IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause Number 1798 of 2001

Between

TRATSEL SUPPLIES LIMITED …… Plaintiff

And

ATTORNEY GENERAL ……Defendant

CORAM: D F MWAUNGULU (JUDGE)

Nkhono, Legal Practitioner, for the plaintiff

Latif and Kalua, Legal Practitioners, for the defendant

Katunga, the official court interpreter

Mwaungulu, J.

ORDER

This appeal arises because the Registrar, following the decision of this Court in National Bank of Malawi v Banda, Civ. Cas. No. 325 of 1991, 29th December 1995, unreported, refused the plaintiff's application, presumably under section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act, to garnishee moneys Government holds in the Reserve Bank. This is another of several appeals against the Registrars rulings, all based on National Bank of Malawi v Banda. In two subsequent decisions, Tayamba General Dealers v Attorney General Civ.Cas. No. 1889 of 2002, unreported; and Apex Car Sales v Attorney General Civ.Cas. No. 3645 of 2001, 10th October 2003, this Court allowed the appeals, holding in effect that National Bank of Malawi v Banda was not correctly decided. The reasons for this Court's change of heart appear later in the judgment.

The issues before this Court are succinctly put by Mr. Nkhono, legal practitioner

for the plaintiff, who obtained a judgment for payment of huge sums of money against the Government, the defendant. Mr. Nkhono suggests two issues: first, whether in Malawi a judgment creditor can enforce payment of a judgment by garnishee proceedings under the Rules of the Supreme Court over funds the Reserve Bank of Malawi holds for Government: secondly, whether garnishee proceedings are a form of enforcement of a judgment. There is no doubt with the second question. The Rules of the Supreme Court include proceedings under Order 49 as a mode of enforcing a money judgment. It is therefore the first question which comes for determination in this appeal. It is related to a very dominant question in the three judgments of this Court: whether Order 77, rule 15 of the Rules of the Supreme Court, supposedly based on section 25 (4) of the Crown Proceedings Act, 1947, is part of our law. Section 25 (4) of the Crown Proceedings Act, 1947, excludes all common law modes of execution between subjects under Orders 45 to 52 for judgments against Government (the Crown). The plaintiff contends that section 25 (4) of the Crown Proceedings Act, 1947 does not apply to Malawi. Consequently, there is no law in Malawi excluding execution generally and garnishee proceedings particularly against Government. The plaintiff further contends that section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act permits execution against Government.

This case and others before it, therefore raise the question of immunity of government from execution. Government recently has overlooked judgment debts. Two decisions of this Court allowed, based on the Civil Procedure (Suits by and against Government and Public Officers) Act, desperate litigants garnishee public funds in the Reserve Bank of Malawi. Two African jurisdictions have done so. One African jurisdiction doubts that administrative law remedies should compel public officials who, for good or bad reasons, delay, refuse or neglect honouring judgments or public debts. The case raises fundamental constitutional questions, individual rights concerns, and public policy considerations. The Court has also to consider whether modes of executing judgments apply to subjects and government alike. Consequently this Court must consider whether our law provides a distinct procedure for executing judgments against government.

The complexity of the matters, that this decision departs from recent decisions of this Court, the need for clarity on this branch of the law, the variety in international and common law approaches and Government's and litigant's interest and anxiety over this Court's recent approaches require care only possible by an overview of the developments on this aspect of law. Developments in Malawi link English law developments on this aspect of law. All our constitutional milestones, the 1889 British Central Africa Order in Council, the 1902 Nyasaland Order in Council, the 1961 Self Government Order in Council, the 1964 Independence Constitution, the 1966 Republican Constitution, and the 1994 Constitution prescribed and preserved statues of general application in England and Wales before 1902 and principles of equity and the common law.

Under English law two legal provisions culminate into and account for the Crown's immunity against execution. Section 25 of the Crown Proceedings Act, 1947, for reasons

appearing later, should be produced in full, provides:

"__(1) Where in any civil proceedings by or against the Crown, or in any proceedings on the Crown side of the Kings Bench Division, or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Government Department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provided for payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the Court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2)__A copy of any certificate issued under this section may be served by a person in whose favour the order is made upon the person for the time being named in the record as the solicitor, or as the person as solicitor for the Crown or for the Government department or the officer concerned.

(3)__If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government Department shall, subject as hereinafter provided, pay to the person entitled or his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole amount so payable, or part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4)__ Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government Department, or any officer of the Crown as such of any such money or costs."

Order 77, rule 15 (1) of the Rules of the Supreme Court, 1998, provides:

"Nothing in Orders 45 to 52 shall apply in respect of any order against the Crown."

Section 29 of our Courts Act, prescribing the practice and procedure for this Court, links and delineates these developments with the law on Government immunity against

execution in Malawi. Section 29 provides:

"Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court:

(a) the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by Rules of Court made under this Act;

(b) any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general application in force in England on the eleventh day of August 1902, and any such Acts as have been applied to or are from time to time in force in Malawi shall not have any application in Malawi;

(c) if any provision of the Rules of the Supreme Court is inconsistent with any provision of any Rules of Court, the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void."

Apart from constitutional provisions, covered later in this order, Government immunity against execution in Malawi depends on understanding pertinent statutes, the Rules of Court and the common law.

Government immunity against execution at common law

Despite paucity under English and Australian law, Canadian decisions confirm government immunity from execution of public property. In Australia Commonwealth v Mewett (1997) 191 CLR 471 at 541-542; and Commonwealth v Anderson (1960) 105 CLR 303, per Dixon, C.J., at 312 and Windeyer, J., at 318-421 evidence the immunity at common law. In Canada, where there has been more contention, Titts v Pilon (1868) 12 LCJ 289; R v Central Railway Signal Co [1933] SCR 555 at 563; and Public Service Alliance of Canada v CBC [1976] 2 FC 145. In the United States in Coalition to Preserve Houston and the Houston Independent School District v Interim Board of Trustees of Weistheimer Independent School District 494 F.Supp. 738, 450 US 901, the court held that under Texan law, school districts are local public corporations of the same general character as municipal corporations; as political subdivisions of state, they are exempt from execution or garnishment proceedings. In Bank of Denver v Romstrom, 496 F.Supp. 242, the Court held that only funds paid over to Department of Housing and Urban Development and hence severed from Treasury are subject to execution in a suit against the Secretary in his official capacity as the United States treasury is not subject to execution because the United States has not waived immunity to that extent.

In the Philippines the general rule is that government properties are not subject to levy and execution unless otherwise provided for by statute (Republic v. Palacio, 23 SCRA 899 [1968]; Commissioner of Public Highways v. San Diego, (31 SCRA 617,) or

municipal ordinance (Municipality of Makati v. Court of Appeals, 190 SCRA 206 [1990]). The Philippine Supreme Court in Commissioner of Public Highways v .San Diego at 625 declared the immunity universal and based on public policy:

"The universal rule that where the State gives its consent to be sued by private parties either by general or special law, it may limit claimant's action 'only up to the completion of proceedings anterior to the stage of execution' and that the power of the Court ends when the judgment is rendered, since government funds and properties may not be seized under writs of execution or garnishment to satisfy such judgments, is based on obvious considerations of public policy. Disbursements of public funds must be covered by the corresponding appropriation as required by law. The functions and public services rendered by the State cannot be allowed to be paralyzed or disrupted by the diversion of public funds from their legitimate and specific objects, as appropriated by law."

For reasons appearing later in the order, it might be useful to record the Philippine Supreme Court directions to judges of its lower courts whom it enjoined "to observe the utmost caution and prudence and judiciousness in the issuance of writs of execution to satisfy money judgments against government agencies and local government units:

"Moreover, it is settled jurisprudence that upon determination of State liability, the prosecution, enforcement or satisfaction thereof must still be pursued in accordance with the rules and procedures laid down in P. D. No. 1445, otherwise known as the Government Auditing Code of the Philippines (Department of Agriculture v. NLRC, 227 SCRA 693, 701-02 [1993] citing Republic vs. Villasor, 54 SCRA 84 [1973]). All money claims against the Government must first be filed with the Commission on Audit which must act upon it within sixty days. Rejection of the claim will authorize the claimant to elevate the matter to the Supreme Court on certiorari and, in effect, sue the State thereby (P. D. 1445, Sections 49-50)."

Statutes could, as we see later, allow for execution in certain respect. The statute must be very clear to achieve this construction. Otherwise, courts construct legislation covering execution generally as only applying to subjects, not Government. The court said in Vaughn v Condon, 199 P 545 at 545, cited in Kama v Chuuk State CSSC cited at http://www.fsmlaw.org/fsm/decisions/vol19/9fsm496-500.htm:

"As a matter of public policy, general provisions making property subject to execution, garnishment, or liens are construed to apply only to property of private persons and corporations, and not to that of public corporations or bodies."

Consequently, case law recognises that without legislation to the contrary, immunity of government against execution is universal and general statutes allowing execution of

property only apply to subjects and not Government.

Government immunity from execution under statutes

Generally, apart from case law, statutes, even in traditional common law jurisdictions, often support government immunity against execution (R v Central Railway Signal Co [1933] SCR 555 350039003800450042003800340030003000300036004100410033003600380035003600 310030003000300030003800330032004300460036003500360045003700320036003600 300030003300420038003900420044004300300030003000360042003300340044004500 300032003000300030003000300030003200430042003700410035003600430030004600 300032003000300030003000300030003000450037004200320043003200300033003100 330039003300330033003300320030003200330033003800330034003300310037004400 300030003000380030003000300030003000000000). In Australia statutes in most territories ensure government immunity from execution Crown Proceedings Act, s 10; Crown Proceedings Act 1993 (Tasmania) 300033003300320032004100430032003000300036004100410033003600380035003600 310030003000300030003800330032004300460036003500360045003700320036003600 300030003300420038003900420044004300300030003000360042003300350030003600 300032003000300030003000300030003200300041004500380045003500380034003300 300032003000300030003000300030003000450037004200320043003200300033003100 330039003300390033003300320030003200330033003600330033000330039003700 4400300030003800300030003000300030003000000000 , s 11; Crown Proceedings Act 1992 (ACT) 380043003900410032003700430031003000300036004100410033003600380035003600 310030003000300030003800330032004300460036003500360045003700320036003600 300030003300420038003900420044004300300030003000360042003300350031003000 300032003000300030003000300030003200300037004300380045003500380034004600 300032003000300030003000300030003000450037004200320043003200300033003100 330039003300390033003200320030003200330033003600330033000330038003700 4400300030003800300030003000300030003000000000 , s 13; Crown Proceedings Act 1993 (Northern Territory) 300030003800450032004300430033003000300036004100410033003600380035003600 310030003000300030003800330032004300460036003500360045003700320036003600 300030003300420038003900420044004300300030003000360042003300350032003400 300032003000300030003000300030003100460041004500380045003500380034003600 300032003000300030003000300030003000450037004200320043003200300033003100 330039003300390033003200320030003200330033003600330033100330030000370044 00300030003800300030003000300030003000000000 , s 11; Crown Proceedings Act 1988 (New South Wales) 420042004100380033003500430030003000300036004100410033003600380035003600 310030003000300030003800330032004300460036003500360045003700320036003600 300030003300420038003900420044004300300030003000360042003300350033003800 300032003000300030003000300030003200300035003900380045003500380034004400 300032003000300030003000300030003000450037004200320043003200300033003100

33003900330038003300380032003000320033003300360033003100330031003700440030003000380030003000300030003000000000 , s 7; Crown Proceedings Act 1958 (Victoria)
45003200440032003200360043003300300030003600410041003300360038003500360031003000300030003000380033003200430046003600350036004500370032003600360030003000330042003800390042004400430030003000300036004200330035003400320030003200030003000300030003200300039003400380045003500380034003600300032003000300030003000300030003000450037004200320043003200300033003100330039003300350033003800320030003200330033003600330030003300370037004400300030003000380030003000300030003000300030000000000 , s 26; Crown Proceedings Act 1980 (Queensland)
41004200320038003200460043003100300030003600410041003300360038003500360031003000300030003000380033003200430046003600350036004500370032003600360030003000330042003800390042004400430031003000300036004200330035003500360030003200030003000300030003200300039003900380045003500380034003700300032003000300030003000300030003000450037004200320043003200300033003100330039003300380033003200300032003300330036003300300033003500370037004400300030003000380030003000300030003000300030000000000 , s 11; Crown Suits Act 1947 (West Australia)
45003500340043003200300043003100300030003600410041003300360038003500360031003000300030003000380033003200430046003600350036004500370032003600360030003000330042003800390042004400430031003000300036004200330035003600360030003200030003000300030003100390031004100360045003100330030003300300032003000300030003000300030003000450037004200320043003200300033003100330039003300340033003700320030003200330033003600330030003300360037004400300030003000380030003000300030003000300030000000000 , s 10. There is similar legislation in Canada (Crown Liability Act, RSC1970) and New Zealand (Crown Proceedings Act 1950
38003300440045003200420043003100300030003600410041003300360038003500360031003000300030003000380033003200430046003600350036004500370032003600360030003000330042003800390042004400430031003000300036004200330035003900360030003200030003000300030003100460036003400380045003500380034003700300032003000300030003000300030003000450037004200320043003200300033003100330039003300350033003700320030003200330033003600330030003100330034003700440030003000380030003000300030003000300030000000000 , s 24.) In the United Kingdom, as seen, section 25 of the Crown Proceedings Act 1947
31004100320034003200390043003000300030003600410041003300360038003500360031003000300030003000380033003200430046003600350036004500370032003600360030003000330042003800390042004400430031003000300036004200330035003700340030003200030003000300030003100460046004200380045003500380034003400300032003000300030003000300030003000450037004200320043003200300033003100330039003300340033003700320030003200330033003600330030003300380037004400300030003000380030003000300030003000300030000000000 guarantees crown immunity against execution.

Legal authors underscore that section 25 of the Crown Proceedings Act is

transposed from sections 13 and 14 of the Petition of Right Act, 1860, (c. 34), which the Crown Proceedings Act, 1947, repealed (Halsbury Statutes, Butterworths, 4th ed Vol. 13 fn). For reasons appearing shortly, section 13 and 14 must be reproduced. Section 13 provided:

"Whenever, upon any such petition of right, a judgment, order, or decree shall be given or made that the suppliant is entitled to relief, and there shall be no rehearing, appeal or writ of error, or, in case of an appeal or proceeding in error, a judgment, order, or decree shall have been affirmed, given, or made that the suppliant is entitled to relief, or upon any rule or order being made entitling the suppliant to costs, any one of the judges of the Court in which the petition shall have been prosecuted shall and may, upon application in the behalf of the suppliant, after the lapse of fourteen days from the making, giving or affirming suck judgment, decree, rule or order, certify to the Treasury, or to the Treasurer of Her Majesty's household, as the case may require, the tenor and purport of the same, in the form in the schedule (No. 5.) to this Act annexed, or to the like effect; and such certificate may be sent to or left at the office of the Treasury, or the Treasurer of Her Majesty's household, as the case may be."

Section 14 provided:

"It shall be lawful for the Treasury, and they are hereby required, to pay the amount of any moneys and costs as to which a judgment or decree, rule, or order shall be given or made that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule, or order the tenor and purport shall have been so certified to them as aforesaid, out of any moneys in their hands for the time being legally applicable thereto, or which may be hereafter voted by Parliament for that purpose, provided such petition shall relate to any public matter; and in case the same shall relate to any private property of or enjoyed by Her Majesty, or any contract or engagement made by or on behalf of Her Majesty in her private capacity, a certificate in the form aforesaid may be sent to or left at the office of the treasurer of Her Majesty's household, or such other person as Her Majesty shall from time to time appoint to receive the same, and the amount to which the suppliant is entitled shall be paid to him out of such funds or moneys as her Majesty shall be graciously pleased or direct to be applied for that purpose."

The Petition of Right Act, however, never had section 25 (4) of the Crown Proceedings Act 1947. Section 25 (4), however, is a codification provision. Authors mention that section 25 of the Crown Proceedings Act bases on sections 13 and 14 of the Petition of Right Act, 1860 notwithstanding section 25 (4) was introduced by the Crown Proceedings Act, 1847.

Legal commentators reflect the correct legal position. Although the Petition of Right Act never had section 25 (4) of the Crown Proceedings Act, the Petition of Right Act came in the context that, up to the Act, subjects could not sue the Crown for torts or breach of contract in common law courts. The Crown, under various statues, could sue subjects in the courts. The Petition of Right Act enabled subjects under the procedure in the Act to recover damages or debts against the Crown. Section 1 provided:

"A petition of right may, if the suppliant think fit, be instituted in any one of the Superior Courts of Common law or Equity at Westminster in which the subject matter of such petition or any material part thereof would have been cognizable if the same had been a mater in dispute between subject and subject, and if instituted in a court of common law, shall state in the margin the venue of trial of such petition; and such petition; and such petition shall be addressed to Her Majesty in the form or to the effect in the schedule to this Act annexed (No. 1), and shall state the Christian and surname and usual place of abode of the suppliant and his attorney, if any, by whom the same shall be presented, and set forth with convenient certainty the facts entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or attorney."

From this context of the Petition of Right Act, prior to it, executions against the Crown were impossible or impermissible. The Petition of Right Act, therefore introduced in sections 13 and 14, referred to earlier, the mode of satisfying judgments against the Crown. The Crown Proceedings Act, 1947 followed the Petition of Right Act. The Petition of Right Act and Crown Proceedings Act, 1947 had the same purpose, expressed eruditely by the House of Lords in British Medical Association v Greater Glasgow health Board [1989] 1 All E.R. 948, H.L.). The Petition of Right Act, in prescribing a procedure for satisfaction of judgments against the Crown in sections 13 and 14, never prescribed the common law methods of enforcement against the Crown. That, however, was also the position at common law. Section 25 (4) of the Crown Proceedings Act, 1947, never changed the legal position before the Petition of Right Act, 1860. Section 25 (4) was therefore a codification statute. Apart from section 25 (4) of the Crown Proceedings Act, 1947, Rules of Court, the Rules of the Supreme Court, are to the same effect.

Judicial opinion supports the legal authors' position. In Franklin v The Queen (No.2) [1974] 1 QB 205 at 211 Shaw, J., does not attribute the purpose of Order 77, rule 15 of the Rules of the Supreme Court to the Crown Proceedings Act, 1947 but to the policy of the law:

"Order 77, rule 15 (1), states succinctly that 'Nothing in Orders 45 to 52 shall apply in respect of any order against the Crown.' That reflects the general policy of the law that execution or other process of enforcement cannot go against the Crown for it would be derogatory of the royal dignity if it were otherwise.

What the court said in Vaughn v Condon, 199 P 545 at 545, cited in Kama v Chuuk State applies mutatis mutandis to general provisions about legislation:

"As a matter of public policy, general provisions making property subject to execution, garnishment, or liens are construed to apply only to property of private persons and corporations, and not to that of public corporations or bodies."

Government Immunity from execution under Rules of Court

Legal writers on the Rules of the Supreme Court practice for England and Wales, when considering Crown immunity from execution, cite Order 77, rule, 15 of the Rules of the Supreme Court alongside section 25 (4) of the Crown Proceedings Act, 1947 (Halsbury Laws of England, Butterworths, 4th ed. Vol. 10, para. 1436, fn 10; Halsbury Statutes, Butterworths, 4th ed. Vol. 13, para. 25, fn; 'Immunity from Execution' Australian Law Commission, fn vii). Section 25 (4) was not first to exclude modes of execution in Orders 45 to 52 to judgments against the Crown. Neither does Order 77, rule 15 start with the Crown Proceedings Act, 1947. Order 77, rule 15 has an older pedigree. Like all Rules of the Supreme Court, Order 77, rule 15, originates from the first Rules of the Supreme Court drafted by the Judges for the new judges of the High Court and Court of Appeal. The rules appeared as the First Schedule of the Judicature Act, 1875. They were expanded and reissued as the Rules of the Supreme Court 1883. Orders 45 to 52 of the 1998 Rules of the Supreme Court were in orders XLI to XLIX of the Rules of Court, scheduled to the Judicature Act, 1875. Order LXII excluded from the rules the practice or procedure in "Proceedings on the Crown side of the Queens Bench Division." The Rules of Court, as early as 1875, well before section 25 (4) of the Crown Proceedings Act, 1947, excluded against the Crown the processes under Orders 45 to 52. Order 77, rule 15 of the Rules of the Supreme Court is not therefore based on the Crown Proceedings Act, 1947. Order 77, rule 15 of the Rules of the Supreme Court predates the Crown Proceedings Act, 1947 and bases on the Judicature Act, 1875. The Crown Proceedings Act, 1947 is not a statute of general application before 1902. The Judicature Act 1875 is a statute of general application before 1902. It, in the First Schedule, limits, through the Rules of Court, the application of writs of execution to the Crown. As common law remedies, they, apart from the Rules of Court, never applied to the Crown.

Government Immunity from execution under the Constitution

The Petition of Right Act and the Crown Proceedings Act, 1947, may be regarded, in the context of a jurisdiction without one, constitutional immunity of Government from execution. The Petition of Right Act, 1860 and the Crown Proceedings Act, 1947 provide

an approach repeated in most jurisdictions with or without a written Constitution. The model restricts Government's power to honour judgment debts by limiting appropriation of public funds and protecting money in the national treasury. Section 83 of the Australian Constitution provides that "[n]o money shall be drawn from the treasury of the Commonwealth except under appropriation by law." Gummow and Kirby, J.J. in Commonwealth v Mewett said:

"Section 65 and 66 of the Judiciary Act accommodates [s 83] in respect of judgments given against the Commonwealth and States. There is to be no execution or attachment, but upon receipt of a certificate of judgment, the Commonwealth Minister of Finance or State Treasury, as appropriate, shall satisfy the judgment out of the moneys legally available."

Our 1994 Constitution possesses similar constitutional limitations on satisfaction of judgments. Section 172 creates the Consolidated Fund. Section 173 (1) (a) and 173 (1) (b) provide for and circumscribes withdrawals from the Consolidated Fund:

"No money shall be withdrawn from the Consolidated Fund except –

(a) to meet expenditure that is charged upon the Fund by this Constitution or by any Act of Parliament consistent with this Constitution; or

(b) where the issue of those moneys has been authorized by an Appropriation Act, a Supplementary Appropriation Act or by an Act made in pursuance of subsection (5) or of sections 178, 179, 180, 181 or 182 or by a resolution of the National Assembly made in accordance with section 177: Provided that this subsection shall not apply to any sums mentioned in section 175 (3).

Section 173 (2) provides for payment from the Consolidated Fund:

"Where any moneys are charged by this Constitution or by any Act of Parliament upon the Consolidated Fund, they shall be paid out of that Fund by the Minister responsible for Finance to the person or authority to whom the payment is due."

Section 173 (3), in a similar fashion like the Australian Constitution, prescribes withdrawals from the Consolidated Fund:

"No moneys shall be withdrawn from the Consolidated Fund except in the manner prescribed by the National Assembly."

Under section 173 (4) this protection inures the fund when the money is in a bank:

"The investment of moneys forming part of the Consolidated Fund by way of deposit with a bank or such other secure investment as may be approved by the National Assembly shall not be regarded as a withdrawal of those moneys from the Consolidated Fund for the purposes of this Constitution. "

Section 174 (1) (c) provides for satisfaction of judgments against the State:

"There shall be charged on the Consolidated Fund in addition to any grant, remuneration or other moneys so charged by this Constitution or any Act consistent with this Constitution … any moneys required to satisfy any judgment, decision or award made or given against the Government by any court or tribunal other than those provided for in the National Compensation Fund."

Government, therefore, satisfies judgments against the state by Courts or tribunals by charging the Consolidated Fund. The Constitution requires Parliament charge the Consolidated Fund when satisfying judgments against the State. Parliament need not and cannot charge the Consolidated Fund where the judgment against the state is already satisfied by execution. The 1994 Constitution, therefore, confirms and ensures Government immunity from execution and provides a mode of executing or enforcing judgments against Government. Statutes, Rules of Court and the common law of Malawi confirm this position.

Malawian statutes

In relation to satisfaction of judgments against the State, the principal Malawian statues are the Civil Procedure (Suits by and against Government and Public Officers) Act and the Courts Act. The Civil Procedure (Suits by and against Government and Public Officers) Act is the equivalent of the Crown Proceedings Act, 1947, United Kingdom. The Civil Procedure (Suits by and against Government and Public Officers) Act and the Crown Proceedings Act, 1947 were passed in 1946, only that the later was effective in 1947. This is important only to emphasize that the development in the United Kingdom and the protectorate were simultaneous. Prior to the Civil Procedure (Suits by and against Government and Public Officers) Act, proceedings against the Crown in the protectorate, as in England and Wales, were, therefore, under the Petition of Right Act, 1860, a statute of general application before 1902. Before the Civil Procedure (Suits by and against Government and Public Officers) Act, therefore, under common law, the Petition of Right Act, 1860, and the Rules of Court in the First Schedule of the Judicature Act 1887, a statute of general application before, 1902, Government was immune from modes of execution under Orders 45 to 52 of the Rules of the Supreme Court.

The Civil Procedure (Suits by and against Government and Public Officers) Act in 1946 did not change the practice and procedure on execution. Section 3 of the Act only covered the practice and procedure for institution and trial of proceedings; the Civil Procedure (Suits by and against Government and Public Officers) Act did not cover the practice and procedure for execution against Government. Section 3 (1) reads:

“Save as may be otherwise expressly be provided by any other Act, suits by or against the Government shall be instituted by or against the Attorney General. Such suits shall be instituted and tried [emphasis supplied] in the same manner as suits to which the Government is not a party.”

Section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act provides for satisfaction and execution of judgments against the State:

“When the decree is against the Government or against a public officer in respect of such act, neglect or default as a foresaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified the court shall report the case for the orders for the orders of Government. Execution shall not be issued on any such decree unless it remains unsatisfied for a period of three months computed from the date of the report.”

There are many ways of reading that aspect of section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act that allows execution of a judgment of a court. Many decisions of this Court suggest these approaches. Casalee Cargo Ltd v Attorney General [1992] 15 MLR 48 was the first decision on section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act. That was my decision as Registrar. It is not binding on me. In that case I thought, and still think so now, that section 8 related specifically to situations emanating from section 4 of the Act. Section 4 of the Civil Procedure (Suits by and against Government and Public Officers) Act, in my opinion, covers acts (commissions) or defaults (omissions) “in pursuance, or execution, or intended execution of any Act or other law, or of any public duty or authority.’

The section does not cover all actions and omissions of government; only acts or defaults in pursuance, or execution, or intended execution of any Act or other law, or of any public duty or authority. A distinction is made between Government acts or defaults emanating from legal obligations from Acts of Parliament or any other law, duty or authority and Government acts or omissions connected to Government as a legal person like all persons in law. The latter are excluded by the wording in section 8. For example, Government, as a legal entity, is entitled to enter into contracts. When it does, it does not do so not in pursuance of, or execution, or intended execution of any Act or other law, or of any public duty or authority. It does so as a legal entity like any other. The acts or default root in the contract, not in pursuance, or execution, or intended execution of any Act or other law, or of any public duty or authority. In Casalee Cargo Ltd v Attorney General at 50, I said:

“However section 8 does not deal with all suits against Government generally but only those related to acts or omissions in pursuance of public or statutory duty. This raises a

question how judgments or orders or decree against Government should be satisfied. It is important to state that section 3(1) of the Civil Procedure (Suits by or against the Government or Public officer) Act only provides for institution and trial of suits by or against Government. It does not deal with execution of judgments, orders, or decrees. Execution is covered by section 29 of the Courts Act …"

Section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act, before considering section 29 of the Courts Act, only, assuming it applies to all cases generally, provides for 'execution to issue", in other words for execution. It does not provide for the practice and procedure for execution.

A distinction must be made between execution and the modes of execution. I adopt the Australian Law Reform Commission's definition:

"Execution is a procedure for the enforcement of judgments, usually involving seizure and sale by the sheriff or other court official of the judgment debtor's property to pay the sum due to the judgment creditor."

The definition suggests the word 'execution' denotes a procedure for enforcing or satisfying a judgment. Under the definition, seizure and sale by the sheriff or other court official of the judgment debtor's property to pay the sum due to the judgment creditor is an instance of executing, enforcing a judgment. Section 8 deals with the former. It does not deal with the latter. In short, section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act does not provide for modes of execution against Government. Section 29 of the Courts Act deals with the practice and procedure of execution of judgments:

"Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) [emphasis supplied] provided in the Rules of the Supreme Court:

Malawian Rules of Court

The Rules of Court ultimately determine the practice and procedure of executing judgments generally and judgments against Government particularly. The Rules of the Supreme Court, much like the Civil Procedure Rules for England and Wales, in Orders 45 to 52, provides for the modes of executing judgments. Order 77, rule 15 of the Rules of the Supreme Court, however, proscribes these modes against judgments against the Crown. Three decisions of this Court discuss the effect of Order 77, rule 15 of the Rules

of the Supreme Court: National Bank of Malawi v Banda, Tayamba General Dealers v Attorney General, unreported and Apex Car Sales v Attorney General.

In National Bank of Malawi v Banda the judgment creditor wanted to garnishee money Government owed to a judgment debtor. Tembo, J., as he then was, said at 1-2 of the judgment:

"It seems to me that the applicant would indeed have been a proper one for which a garnishee order should have been granted, were it not for the fact that the garnishee in the instant case is the Government of Malawi, which is represented by its legal officer, the Attorney General. Order 49 (1) paragraph 29, clearly and expressly provides that no order for the attachment of debts shall be made or have effect in respect of any money due or accruing from the Crown. Further, Order 49 generally does not apply in respect of any order against the Crown. The effect of that in our situation is that Order 49 does not apply in respect of any order against the Government."

There is no Order 49, rule 1, paragraph 29 in the Rules of the Supreme Court. Order 77, rule 15 prohibits application of garnishee orders against the Crown. The Rules of the Supreme Court, therefore, prohibit garnishee orders against the Crown. Justice Tembo, however, never considered the question whether order 77, rule 15, or Order 49 (1), because of the Crown Proceedings Act, 1947 was part of our law. The Judge considered the Crown Proceedings Act, 1947 in a different context.

In Tayamba General Dealers v Attorney General the Registrar refused to grant a garnishee order, apparently based on National Bank of Malawi v Banda. Chimasula, J., in the course of the order said, in words quoted by Kapanda, J., in Apex Car Sales v Attorney General:

"[T]he Registrar should weigh the pre-1994 constitutional order and compare it with the post May 1994 constitutional framework. Can rule of law exist where Government wants to overprotect itself? If Government wants to participate in commercial bank facilities it must realize that garnishee orders fully attach to commercial banks and there would be nothing improper in making a garnishee order against a commercial bank for its credit balance in favour of a government department or agency."

The immunity of government against execution by judicial pronouncements, Rules of Court, statutes and Constitutions is, as shown, pervasive and grounded on rule of law and public policy, not overenthusiasm. The immunity is contemporary and well grounded in our 1994 Constitution. The Judge's concerns are allayed by considering the other competing and compelling stakes in the Consolidated Fund expressed better in a passage in Kama v Chuuk State:

“The Vaughn case, supra, further held that public funds are pecuniary interests of great magnitude, and vast numbers of human beings are dependent on public funds for their ‘security of life and property.’

‘To permit the great public duties of [government] to be imperfectly performed, in order that individuals may better collect their private debts, would be to pervert the great objects for which government exists.’”

Government immunity against execution, as section 173 (4) of the Constitution demonstrates, remains even if moneys in the Consolidated Fund are in a bank. Moreover, from the wording of section 173 (1) and 173 (3), money from the fund can only be used for what Parliament votes it for. The funds voted for other purposes cannot be used for another. Consequently, only money charged to satisfy judgment debts under section 174 (1) (c.), is available for the purpose. This is apparent in our Constitution and in section 14 of the Petition of Right Act, 1860. Whatever the case, Parliament must, before use for the purpose, appropriate the funds for use to satisfy judgment debts. This is what the Philippine Supreme Court in Commissioner of Public Highways v .San Diego meant by “legitimate and specific objects, as appropriated by law” and Gummow and Kirby, JJ., meant in Commonwealth v Mewett by “the amount legally available.”

In Apex Car Sales v Attorney General, after approving of the statement in Tayamba General Dealers v Attorney General, Kapanda J., said:

“As we understand it, there is no law in Malawi that would stop government to obtain a garnishee order if it wanted to enforce a judgment against any other person. Yet in the National Bank of Malawi case this court conferred government immunity from garnishee orders in respect of funds due or accruing to it. The immunity that we conferred on government is not clearly spelt out in the said Civil Procedure (Suits by and against Government and Public Officers) Act. Indeed, it is against the rule of law if we were to allow that government be able to obtain a garnishee order in respect of funds due or accruing to a person when it is impossible to do so against Government funds. This is the more so where our legislature did not enact a law to shield government from the effects of a garnishee order. In the absence of law conferring immunity to government the court cannot justify its decision that has the effect of shielding government by not subjecting it to the same mode of enforcing judgment that it might employ against private subjects.”

As appeared earlier and will appear shortly, the Rules of Court, which created the different modes of enforcing judgments, applied only to subjects. The Rules of Court under the Judicature Act 1875 then dis-applied the Rules of Court in Crown proceedings in the Kings Bench Division of the High Court. Consequently, garnishee proceedings were impermissible against the Crown. There were, however, statutes, of general application, allowing the Crown to garnishee against subjects. Under these laws,

Government can garnishee. There is no law, however, permitting subjects to garnishee Government. On the contrary, there are laws, we see in a moment, proscribing subjects from garnisheeing Government.

First is Order 77, rule 15 of the Rules of the Supreme Court. The objection to Order 77, rule 15 premises on Apex Car Sales v Attorney General where the judge thought exclusion of processes under Orders 45 to 52 of the Rules of the Supreme Court bases on section 25 (4) of the Crown Proceedings Act, 1947. The Judge said:

"Further, wee wish to observe that the said Order 49 of the Rules of the Supreme Court, which is founded on the Crown Proceedings Act, 1947 and proscribes the use of garnishee proceedings against the Crown, has no application to Malawi since the said Crown Proceedings Act is not part of our received law: Sisya v Attorney General [1993] 16(2) MLR 820. In the absence of a similar legislation in Malawi, prohibiting the issuing of garnishee orders in respect of Government funds, we cannot deny litigants the opportunity to enforce money judgments against Government through Garnishee Proceedings."

The objection premises on two assumptions: first, that the rule could not be premised on other statutes even though of no general application before 1902; secondly, that Order 77, rule 15 conferring Government immunity from execution bases on section 25 of the Crown Proceedings Act, 1947. The first assumption requires considering the content of the Rules of the Supreme Court. First, they are Rules of Court, the court has inherent jurisdiction to regulate its procedure. Secondly, unless specific Acts provide specific procedure, the rules apply to all civil proceedings in the High Court (see Order 1, rule (2) (1) and (2). Thirdly, the rules are not necessarily reflective of statutory provisions although some rules base on statutes. Rules based on specific statutes apply only if they satisfy other tests: rules based on post 1902 statutes apply if specifically applied to Malawi; rules based on pre 1902 Statutes apply only if the statute applied generally in England and Wales. Rules not based on statutes apply generally. Then there are rules based on specific statutes in the United Kingdom for which there is an equivalent statute here: the rules in the Rules of the Supreme Court should, with appropriate modification, be taken to have been made under our statute.

Order 77, rule 15 of the Rules of the Supreme Court, on this analysis, is a rule made under the Civil Procedure (Suits by and against Government and Public Officers) Act. The rule, is therefore, not based on the Crown Proceedings Act, 1947. It is made under our statute. There are many such rules in the Rules of the Supreme Court: Order 73 (Arbitration Proceedings, under our Arbitration Act, cap 6.03); Order 79 (Criminal Proceedings); order 91 (Revenue Proceedings); Orders 93 and 94 (Applications and Appeals to the High Court under Various statutes); Order 95 [Bills of Sale, under the Bills of Sale Act, cap 48:03) Order 99 (Inheritance (Provision for Family and Dependants) Order 100 (Trade Marks, under the Trade Marks Act, cap 49:01, Trademarks Act); Order

103 (Patents, Registered Designs, under the Patents Act, 49:02 and Registered Designs Act, cap 49:05, under our Companies Act, cap 46:03); Order 106 (Solicitors) and Order 102 (Companies Act). Order 77, rule 15 therefore bases on the Civil Procedure (Suits by and against Government and Public Officers) Act. These rules are not, under section 29 (b) of the Courts Act, Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament. The rules refer to our statutes too.

On the second assumption, Order 77, rule 15 conferring Government immunity from execution does not, according to section 29 (1) (c) of the Courts Act, base solely on section 25 of the Crown Proceedings Act, 1947. Besides basing on our Civil Procedure (Suits by and against Government and Public Officers) Act, the limitation in Order 77, rule 15 applied generally before the Crown Proceedings Act, 1947. A similar rule existed before the Crown Proceedings Act, 1947 under the Supreme Court of Appeal Judicature Act 1875 and the Petition of Right Act, 1860, both statutes of application before 1902. Order 77, rule 15 predates the Crown Proceedings Act, 1947 and emanates as an independent rule of court.

That it is an independent rule of court is important for another point which I want to make because of some comments in Tayamba General Dealers v Attorney General and Apex Car Sales v Attorney General: the modes of executing judgments in Orders 45 to 52 in the Rules of the Supreme Court (formerly Orders XLI to XLIX) are creatures of the Rules of Court; the same Rules of Court, since 1875 and up to 1947, excludes their application to Government. In so excluding their application to Government, Judges of the Court, who initially made the rules, reacted to public concerns, we see shortly, and the prevailing constitutional arrangements favouring government immunity against execution. Those constitutional and public policy concerns arise in the argument of this appeal and are eruditely accentuated by my learned colleagues in this Court. The choices were made then that still rule us today. The choices were then generally universal and are today in favour of protecting all public property from execution. In relation to money in the Consolidated Fund there is no room for a choice. The Constitution proscribes withdrawals from the Consolidated Fund, even when money is in the bank, except by appropriation according to the Constitution. Although Government should respect court judgments, the Constitution prescribes that money required for judgments against Government should, following proper procedure, be charged to the Consolidated Fund. These constitutional provisions, in my most considered view, put moneys in the Consolidated Fund out of reach of a sheriff or his officers executing a writ of fieri facias or creditors wanting to garnishee a debtor Government or a debtor who Government owes money and complement and augment what has always been the practice of this Court since 1875 until Tayamba General Dealers v Attorney General and Apex Car Sales v Attorney General that Orders 45 to 52 do not apply to judgments against Government. This rendition of the constitutional provisions coheres with the universality of the principle under foreign case law referred to as section 11 (2) (c) of the Constitution exhorts.

The two decisions insist that because Government can garnishee against the subject subjects should be able to garnishee. The quest for reciprocity fails on two grounds. First, as we have seen laws and public policy are against reciprocity. Secondly, and this is equally important, orders 45 to 52 of the Rules of the Supreme Court apply to 'judgment debtors.' Lord Denning in Franklin v The Queen (No.2) at 218 rejects, properly in my judgment, that in the Rules of Court the expression refers to Government. "Furthermore," the Master of Rolls said, in relation to Order 48, one included in the ban, "the Crown is not a 'judgment debtor' in any sense of the word."

Of course the concerns raised are germane. They, however, only indicate the difficult policy choices in opting for a principle of law. Indeed, a law that only allows Government to use coercive measures under Orders 45 to 52 of the Rules of the Supreme Court against subjects and not vice versa on the face of it is inclined. On the other hand disruption to public services through a contrary rule concerned, correctly in my judgment, the Philippine Supreme Court in Commissioner of Public Highways v .San Diego, the Law Reform Commission of Canada in 1985 and The Law Commission in Australia. The other concern, noted by the Australian Law Commission, is what happened here: Government can refuse or slow payments by accounting procedures or fulfilling certain budgetary concerns. The Australian Law Commission, which recommended no change to Government immunity against execution, proceeded on there being no evidence of such practice in Australia. Here the proliferation of garnishee proceedings only evidences an orchestrated neglect by Government to honour judgment debts and judgments of the Court.

The solution, in my judgment, is not to do that which, from all I have said, is not permitted by law. This Court can only emphasize to Government the importance of honouring judgment debts which are really judgments of the court and stress that the wording of section 174 (1) (c.) of the Constitution is mandatory

"There shall [emphasis supplied] be charged on the Consolidated Fund in addition to any grant, remuneration or other moneys so charged by this Constitution or any Act consistent with this Constitution … any moneys required to satisfy any judgment, decision or award made or given against the Government by any court or tribunal other than those provided for in the National Compensation Fund."

The section requires Government to charge the Consolidated Fund with money required to satisfy judgments of courts or tribunals. Where a public official neglects or refuses to act under the importune of section 174 (1) (c.), the subject has public law remedies. Stickrose (Pty) Limited v The Permanent Secretary of the Minister of Finance. S.C.Z. Judgment No 30 of 1999, http://www.unza.zm/courts/supreme/full/99scz30.htm suggests the contrary.

In Stickrose (Pty) Limited v The Permanent Secretary of the Minister of Finance the plaintiff obtained a judgment against Government. He served Government with an appropriate notice under which Government was to pay on receipt of the certificate. Government paid part of the money. The plaintiff's application for committal failed: under Zambian law the government official could not be arrested for liability by Government. The plaintiff's application for judicial review failed in the High Court. Dismissing the appeal, the Zambian Supreme Court said:

"In the first place we wish to make the observation that Order 45 of the White book, 1999 edition, groups together the methods for the enforcement of the judgments and orders of the court. In England those methods do not apply against the crown. But the most significant observation is that all those methods listed in Order 45 do not include judicial review as one of those methods for the enforcement of the judgments and orders of court. The prohibition against using Order 45 as a method of enforcement of the judgments and orders of court is clearly stated in Order 77 which itself provides the method for satisfaction of orders against the crown. It is also most significant to observe that order 77 of the White book, 1999 edition does not include judicial review as a method of enforcing judgments against the crown.

In Zambia, the law governing satisfaction of judgments and orders against the State is specifically provided in Part IV of the State Proceedings Act. Section 21(1) of the State proceedings Act, Cap.71 makes provisions for the issuance on application, of a certificate containing particulars of an order made against the State. Section 21(3) reads as follows:

"(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Permanent Secretary, Ministry of Finance, shall subject as hereinafter provided, pay to the person entitled or to the legal practitioner acting for such person in the proceedings to which the order relates the amount appearing by the certificate to be due to him together with the interest, if any, allowed under section twenty."

The appellant in the present appeal correctly followed these provisions. But when the State began to drag their feet in complying with the payments as per particulars in the certificate, the applicant decided to apply for judicial review. They obtained the order of mandamus but this did not help matters either. Subsequently they applied for committal of Mr. James Mtonga. While the appellant was entitled to enforce the Order that was made in their favour, the issue is whether it was competent to do so by way of an application for judicial review. Subsection (4) of Section 21 of the State Proceedings Act states:

"(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the State of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the State, or any public officer as such, of any such money or costs."

In the instant appeal a process of judicial review was issued out of the High Court to obtain an order of mandamus, which was directed at Mr. James Mtonga, a public officer, as a means for enforcing payment by the State. Subsequently committal proceedings were

commenced against Mr. James Mtonga as an individual. The use of the process of judicial review was in our view contrary to law and therefore a nullity. The issuance of judicial review proceedings as a means of enforcing judgment was a complete abuse of the court process."

The Zambian Supreme Court's decisions are persuasive in this Court. The Zambian Supreme Court, however, understood judicial review, at least, in that case to be a mode of or an aid to execution and rejected it simply because, as a mode of enforcing judgment, the Rules of Court never covered it. Judicial Review, however, is a remedy sui generis, and through its peremptory orders of mandamus, certiorari and prohibition, an effective tool of administrative law. In the Stickrose (Pty) Limited v The Permanent Secretary of the Minister of Finance, through mandamus, it was a proper way, not another mode of execution, for the Permanent Secretary to comply with section 21 (3) of the State Proceedings Act. The trend worldwide is for administrative remedies to compel Government to do the lawful. In the direction to Judges below it the Philippines Supreme Court said: "Rejection of the claim will authorize the claimant to elevate the matter to the Supreme Court on certiorari and, in effect, sue the State thereby (P. D. 1445, Sections 49-50)." (See 'Immunity from Execution', the Australian Law Commission). Moreover, judicial review, in that sense becomes an aid to execution. We can borrow from American Jurisprudence: all aids to execution are executions. In Kama v Chuuk State, the Supreme Court said:

"These supplementary proceedings also 'take various forms, variously denominated as proceedings in aid of execution, garnishments after judgment, garnishee execution, attachment execution, and income execution … It is said that 'a supplementary proceeding is as much a means of enforcing a judgment as the ordinary writ of execution.'"

Orders 45 to 52 are not exhaustive of all means of enforcing all judgments of the courts.

The Constitution, statutory law, the Common law, Rules of Court and Law Reform confirm immunity for Government from execution. This does not mean that the subject has no remedy against Government. It means the particular modes of enforcing judgment between subjects are inappropriate for judgments against Government. In Vaughn v Condon, 199 P 545 at 545, cited in Kama v Chuuk State, the Court said:

"As a matter of public policy, general provisions making subject to execution, garnishment, or liens are construed to apply only to property of private persons and corporations, and not to that of public corporations or bodies."

The ignominy in the rule, if any, is mollified, as seen, by statutory and constitutional

provisions requiring Government to honour judgments against it in a specific way. The practice is in my judgment to proceed as stated in Casalee Cargo Ltd v Attorney General. In one sense proceeding under section 8 in its present form would not enable Parliament to appropriate moneys for judgments against Government, unless, I suppose, the Court, in stipulating the time for compliance with the judgment, regards the time Parliament might take to appropriate the funds in compliance with the Constitution. Whatever gaps are in the section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act, the Petition of Right Act, 1860, a statute of general application covers them and Casalee Cargo Ltd v Attorney General considers them. There might, as many decisions of this Court suggest, be need for reform in this area of law to stave off the events since the two decisions of this Court. There is no doubt in my mind that the law is as I have stated. If not, the rules of construction about general provisions like the ones considered here yield similar results.

To the question whether Government judgment creditors can garnishee funds in the Consolidated Funds of the Reserve Bank as a matter of course, the answer is that the common law, our statutes and Rules of Court do not allow that. Section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act use of the word 'execution' refers to enforcement and is not, therefore, prescriptive of the mode of execution. The common law modes of execution in Orders 45 to 52 historically never applied to the Crown. The Constitution and statutes provide a mode of executing judgments against Government. This constitutional and statutory mode is a mode of execution of Judgments against Government as the ones in Orders 45 to 52 are modes to the same effect between subjects. If any Government official refuses or neglects to do what the Constitution and the statutes require the subject has administrative remedies. The administrative remedies complement or augment the stated method of enforcing or executing a judgment of the court and such are executions for purposes of section 8 of the Civil Procedure (Suits by and against Government and Public Officers) Act. In Franklin v The Queen (No.2) at 210, Shaw, J., said:

"The effect of the second half of section 20 of the Act of 1877 properly understood is not to transfer or transmit to the registrar a personal liability or obligation to pay to the extent of funds in his position, but to impose upon him the responsibility of performing the ministerial acts which will have the result of utilizing those funds to discharge what remains the reliability of the judgment debtor, that is to say, the Crown. If the registrar fails or neglects to comply with his statutory duty to do the requisite acts within his power, there are no doubt ways and means for dealing with such recalcitrance. I am not concerned to consider what would be the appropriate course, judicial or executive, that might be taken."

It does not have to come to that. "It is always presumed" said Lord Denning, M.R., in Franklin v The Queen, "that, once a declaration of entitlement is made, the Crown [Government] will honour it." There is no statute or Rule of Court permitting the use of the common law modes of execution in Orders 45 to 52 of the Rules of the Supreme

Court against Government. Section 8 has to be read as referring to the mode of executions envisaged by the Constitution which in the procedure it lays protects funds in the Consolidated Fund from execution even if those funds are in a bank. The Constitution requires Parliament to appropriate funds to satisfy judgment debts. This protective procedure will be disrupted to the much disdain and consternation to public services if the law were to allow execution of public funds and property to satisfy private debts. It is important that judgment debts against Government be settled by the appropriate process set by framers of the Constitution.

In requiring appropriation for satisfying judgments debts, Government, for two reasons, far from impinges the subjects' right to an effective remedy under the Constitution. First, there is no denial of a remedy. The Constitution creates a process for ensuring the remedy. Secondly, it is the Constitution, the Constitution that creates the right to an effective remedy, that itself creates the immunity of Government from execution. A provision in the Constitution cannot be unconstitutional. Where there are conflicts, and there is a presumption that the Constitution cannot want to create inconsistencies in itself, rules of construction, will resolve the confusion, but only where, unlike here, there is a conflict. More importantly the right to an effective remedy is derogable and the common law, statute and rules of court can, as done here, limit the right. The limitation is universal, does not confront international human standards and is necessary in an open democratic society.

The Registrar was, in my most considered opinion, right to refuse the garnishment of funds in the Reserve bank. The appeal is dismissed with costs.

Made in Court this 16th Day of December, 2003

D F Mwaungulu

JUDGE