



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 137 OF 2018**

**BETWEEN:**

**THE STATE (On the application of PEMPHERO MPHANDE**

**and MKOTAMA KATENGA KAUNDA)**

**CLAIMANTS**

**AND**

**BLANTYRE CITY COUNCIL**

**1<sup>st</sup> DEFENDANT**

**THE ATTORNEY GENERAL (MINISTRY OF  
INFORMATION, COMMUNICATION AND TECHNOLOGY)**

**2<sup>nd</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

T. Chirwa, Counsel for the Claimants  
B. Matumbi, Counsel for the 1<sup>st</sup> Defendant  
N. Chisiza, Counsel for the 2<sup>nd</sup> Defendant  
Mankhambera, Court clerk

**JUDGMENT**

1. This is the decision of this Court made under Order 19 Rule 20 (1) Courts (High Court) (Civil Procedure) Rules, on an application by the claimants for judicial review of the defendants' decision, namely, the erection of a statue of Mohandas Karamchand Gandhi more affectionately known as Mahatma Gandhi (hereinafter referred to as the Statue) on public land at Ginnery

Corner in Blantyre and a decision to erect the Statue without a meeting of councilors of Blantyre City Council and without authority from the Director of Planning at the said Council.

2. By the said application, the claimants sought the following reliefs, namely, a declaration that the conduct of the defendants in erecting the Statue is contrary to section 19 of the Constitution in that it was made with disregard to the views and interests of a number of individuals; a declaration that the decision of the defendants to proceed with the erection of the Statue is unlawful in that the Blantyre City Council did not meet to authorize the construction of the Statue; a declaration that the decision of the defendants to construct the Statue is unlawful in that the Director of Planning did not authorize the said construction; a like order to certiorari quashing the decision of the defendants to construct the Statue and a permanent injunction restraining the defendants from proceeding with the construction of the Statue.
3. This Court wishes to state at the outset that there is no evidence proffered by the claimants to show that the 2<sup>nd</sup> defendant made any decision that can be subject of judicial review in this matter. Order 19 Rule 23 (2) (c) Courts (High Court) (Civil Procedure) Rules requires that on a judicial review application a party that is alleged to have made a decision or should have made the decision be named as the defendant. It is actually not permissible on a judicial review application to cite the Attorney General as a defendant in the same fashion as is the case with ordinary actions against Government. The Attorney General will be cited as defendant in judicial review proceedings where his decision is subject of judicial review in line with Order 19 Rule 23 (2) (c) Courts (High Court) (Civil Procedure) Rules or where an Act of Parliament is sought to be reviewed in line with Order 19 Rule 23 (2) (a) Courts (High Court) (Civil Procedure) Rules. Both scenarios have not been shown to arise in this matter.
4. The 2<sup>nd</sup> defendant is accordingly discharged from these proceedings. And that leaves the 1<sup>st</sup> defendant, Blantyre City Council.
5. The claimants filed a sworn statement to ground the instant application for judicial review in which they stated that it came to their knowledge that the Government had authorized the construction of the Statue on public land along the Ginnery Corner stretch of the Masauko Chipembere Highway.

6. The claimants asserted that they have on record remarks made by Mahatma Gandhi in which he called black Africans 'kaffirs' and further derided them to be savages and living lives below that of human beings. They asserted that being Black people themselves, such remarks have invited a sense of loathe and detestation for the said Mahatma Gandhi.
7. They claimed that the construction of the Statue on an open public land herein will only serve to reignite and fuel this sense of loathe as they use the road along which the Statue is being set to be erected every day for their traverse to and from work and on and about town. They asserted that, as such, the erection of the Statue will injure their feelings as Black Africans and as bona fide tax paying citizens of this country.
8. They asserted that the 1<sup>st</sup> defendant Council did not meet to authorize the erection of the Statue. Further, that the Director of Physical Planning did not vet the erection of the Statue.
9. They then claimed that the Government owes them a duty to secure their social and psychological well-being. And that the fact that the offensive Statue will be constructed on an open public land to which they will be exposed daily abrogates the Government's duty towards them as bona fide tax paying citizens. And that the decision of the 1<sup>st</sup> defendant is therefore unfair, unjust and unjustifiable. They added that the conduct of the 1<sup>st</sup> defendant has put them and many others to great confusion, instability and anguish.
10. On its part, to oppose the application for judicial review, the 1<sup>st</sup> defendant relied on the sworn statement of Lytton Nkata, its Director of Administrative Services, that was filed on an earlier application made by the 1<sup>st</sup> defendant to set aside an order of injunction granted in these proceedings to stop the erection of the Statue.
11. By that sworn statement he asserted that since time immemorial, the Government of India has had mutually beneficial relations with the Government of Malawi to the extent that many Indian nationals have made Malawi their home and have become Malawian citizens or permanent residents. He added that in the City of Blantyre, in particular, there is a commendable Indian population in commerce and other livelihoods and both nations benefit from this interrelationship in economy, culture etc.
12. He then stated that the permanence and size of the Indian community in Malawi has led to Malawi recognizing the Indian culture as part of the Malawi

- culture. And that this fact is evident in the celebration of India's hero, Mahatma Gandhi, who was honoured by having a road named after him, namely, Mahatma Gandhi road which runs from Queens Elizabeth Central Hospital round about all the way through the College of Medicine to CI. He added that he has seen this road throughout his life and he presumed that the road was named even before he was born and that must be over 35 years old.
13. He asserted that the great relations between Malawi and India therefore run from time immemorial and command mutual respect and admiration.
  14. He then asserted that in 2018, the Government of India approached the Malawi Government with a proposal to add on to the honour of Mahatma Gandhi by erecting a bust/statue at the junction where Mahatma Gandhi road starts, that is, Queen Elizabeth Central Hospital round-about.
  15. He indicated that, as Blantyre City Assembly, they were informed of the development that the Malawi Government had allocated a narrow strip of land available at the said junction for the purposes of the Indian Government to erect the Statue. He added that the Council approved the plans to erect the Statue.
  16. He then stated that the crux of the matter appears to be the allegation that Mahatma Gandhi was racist. He then asserted that he had done his own research on the facts and he had sought advice of counsel. And that he had found the following facts as material in response to the allegations made by the claimants in this matter.
  17. First and foremost, that Malawi is a full democracy where the rights of all peoples, regardless of being minority are respected. And that one such right is culture. Specifically, he observed that the odoration by Indians given to Mahatma Gandhi is part of Indian culture. And that as a matter of fact, the word 'Mahatma', which is an adaptation of Sanskrit word '*Mahatman*', means 'great souled', a revered person regarded with love and respect, a holy person or a sage. He added that it he found that it was a constitutional fact that the Indian community in Malawi is entitled to practice their culture and honour Mahatma Gandhi as such.
  18. He explained that it was his factual observation that the honouring of Mahatma Gandhi is not a new thing in the world, let alone in Malawi, where we already have the Mahatma Gandhi Road as already stated. And that the erection of the Statue is not a new phenomenon.

19. He then stated that he is alert to some allegation made against the man Mahatma Gandhi that he was a racist. He added that he did a deep research on the issue and found that the allegation is mostly based on a recent controversial book titled 'The South African Gandhi: Stretcher-Bearer of Empire'. He noted that in the said controversial book the authors, Ashwin Desai and Goolan Vahed, who are South African academics make the argument that Mahatma Gandhi was indifferent to the plight of the indentured for a larger part of his stay in the country of South Africa.
20. He then stated that his further research, including analysis of various facts in the said controversial book on the racist allegations revealed to him that the premises on which the racism allegations are made are mostly collected from the earlier years of Gandhi before he was 24 years old and he became a Mahatma.
21. He went on to state that in his research, he also observed that there is difference of opinion on the racism allegation as other respected authors like Ramachandra Guha author of Gandhi Before India (2013), proposes that Gandhi remains relevant to date. And that in that said book, the authors advise that 'to speak of comprehensive equality for coloured people was premature in early 20<sup>th</sup> Century South Africa. And that attacking Gandhi for racism was therefore 'takes a simplistic view of a complex life'. He added that Guha writes that South Africa changed the 'earnest naïve lawyer to a smart sagacious and focused thinker/activist'.
22. He added that Guha presents four aspects of Mahatma Gandhi's legacy which remain relevant, not just to India but to the world and that these are: non-violent resistance to unjust laws or authoritarian Government, promotion of inter-faith understanding and religious tolerance, an economic model that does not pillage nature and courtesy in public debate and transparency in his dealings.
23. He then explained that in his research, he further discovered that Mahatma Gandhi's legacy is truly relevant to the world and Malawi as well. And that he found hundreds of epigrams from Mahtama Gandhi compiled in a book titled 'Epigrams from Gandhi' compiled by SR Tikekar (1971) which show conclusively that when Mohandas Karamchand Gandhi became Mahatma Gandhi was anti-racist, championed unity, was against gender discrimination,

was against abortion, championed democracy, was against terrorism and championed religious tolerance.

24. He added that in his research he also found as a fact that the great Martin Luther King Jr, the world renowned black civil rights activist adored and modelled himself on Mahatma Ghandhi to the extent that he modelled his own technique in the civil rights struggle on Mahatma's non-violent technique.
25. He then asserted that from the foregoing observations, it is a fact that Mahatma Ghandhi is relevant and the erection of the Statue is a worthy project for the inspiration of many noble causes.
26. He indicated that he also had comparative reference to other statues in Malawi and particularly the statue of Dr. Hastings Kamuzu Banda erected in area 18 in Lilongwe. He observed that the statue is relevant regardless of the evil things attributable to Dr. Banda and his dictatorship of the Malawi Congress Party and which lasted over 31 years. He noted that Dr. Banda banished to the northern region all teachers who hailed from the northern region of Malawi. And that this was no doubt an abhorrent thing to do and yet that Dr. Banda's statue remains relevant as the founder of the Malawi Republic.
27. He then explained that from a financial perspective, the Blantyre City Council was advised by the Indian Government that the Statue would be erected by the Indian Government and the community of Indians in Malawi and hence no Malawian tax payers' funds would be used. He added that from a land use perspective, the land allocated for the Statue is a narrow strip of land which cannot be used for any different purpose and is just good enough for a small public park or garden.
28. He then stated that from all the above facts, he believes that the Statue is a worthwhile project as Mahatma Ghandhi remains relevant to many causes like gender equality, religious tolerance, anti-terrorism, equality, justice and peace etc. And that all these causes are active in Malawi and a ready example is the 50/50 campaign aimed at reducing the gender imbalance in our society. He elaborated that, in line with Mahatma Ghandhi's words, women are not the weaker sex and deserve an equal slice of the national cake in all aspects like governance, commerce etc. He asserted that in this way Mahatma Ghandhi is a source of inspiration for all these noble causes which he stood for.
29. He then asserted that after examining the claimants' sworn statement, he observed that they not only suppressed all the great qualities of Mahatma

Ghandhi and his relevance but also failed to reveal that the racism allegation against Mahatma Ghandhi only refer to his early life as a naïve lawyer before he became a Mahatma.

30. This Court is called upon to determine two issues, namely, whether the law and procedure was followed when the Statue was sought to be erected herein. And whether the erection of the statue breaches the right to dignity of the claimants herein as provided in section 19 of the Constitution.
31. At this stage this Court will consider the submissions of the claimants, the only ones filed after the parties agreed that this matter be determined on the papers as filed on the record.
32. The claimants submitted on the nature and purpose of judicial review. The correctly submitted that traditionally, and for long, it has widely been held that judicial review is concerned with the manner in which a decision was made, but not with its merits. For instance, it was held *In the Matter of the Constitution of the Republic of Malawi and in the Matter of the Removal of Mac William Lunguzi as Inspector General of Police and in the Matter of Judicial Review* Misc. App. 55 of 1994, per Mkandawire J., that:

Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power.

33. They correctly submitted that recently, the introduction of human rights and the inclusion of fundamental rights in Constitutions has changed this view. Judicial review, especially in Malawi today, goes beyond the review of the decision making process. It goes to the very substance of the decision. Now, judicial review has to be based on sound human rights and constitutional principles.
34. The claimants noted that perhaps one of the most prominent proponents of this ‘modern view’ about the nature and purpose of judicial review in Malawi is Prof Danwood Chirwa. In his article titled ‘Liberating Malawi’s

Administrative Justice Jurisprudence from Its Common Law Shackles’ *Journal of African Law* 55 (1) (2011) 105, he proposed that judicial review under the Constitution of the Republic of Malawi is different from, and is broader in scope than, the traditional common law one. For him, judicial review in Malawi falls into two categories: (i) judicial review concerning acts, decisions, and omissions of Government for their conformity with the Constitution of the Republic of Malawi; and (ii) judicial review simpliciter (of an administrative action), which involves the review of administrative actions, decisions, and omissions on more grounds than those which are available in common law judicial review.

35. The claimants correctly observed that this kind of categorization of judicial review in Malawi has received judicial endorsement in several recent cases including: *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union* (Judicial Review) (Misc. Civil Cause No.1 of 2015) [2015] MWHC 494 (27 July 2015) and *S v Judicial Service Commission and Another* (Judicial Review No. 22 of 2018) [2019] MWHC 34 (04 February 2019).
36. They observed that in the *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union case*, supra, the Court, with Justice Kapindu presiding, had this to say:

I should mention that I deliberately use the full term “judicial review of administrative action here” because in modern day Malawian constitutional law, which inextricably intersects with administrative law, there are two types of judicial review, viz: (a) judicial review of administrative action and (b) constitutional judicial review. The former is the review procedure by courts of conduct by public authorities or bodies that requires the procedure under Order 53 of the Rules of the Supreme Court, 1965 (or for those of another procedural school of thought, the procedure provided for under Order 54 of the Civil Procedure Rules, 1998). The latter review process (Constitutional judicial review) is premised on Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution, where the Courts review conduct by the Government or law for consistency with the Constitution. It need not be administrative action.

37. They correctly observed that in the *S v Judicial Service Commission and Another case*, supra, the Court, with Justice Ntaba presiding, observed that

At this point, it is highly crucial, that this Court discusses, the far reaching implications of why this case goes beyond the procedural judicial review which has been highly and ably argued by both parties. By virtue of sections 12 (vi) and 43 of the Constitution, which entrench the principle of the rule law and the right to administrative justice respectively, the basis for judicial review is grounded in the Constitution. It is not just grounded in the English law concept of the inherent powers of court nor is it limited to the ultra vires doctrine. Interestingly, Danwood Chirwa in his article 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' (2011) published in 55(1) Journal of African Law 105 at 107 stressed this position. He further argued that section 43 also recognizes the ground of procedural fairness, which is broader in scope than the traditional rules of natural justice. The common law rules expressed under Order 19 of the CPR or the old Order 53 of the RSC are valid for the procedural judicial review, but are subservient to the Constitution. It is important to note that constitutional supremacy as per sections 4, 5, 8 and 48(2) of the Constitution means that the courts have an obligation to ensure that administrators and others who hold public power not only act within powers granted to them but also 'function in accordance with the laws enacted by the legislature as well as with the ethos, values, principles and edicts espoused by the Constitution.

38. The claimants correctly point out that if any person harbored any doubt about this 'modern view' of judicial review in Malawi, Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is now conclusive on this point. It provides for constitutional judicial review on one part, and judicial review simpliciter on the other part. It expressly provides that judicial review shall cover the review of:

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

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

39. The claimants then submitted on the lawfulness of the decision of the 1<sup>st</sup> defendant to erect the Statue herein.
40. The claimants submitted that, with respect to powers and functions of a local authority on matters of statues, section 5 (1) (c) of the Second Schedule to the Local Government Act, 1998, provides that:

Without prejudice to the provisions of the Public Roads Act, the National Roads Authority Act and the Urban Areas Streets (Public and Private Streets) Act, an Assembly may... “layout and adorn any street, square or open space the property of the Assembly, or of any other public body subject to agreement between the parties as to the cost thereof, and may maintain statues and other structures erected by the Assembly or vested in the Assembly by any person or body under any architectural scheme required by the Assembly.

41. They noted that, by way of the Local Government (Amendment) Act, 2010, the Local Government Act was amended by deleting the word ‘assembly’ and substituting in its place the word ‘council’.
42. They then noted that, a statue may fall within the meaning of ‘building’ under the Physical Planning Act, 2016. And that under section 2 thereof, a ‘building’ is defined as any building, erection or structure erected on or made on, in or under any land and includes the land on, in or under which the building, erection or structure is situated.
43. They then pointed out that section 19 of the Physical Planning Act provides that a local government authority shall appoint a planning committee for its area of jurisdiction which shall be the responsible planning authority for the area and shall exercise any duties as are conferred by this Act.
44. They further pointed out that, besides, section 20 (1) of the Physical Planning Act establishes the composition of a planning committee for a City Council. It comprises of, among others, the Director of Planning and Development, who shall be its Secretary.
45. They observed that another relevant piece of legislation on erection of monuments in Malawi is the Monuments and Relics Act of 14<sup>th</sup> March 1991. And that section 2 (b) of this Act defines a ‘monument’ as any structure, building, erection, ruin, stone, circle, monolith, altar, shrine, pillar, statue, memorial, fortification....
46. They noted that under section 3 of the Monuments and Relics Act, it is provided that the Chief Antiquities Officer is the person responsible for the administration of this Act. And that, further to this, section 4 (e) of the Monuments and Relics Act provides that the Chief Antiquities Officer shall take steps as he may consider necessary for the erection, in suitable places, of

tablets or statues relating to monuments or relics or giving information about historical events which have occurred at or near such monuments or relics.

47. Additionally, they noted that section 12 of the Monuments and Relics Act provides that the Minister may, on behalf of the Government, accept any monument or relic, or relics or any estate or interest therein, which the owner desires to give or has bequeathed to the Government.
48. It is the claimant's contention and submission that the erection of the Statue is not lawful. They asserted that, needless to say, something is lawful if it is not contrary to the law; or if it is permitted by the law. See Black's Law Dictionary, 8<sup>th</sup> edition. And that it follows that under Order 19 rule 20 (1) (b) (i) of the Courts (High Court) (Civil Procedure) Rules, 2017, an administrative action will be judicially reviewed to establish if it is in conformity, and not contrary to the applicable law; indeed, if it is permitted by that law.
49. In the present matter, the claimants observe that the decision to erect the statue was not done in conformity with the applicable law. They asserted that, foremost, a Council derives its powers from the Local Government Act, 1998. And that under section 5 (1) (c) of the Second Schedule to the Local Government Act, a Council has the power to maintain statues and other structures erected in the area under its jurisdiction either by that Council or by some other person who has vested it in that Council under any architectural scheme required by the Council. They argued that a reading of this provision shows that a Council has power to erect a statue or such other like structure within its jurisdiction; and has the power to maintain such statue and structure erected by itself or by some other person which has been vested in it. The claimants note, however, that this provision is silent on the procedure and practice which a Council, or any other person, has to follow before erecting a statue or such other structure within the area under that Council's jurisdiction. It is not clear on questions such as: (i) who, in the Council, ultimately decides on the erection of a statue; and (ii) where a statue can be erected. They conclude that there is, thus, a lacuna in the law under this Act. This Court is not convinced about the accuracy of the submission on this aspect of lacuna considering that applications for building planning permission are made to the local government authority in case of any development within its area of jurisdiction, the Council in this case, and there is a procedure provided for the same. See section 46 (1) (a)(i) of the Physical Planning Act.
50. The claimants then observed that, aside the Local Government Act, the Physical Planning Act is another relevant piece of legislation on erection of statues in Malawi. And that a look at the definition of a 'building' under section 2 of this Act shows that it is wide enough to include a statue or such other like structure. As such, they contend and submit that the provisions of

the Physical Planning Act should have applied to the erection of the statue in the matter herein.

51. The claimants then noted that from the sworn statement of Lytton Nkata for the 1<sup>st</sup> defendant herein, it has been stated that the idea to erect the Statue herein came from the Indian Government. And that representatives of that Government approached the Malawi Government sometime in 2018 with a proposal to add on to the honor of Mahatma Ghandi by erecting a bust/statue herein. Further, that as Blantyre City Council, they were informed of the Development. And that the Council discussed this idea and they proceeded to allocate a narrow strip of land available at the said function for the purposes. In fact, the sworn statement on this aspect indicates that the Council was notified by Government that Government had allocated the land on which the Statue was to be erected.
52. The claimants observed that it is notable from these averments that there is an omission to state whether the Planning Committee of the Council, appointed under section 19 of the Physical Planning Act, ever met and discussed this development. And that under, section 20 (1) of this Act, such Planning Committee of a Council comprises of, among others, the Director of Planning and Development, who is its Secretary.
53. The claimants observed further that, from the facts as indicated in the 1<sup>st</sup> defendant's sworn statement, there is nothing to show that the Planning Committee of Blantyre City Council, with the participation of its the Director of Planning and Development, deliberated the proposal to erect this statue. And that, indeed, there is no resolution of this Committee, or of the whole Council, approving this proposal. The claimants submitted that the silence of the 1<sup>st</sup> defendants on this point positively indicates that this Committee did not deliberate this proposal, nor was the Director of Planning and Development involved. They added that, in any case, the need to involve this Committee, and the Director, is not a simple legal technicality. Arguably, this Committee and the Director are better suited to determine whether the proposed site of a statue is suited to that purpose taking into account the development and architectural plans of the City. In that regard, the claimants contended and submitted that the failure to involve the Planning Committee and the Director of Planning in decision to erect this statue makes the 1<sup>st</sup> defendant's decision unlawful.
54. Further to the foregoing, the claimants contended and submitted that the Monuments and Relics Act may also be applicable to a decision to erect a statue in this country. And that, observably, the definition of a monument in section 2 of the Monuments and Relics Act includes a statue. Further, that indeed, a statue is an example of a monument. The claimants indicated that it occurs to

them that under section 3 of the Monuments and Relics Act, it is provided that the Chief Antiquities Officer is the person responsible for the administration of the said Act. And that under section 4 (e) of the Monuments and Relics Act the Chief Antiquities Officer is obligated to take such steps as he may consider necessary for the erection, in suitable places, of tablets or statues relating to monuments or relics or giving information about historical events which have occurred at or near such monuments or relics.

55. The claimants observed that in the present case, there is nothing in the 1<sup>st</sup> defendant's sworn statement to suggest the Antiques Officer was involved in the decision to erect the statue herein. They argued that, to that extent, the omission of this officer in the decision to erect this statue unlawful.
56. This Court agrees with the claimants that the City Council can indeed maintain statues either erected by itself or by others and as vested in it. See section 5 (1) (c) of the Second Schedule to the Local Government Act.
57. It follows that indeed the Blantyre City Council should also have discussed and approved the proposal made by Government for the erection of the Statue. There is no proof of such approval apart from an assertion by Mr. Nkata. It is the considered view of this Court that the City Council resolutions are recorded in writing and are to be produced to prove such matters as are alleged concerning the approval of the erection of the Statue.
58. This Court agrees with the claimants that the Physical Planning Act applies to the erection of the Statue herein. The definition of a building as provided in section 2 of the Physical Planning Act covers the Statue since it includes an erection or structure on land. Consequently, the view of this Court is that, indeed, a planning permission application for the erection of the Statue herein ought to have been made in terms of section 46 (1) (a)(i) of the Physical Planning Act.
59. This Court also entirely agrees with the claimants that, according to the evidence, indeed the Planning Committee appointed under section 19 (1) of the Physical Planning Act, which is responsible for all planning matters within the jurisdiction of the Blantyre City Council, never met and never discussed to approve the erection of the Statue herein within the city. There is no proof of this fact by the 1<sup>st</sup> defendant. This Committee is indeed the one that has the power and legal authority to determine the suitability of the erection of any building including a statue in any part of the City pursuant to section 50 of the Physical Planning Act. One of the considerations it would have is whether the proposed development is desirable, convenient or necessary having regard to the public interest. see section 50 (1) (i) of the Physical Planning Act. The failure to seek planning permission from the Planning Committee before the erection of the Statue was therefore not lawful.

60. In view of the foregoing this Court agrees with the claimants and finds that the decision of the 1<sup>st</sup> defendant to allow the erection of the Statue was not lawful and therefore cannot stand as it is contrary to the relevant provisions in the physical Planning Act as discussed herein.
61. However, with regard to the Monuments and Relics Act, this Court has noted the section 4 (e) of the Monuments and Relics Act which provides that the Chief Antiquities Officer is obligated to take such steps as he may consider necessary for the erection, in suitable places, of tablets or statues relating to monuments or relics or giving information about historical events which have occurred at or near such monuments or relics. This Court does not agree with the claimants' submission that the matter of the Statue herein is covered by that provision. The duty of the Chief Antiquities Officer is to erect statues in relation to monuments. The Statue in question herein is not related to any monument and therefore does not fall under the provision in section 4 (e) of the Monuments and Relics Act.
62. With respect to justification of a decision, the claimants observed that the Constitution of the Republic of Malawi, in section 43 (c) thereof, is material. And that it provides that every person shall have the right to lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened. They observed further, that the same is also provided for under Order 19 rule 20 (1)(iii) of the Court (High Court) (Civil Procedure) Rules, 2017.
63. They pointed out that in the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, Lord Greene MR stated the principles which must guide a court when it considers whether it should interfere with an apparent exercise of a power entrusted by Parliament on an executive authority. They noted that the Master of the Rolls stated at 682 that:
- .... a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority.
64. The claimants observed that from the *Wednesbury case*, it is evident that a decision is unreasonable if the decision maker failed to take into account relevant considerations; or if he took into account factors that he ought not to.

65. They then contended that, in the present case, the racial remarks and actions of Gandhi against Black people, and the offence which these have caused among Black people worldwide, were relevant considerations which the 2<sup>nd</sup> defendant ought to have taken into account before deciding to allow the erection of the Statue.
66. The claimants asserted that indeed, it has been shown in their sworn statement herein that the statues of Gandhi have generated protests in Ghana, South Africa, and several other western countries among people of Black and Indian origin in reaction to his racist remarks and actions. And that the Court may take judicial notice of the fact, for instance, that a statue of Gandhi in Parliament Square, London, was painted with graffiti during the 'Black Lives Matter' protests in that city following the death of an African American, one George Floyd, in the United States of America. They added that it is also a notorious fact that a statue of Gandhi was removed immediately after it was unveiled within the campus of the University of Ghana following massive protests in response thereto. They argued that these acts reflect how much some Black people revile and detest Gandhi for his racial slurs which he made against their race while he was in South Africa.
67. They added that, besides, they have shown that an Indian Minister and a local governing Hindu nationalist BJP party local official in the Indian State of Tripura are on record to have said that India has no place for statues dedicated to foreign leaders. And they contended that it follows from these utterances that India has no place for a statue of a Malawian leader, or hero. And, they observed that while Indian leadership would not allow a statue for a Malawian to be erected in their country, the 1<sup>st</sup> defendants decided to permit the erection of the Statue herein.
68. They then submitted that these foregoing are matters that the 1<sup>st</sup> defendant ought to have taken into account in its decision herein. And that, to the extent that the 1<sup>st</sup> defendant failed to do so, its decision herein is unreasonable. They further contended that these matters make the 1<sup>st</sup> defendant's decision unjustifiable.
69. This Court has observed that indeed the claimants and others protested the erection of the Statue herein. By not following the law to let the Planning Committee decide on the planning permission for the erection of the Statue the public interest in the matter, which the said Planning Committee ought to

consider among others, never featured in the decision making process. The 1<sup>st</sup> defendant never considered the feelings of some Malawians who have serious reservations to the erection of the Statue.

70. Consequently, this Court agrees with the claimants that the 1<sup>st</sup> defendant failed to take into account relevant considerations when it let the Statue be erected when the figure in the Statue is subject of some controversy arising out of the racist remarks that he made during his life against Black people. For that reason, this Court finds the decision of the 1<sup>st</sup> defendant to allow the erection of the Statue herein unreasonable and unjustifiable. The said decision cannot therefore stand on that account.

71. At this stage this Court has found that the decision allowing the erection of the Statue is unlawful for contravening statutory provisions and also for being unreasonable and unjustifiable. On that basis, this Court grants the claimants all the reliefs sought, namely, a declaration that the decision of the 1<sup>st</sup> defendant to proceed with the erection of the Statue is unlawful in that the Blantyre City Council did not meet to authorize the construction of the Statue; a declaration that the decision of the defendants to construct the Statue is unlawful in that the Planning Committee did not authorize the said construction; a like order to certiorari quashing the decision of the 1<sup>st</sup> defendant allowing the construction of the Statue and a permanent injunction restraining the defendants from proceeding with the construction of the Statue.

72. With regard to the last relief sought by the claimants, namely, a declaration that the conduct of the defendants in erecting the Statue is contrary to section 19 of the Constitution in that it was made with disregard to the views and interests of a number of individuals, this Court considered the question whether this proceeding expressly and substantially relates to, or concerns the interpretation or application of the provisions of the Constitution so that it be heard by and be disposed of before not less than three judges, popularized as ‘Constitutional Court’, in line with section 9 (2) of the Courts Act. This Court requested the parties to indicate their views on the same and none positively answered this question.

73. This Court has considered that it was stated in the case of *Malaya v Attorney General* Constitutional Case number 3 of 2018 (High Court) guides that the mere fact that a claim has been made in reference to multiple constitutional provisions does not qualify a case as one that needs constitutional interpretation. And that to qualify as a constitutional court issue, the

interpretation or application must be “the specific and particular fundamental issue before the court. It must not be a side issue or an enhancement to the claim.”

74. In the present matter, it has already been found that on the judicial review simpliciter, that the decision of the 1<sup>st</sup> defendant in allowing the erection of the Statue is administratively unsound. The issue of the said decision being counter to the right to dignity as provided in section 19 (1) of the Constitution is therefore no longer fundamental to these proceedings and this Court’s considered view is that it can go ahead and express its determination on the same without falling foul of section 9 (2) of the Courts Act.
75. With regard to this issue of violation of their dignity, the claimants commenced by submitting on the legal obligation of the State corresponding to human rights.
76. The claimants correctly submitted that when a State enshrines human rights in its constitution, or when it becomes a party to international human rights treaties, it assumes three legal duties or obligations which correlate or correspond to those human rights. And that these are; to respect, to protect and to fulfil the human rights that are in that constitution, or those included in these treaties, as the case may be. See J. Nickel, ‘How Human Rights Generate Duties to Protect and Provide’ in *Human Rights Quarterly* vol. 15 (1993). Available on <https://heinonline.org/HOL/LandingPage?handle=hein.journals/hurq15&div=11&id=&page=>.
77. The claimants asserted decorously that it is trite that the obligation to respect means that a State must refrain from interfering with or limiting the enjoyment of human rights. And that it is also described as a negative obligation, as the State has to abstain from violating human rights.
78. They then appropriately observed that the other two obligations include positive duties, which means that the State has to take action to deliver or realise those rights. They added that the obligation to protect requires States to interfere in order to protect individuals and groups against human rights abuses by others, in particular private actors. And that the obligation to fulfil means that States must take positive measures to facilitate the enjoyment of human rights.

79. The claimants then correctly noted that under section 211 of the Constitution of Malawi, international human rights treaties which Malawi has ratified over the years are part of the law of this Republic. For instance, Malawi ratified the International Covenant on Civil and Political Rights (ICCPR) on 22 December 1993 and the African Charter on Human and Peoples' Rights (ACHPR) on 17 November 1989.

80. They then noted suitably that under section 5 of the Constitution, it is stated that any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

81. Additionally, they noted that section 46 (1) of the Constitution provides that:

Save in so far as it may be authorized to do so by this Constitution.....the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid.

82. The claimants then aptly asserted that when interpreting the Constitution, section 11 of the Constitution enjoins a Court as follows:

(1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.

(2) In interpreting the provisions of this Constitution a court of law shall—

- (a) promote the values which underlie an open and democratic society;
- (b) take full account of the provisions of Chapter III and Chapter IV; and
- (c) where applicable, have regard to current norms of public international law and comparable foreign case law.

83. With respect to principles applicable to the interpretation of a constitutional provision, the claimants properly observed that Banda, C J in the case of *Nseula Fred v Attorney General and Another* MSCA Civil Appeal No. 32 of 1997 stated as follows:

A Constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the

interpretation of other pieces of legislation are not necessarily applicable to the interpretation of the Constitution.

84. They further appropriately noted that *In Re Section 65 of The Constitution* ((15 of 2005)) [2006] MWHC 139 (07 November 2006), the High Court held that the Constitution should not be interpreted in a legalistic or pedantic manner, but broadly and purposively, with the aim of fulfilling the intention of its framers.
85. The claimants then submitted that with respect to the right to dignity, the starting point are principles of national policy as enshrined in section 12 (d) of the Constitution where it is provided that the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote. Furthermore, that section 19 (1) of the Constitution provides that the dignity of all persons shall be inviolable.
86. The claimants fittingly noted that the right to dignity is enshrined in multiple international human rights instruments which are binding on Malawi. For instance, it is invoked in the preambles to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention on the Rights of the Child (UNCRC), all of which refer to “... the inherent dignity ... of all members of the human family [as] the foundation of freedom, justice and peace in the world....”
87. The claimants aptly observed that the UDHR goes further by stating in article 1 that “[a]ll human beings are born free and equal in dignity and rights.” And that the preambles to the ICCPR and ICESCR state that the “equal and inalienable rights of all members of the human family ... derive from the inherent dignity of the human person.” Similarly, that the UN Convention against Torture states in its preamble that “recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and goes on to expressly state that “those rights derive from the inherent dignity of the human person.”
88. The claimants further correctly observed that the concept of human dignity is also invoked in the preambles to the UN Convention on the Elimination of All

Forms of Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination against Women, both of which are devoted to the elimination of discrimination based on an external characteristic—race and sex. Similarly, the Vienna Declaration made at the World Conference on Human Rights in 1993 stated in its preamble that “all human rights derive from the dignity and worth inherent in the human person.”

89. The claimants then aptly noted that, in particular, the right to human dignity is expressly mentioned in the preamble and in article 5 of the African Charter on Human and Peoples Rights.
90. The claimants then observed that, with respect to its meaning, or its minimum core content, the concept of dignity may not have a universal or uniform meaning. And that it has been suggested that its meaning depends on context, such that what it means in a given context (such as racial relations) is dependent on that context. They indicate that tracing its meaning from a survey of ideas over centuries, one finds, for instance, that classical Roman thought as captured in Cicero’s ideas referred to human dignity as the dignity they have simply by virtue of being human, which does not depend on any external characteristic. See Christopher Mc Crudden, “Human Dignity and Judicial Interpretation of Human Rights” in *European Journal of Human Rights* vol. 19 no. 4, page 657. Available on <https://academic.oup.com/ejil/article/19/4/655/349356>.
91. They then noted that during the Middle Ages, the dominant theological thought emphasized the idea of mankind as having dignity because Man was created as an image of God. They asserted that, Mc Crudden states at 658, that the Catechism of the Roman Catholic Church extended this idea by holding that:

Of all visible creatures only man is ‘able to know and love his creator’. He is ‘the only creature on earth that God has willed for its own sake’, and he alone is called to share, by knowledge and love, in God’s own life. It was for this end that he was created, and this is the fundamental reason for his dignity... Being in the image of God the human individual possesses the dignity of a person, who is not just something, but someone. He is capable of self-knowledge, of self-possession and of freely giving himself and entering into communion with other persons. And he is called by grace to a

covenant with his Creator, to offer him a response of faith and love that no other creature can give in his stead.

92. They also noted that, for humanists of the Renaissance such as Pico della Mirandola, at the root of man's dignity is his ability to choose to be what he wants, what he wills, and that this is his gift from God. And that, during the age of Enlightenment, the idea of 'dignity of man' was divorced from religious elements. Further, that philosophically, man was said to have dignity by virtue of his autonomy, by being lord of his fate and shaper of his future. Such that, by extension, to treat people with dignity is to treat them as autonomous individuals able to choose their destiny. See Mc Crudden at 659.
93. The claimants then observed that the right to dignity has been drawn on by Judges from various jurisdictions and from various international competent courts and human rights bodies. And that they have invoked it judicial decisions in matters of race relations. For instance, in the *South West Africa case (in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276)* Advisory Opinion of 21 June 1971, [1971] ICJ Rep 16, at 77., Justices Tanaka and Vice President Ammoun of the International Court of Justice used the right to dignity to hold that practices of racial discrimination and apartheid were contrary to international law. And that in the Separate Opinion of Vice-President Ammoun, he held that:

[i]t is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights. From this first principle flow most rights and freedoms. Of all human rights, the right to equality is far and away the most important. It is also the one which has been longest recognized as a natural right: it may even be said that the doctrine of natural law was born in ancient times with the concept of human equality as its first element.

94. The claimants noted that, on its part, the European Commission of Human Rights held, in *East African Asians v United Kingdom* (3 E.H.R.R. 76) 15 December 1973, that publicly singling out a group of persons for differential treatment on the basis of race may constitute a special form of affront to

human dignity and might therefore be capable of constituting degrading treatment.

95. The claimants then posited that sometimes dignity is seen as particularly associated with protecting an individual from mental torment inflicted by racial discrimination. And that, in its particularity, the Committee on the Elimination of Racial Discrimination has made several decisions based on the International Convention on the Elimination of All Forms of Racial Discrimination. Indicating that such decisions include *Dragan Durmic v Serbia and Montenegro*, Communication No. 29/2003, U.N. Doc. CERD/C/68/D/29/2003 (2006) where it was argued on behalf of the petitioner, and tacitly upheld by the Committee, that a State has an obligation to protect an individual, because of his right to dignity, from racial discrimination; and that under article 3 of the International Covenant on Civil and Political Rights that a State has a duty to prevent, prohibit, and eradicate all practices of racial discrimination.
96. The claimants then observed that the South African Constitutional Court has had occasion to consider the meaning of the right to dignity. For instance, in *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 328, O'Regan J. aptly said that:

Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights...

97. The claimants submitted that distilling its minimum core content from case law, literature, and constitutional provisions of advanced democracies, the right to dignity, at a minimum, therefor entails that:
- (a) Every human being has an inherent dignity by virtue of his or her humanity, irrespective of external characteristics including, inter alia, race;
  - (b) This inherent dignity demands that certain human rights should be protected; and

(c) Because dignity inheres in human beings, irrespective of external characteristics, every human being should be entitled to enjoy his or her human rights without suffering any discrimination or distinction based on such external characteristics. See Conor O' Mahoney, "There is no Such Thing as the Right to Dignity" (Oxford University Press, 2012). Available on <https://academic.oup.com/icon/article/10/2/551/666082>.

98. They then contended that the decision allowing the construction of the Statue herein is not in conformity with the right to dignity under section 19 (1) of the Constitution.

99. The claimants then submitted that, in his sworn statement which was used to obtain the Court's permission to commence judicial review proceedings and to obtain an injunction in the matter herein, the 1<sup>st</sup> claimant, Pemphero Mphande, has shown that he resides within the City of Blantyre. And that almost on a daily basis, he passes by the spot where the 1<sup>st</sup> defendant allowed construction of the Statue. Further that this spot is in on a piece of public land along the 'Mahtma Gandhi' road (the Queen Elizabeth Central Hospital to College of Medicine road). And that it is close to where this road joins the roundabout on the Chipembere Highway. The claimants asserted that, if constructed, the 1<sup>st</sup> claimant, and all else who will be passing by that place, will continually be made to see it in their daily lives. And that it be a daily and constant reminder about who Gandhi was, and about what he said about Black Africans. Further, that the 1<sup>st</sup> claimant has further shown that Gandhi, while he was living in South Africa, is on record to have referred to Black Africans as 'kaffirs', a derogative terms used to denigrate and disparage those belonging to the Black race.

100. The claimants observed that, in paragraph 4 of his supplementary sworn statement in response to the 1<sup>st</sup> defendant's application for vacation of the injunction in the matter herein, Pemphero Mphande has shown that he and the 2<sup>nd</sup> Applicant, Mkotama Katenga Kaunda, are not the only Malawians who are objecting to the erection of the Statue. They added that as of the date of that sworn statement, it had been challenged by approximately 3,850 signatories on a petition hosted on the website "change.org," as well as by over 9,100 people who had liked the "Gandhi Must Fall - Say No to His Statue in Malawi" Facebook Page. They noted that over eighty percent of the

Facebook supporters for that petition were Malawians resident in this country to whom the Statue will be a constant mental torment.

101. The claimants then noted that, in paragraphs 12 and 13 of the sworn statement of Lytton Nkata, which the 1<sup>st</sup> defendant used in opposition to the application for an injunction herein, the 1<sup>st</sup> defendant acknowledged that there are recent academic works which documented the racist remarks Gandhi made while he was resident in South Africa. In particular, that the 1<sup>st</sup> defendant admits that there is a book, titled *The South African Gandhi: Stretcher-Bearer of Empire*, by Ashwin Desai and Goolan Vahed. They observed that in that book, these two South African academics make an observation that Gandhi made some racist remarks against Black Africans; and that he was indifferent to their plight in colonial South Africa. The claimants asserted that, observably, these two authors spent 7 years exploring the story of Gandhi while he lived in South Africa for more than two decades - 1893 to 1914 – where he campaigned for the rights of Indian people there.

102. The claimants noted that, in that book, these authors observe that during his stay in Africa, Gandhi kept the Indian struggle "separate from that of Africans and coloureds even though the latter were also denied political rights on the basis of colour and could also lay claim to being British subjects". And that the authors further write that Gandhi's political strategies - fighting to repeal unjust laws or freedom of movement or trade - carved out an exclusivist Indian identity "that relied on him taking up 'Indian' issues in ways that cut Indians off from Africans, while his attitudes paralleled those of whites in the early years". They added that, Gandhi, the authors write, was indifferent to the plight of the indentured, and believed that state power should remain in white hands, and called black Africans Kaffirs, a derogatory term, for a larger part of his stay in the country. See <https://www.bbc.com/news/world-asia-india-34265882>.

103. The claimants then submitted that, on racial segregation, these authors found out that Gandhi is on record to have specifically said the following:

(a) In 1893, he wrote to the Natal Parliament saying that a "general belief seems to prevail in the Colony that the Indians are a little better, if at all, than savages or the Natives of Africa";

- (b) In 1904, he wrote to a health officer in Johannesburg that the council "must withdraw Kaffirs" from an unsanitary slum called the "Coolie Location" where a large number of Africans lived alongside Indians. "About the mixing of the Kaffirs with the Indians, I must confess I feel most strongly";
- (c) The same year he wrote that unlike the African, the Indian had no "war-dances, nor does he drink Kaffir beer". When Durban was hit by a plague in 1905, Gandhi wrote that the problem would persist as long as Indians and Africans were being "herded together indiscriminately at the hospital";
- (d) And, he supported more taxes on impoverished African people and turned a blind eye to the brutality of the Empire on Africans.

104. The claimants noted that, observably, the findings of these authors on the remarks Gandhi made against Black Africans have not been disputed, or discredited, in the academe. And that, also, the 1<sup>st</sup> defendant, in its sworn statement of Lytton Nkata, do not discredit these findings. Further, that in fact, the 1<sup>st</sup> defendant admits Ghandhi did make some remarks which have been deemed to be racists. Only that, the 1<sup>st</sup> defendant make reference to another book 'Ghandhi before India' by some other author Ramachandra Gulia, in which it is said that Gandhi made these remarks in his naïve young years, before the age of 24, and before he became a 'Mahtma', a saintly person.

105. The claimants contended and submitted that the suggestion made by the 1<sup>st</sup> defendant in the sworn statement of Lytton Nkata that Gandhi made these racist remarks in his naïve tender years before the age of 24, that he was a changed man, a 'saint' in his later years, and that he came to believe in the equality of all races, is not supported by facts. They asserted that, in the supplementary sworn statement of Pemphero Mphande herein, it has been shown that there is documented evidence on the continued racists remarks and actions which Gandhi made against Blacks up to the time he reached the age of 40, a fact which the 1<sup>st</sup> defendant has not disputed.

106. The claimants asserted that it is our further contention and submission that Gandhi never denounced or apologized for the racist remarks he made against Black people as referenced herein, contrary to the godly picture the 1<sup>st</sup> defendants would want the Court to have of him. Indeed, that the idea that

Gandhi was a “spiritual figure” who transcends politics “is something [the Court] should reject.” Quoting <https://www.theguardian.com/world/2019/oct/17/manchester-council-urged-reject-mahatma-gandhi-statue-racism> .

107. They then observed that, on his part, the author Ashwin Desai disagrees with such a suggestion from the 1<sup>st</sup> defendants. And that he contends that:

Gandhi believed in the Aryan brotherhood. This involved whites and Indians higher up than Africans on the civilised scale. To that extent he was a racist. To the extent that he wrote Africans out of history or was keen to join with whites in their subjugation he was a racist." To the extent that he accepted white minority power but was keen to be a junior partner, he was a racist. Thank God he did not succeed in this as we would have been culpable in the horrors of apartheid.” See <https://www.bbc.com/news/world-asia-india-34265882>.

108. In the premises, it is the claimants’ further contention that Gandhi’s words positively indicate that he did not think of a Black person, compared to other races, as having the same right to dignity. And that, indeed, case law, as exemplified in the following cases, has definitely held that this is a right that accrues to all human beings:

(a) On its part, the ICJ, through its Vice President Amooun in his Separate Opinion in the South West Africa case, supra, held that the right to dignity, is synonymous with the right to equality, and it accrues to all human beings. Indeed, all human beings are born free; and equal in dignity and rights;

(b) On their part, the European Commission on Human Rights, in the *East African Asians v United Kingdom*, supra, affirmed that publicly singling out a group of persons for differential treatment on the basis of race may constitute a special form of affront to human dignity and might therefore be capable of constituting degrading treatment; and

(c) And, to the South African Constitutional Court, as stated in *S v Makwanyane*, supra, recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings; [it entails that all] human beings are entitled to be treated as worthy of respect and concern.

109. The claimants then argued that, cumulatively, Gandhi's remarks, as pointed out herein, were that Black Africans are "savages", "half-heathen natives", "uncivilised", "dirty" and "like animals". And that, in essence, his view and belief was that races belong to classes. Further, that he viewed Africans as belonging to the bottom most class, beneath his. And that, given these remarks that he made, and views and beliefs which he held, against Black Africans there, the claimants contended and submitted that Gandhi harmed the dignity of Black Africans. They insisted that his remarks, views, and beliefs continue to cause such harm to the present day. And that his views were an encouragement of the denial to persons of the Black race to access public spaces accessed by other races, an apartheid practice which came to be prevalent in South Africa for many years. They noted that he publicly singled out Blacks, for differential treatment on the basis of their race. And that his views constituted a special form of affront to human dignity of Black people and are therefore be capable of constituting degrading treatment which he wanted Black people to be perpetually subjected to.

110. At this point, the claimants invited this Court, in its interpretation of section 19 of the Constitution, to adopt and apply a 'purposive and generous', per the Nseula case, as well as a 'broad and purposive', as per the Re Section 65 of The Constitution case, approach to the interpretation of a constitutional provision; and draw on the cited literature on applicable current norms of international law and foreign case law as dictated by section 11 of that same Constitution.

111. In the premises, the claimants contended and submitted that the right to dignity under section 19 of the Constitution of Malawi, in the context of matters of race relations, means that every individual human being in this country has, at a minimum, an inherent dignity by virtue of his or her humanity, irrespective of external characteristic of race. Besides, that it entails that every human being, because dignity inheres in all human beings,

irrespective of any external characteristics, should be entitled to enjoy his or her human rights without suffering any distinction based on any of those characteristics. Further, that indeed, it means that every human individual, regardless of race, is not just something, but is someone. And that it means that every human being, regardless of race, has the ability to choose to be what he wants, and what he wills; he is an autonomous, self-governing being, a lord of his fate and shaper of his future, such that, by extension, he has to be treated as an autonomous individual able to choose his destiny. And that the right to dignity would mean that every person, regardless of race, counts and is worth to be treated with respect and concern.

112. They claimants asserted that, observably, Gandhi's recorded racist remarks and actions as cited in the preceding paragraphs herein are inimical to any idea of a Black person's dignity. They added that all the while Black people, in the apt words of Cicero, have the dignity which any other human being has simply by virtue of being human, which does not depend on any external characteristic, Gandhi's words suggest that Black people, to him, are less of human beings and do not possess the same level of dignity on account of their external characteristic of race. And that, indeed whereas viewed from the perspective of Middle Ages thought, the dignity which a Black person has is because he too was, to the believer, created as an image of God, and is not just something, but someone, Gandhi's remarks suggest that he thought of a Black person not as created in the image of the same God, and that a Black man is not someone, but is something. Further, that whereas a Black person too, as Pico della Mirandola would put it, has the ability to choose to be what he wants, and what he wills, Gandhi's words suggests that he thought of a Black person as a person who does not have and should not be thought to have that ability. And that, whereas a Black person too, viewed from the perspective of the Enlightenment Age thought, has dignity by virtue of he too having autonomy, he too being lord of his fate and shaper of his future, such that, by extension, he too has to be treated as an autonomous individual able to choose his destiny, Gandhi's words suggests suggest that he did not think of a Black person as also having that autonomy and worth that treatment. Further that he did not think of a Black person as a full human being too. And that he thought of a Black person who should perpetually be subject to, and subjugated by, other races.

113. The claimants asserted that this Court may take judicial notice of the fact that public statues and monuments, generally speaking, are erected in a country to celebrate individuals and great moments in that country's history. And that, to an extent, a statue is a mark of self-respect of a people in a given country.
114. They asserted further that, it follows that a statue of Gandhi is a celebration of him by some (and not all) people of India and of Indian origin. And that through it, it reminds them of his political achievements for their country. But that, however, constructing a statue in his remembrance in Malawi will not be about his celebration among native Malawians but be a constant reminder to them about the lowly views and beliefs he held, and the remarks he made about people of their kind. Further, that it will constantly remind them of how inferior they are as Black people in his eyes and those who share his views and beliefs. And that it will be a lasting memorial and a permanent monument to his tormenting racial beliefs about being Black.
115. The claimants indicated that, given the above suggested 'purposive, broad and generous' interpretation of the right to dignity in section 19 of the Constitution, it is their contention and submission that the decision and act of the 1<sup>st</sup> defendants to permit the construction the Statue in Gandhi's honour is not in conformity with the right to dignity under this constitutional provision. And that this is so in two senses: firstly, the right to dignity necessarily requires the State and its agencies to take steps to diminish or demote, and not elevate, anything capable of validating Gandhi's beliefs and views against a Black person. They noted that, observably, the 1<sup>st</sup> defendant's actions herein have failed to perform its correlative or corresponding duty to protect the right to dignity of the claimants and of any other person of a Black race in this country tormented by Gandhi's racist remarks and actions; and, secondly, that the right to dignity requires a people honouring their own heroes or those who respected their race, and denouncing foreign heroes whose words and actions harmed, or continue to harm, their dignity.
116. Consequently, the claimants contended and submitted that the State of Malawi, through the 1<sup>st</sup> defendant, has, in permitting the erection of the Statue to take place, failed to discharge its obligation to protect the honour and dignity of the claimants as persons belonging to a Black race. And that as may be inferred from the decision of the Committee on the Elimination of Racial

Discrimination in *Dragan Durmic v Serbia and Montenegro*, supra, a State has an obligation to protect an individual from racial discrimination; and that under article 3 of the International Covenant on Civil and Political Rights, a State has a duty to prevent, prohibit, and eradicate all practices of racial discrimination. They submitted that permitting the erection of the statute represents a failure by the State to fulfil this duty.

117. The claimants further contended that permitting the construction of the Statue to proceed will show that native Malawians have no respect for themselves and look down on their own heroes, and praise heroes of others who had, or have, no respect for them. They asserted that in the supplementary sworn statement of Pemphero in opposition to the 1<sup>st</sup> defendant's application for the injunction herein, it has been shown that in March 2018, the then Indian Union Minister of State for Home Hansraj Gangaram Ahir stated, that: "I want to make it clear that statues of foreign leaders are not required in India.... We have no place for them". <https://www.thehindu.com/news/national/statues-of-foreign-leaders-have-no-place-in-india-minister-hansraj-ahir/article22951799.ece>. The claimants observed that, in its sworn statement, the 1<sup>st</sup> defendant has not disputed that these utterances were made.

118. The claimants asked this Court to take judicial notice of the fact that in 2018, a statue of Lenin, a former Soviet revolutionary leader, was toppled in Tripura State, India. And that it was widely reported that the statue was toppled by members of the current governing BJP party, which is widely known for its strong Hindu nationalism. And that when asked about the removal of the statue, a local leader of this party is recorded to have said that:

For years, there has been resentment against this statue of Lenin. It was built by the municipality and funded by the taxpayers' money. Why should the taxpayer have to finance a statue of Lenin? What does this foreigner Lenin have to do with our people? See <https://www.bbc.com/news/world-asia-india-43297477?piano-modal> h68j9809hh0hhh.

119. The claimants then asserted that, arguably, these sentiments from that Indian Minister and local party leader reflect the link that is there between the right to dignity and erection of a statue in honour of some figure. And that a reading of those sentiments is that a people with a sense of dignity will erect

statues of their own heroes, and not of foreign heroes; conversely, erecting statues for foreign heroes is a mark of lack of a sense of self-respect for a people. In that regard, the claimants submitted that a statue for Gandhi, a hero foreign to Malawi, will truly demonstrate a lack of a sense of self-respect among Malawians of African origin, a feeling which is similar to the one some Indian leaders expressed towards the statue of Lenin, a foreign hero in their country. And that, evidently, it is a hypocritical double-standard, and an abuse of the power differential between India and Malawi, for India to propose that Malawi accepts a statue of an Indian leader when India rejected a statue of a foreign leader, and would, by extending the same logic, reject a statue of a Malawian hero or leader. They added that, if India has dignity so much so that it has no place for statues of foreign leaders, Malawi has the same dignity and has no place for a statue of a Gandhi, a leader foreign to Malawi.

120. The claimants then observed that, the right to dignity, like all constitutional rights, is not absolute and is subject to limitations under section 44 of the Constitution. They however observed that, arguably, limiting the right to dignity by way of constructing of a statue for a man who disparaged the race of native Malawians can scarcely be a permissible limitation of this right under section 44 of the Constitution.

121. The claimants then pointed out that perhaps it merits pointing out that in the sworn statement of Lytton Nkata for the 1<sup>st</sup> defendant, it has been asserted that constructing a statue of Gandhi in Malawi is not without precedent. And that it has been asserted that we already have a road in the City of Blantyre, the Mahtma Gandhi road, named after him. The claimants indicated that it is apparent that the 1<sup>st</sup> defendant is suggesting that if Government was able to give the road that name, Government should similarly be permitted with the construction of a statue in honour of the same person, after all the statue will be constructed along that same road. Further, that it also seems to be the 1<sup>st</sup> defendant's suggestion that if the name of that road is presently not offending claimants' sense of dignity, how then will the statue be able to do so.

122. The claimants invited this Court to take judicial notice of the fact that the circumstances in which the Government gave this road that name are different from those under which Government seeks to construct the Statue. They pointed out that Government gave the road that name during the time

when Malawi was under an autocratic rule; when there was no respect for human rights. And that the said rule was based on the 1966 Republican Constitution of Malawi, which was discarded and abandoned in 1994. The claimants observed that under section 2(1) (iii) of Schedule 2 to that Constitution, it was indeed stated that: “The Government and people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights and of adherence to the law of Nations.” And that looking at that section, human rights as provided for under the UDHR were, technically speaking, part of the law of this country during that time. And that the Malawi Supreme Court of Appeal affirmed this position in *R v Chihana* MSCA Criminal Appeal No. 9 of 1992.

123. But, the claimants submitted, it goes without saying that any recognition of human rights in this country under that 1966 Republican Constitution was merely cosmetic and far from being meaningful. And that given the political context and constitutional order of that time, the State felt no sense of obligation to respect any human right. And that this was especially so because any governmental decision was not practically, though theoretically, open to judicial review. Of note, the claimants submitted, was section 62(1) of the 1966 Constitution, which granted the High Court its jurisdiction, did not specifically confer on it the power to review a decision or act of government or the power to declare governmental acts or decisions unconstitutional or unlawful.

124. The claimants then pointed out that the case of *Chirwa v State* [1994] MLR 59 is in point. And that in that case, the applicant’s right to administrative justice was violated in the manner in which he was dismissed from some public office during that time. He did not go to court to challenge the constitutionality or lawfulness of that decision until after there was a change of the constitutional order and of government. Perhaps, the claimants point out, it is in the case of *Gondwe v Attorney General* [1995] 2 MLR 492 where the High Court aptly captured this point when it stated that:

the political climate in Malawi during the reign of the former Government was such that it was not only prohibitive but in fact dangerous and a real risk to those who might have attempted to take the Government to court

more especially in matters like the present where the allegation is that the Government forfeited property without just cause. There was in my view clearly a disabling atmosphere created by the Government itself until such a time as people found it permissible to institute proceedings against the Government and this was only possible when Government changed hands.

125. The claimants asserted that it was in that context, therefore, that Government managed to give the said road the name of Gandhi. Expectedly, the claimants submitted, no one dared go to Court to assert his/her right to dignity in opposition to the naming of the said road after Gandhi without facing real risk of loss of life, limb or liberty. They added that such disabling environment is no longer there.

126. Finally, the claimants disagree to any argument which the 1<sup>st</sup> defendant may make that if the name of that road is presently not offending the claimants' sense of dignity, erecting a statue in honour of the same person should, likewise, not offend them. They contended and submitted that naming a road after a person and erecting a statue for that person do not have the same symbolic significance and impact on the psyche of a people in a given country. They asserted that it is all in what a statue or a name represents. And that a statue represents so much more. They indicated that one author once observed that:

Monuments are both public art and symbols important to those who hold political and economic power. Statues of a general on a horse, leading the troops, are meant to inspire pride in the national cause the general represents. Statues of statesmen often portray them as larger-than-life figures, staring off into the distance, proudly leading the way. These representations symbolize the feats and accomplishments of historical figures and their role in building the nation. Because of what monuments and statues represent, they become focal points for challenges to the established power structure.... Monuments come under scrutiny during times of political and social transformation. And the practice is hardly new, dating back to at least the Roman Empire. See <https://www.rand.org/blog/2020/07/confederate-statues-symbolize-role-of-racism-in-america.html>.

127. In the premises, the claimants contended and submitted that erecting a statue for Gandhi, in one of the most visible public spaces within the City of Blantyre, will be an elevated representation of his beliefs and views, and of

Indian power over native Malawians. And that it will be a weighty symbolic indignity that the claimants will have to suffer in its gaze; than what they can suffer because of his name given to a road, which was written on some obscure and decrepit plaque, if any still exists to date. They added that the Statue will be a permanent reminder of the continued inferior social status of a Black person, compared to an Indian, in Gandhi's gaze from the Statue, unlike his name on that plaque which gives no such gaze.

128. This Court agrees with the claimants that this Court must read the Constitution purposively to fulfil the intention of its framers. See *In Re Section 65 of The Constitution* ((15 of 2005)) [2006] MWHC 139 (07 November 2006).

129. This Court is also mindful of the principles that should guide it reading the Constitution as provided in section 11 (2) of the Constitution which requires that such a reading must promote the values which underlie an open and democratic society, take full account of the provisions of Chapter III and Chapter IV; and where applicable, have regard to current norms of public international law and comparable foreign case law.

130. It occurs to this Court that on a purposive reading and bearing in mind the principles in section 11 (2) of the Constitution, the right to dignity in section 19 (1) of the Constitution entails that every person has intrinsic worth as a human being regardless of external factors, as ably demonstrated by the claimants. See *S v Makwanyane* and numerous other authorities cited by the claimants.

131. The making of racist remarks against a person violates a person's human dignity as it tends to disregard and reduce that person's sense of intrinsic worth. Constantly reminding a person of racist remarks applicable to such a person would be counter to a person's intrinsic worth as a human being and surely would not sit well with the right to dignity.

132. This Court has noted the undoubted facts as indicated by the claimants, which show that Gandhi held and expressed views that disparaged Black people as he was resident in South Africa. Those views have not been disputed by the 1<sup>st</sup> defendant. Those views are well documented as expressed by the claimants herein. This Court will not reproduce the views as expressed but indicate that it finds such views to be clearly racist. It also appears to this Court that it is not clearly shown by the 1<sup>st</sup> defendant that indeed Gandhi held

those views only as a naïve young lawyer, as the 1<sup>st</sup> defendant wants this Court to believe. What is clear is however that the 1<sup>st</sup> defendant has not brought any literature showing that Gandhi acknowledged and recanted his offensive views expressly at any given point in his life time.

133. In the premises, the 1<sup>st</sup> defendant's decision to allow the erection of the Statue herein would be a constant reminder to the claimants, and others like them, of the racist views held by the person honoured by the Statue. That would not sit well with the dignity of the claimants and those like them who know what racist statements the one honoured by the Statue said about Black people and what views he held about Black people.

134. This remains the case despite the undisputed fact that Mahatma Gandhi is a revered figure amongst his fellow countrymen and others for his significant non-violent role during the struggle for the independence of India from British colonial rule as alluded to by the 1<sup>st</sup> defendant.

135. This Court also finds inept the reference by the 1<sup>st</sup> defendant to the erection of the statue of Dr. Hastings Kamuzu Banda and the attempt to use that to justify the erection of the Statue herein. The two figures are incomparable. The one in contention in this matter is not a Black African and is a non-Malawian who clearly made well documented racist comments and held like views about Black people. He cannot be compared to Dr. Hastings Kamuzu Banda whose statue was erected because he is part of the history of this country, although he was at the helm of the autocratic rule.

136. This Court would like to agree with the claimants that the State and its organs, of which the 1<sup>st</sup> defendant is one, has an obligation to protect and promote the human rights of the people. The 1<sup>st</sup> defendant will not be protecting and promoting the right to dignity of the claimants and others like them by allowing the erection of the Statue of a person who viewed Black people like the claimants as sub human.

137. In short, this Court agrees with the entire submission of the claimants that the decision of the 1<sup>st</sup> defendant in allowing the erection of the Statue herein violates the right to dignity of the claimants and others like them who protested against the erection of the Statue. The 1<sup>st</sup> defendant by its decision herein violated section 19 (1) of the Constitution with regard to the claimants and others who joined in protesting against the Statue.

138. This Court agrees with the claimants that they would not have challenged the naming of the street after Ghandhi herein during the many years prior to 1994 when multiparty politics and human rights came into being in Malawi. And that such failure, which was due to the disabling environment as elaborated by the claimants, cannot be used to diminish the case of the claimants. See *Gondwe v Attorney General* [1995] 2 MLR 492.
139. This Court further agrees with the claimants that the fact that there is a road named after Ghandhi does not diminish the gravity of the violation herein considering that the road signage is less compelling in terms of effects on the claimants compared to the Statue that would command the view of the area where it was intended to be erected and would project its gaze on those passing by. This is not the case with the road.
140. In the final analysis, this Court finds that the decision of the 1<sup>st</sup> defendant that was in contravention of section 19 (1) of the Constitution would also compel this Court to allow the reliefs already granted to the claimants herein.
141. The 1<sup>st</sup> defendant is condemned to pay the costs of the successful claimants to be assessed by the Registrar.

Made in open Court at Blantyre this 29<sup>th</sup> April 2021

M.A. Tembo  
**JUDGE**