Assembly will, under section 67 (3) of the Constitution, be called to
10 Parliament within 45 days after the polling day. However, this happens after the Members of Parliament have taken oaths under section 52 of the Constitution which states that:

> *"Every member of Parliament, before taking his or her seat, and every officer of Parliament, before assuming duties of his or her office, shall take and subscribe before the Chief Justice in the National Assembly –*
>
> *(a) the oath of allegiance is the form prescribed by law; and*
>
> *(b) such other oaths for the due performance of their respective officers as may be prescribed by law."*

Consequently, the President and Members of Parliament having been sworn in and
20 taken oaths, as the case may be, a new Government democratically elected by the people in a general election is formed.

Before I go back to sections 54, 114 and 100 of the Parliamentary and Presidential Elections Act, it is important to state that section 77 of the Constitution provides for the franchise of the people of Malawi. Section 77 (1) of the Constitution provides that-

"All persons shall be eligible to vote in any general election, by election, presidential election, local government election or referendum, subject only to this section."

The Constitution therefore provides for five types of elections. So far, Parliament has enacted laws and made provision to govern the general election, by-election, local government election and referendum. Although a President can be elected during a general election, a Presidential election is the election of the President other than that by general election. There are no specific provisions in our laws to govern the election of a president other than the general election.

10 I will now refer to the three circumstances in which we can have a Presidential election under Parliamentary and Presidential Elections Act. First is section 54 (d), which states-

"Where - .....

(d) a candidate for election to the office of President who would otherwise have been entitled to be declared duly elected as President dies after the poll has begun in an election to the office of President, but before he has been declared duly elected as President, the Commission shall, by notice published in the gazette, declare that all proceedings relating to the election of
20 *the office of President are void and that proceedings shall be immediately commenced afresh in accordance with this Act."*

The Commission has the duty to declare the proceedings relating to the election void. Proceedings for a fresh election of a President begin immediately. Although the time frame for such a fresh election of the President is provided for in the Parliamentary and Presidential Elections Act there are no specific provisions on how

to proceed. In such a case, no one is declared duly elected, the proceedings relating to the election are void ab initio. The incumbent President would continue in office until a new candidate is returned and sworn in as President. However, where it is the incumbent President who dies while he or she is a Presidential candidate, the First Vice President would continue in office until the fresh Presidential election is determined.

The second Presidential election would come under section 114 of the Parliamentary and Presidential Elections Act. This section governs appeals from the Commission to the High Court before the national result is declared. I will refer only to the most
10 relevant parts thereof -

> "... ...
>
> *(5) At the conclusion of the trial of an election petition the court shall determine whether the member whose nomination or election is complained of, or any other and what person was duly nominated or elected, or whether the election was void, and shall report such determination to the Commission. Upon such report being given such determination shall be final.*
>
> *(6).......*
>
> *(7) Notwithstanding subsection (6), the High Court shall have*
> 20 *power, subsequent to the holding of an election, to declare void the election if, upon hearing the petition referred to in subsection (1), the High Court is satisfied that there are good and sufficient grounds for declaring void the election.*".

This section applies to all appeals to the High Court from the Commission's decision in respect of complaints placed before it; including those filed at the beginning of

the determination of the national results, under section 97 of the Parliamentary and Presidential Elections Act. The gist of the section is that the Court has power to declare the election void. The election so declared is void ab initio. No results will be declared thereon. Where the petition related to the election of the President, the declaration under this section will trigger a fresh election of the President. In such a case, the election being void ab initio, the incumbent President will continue in office until a fresh election is held, the results are declared, a candidate is returned and sworn in as President. The Parliamentary and Presidential Elections Act does not provide the procedure for such election, who would declare the date thereof or how
10 long, after the declaration by the High Court, such election would be held.

It is important to note, in respect of a fresh Presidential election under sections 54 and 114 of the Parliamentary and Presidential Election Act, that no candidate is returned into the office of President. The incumbent President therefore continues in office until a presidential election is held and a candidate is returned and sworn in as President.

The third Presidential election is provided for under section 100 and of the Parliamentary and Presidential Elections Act. Under section 100 of the Act, national results of the general election will have been published and a candidate returned into office. What is challenged under this section is not the election itself but the return
20 of a candidate, as a member of the National Assembly or President, as the case maybe. Where the challenge is not successful, the President elect who was sworn in will continue in office as if there was no such challenge; section 100 (3) (a) of the Act. However, where the challenge is successful, subsections 3 (b) (4) and (5) will apply. I will reproduce them-

"... ...

(3) If on hearing of a petition under subsection (1), the High Court makes an order declaring –

(a) ......

(b) that the member of National Assembly or the President, as the case maybe, was not duly elected, the Registrar of the High Court shall forthwith give notice to the Commission which shall publish a notice in the gazette stating the effect of the order of the High Court.

(4) Pursuant to an order of the High Court under subsection 3 (b) declaring that the member of the National Assembly or the President, as the case maybe, was not duly elected, a fresh election for the seat of the member of National Assembly or to the office of the President, as the case maybe, shall be held in accordance with this Act.

(5) A declaration by the High Court under subsection 3(b) shall not invalidate anything done by the President before that declaration."

The duty of the Court under this section is to declare undue return of the candidate and no more. The Registrar of the High Court will then notify the Electoral Commission which will put a notice in a gazette of the effect of the declaration. The Commission is required to give notice that there is a vacancy for the seat of the National Assembly or the office of the President, as the case may be, and that there shall be a fresh election. What happens thereafter depends on which office the declaration relates to.

Where the Court declares undue return of a member of National Assembly, the Parliamentary and Presidential Elections Act and the Constitution are clear on what will happen. The Registrar of the High Court will notify the Commission of the

decision of the High Court. The Commission will then gazette the decision of the High Court and the effect thereof: that there is a vacancy and that there will be a fresh election. After the notice of the vacancy in the seat of the National Assembly is put in the gazette by the Commission, the Speaker of the National Assembly too will gazette the vacancy and the cause thereof, under section 44 of Parliamentary Presidential Elections Act, which states-

> *"A vacancy in the membership of the National Assembly which exists otherwise than by dissolution of Parliament shall be published by the Speaker by notice in the gazette stating the cause of the vacancy."*

10 Further, under section 32 (2) of the Parliamentary and Presidential Elections Act, which states that-

> *"When a member of the National Assembly dies or resigns, or the speaker gives notice under the relevant provision of the Constitution that a seat of a member of the National Assembly has become vacant, a by-election shall be held."*

The end result, therefore, is that there will be a by-election. Notwithstanding that a by-election can be deferred if the member affected files and prosecutes an appeal: section 63(3) of the Constitution, sections 33 and 44 of the Parliamentary and Presidential Elections Act. Section 63(2) of the Constitution states that-

20 > *"The Speaker of the National Assembly shall give notice in the Gazette in the event that the seat of any member of Assembly shall become vacant under this section:*
>
> *Provided that –*

> (a) *Parliament shall make provision for holding by-election to fill an vacancy that shall occur,*
>
> (b) *Any by-election to fill a vacancy that occurs shall be held within sixty days after the seat of the member becomes vacant or, if in the opinion of the Speaker the circumstances do not so admit, as expeditiously as possible after the expiry of that period;..."*

What comes out clearly is that a by-election to fill a vacancy in the National Assembly must be held within sixty days; after the seat becomes vacant; that is, that
10 the election, results and return are declared. This is determined by the Constitution. In the event of an appeal or any other intervening cause, the Speaker will determine "as expeditiously as possible" the date of a by-election. The Constitution therefore, vests the authority to determine the date of a by-election in the Speaker and not in the Electoral Commission.

There is no procedure for a Presidential election after a declaration of undue return under section 100 of the Parliamentary and Presidential Elections Act. After the Registrar has notified the Commission of the declaration by the High Court, the Commission will put a notice in the Gazette of the vacancy in the Presidency and the resultant fresh presidential election. It is crucial to bear in mind however, that
20 when the Court declares that there was undue return or undue election of the President, the candidate returned and his running mate cease to have the right to occupy the office of the President. It becomes incumbent therefore, for the State to have a fresh Presidential election to fill the vacancy in the office of the President.

I had, earlier in my opinion, articulated the process of a democratic transition and succession to the office of President. It must be observed that once the results of the

poll are published, it is open to the contenders to challenge the return of the winning candidate within seven days. If there is no such challenge the poll is determined and is indisputable. Where there is a challenge to the return of the President, it is open to the President elect to choose to be sworn in or to wait for thirty (30), days before it becomes mandatory to swear in the President elect in accordance with section 81(3) of the Constitution.

The first option is where the President elect elects to wait for 30 days before being sworn in such a case the Presidency does not transfers. The incumbent President continues in office until the President elect is sworn in.

10 The second option is where the President elect is sworn in, whether earlier or in compliance with section 81(3) of the Constitution, he or she will have succeeded into the office of the President. Where the incumbent President is re-elected he or she will hand over to and take over office from himself or herself. This is what happened in the present case. In any case there is succession to the office of the President. The President elect, when sworn in, is entitled to hold the office, notwithstanding the challenge until and unless the High Court declares undue election. The return of the President after a challenge under section 100 of the Parliamentary and Presidential Act is therefore voidable. It becomes void only after a declaration of undue election by the High Court. This will create a vacancy in the
20 office of the President.

The position taken by the Court below was that a declaration of undue return under section 100 of the Parliamentary and Presidential Elections Act makes the Presidency void ab initio and therefore, no vacancy is created. The Presidency therefore is reverted to the ones who held the office before the general election notwithstanding that the one declared unduly elected was sworn in office as President. I have found this position untenable.

To begin with, one cannot reconcile the position that a declaration of undue election under section 100 of the Parliamentary and Presidential Election Act creates a vacancy in respect of a member of National Assembly but does not create a vacancy in the Presidency. Secondly one cannot reconcile the position that a Presidency that is void ab initio is capable of creating constitutional offices valid at law. Our finding on the illegality of Constituency Tally Centres would not support such a position. It is, further, difficult to conceive what would happen where the ones who held the Presidency previously have died. It is my firm view therefore, that the declaration of undue election of the President makes the Presidency void and creates a vacancy.

10 Since the President is elected concurrently with the First Vice-President, the declaration of undue return creates a vacancy in both offices. The only recourse therefore is section 85 of the Constitution which states-

> *"If at any time both the office of President and First Vice President become vacant the cabinet shall elect from among its members on Acting President and Acting First Vice-President who shall hold office for not more than sixty days or, where four years of a Presidential term have expired, for the rest of the Presidential term."*

The Cabinet that elects the Acting President and Acting First Vice-President would have been formed before the Presidency became voidable and survives by operation
20 of section 100 (5) of the Parliamentary and Presidential Elections Act which states that *"anything done by the President before the declaration of the Court shall not be invalidated."*

The election, by the Cabinet of the Acting President and Acting First Vice President, would exclude the President and the First Vice-President because they would have

been declared unduly elected under section 100 (3). The nullification of the election by the Court below therefore is not supported at law.

Although there are no specific procedures for the presidential election after a declaration of undue return, it is clear that the matter will go to the cabinet in accordance with section 85 of the Constitution. After cabinet elects the Acting President and Acting First Vice-President, the nation, once again, will have a Parliament, in accordance with section 49 (1) of the Constitution. Parliament that is, the Acting President, as Head of State, and the National Assembly, being aware that the Acting President has to hand over the office to an elected President within sixty days, will decide the date for a Presidential election. It could not have been the intention of the framers of our Constitution to relegate authority to decide matters of presidential election to the Electoral Commission, which does not even have authority to decide the date of a by-election.

In my judgment therefore, the Presidency does not revert to the President of the previous Government, after the President elect succeeds office by being sworn in. I also find that it was not open to the Court below to extend the term of the previous Government at all. Lastly I find that the authority to determine the time frame for afresh Presidential elections under section 100 of the Parliamentary and Presidential Election Act vests in the Parliament, and not the Court or the Electoral Commission.

Lastly, I will make observations on the tenure of the Presidency, after a Presidential election which results from a declaration of undue return, under section 100 of the Act.

The tenure of the President runs from one general election to the next general election which is called a term. This is determined by sections 67 (1) and 80 (1) of

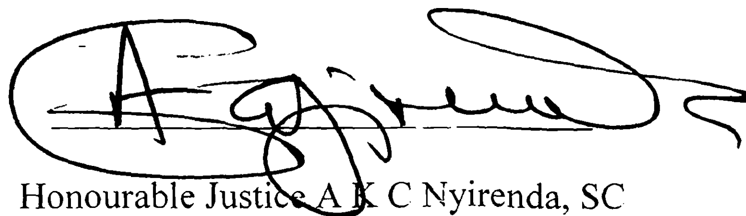
the Constitution, as earlier illustrated. Tenure of the office of the President is provided for in section 83 (3) of the Constitution, which states that-

> "*The President, the First Vice President and the Second Vice President may serve in their respective capacities a maximum of two consecutive terms, but when a person is elected or appointed to fill a vacancy in the office of the President or Vice President, the period between that election or appointment and the next election of the President shall not be regarded as a term.*".

It is clear that a person elected or appointed to fill a vacancy in the office of the President or Vice President between general elections takes a "non-term" Presidency. In my view, there will be no need to amend the Constitution, to create a full term Presidency. The President who will be elected in the coming Presidential election therefore, will serve a non-term presidency up to the next general election. The same happens to a member of the National Assembly who is elected in a by-election, he or she only serves for the remainder of the term of that Parliament.

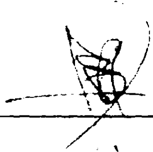
Other than what I have specified herein, I agree with the judgment and I defer to the collective view the final disposal of this appeal.

Pronounced in Open Court at Lilongwe this 8th day of May, 2020.



Honourable Justice A K C Nyirenda, SC

CHIEF JUSTICE

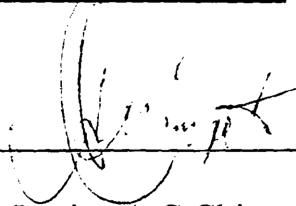


Honourable Justice E B Twea, SC

JUSTICE OF APPEAL

Honourable Justice R R Mzikamanda, SC

JUSTICE OF APPEAL



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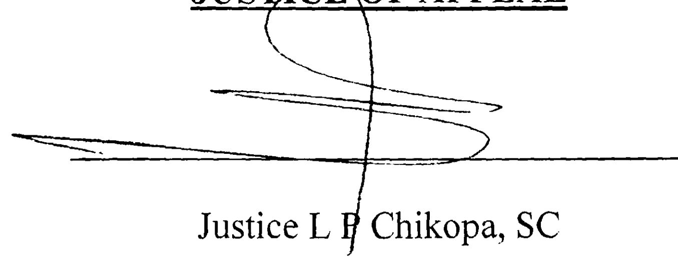
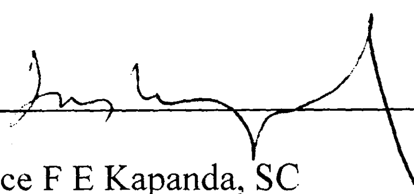
Honourable Justice A C Chipeta, SC

JUSTICE OF APPEAL



Justice L P Chikopa, SC

JUSTICE OF APPEAL



Justice F E Kapanda, SC

JUSTICE OF APPEAL

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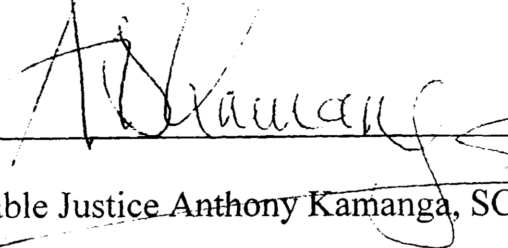

Honourable Justice Anthony Kamanga, SC

JUSTICE OF APPEAL