IN THE SUPREME COURT OF APPEAL

MSCA Civil Appeal No 19 of 2019

(Being Judicial Review Cause No 20 of 2016 High Court of Malawi, Principal Registry)

STATE (ex parte AERO PLASTIC INDUSTRIES LTD — APPELLANT

AND

DIRECTOR OF ENVIRONMENTAL AFFAIRS — RESPONDENT

CORAM: HON THE CHIEF JUSTICE A.K.C NYIRENDA SC

HON JUSTICE R.R MZIKAMANDA SC, JA

HON JUSTICE A.C CHIPETA SC, JA

HON JUSTICE L.P CHIKOPA SC, JA

HON JUSTICE F.E KAPANDA SC, JA

HON JUSTICE D.F MWAUNGULU SC, JA

HON JUSTICE A.D KAMANGA SC, JA

Alide, for the Appellant

Chisiza, for the Respondent

W. Shaibu/ S. Kumbani, Judicial Research Officers

Minikwa/Masiyano, Court clerks

M. Pindani, Court Reporter

JUDGMENT

Nyirenda, CJ

I agree with the judgment Justice Mwaungulu will deliver. I also dismiss the appeal.

Mzikamanda, JA

I also agree that the appeal must be dismissed.

Chipeta, JA

I would also dismiss the appeal

Chikopa, JA

The appeal should be dismissed

Kapanda, JA

I have nothing to add to the judgment. I will also dismiss the appeal.

Mwaungulu, JA

PRÉCIS

When these proceedings commenced on 20 April, 2016, the Environment Management Act, 1996, the Act throughout the judgment, was the governing legislation. The Environment Management Act, 2017, the 2017 Act in this judgment, repealing the 1996 Act, was probably the relevant legislation at the time of the judgment on the judicial review. It is certainly the legislation on the date of the order appealed from of 14 June, 2018 and at the hearing of the appeal when, reserving judgment, this Court unanimously dismissed the appeal.

The later legislation creates the Environmental Authority (section 7 (1) of the 2017 Act) and a body corporate (section 7 (2) of the 2017 Act) where it allocates most powers to the authority held by the Minister responsible of Environmental and, the Minister in the course of the judgment, the Director of Environmental Affairs in the Act, the Director in this judgment, leaving most powers of inspectors, analysts and legal agencies intact. The 2017 Act, replaced the Environmental Appeals Tribunal in the Act, with the Environmental Tribunal. The change was only in nomenclature – the tribunal retaining substantially the same functions and subject to structural and functional changes introduced by the repeal of the 1996 Act by the

2017 Act. This Court's reasoning bases on the 1996 Act, the law under which the proceedings commenced and probably the law at the date of the substantive judgment the basis of the judgment appealed from. Except for the structural and functional changes the 2017 Act introduces, the two legislations, on matters determinative in this appeal, are *pari materia.* The judgment, if necessary, refers to the 2017 Act.

The respondent, the Director, just like in the 2017 Act, is, generally, immune from legal proceedings. The Court below, when proceedings commenced in 2016, never considered the precondition under the Act for instituting proceedings against the Director. The Court below, under the Act, just like under the 2017 Act, lacked jurisdiction to determine the matter – save on appeal from decisions of the Environmental Appeals Tribunal, the Environment Tribunal under section 107 of the 2017 Act. The Court below, albeit the basis of granting it is not clear from the record, should not, on the facts of this case, have, in the first place, granted permission for judicial review. The Act established the Environmental Appeals Tribunal for matters under the Act and provided an appeal procedure. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Convention throughout the proceedings) and the Southern Africa Development Community (SADC) Treaty (the treaty throughout the proceedings) enable, rather than contradict, what the Minister responsible for environmental affairs and the Director did. Legislation – except for subsidiary legislation - is only subservient to the Constitution and can, therefore, only be reviewed for constitutionality not reasonableness or for compliance with international instruments – which are subservient to the Constitution. Delegated legislation – can be reviewed for compliance with legislation it is made and on the principles in *Kruse v Johnson* [1898] 12 QB 92. Sentences, if constitutionally compliant under section 108 (2), can only come under judicial review for being inhuman and degrading punishment. Challenges for sentences constitutionally approved imposed by courts can only, under section 42 (2) (f) of the Constitution, be by way of appeal or review.

Laws, actions and decisions which enhance and protect Part IV of the Constitution, if not contradicting other constitutional provisions, are necessarily not limitation of rights under the Constitution and, if they be limitations, stand if they are reasonable and proportionate to a goal. Protection of the environment is a legitimate goal to enforce, protect and enhance the statutory right to a decent environment (under the environment under the Act), the right to a clean and healthy environment (under the 2017 Act). This statutory right bases on the fundamental

principle on national policy and is not a Part IV of the Constitution right. Our environmental laws, actions and decisions are, therefore, not adjudged reasonable or unreasonable by comparison to laws of other nations who, like us, exercise sovereignty on their people and territory. Our environmental laws, actions and policy offend no constitutional provision or right and can, therefore, be amenable only to constitutional review under section 108 (2) of the Constitution, cannot be amenable for judicial review in the common law and statutory sense (the Statute Law (Miscellaneous Provisions) Act. Under section 108 (2) of the Constitution legislation remains valid until declared invalid by the Court below.

THE APPEAL

This appeal, properly understood, questions the process of authorities, with power to make a decision, law or policy, in arriving at a policy or decision, the policy and decision themselves and measures to enforce the law, decision or policy. In context, the decisions, policies or laws concern measures to protect the environment – very contemporary in legislation and policy world-over. Of immediate and urgent concern is pollution of air, land and water from and by, however useful and cheap, plastic products. The appeal, queries, on many grounds, the decision of the Court below of 14 June, 2018, rejecting an application for judicial review by the State in respect of the matter Aero Plastic Industries Ltd against policies, decisions and laws promulgated by the Minister and the Director.

The appellants, the State, in the matter of Aero Plastic Products Ltd and Mr. Majid, appealing against the whole judgment, contend before this Court first that the Court below could not, on the evidence and law, have found that the appellants were heard when the respondent, the Director, closed the appellants' factories. Moreover, the appellants contend, the Court below erred in finding that the Director consulted the appellants ere the Environment Management (Plastic) Regulations 2015 – the Regulations throughout the proceedings – passed. Additionally, the appellants contend, the finding by the Court below that the Minister considered all relevant matters before enacting, implementing and enforcing Regulations was erroneous. Finally, the appellants fault the Court below in finding that there was no Southern Africa Development Community treaty, protocol or convention whatsoever binding on Malawi on the manufacturing, distribution and selling of thin plastic products of less than 60 micrometers despite clear evidence before the court that the consideration of the micrometers obtaining in the regulations for other SADC was

disregarded by the Minster although such considerations were used by the Minister in what purported to be the consultation before enacting the said Regulations.

BACKGROUND

Up to this point, this is what we know. Government concerns, through the Director, about banning plastic products have a long pedigree. Initiated in 2004, by the Department of Environmental Affairs, by lips and bounds, they culminated in the 2015 Regulations. The government initiative resulted in a policy which government introduced following several steps. There were intergovernmental meetings on formulation and implementation of the policy to be in a form of a ban – effective on 30 April, 2013 – on production of certain sizes of plastics. The Government informed – by letters and a newspaper publication in the Weekend Nation on 13 March, 2013 – all relevant stakeholders of the ban.

On 14 March, 2013, the Ministry of Environment and Climate Change Management – through the Environmental Affairs Department – held a stakeholders meeting. The umbrella organisation and the appellants attended. The meet recognised that the industry needed more time and 30 April, 2013 the Ministry proposed was impractical. The meeting ruminated on the ban's technical, economic and social cost and implications. The meeting, noting alternatives, mostly suggested by industry, nevertheless, agreed, even without proper management systems and regarding futuristic actions by the industry, for the ban.

On 13 April, 2013, the Secretary for Environment and Climate Change Management, in an order published in the Weekend Nation, pushed the effective date to 30 June, 2014 – by fourteen months. In the order, the Secretary for Environment and Climate Change, excepting thin plastics for specified uses, banned thin plastics of less than 60 micrometers. The Secretary for Environment and Climate Change Management also harbingered the 2015 Regulations. On 27 March, 2014 the Plastic Manufacturers Association of Malawi wrote the Minister:

> Please note that, as we explained earlier, the ban on thin Micron, Plastic products will have an adverse impact on our industry. Most of us have designed this industry based on the need and affordability of the local people. Most of the people cannot afford to spend more money on packaging. Increasing the Micron, as per your request, will increase the

price so the products which will result in less sales and less revenue to the Government.

Instead of banning the thin micron, Government will assist the Private sector how to eradicate the Plastic waste from the Environment.

Some companies have already initiated to setup a Plastic Recycling Plant and informed Government about that Project. By the implementation of this project Malawi Environment will be free from the Plastics.

Also we are working on a new technology of using Bio-degradable Master batch to be used in our Production, which will enhance the Bio-degradability of Plastic products. This will be boom to the Environmental stability.

In view of the above, keeping the future of our Plastic Industry and the buying power of the local people we request you to extend the ban up to 30th June 2015, by that time the Recycling Plant will be commissioned also.

The Minister responded on 14 April, 2014:

Considering the issues you have raised and actions proposed towards production of biodegradable plastics, investment in recycling machines and commencement of social programmes to reduce indiscriminate production and use of thin plastics, it has been necessary to extend the commencement date of commencing the ban to 30 June, 2015.

However, take note that this is the last time to do so and we shall continue to monitor to ensure that we are all moving positively towards the deadline. We therefore expect your organisation to take all necessary measures to ensure that the proposed milestones are achieved timely.

On 1 August, 2014, the Director issued a public notice in the Daily Times, confirming that the ban was effective 30 June, 2014. The notice further provided:

Non Compliance. The Ministry is hereby informing the general public that non-compliance with the ban is an offense punishable by law. Penalties for no-compliance range from fines to imprisonment. In addition, manufactures, distributors and retail shops who do not comply

with the ban risk closure of their business premises. The Ministry would also like to remind the general public that the plastic littering is an offence and any individuals caught throwing plastics litter in public places will be fined on the spot or risk imprisonment.

Enforcement Measure

Following this announcement, the Government through the Ministry of Natural Resources, Energy and Mining will undertake the following enforcement activities from 18th August 2014.

a) Inspect plastic manufacturing companies, retail shops, distribution shops to check their compliance with the ban. Companies found in manufacturing, distributing or handing out thin plastics to customers in the country will be fined and the goods will be confiscated.
b) Other law enforcement agents will also start to inspect vehicles transporting goods in the country and individuals found transporting thin plastics will be fined on the spot and goods confiscated.
c) The Ministry will continue conduct public awareness campaigns to sensitize the general public of the ban and the use of environmentally friendly alternative products.

Conclusion

The general public is advised to take note that production, importation, distribution and use of thin plastics in the country below the prescribed thickness limits is illegal, the Ministry will therefore not hesitate to take drastic action or impose penalties to those found not complying with the ban. Environmental inspectors, City Council Inspectors and other law enforcement officers will be effectively empowered and strategically placed to ensure that full compliance with the ban is fully achieved.

It appears that the Director was unaware of negotiations between the Minister and the appellants changing the date. Consequently, another meeting occurred between plastic manufacturers and the Director on 14 October, 2014 postponing the effective date to 30 June, 2015. It is useful to record a critical paragraph of the agreement:

> This Negotiated Agreement ... is made and entered into by and between the Environmental Affairs Department ... and Plastics Manufacturers

Association ... for the purpose of addressing the ban by the Malawi Government of the Production, importation, distribution and use of plastic films, plastic bags and plastic sheets for use in Malawi, with a wall thickness of less than sixty ... micrometers.

In July, 2015 the Director commenced inspections of various premises under the Act and Regulations effective on 27 March, 2015. The Director on 1 July, 2015 wrote about the results and actions to be taken to Chipiku Stores, Lilongwe, and Game Stores, Lilongwe. The Director wrote the appellants on 10 July, 2015:

> Reference is made to the inspection made by the inspectors from the Environmental Affairs Department and Liyakat Hussain of your premises at Aero Plastic Mzuzu Branch on 10 July, 2015.
>
> The inspection revealed that your activities are in violation of the provisions of Regulation 3 of the Environment Management (Plastics) Regulations, 2015, which prohibits the importation, manufacture, trade and commercial distribution of plastics, plastic bags and plastic sheets made of plastic film for use in Malawi, with a wall thickness of less than sixty micrometers.
>
> In light of the above, you are required to immediately stop all activities that are in violation of regulation 3 of the plastics regulations. Failure to comply with this requirement could result in closure of the premises under section 76 of the Environment management Act of 1996 and or legal action being taken against you in accordance with Regulation 7 of the plastics regulations.

On 11 February, 2016 the Director issued protection orders under section 76 of the Act against Aero Plastics Industries Ltd and Majid Sattar t/a Rainbow Plastics:

> WHEREAS section 76 (1) of the *Environment Management Act No. 23 of 1996* provides that where the Director of Environmental Affairs believes, on reasonable grounds, that this Act or any regulations made thereunder, have been contravened, the Director may, order the closure of any premises by means of, or in relation to which the Director reasonably believes the contravention was committed.
>
> WHEREAS Regulation 3 of the Environment Management (Plastics) Regulations, 2015 prohibits the importation, manufacture, trade and commercial distribution of plastics, plastic bags and plastic sheets made

of film for use within Malawi, with a wall thickness of less than sixty micrometers.

WHEREAS following an inspection of the above cited company at its premises at Chirimba Industrial Area on 19th January 2016, it was found that the company was manufacturing thin plastics in contravention of Regulation 3 of the Environment Management (Plastics) Regulations, 2015.

THEREFORE TAKE NOTICE that AEROPLASTICS is hereby ordered closed with immediate effect until such a time as the provision of the Environmental Management (Plastics) Regulations 2015 have been complied with.

FAILURE TO COMPLY WITH THIS ORDER will result in legal proceedings being instituted against you.

On 12 February, 2016 a meeting occurred between the Director and Abdul Majid Sattar t/a Rainbow Plastics that culminated in a letter to the former of 15 February, 2016:

We acknowledge that the factory was involved in the production of Thin Plastic in contravention of the law as stated in the Closure Order issued by your visiting officers.

We give your office full assurance that we will, with immediate effect, desist from the production of Plastics under the stipulated micrometers gazzetted by your ministry, which we fully understand is contrary to the Environment Management (Plastics) Regulation 2015. This includes the stated 6 x 10 and the 8 x 12 sizes as advised by your good office.

This factory has a staff contingent of over 140 local Malawians that are dependent on this factory for their livelihood. The closure of the factory has negatively impacted their much needed income stream in these trying and difficult times.

In light of our assurance that we will no longer produce plastic bags under the stipulated micrometers gazzetted by your ministry for the local market, coupled with consideration of the plight of the staff

working in this factory, we wish to request your consideration in the earliest re-opening of this factory.

We thank you for your understanding in this matter and look forward to your positive response.

Aero Plastics Industries Ltd on 16 February, 2016 wrote the Director:

Reference is made to the Closure Order dated 11th February 2010 and issued under the Act.

We acknowledge the Closure Order. However, we hasten to point out that the closure has grounded all the operations at the factory for the other production lines. Further to our meeting on Friday, 12th February, 2016, we propose and undertake as follows:

1. The factory be opened forthwith
2. Aeroplastic Industries would stop forthwith the production of plastic bags and plastic sheets made of plastic film with a wall thickness of less than sixty micrometers (Thin Plastic Bags)
3. Aeroplastic Industries should provide a framework of policies or controls for manufacturing, trading and distribution of Thin Plastic Bags within the ambit of Environmental Management Act and more particularly Environment Management (Plastics) Regulations, 2015. The policies or controls to be submitted to the Directorate of Environment Management within 7 days from the date of the re-opening of the factory premises.
4. The production of Thin Plastic Bags would only resume after an endorsement of the policies or controls by the Directorate of Environment.
5. Aeroplastic Industries would provide logistical assistance to the Directorate of Environment Management in monitoring compliance of the undertakings made herein.

We remind that the closure has affected over 350 employees, existing contracts with clients and the going concern of the company. We therefore request for an immediate re-opening of the factory premises. These undertakings are without prejudice to our rights under the law.

The Director wrote Aero Plastics Industries Ltd and Majid Sattar t/a Rainbow Plastics on, respectively, 18 and 19 February, 2016, in letters similarly worded:

We have considered your application and have decided not to fully lift the Closure Order until the Department is satisfied that you are fully complying with the Environment Management (Plastics) Regulations, 2015. As such, the Department will temporarily open the production unit for three days from 18th to 20th February, 2016 to allow you to run your factory and demonstrate to the department that you are capable of producing the recommended plastic products. Officers from the Department and Malawi Bureau of Standards (MBS) will be available during this demonstration period.

Full lifting of the Closure Order will be done after you meet the following conditions:

a) You demonstrate to the Department that you are capable of producing recommended plastic products of more than 60 micrometers;
b) You label your product as stipulated in the Environment Management (Plastics) Regulations 2015;
c) If you intend to produce thin plastics products for exportation, you should obtain a clearance letter from the Department after submitting the following information to the Department:
   - Name of the client;
   - Quantity of the consignment exported per week, month etc.
   - A sample of properly labelled final product indicating name of the client, country and standards labelling requirement as per the regulations.
d) You do not remove any existing stocks of thin plastics from your factory premises. During the opening you are required to agree with our office and MBS on how the stock will be dealt with.

THE ACTION IN THE COURT BELOW

The appellants in their judicial review application on 20 April, 2016 sought to impugn and obtain relief on sets of decisions and actions the Director made. First was the Director's decision of 11 February, 2016 closing the appellants' factories, Aero Plastic Industries Ltd and Rainbow Plastic, situate at Chirimba Industrial Area and the Director's imposition of penalties on the appellants' and/or their distributors

or customers on allegations that the appellants and/or their distributors or customers manufacture and/or distributing/selling plastics less than 60 micrometers contrary to regulation 3 of the Regulations. Second was the Director's decision in adopting, implementing and enforcing the Regulations, particularly regulation 3, banning manufacturing, distribution and consumption of thin plastics less than 60 micrometers without due regard to relevant factors/considerations such as economic hardship the same would cause to the appellants, distributors and consumers and the similar regulations on the minimum micrometers within the Southern Africa Development Community (SADC) region and beyond. The appellants entreated the Court below declare closure of factories and imposition of penalties unconstitutional for violation of the right under section 43 of the Constitution to fair administrative action. The appellants, therefore, sought a quashing order for the decisions and a compelling order for the Director to adopt SADC region's minimum micrometers – 24 to 30 micrometers. The appellants also sought stay of execution of the Director's orders.

THE APPELLANTS' SUBMISSIONS IN THE COURT BELOW

The gravamen of the appellants' actions were that the Director's actions and decisions infringed sections 28 and 43 of the Constitution and were, therefore, vitiated and defied rules of natural justice and were, therefore, unreasonable. Under section 28 of the Constitution, the appellants contended that the Director, when closing premises, said no word. The Director, therefore, never gave them an opportunity to explain. They contended that the Director, in determining the 60 micrometers threshold, never consulted them and overlooked section 43 rights of those in the industry and what obtains in SADC. In that sense, the Director, the appellants argued, acted unreasonably. The appellants, therefore, requested an order that the Director adopt the minimum threshold of 24 micrometers adopted by some countries in SADC region or beyond. The appellants further argued in the Court below that they, during the consultation, coyed or cloyed with the regulations because they knew that, in the circumstances, they will have a day in court to challenge the legislation and the decisions.

THE RESPONDENT'S SUBMISSIONS IN THE COURT BELOW

The Director submitted that the judicial review was of policies or decisions to fulfil those policies. This was impermissible. The Courts, the Director, contended, are ill-equipped to consider policy matters and such determination usurps functions of the political wing of government – the legislature and the executive branches of government. Moreover, the Director submitted, it is not for courts to determine reasonableness or fairness of a policy or legislation. Additionally, the Director submitted, without any treaty or protocol from SADC, there was no obligation on Malawi – a sovereign state – to follow standards of any state or states. The Director, however, submitted that legislation and approaches in other states – some SADC – informed the policies and eventual legislation which were the Regulations. The Directorate submitted that it has been all the way with all appellants and those in the industry in the representative action when formulating the regulation and warned in writing and other ways the appellants when making environment orders.

THE JUDGMENT OF THE COURT BELOW

The Court below granted permission for and heard the judicial review. The judgment on the substantive review is not in the record of appeal. The Court below, in the judgment appealed from, quotes the final order from it. It seem that the Court below never delivered the judgment on the actual hearing. The appeal is from the judgment of the Court below dated 14 June, 2016. That judgment concerns suspension of the enforcement of the order and describes and explains the order in the earlier judgment:

> It is noted that the commencement of these proceedings sometime in early 2016, the applicants obtained a stay order staying the implementation of the decision complained of herein which effectively meant that the ban on the manufacturing, distribution, sale and use of plastics of less than 60 micrometers could not be implemented. The matter having been dismissed, the respondent are at liberty to implement the regulation.

In the judgment on the suspension of the execution of the order the Court below explains its previous decision. After discussing the law on stay of execution and the principles on which judicial review bases, the Court below discusses two matters raised in the judicial review. The Court on the first aspect:

> Regarding the first complaint, the evidence of the respondent indisputably shows that the applicant's business premises/factories were first inspected in July 2015, whereupon it was discovered that they were producing the outlawed plastics and warning letters were duly issued as evidenced by exhibit THM7a to the affidavit in opposition. The warning demanded a stop in the production of the outlawed plastics or else the respondent would close factories and/or impose other sanctions. In the considered view of the Court, if the applicants have representations to make, then they would have made them by way of responding to the warning. In other words, the warning itself, in a sense, afforded the applicants an opportunity to be heard which they did not utilize, instead, they continued with the production of the outlawed plastics. This continued up to around January 19, 2016, when another inspection of the applicant's factories showed that the unlawful production had not stopped, prompting the respondent to order the closure of the factories. Certainly, the respondent, having earlier warned the applicants who did not make representations but continued with the mischief, the respondent cannot be accused of not having heard the applicants before closing the factories. The respondent made every effort to treat the applicants fairly. It is also significant to note that in exhibits TGM8a and TGM8b, the applicants admitted wrongdoing. The complaint of not being heard is therefore unattainable and is accordingly dismissed.

The Court below considered the second aspect ruling, once more, against the appellant:

> The second aspect has two aspects, namely, alleged failure by the respondent to due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers and alleged failure to take into account similar regulations on the minimum micrometers in the Southern Africa Development Community (SADC) region and beyond.
>
> On the first aspect, the evidence shows that, from as way back as 2004, when the idea to ban the manufacturing and use of thin plastics because adverse effects on the environment, was mooted, the government, through the Department of Environmental affairs, which is headed by

> the respondent, has taken a number of activities aimed at engaging and sensitizing various stakeholders and interest groups, including the applicants, through their mother body known as Plastic Manufacturers Association of Malawi ... As can be clearly seen, the respondent's department made every endeavor to engage ... those likely to be affected ... It is the evidence of the respondent that, from the engagements and consultations, it came to light that the ban could cause economic hardship, loss of revenue and loss of jobs, but, at the same time, considering the government policy of promoting sustainable development within the capacity of the environment and in order to strike some kind of a balance on the seemingly competing interests, the Environment Management (Plastics) Regulations, 2015, were formulated in such a fashion that certain thin plastic products and uses would be exempted from the ban. Significantly, the evidence, especially exhibit TGM6, which PMAM signed for, provided for interim arrangements for implementation of the ban, shows that a phased out approach was put in place on the implementation of the ban in order, among other things, to give time to manufacturers, like the applicants, to make necessary technological adjustments that would enable to produce thicker plastics ... From the evidence, as it has just been shown, the respondent conducted extensive consultations with all relevant stakeholders including the applicants and only came up with the regulations on the ban and implementation thereof after taking into account the feedback and relevant factors, including economic implications of the ban.

The Court below also addressed overlooking SADC and beyond SADC standards:

> Moving on to the second aspect, which is the alleged failure to take into account similar regulations on the minimum micrometers within the Southern Africa Development Community (SADC) region and beyond, the evidence of the respondent both in her affidavits and cross-examination settles the matter. The evidence of the respondent is essentially that, in formulating, and enforcing/implementing the Environment Management (Plastics) Regulations, 2015, what obtains in the SADC region was considered and it was observed that is those countries where thin plastics of less than 60 micrometers are allowed,

> they have in place advanced waste management systems that arrest the adverse environmental effects thin plastics cause unlike in Malawi where no such systems are in place such that Malawi needs its own tailor made regulations to address its specific challenges...
>
> It is also the evidence of the respondent that there is no SADC treaty, protocol or convention whatsoever binding on Malawi on the manufacture, distribution and use of plastics. Indeed the applicants have not shown that there is any such instrument which binds Malawi and which has been contravened.

The Court below though that these were matters of policy and regulations and well in the purview of the Minister or the Director and not the Courts'. The Court below cited Roskill, LJ, in *Council of the Civil Service Union v Minister for the Civil Service* [1984] 3 All ER 949, 954:

> It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair.

REASONING

The law

The Act, was an Act "for the protection and management of the environment and the conservation and sustainable utilization of natural resources and for matters connected therewith and incidental thereto." Section 4 of the Act – there is not much material difference with section 3 of the 2017 Act – in the general principles of the Act stated the national environmental policy:

> (1) It shall be the duty of every person to take all necessary and appropriate measures to protect and manage the environment and to conserve natural resources and to promote sustainable utilization of natural resources in accordance with this Act and any other written law relating to the protection and management of the environment or the conservation and sustainable utilization of natural resources.
>
> (2) Without prejudice to the generality of subsection (1), every person required under any written law to exercise power or perform functions relating to the protection and management of the environment or the

conservation and the sustainable utilization of natural resources shall take such steps and measures as are necessary for—

(a) promoting a clean environment in Malawi;

(b) ensuring the sustainable utilization of the natural resources of Malawi;

(c) facilitating the restoration, maintenance and enhancement of the ecological systems and ecological processes essential for the functioning of the biosphere, and the preservation of biological diversity;

(d) promoting public awareness and participation in the formulation and implementation of environmental and conservation policies of the Government;

(e) promoting cooperation with foreign governments and international or regional organizations in the protection of the environment and the conservation and sustainable utilization of natural resources;

(f) promoting scientific research, technological development and training relating to the protection and management of the environment or the conservation and sustainable utilization of natural resources.

The Minister and the Director and, indeed, legal agencies operated under this broad plenipotentiary.

The Director of Environmental Affairs is, generally, immune from legal proceedings.

The Director is, generally, immune from legal proceedings. Section 68 of the Act, like section 19 of the 2017 Act, covered immunity or protection of officials from legal proceedings:

> No legal proceeding shall be brought against the Minister, Director, an inspector, an analyst or any other person duly authorized by the Minister, the Director, inspector or analyst to do anything authorized under this Act, in respect of anything done in good faith under the provisions of this Act.

The immunity (protection under the 2017 Act) was total. No proceedings should have been brought. Proceedings, therefore, can only be commenced if a party establishes bad faith. The onus is on the one alleging to, before commencing those proceedings, establish bad faith. Proceedings commenced without a determination of bad faith are null and void. In so stating, this Court is conscious of its observations in *Kabathi and others v Malawi Telecommunications Ltd* (2016) Civil Appeal No 51 (MWSCA) (unreported) that 'null and void' are anachronistic expression of what is really construction of a statute to determine the intention of the legislature. The wording in section 68 of the Act was not such that this was a procedural step. The wording suggested a protection to the Director against legal proceedings in such a way that legal proceedings whether in the Environment Appeals Tribunal – Environmental Tribunal under the 2017 Act – or under judicial review in the High Court either there is a separate application for showing bad faith or the application is included in the application for leave for judicial review.

In *State ex parte Kabathi and others v Malawi Telecommunications Ltd* (2016) Civil Appeal No 51 (MWSCA) (unreported) this Court said:

> Certain principles emerge. It is a matter of construction of the statute whether proceedings requiring leave set leave a precondition rendering commencing proceedings without leave, if important, a nullity. The court must examine the statute from its context history and circumstances and consider the extent to which the legislation affects the right to access to justice. Provisions protecting from criminal or civil liability are likely to be preconditions and proceedings commenced without leave are null and void. Provisions, statutory or otherwise, with similar clauses – designed to advance procedural requirements – are regulatory and proceedings commenced without leave are irregularities which a court can remedy.

There is always a presumption of regularity for those exercising legal power (*R (Newhaven Port and Properties Ltd) v East Sussex Council* [2013 EWCA Civ 276; *R (Archway Street Metal Works) v Secretary of State for Communities and Local Government* [2015] EWHC 794 (Admin)). *Omnia praesumuntur rite esse acta.* In *Newhaven Port and Properties Ltd) v East Sussex Council* [2013 EWCA Civ 276, Richards, LJ, said:

> The bye-laws on which our attention was focused are contained in Part IV of the bye-laws relating to Newhaven harbor. They were made by

> the Southern Railways on 20 February, 1931 and confirmed by the Minister of Transport on 6 March, 1931. There is no reason to suppose that they were not given the publicity required by sections 86 and 87 of the 1847 Act before the Minister confirmed them: *omnia praesumuntur rite esse acta* (the presumption of regularity). The inspector herself applied the presumption ... In my judgment this is equivalent to a finding of fact (which is unchallenged) that the appropriate procedure (including the requirement of advance publicity and the publication on boards in the harbor), was followed.

The law, therefore, in this matter, presumes that the Director acted in good faith. Anyone wanting to commence legal proceedings against the Director of Environmental Affairs must first demonstrate, by application, that the Director acted in bad faith. Counsel from both sides did not, as Counsel, advise the Court below of the Director's immunity from legal proceedings. The Court below never considered the precondition for instituting proceedings against the Director.

The Court below lacked jurisdiction – save on an appeal from the Environmental Appeals Tribunal.

The Act gave the High Court, in matters environmental, appellate jurisdiction from the Environmental Appeals Tribunal. Section 69 of the Act:

> There is hereby established an Environmental Appeals Tribunal (in this Act otherwise referred to as the "Tribunal") which shall—
>
> (a) consider appeals against any decision or action of the Minister, Director or inspector under this Act;
>
> (b) consider appeals against the refusal by the Minister or Director to issue a licence under this Act;
>
> (c) consider appeals against the revocation by the Minister or Director of a licence issued under this Act;
>
> (d) consider appeals against the closure pursuant to this Act of any premises;
>
> (e) consider such other issues relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources as the Minister, the Director or any person may refer to it.

Section 69 (a) of the Act covered persons whose decisions the Environmental Appeals Tribunal had jurisdiction. Section 69 (g) and (e) of the Act covered where complaints against premise closure under the Act. The Court below, therefore, had no original jurisdiction in matters environmental. Closure of premises was a matter for the Environmental Appeals Tribunal as the first instance of appeal from a Minister's, a Director's, an inspector's or an analyst's decision.

The Environment Management Act had a definite complaint procedure. Section 5 of the Environment Management Act created the right to a decent environment – the right to clean and healthy environment under section 4 of the 2017 Act – and provided for enforcement of the right:

> (1) Every person shall have a right to a clean and healthy environment.
>
> (2) For purposes of enforcing the right referred to in subsection (1), any person may bring an action in the High Court—
>
> (a) to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources;
>
> (b) to procure any public officer to take measures to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment for which the public officer is responsible under any written law;
>
> (c) to require that any on-going project or other activity be subjected to an environmental audit in accordance with this Act.
>
> (3) Any person who has reason to believe that his or her right to a clean or healthy environment has been violated by any person may, instead of proceeding under subsection (2), file a written complaint to the Minister outlining the nature of his or her complaint and particulars, and the Minister shall, within thirty days from the date of the complaint, institute an investigation into the activity or matter complained about and shall give a written response to the complainant indicating what action the Minister has taken or shall take to restore the claimant's right to a clean and healthy environment, including instructing the Attorney General to take such legal action on behalf of the Government as the Attorney General may deem appropriate.

(4) Subsection (3) shall not be construed as limiting the right of the complainant to commence an action under subsection (2):

Provided that an action shall not be commenced before the Minister has responded in writing to the complainant or where the Attorney General has commenced an action in court against any person on the basis of a complaint made to the Minister.

Whosoever's right to a decent environment was affected has two options. One could take an action in the High Court or complain to the Minister. The Minister was to investigate within 30 days of the complaint. The Minister could instruct the Attorney General to take any legal action necessary on the matter. Equally, the Director could take action against anyone violating the right. Section 9 of the Act – section 13 of the 2017 Act – covered appointment of and assigned specific functions to the Director:

(1) There shall be appointed in the public service a Director of Environmental Affairs (in this Act otherwise referred to as the "Director") and such other suitably qualified public officers as may be required for the proper administration of this Act.

(2) The Director shall—

(a) carry out the duties and functions provided under this Act and such other duties as the Minister may, from time to time, assign to him;

(b) be responsible to the Minister for the proper discharge of his functions under this Act and for the implementation of such policies relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources as the Minister may determine;

(c) furnish the Council with such information or documents as the Council may require and, from time to time, report to the Council the status of the environment and natural resources.

Under section 33 (1) of the Act, the Director could issue protection orders:

The Director shall have power to issue environmental protection orders against any person whose acts or omissions have or are likely to have adverse effects on the protection and management of the environment

and the conservation and sustainable utilization of natural resources, and the environmental protection orders shall be in the prescribed form and, if no such form is prescribed, in such form as the Director may determine.

A protection order could, under section 33 (2) (b) of the Act, require certain actions from the Director to the person they were directed ... "to stop, prevent or modify any action or conduct which caused or contributed or was likely to cause or contribute to pollution. Moreover, under section 33 (3) (d) and (e) of the Environment Management Act an environmental protection could specify ... "(d) the penalties which may be imposed for non-compliance with the environmental protection order; and (e) such other matters as the Director may consider necessary for the protection and management of the environment and the conservation and sustainable utilization of natural resources." Section 33 (5) absolved the Director of responsibility for "consequences of any action reasonably taken by him in good faith under this section. Section 33 (6), of the Act, provided that, subject to subsection (5), any person aggrieved with an environmental protection order could, within thirty days from the date on which it was made, appeal to the Tribunal. Section 33 (6) of the Act, provided that, subject to section 33 (5), the Director's decisions could be appealed to the Environmental Appeals Tribunal.

The Director under section 76 (1) and (2) of the Act could close premises by whose contravention was committed until the Act or regulations were complied with or an order of the Court. Appeals against protection orders and premise closure lay to the Environmental Appeals Tribunal under sections 69 (a), (d) and (e) of the Act. As the Lord Chancellor said in *Pasmore & Others v The Oswaldwhistle Urban District Council* [1898] AC 387, ". . . where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of given by the statute."

The High Court, however, beside its appellate jurisdiction, retained the power of judicial review – but, in relation to the Director General, the action or decision must be shown to be made in bad faith. At least, if it had jurisdiction, this was a case where the High Court should have deferred to the Environmental Appeals Tribunal. Where legislation provides that proceedings should commence in a different forum, tribunal or court and gives a right to appeal to the High Court, proceedings must commence in the forum, tribunal or court and the High Court must defer to the other form, tribunal or court as it is clear that the legislature intends that the High Court,

as an appellate court, be a court of first review or appeal – preserving the right to a litigant to two rights of appeal, albeit there might be a limitation to appeal on the facts to the Supreme Court. Where legislation provides for an appeal, there need not be an application for judicial review of the decision. Precisely because an appeal procedure presupposes a determination on the merits – not the process – of the decision.

The High Court exercises its judicial review jurisdiction only as a last resort and in prescribed manner. The High Court, therefore, seldom exercises its jurisdiction where there are other avenues for a remedy. Where, therefore, an Act provides for an alternative remedy or review, the High Court will not, as a matter of course, grant permission for judicial review. In fact, in the rare circumstance where leave will be granted without exhaustion of remedies is where there is no other remedy or course available. That will not be the case where, as here, there was an elaborate procedure determine the matter; a right to appeal to the Tribunal from the decision of the Director of Environmental Affairs; and a subsequent appeal to the High Court. Section 70 (7) of the Act provided for an appeal from the Environmental Appeals Tribunal to the High Court.

> Any person aggrieved with the decision of the Tribunal may appeal to the High Court within thirty days from the date of the decision of the Tribunal.

Counsel for the appellant never brought sections 69 and 77 (7) of the Act, the alternate remedies, to the attention of the Court below when applying for leave.

This Court has jurisdiction, during an appeal from an order or a judgment on judicial review to revisit the permission granted for judicial review and, where permission was improperly granted, set aside the permission and prerogative orders following that permission. There is no reason on the facts why the Court below, if its attention was brought to it, would have granted permission notwithstanding that there were alternative remedies or avenues. The Court below, albeit the basis of granting it is not clear from the record, should not, on the facts of this case, have, in the first place, granted permission for judicial review. The Environment Management Act set a tribunal for matters under the Act and provides an appeal procedure all the way to the Court below up to this Court. Later, the reasoning demonstrates that there cannot be judicial review of legislation *per se* except for constitutionality and where, like here, the law, action or decision is not impugned

for violation of rights under Part IV of the Constitution, there cannot be judicial review for purposes of the Statute Law (Miscellaneous Provisions) Act.

Substantive matters in the review.

On the first ground of Appeal, to wit, the appellants' contention before this Court that the Court below could not, on the evidence and law, have found that the Director heard the appellants when the Director closed the appellants' factories, this Court can only confirm what the Court below found. On appeal from a decision of the Court below sitting at first instances, this Court proceeds by way of rehearing of the evidence on the record, remembering always that the Court below had the advantage, denied this Court, of hearing and watching the witnesses' demeanour. Demeanour may be a poor guide – it is a guide nonetheless. Here, however, most evidence is documentary. The Court below, on ample evidence, mostly from the appellants, found that the Director, before closing premises, afforded the appellant ample opportunity to be heard. The Director, after the appellants complained of the closure while admitting wrongdoing, actually heard the appellants. In the response, the Director drew the appellants' attention that closure will cease when the appellants complied with the order or statute. The Director's actions – closure and protection orders – are allowed by the parent Act. They were therefore, in the absence of evidence to the contrary, done in good faith. The appellants had to show bad faith before countermanding those actions in the Court below – even if they were based on prohibitions from subsidiary legislation.

There cannot be any controversy on the finding of the Court below that the Minister through the Director did more than was required to introduce the subsidiary legislation the Regulations were. The appellants contend that the Minister never consulted them when implementing promulgating the bye-laws. As stated earlier, assuming that consultation was a legal requirement for the Director, there is always a presumption that the authority acted regularly – in this case, that there was a consultation. The onus, therefore, is on the one suggesting that the consultation.

There is, no requirement, unless a statute requires, for consultation before legislation passes. If there is, the least it could be is, in the words of Woolf, LJ, in *R v Inner London Education Authority, ex parte Ali* [1990] 2 Admin LR 822, a 'target duty' and the authority had just to do the best endeavor but the act or inaction by no means illegal (*Bradbury &others v Enfield London Borough Council* [1967]; *R v Secretary of State v for trhe Environment 7 others ex parte Ward* [1984] 1 WLR 834.

The law making body, a deliberative body, where consultation is required, determines the scope and nature of the consultation. Consultation can be oral or written. For written consultations, other jurisdictions introduce codes of conduct which are not binding at all but nevertheless guiding to ensure transparency and clarity of the consultation. The Minister and the Director resorted to the informal face to face consultation and documentation. A court cannot be connoisseur of modes or adequacy of consultations a legislator or delegatee chooses for legislation or subsidiary legislation. The Court would be ill-equipped to do so. Here the Minister, the Minster had not to, conducted an intense consultation. The matter was best left to him to decide on the scope and nature of investigation. The Minister did the best in the circumstances. In *R v Inner London Education Authority, ex parte Ali*

> In relation to another broad duty which is placed upon a local authority (by section 6 of the Caravan Sites Act 1968), in *R v Secretary of State for the Environment & Others ex parte Ward* [1984] 2 All ER 556, [1984] 1 WLR 834, when considering a suggestion that that duty was qualified in the way Mr. Goudie submits the duty under section is qualified, I said, with regard to the suggestion that the duty of the council is limited to that which is "'practicable or reasonably practicable or reasonable or that it must use its best endeavours":
>
> > The duty is not, in my view, qualified precisely in this way. It is qualified by the fact that what is or is not adequate accommodation is question in the first instance for the authority concerned, which has to make a value judgment, taking into account all the circumstances. It is also qualified by the fact that except in exceptional circumstances, the court will not seek to enforce that duty, but leave the matter to the Secretary of State, who can be expected to only exercise its powers when it is appropriate to do so.
>
> In R v Secretary for the Environment, Ex parte Lee 54 P&CR, [1985] JPL 724 311 Mann J endorsed my approach and added:

The court, where the authority has done its best, seldom grants discretionary prerogative orders on orders which are, by nature, discretionary. Lord Woolf

continued:

> There is the further and most important consideration, that alternative remedy apart, the remedies in public law are discretionary remedies and would not normally be granted if an authority is doing all that it sensibly can to meet an unqualified statutory obligation (see *R v Bristol Corporation Ex p Hendy*, per Scarman LJ) .The duty under section 8 is therefore not absolute. A local education authority which is faced with a situation where, without any fault on its part, it has not complied with the standard which the section sets for a limited period is not automatically in breach of the section. Here refer to changing situations which could not be anticipated, not questions of resources or priorities. Furthermore, even where there is a breach of section 8 the Court in their discretion may not intervene if by the time the matter comes before the Court the local education authority is doing all that it reasonably can to remedy the situation. The situation is best left in the hands of the bodies to whom Parliament has entrusted performance of the statutory duty if they are seeking to fulfil that duty.

The Court can properly assume that a legislative body – as a deliberative body – would consider those matters, demanding that another or other and better modes of inquiry portend. This recognises that legislation, under section 8 of the Constitution remains a "separate status, function and duty" of the legislature with, under section 56 (1) of the Constitution, the right and power to determine its procedure, even where that power is delegated.

A court, where, like here, the legislation was passed, will presume regularity in favour of the legislative body that such consultation and in a manner reasonable occurred. In *R (On application of the Noble Organisation Ltd) v Thanet District Council* [2006] 1 P & CR 197 Auld LJ, said:

> As Miss Robinson and Mr. Katkowski submitted, the domestic law principle is clear, and was correctly applied by the Judge, namely that administrative acts are valid unless and until quashed by a court: see *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, HL, per Lord Diplock at 366A-E; and *R v Restormel BC, ex p Corbett* [2001] EWCA Civ 330, [2001] 1 PLR 108, per Schiemann LJ at paras 15 and 16. If the time has passed for them to be

> challenged by way of judicial review, they stand notwithstanding that the reasoning on which they are based may have been flawed: see *O'Reilly v Mackman* [1983] 2 AC 237, HL, per Lord Diplock at 283F. For an example of the application of that principle in a closely related context to planning, see *Lovelock v Minister of Transport (1980) P& CR 336*, CA, per Lord Denning MR at 345, in which the Court declined to quash a compulsory purchase order, notwithstanding its unlawfulness, because the challenge was too late. As Mr. Katkowski observed, the principle does not remove the SMITH BERNAL WORDWAVE possibility of challenge; rather, it allows for the regulation of challenge in respect of forum, standing and timing, all in the interest of efficient administrative decision-making. The principle, as he observed, is of fundamental importance and is representative of a broader legal concern, that of legal certainty. In the exercise of powers by public authorities, it is clearly in the public interest that their decisions cannot be open to challenge long after they have been taken and acted upon."

There was, therefore, as the Court below found, consultation and very adequate, for that matter, before the subsidiary legislation passed. There was no challenge from the appellant that the consultations were inadequate or wrong. On the contrary, there is evidence that the appellants approved of the approach all along. The appellant cannot come after the regulations are passed and are acted upon – where the appellant was consulted – and question the process. In *The Queen on the Application of Archway Sheet Metal Works Josif Family Trustees Applicants v Secretary of State for Communities & Local Government* [2015] EWHC 794 (Admin) the Court said:

> The presumption of regularity is the principle that public law acts stand and are to be regarded and relied upon as lawful unless and until quashed as being unlawful by the court.

There is a tepid challenge to the regulations that does not go to their legality.

Overall, there is no suggestion that the regulations are contrary to the Constitution or the Act. Beyond that, on the presumption of regularity, consultations must have occurred unless the contrary is proved. In *Smith v East Elloe Rural District Council* [1956] AC 736, where (pages 769 to 770) Lord Radcliffe said:

An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders." Reliance was also placed on the House of Lords' decision in *O'Reilly v Mackman* [1983] 2 AC 237. In the speech of Lord Diplock he recorded as follows:

> This reform may have lost some of its importance since there have come to be realised that the full consequences of [*the] Anisminic* [test] in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure. Failing such challenge within the applicable time limit, public policy expressed in the *maxim omnia praesumuntur rite esse acta*, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision."

The appellants never proved that consultations were either required or absent. There is nowhere in the Act that requires the Minister or the Director to consult the public. Neither is the intimation in section 8 (2) (c) of the Act that the Minster prepare plans and develop strategies for the protection and management of the environment and the conservation and sustainable utilization of natural resources, and facilitate cooperation between the Government, local authorities, private sector and the public in the protection and management of the environment and the conservation and sustainable utilization of natural resources an invitation to consult for purposes of legislation.

Wherever consultation is required under the Act, it is the Minister either consulting with other Ministers (sections 77 (3), 31 (1), 35 (2), 40 (1) and 59 (3) or lead agencies (section 7 (1)) or the Director of Environmental Affairs (sections 27

(1) and 32 (3). Section 2 of the Act defines a lead agency: "any public office or organisation including any Ministry or Government department which is conferred by any written law with powers and function for the protection and management of any segment of the environment and the conservation and sustainable utilization of natural resources of Malawi." Moreover, the Environment Management Act specifies those who can make recommendations to the Minister and Director of Environmental Affairs – that certainly does not include all and sundry (sections 7 (2) (k) and (l); 11 (a), (b); (c); 24 (1); 31, 32 (1) the Director of Environmental Affairs section 26 (2) (d); the technical committee (section 17 (a), (b) and (c); 35 (1) (h); 36 (1); 37 (1); 37 (3); section 59 (2).

The Minister, concerning regulations, only requires, under section 41 (2) of the Environment Protection Act, recommendations when formulating regulations on the ozone layer and only from the council – not from the public. Section 77 of the Environment Management Act, which gives the Minister the general power to make regulations is simple and direct and creates no duty on the Minister to consult or have recommendations from anyone – the public included – when promulgating regulations under the Act. Except, as mentioned earlier, the Environment Management Act, never provided for consultation or recommendations for regulations in the wider powers given the Minister. The Act, covered administration of the Act and, in section 8 creates duties and powers for the Minister:

> (1) It shall be the duty of the Minister to promote the protection and management of the environment and the conservation and sustainable utilization of natural resources, and the Minister shall, in consultation with lead agencies, take such measures as are necessary for achieving the objects of this Act.
>
> (2) Without prejudice to the generality of the foregoing, the Minister shall—
>
> > (a) formulate and implement policies for the protection and management of the environment and the conservation and sustainable utilization of natural resources;
> >
> > (b) co-ordinate and monitor all activities concerning the protection and management of the environment and the conservation and sustainable utilization of natural resources;

(c) prepare plans and develop strategies for the protection and management of the environment and the conservation and sustainable utilization of natural resources, and facilitate cooperation between the Government, local authorities, private sector and the public in the protection and management of the environment and the conservation and sustainable utilization of natural resources;

(d) initiate, facilitate or commission research and studies on any aspect of the protection and management of the environment and the conservation and sustainable utilization of natural resources;

(e) prepare and lay before the National Assembly at least once in every year a report on the state of the environment;

(f) co-ordinate the promotion of public awareness on the protection and management of the environment and the conservation and sustainable utilization of natural resources;

(g) monitor trends in the utilization of natural resources and the impact of such utilization on any segment of the environment;

(h) receive and investigate any complaint by any person relating to the protection and management of the environment and the sustainable utilization of natural resources;

(i) recommend to the Government, on the advice of the Council, international or regional treaties, conventions or agreements relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources to which Malawi should become party;

(j) promote international and regional cooperation in the protection and management of the environment and the conservation and sustainable utilization of natural resources shared between Malawi and other countries;

(k) on the recommendations of the Council, prescribe, by notice published in the Gazette, projects or classes or types of

projects, for which environmental impact assessment is necessary under this Act;

(l) on the recommendations of the Council, prescribe, by notice published in the Gazette, environmental quality criteria and standards necessary for the maintenance of essential ecological processes and a healthy environment;

(m) carry out such other activities and take such other measures as may be necessary or expedient for the administration and achievement of the objects of this Act.

(3) In discharging his duties under this section, the Minister shall, where appropriate, consult the Minister responsible for any segment of the environment.

Section 31 of the Environment Protection Act, providing for environmental management, provides for environmental incentives and requires the Minister to do certain things:

The Minister, on the recommendation of the Council and in consultation with the Minister of Finance, shall determine—

(a) such fiscal incentives as are necessary for promoting the protection and management of the environment and the conservation and sustainable utilization of natural resources; and

(b) such measures as are necessary for preventing the unsustainable use of natural resources and controlling the generation of pollutants.

No other treaty – including Southern Africa Development Cooperation treaty, protocol or convention whatsoever – binding on Malawi.

Our 1994 Constitution introduces, among other things, two important considerations concerning what has now become a statutory right – the right to a decent environment under the Act, or a right to a clean and healthy environment under the 2017 Act – imposing a statutory duty on government under the Constitution and under the country's international obligation as a sovereign state and member of the international community.

The Constitution of Malawi, 1994, does not in Chapter IV, create a specific right to the environment as does section 4 of the Act – section 5 of the 2017 Act. Instead the Constitution covers the environment in the general principles of the Constitution in section 13 (d):

> The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals ... manage the environment responsibly in order to— (i)prevent the degradation of the environment; (ii) provide a healthy living and working environment for the people of Malawi; (iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and (iv)conserve and enhance the biological diversity of Malawi.

As values and principles of the Constitution, these constitutional provisions inform formulation of legislation (section 8 and 10 (2) of the Constitution), policies (section 7 and 10 (2) of the Constitution) and interpretation and development of the common law and customary law (section 9, 10 (2) and 11 (2) (b) of the Constitution). The Constitution in section 1 recognises the State's sovereignty and obligations under the law of nations:

The Republic of Malawi is a sovereign State with rights and obligations under the Law of Nations.

Obligations under the Law of Nations include obligations under international law – conventional or customary. International instruments exist for Malawi – in the Southern Africa Development Community and beyond – on plastics. All instrument, contrary to what is suggested here, enable the Minister and the Director to prohibit the manufacture, sale, transportation and disposal of plastics – now considered dangerous and hazardous waste.

The dominant international law agreement on the environment is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, signed on 22 May, 1989 – almost exactly five years before the Malawi Constitution, 1994. Malawi adopted the Convention on 24 April 1994. The Convention became enforceable on 20 July, 1994 – two months after the Constitution, 1994, became law. So much so that, until the Environment Act, 1996 (repealed by the 2017 Act), the central law on the environment was the Convention.

The Convention was amended on 29 April, 2019, amendment to cover plastics. The amendment is effective 1 January, 2021.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, created to cover cross boarder transfer and disposal of waste, impacts on domestic production in two ways. First, by declaring that, for waste, other than that is in the Annexes I and II, prohibition of importation and exportation depends on whether the other country, based on its own laws, prohibits the waste. Consequently, while the product may be banned in a country, a State can produce it for another. Secondly, and substantially, by leaving it to the Member State to determine what is toxic if excluded in the Annexes.

Parties to the Convention were, under the preamble, aware of the growing threat to human health and the environment from increased generation and complexity and transboundary movement of hazardous wastes and other wastes. They were unanimous that effective protection of human health and the environment from dangers from such wastes was by reducing their generation to a minimum in quantity and/or hazard potential. Parties to the Convention, however, fully recognized a State's sovereign right to ban entry or disposal of foreign hazardous wastes and other wastes in their territories. Parties to the Convention, moreover, affirmed a member State's responsibility for fulfilling international obligations concerning protection of human health and protection and preservation of the environment and its liability in international law. Parties to the Convention also recognized that a State, in material breach of the Convention or protocol, will have the relevant international law of treaties apply to it. Parties to the Convention were, in passing the Convention determined to protect, by strict control, human health and the environment against adverse effects from generation and management of hazardous wastes and other wastes. Parties to the Convention committed themselves to environmentally sound management defined in Article 2 (8) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.

Under Article 3 (1) of the Convention member States were enabled to add other wastes:

> Each Party shall, within six months of becoming a Party to this Convention, inform the Secretariat of the Convention of the wastes,

other than those listed in Annexes I and II, considered or defined as hazardous under its national legislation and of any requirements concerning transboundary movement procedures applicable to such wastes.

Under Article 4 (2) (a) of the Convention there is an obligation to reduce waste production within a State:

> Each Party shall take the appropriate measures to … [e]nsure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects.'

Under Article 4 (13) of the Convention parties are required to reduce export of waste beyond their boarders:

> Parties shall undertake to review periodically the possibilities for the reduction of the amount and/or the pollution potential of hazardous wastes and other wastes which are exported to other States, in particular to developing countries.

The 1992 Rio Declaration on the Environment and Development has a precautionary principle: in order to protect the environment, the precautionary approach shall be widely applied by States according to their capacity. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The Southern Africa Development Community Treaty, which Malawi and other member States signed the on 17 August, 1992, equally covers environmental matters. Under Article 5 (1) (g) of the Southern Africa Development Community Treaty member States to the community aim to "achieve a sustainable utilization of natural resources and effective protection of the environment." Under Article 6 of the treaty, member States aim to "undertake to adopt measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measures likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the provisions of this treaty." Under article 4 member States will act, among others, on the principles of "sovereign equality of all Member States … equity, balance and mutual benefit …" Under Article 6 (5) of the treaty, member States "shall take all necessary steps to accord

this treaty the force of National law." Under Article 6 (4) of the Treaty member States "shall take all steps necessary the uniform application of this Treaty."

Of course the current original constitutional provision provides that treaties entered after the coming into force of the Constitution provides that treaties after that date shall domesticate by an Act of Parliament. This provision was introduced in subsequent constitutional amendments. The amendment, certainly, is silent on treaties before the coming into effect of the Constitution. These were covered by the provision before the amendment. The prior provision made all treaties signed before the coming into effect of the 1994 Constitution part of our law without any need for further action from Parliament on the coming into effect of the Constitution. Malawi signed the convention and treaty before the coming into effect of the 1994 Constitution.

The 1994 Constitution covers the environment in the national policy. Besides, legislation, the Constitution enables other subservient law – international law – to cover the environment, the Convention and the Treaty. Two distinct threads permeate the constitution, the Convention and the Treaty.

The State is sovereign and on matters environmental and the manufacture, distribution, sale and disposal of waste – including plastics. The Convention and the Treaty require the member States act though their sovereignty – the power to pass laws on its people within its territory. That is the sovereignty expressed in section 1 and 8 of the Constitution – the power to legislate. It is better mirrored by that in relation to interpretation – not legislation – Courts in Malawi can use international precedents and judicial pronouncements. Courts cannot use foreign legislation in the same as they are allowed foreign judicial pronouncements. Our legislature does not have to – although it may – mirror, refer, mimic or use legislation of other jurisdictions in their wider power to legislate. In this respect, the Minister through the Directors, accepting, on the evidence, the finding of the Court below, did refer to comparative legislation and, nevertheless, determined and settled for 60 micrometers. There is nothing in principle, under our law or law of nations to compel our legislature to consider foreign legislation – legislation of another sovereign intended for the people and territory of that other sovereign.

No other treaty or Southern Africa Development Cooperation treaty, protocol or convention whatsoever binding on Malawi on the manufacturing, distribution and selling of thin plastic products of less than 60 micrometers.

The Minister, even if there is legislation on minimum micrometers in other jurisdictions, was supposed to make the best judgment based on the Malawi situation. Counsel are *ad idem* that the Treaty does not provide for a standard or minimum of plastic density. A treaty, by its nature, cannot reach that finesse and characteristically and properly leaves this finesse to Member State and with no obligation on any state to mimic another. Of course Article 6 (4) of the Treaty member States "shall take all steps necessary for the uniform application of this Treaty." This is uniform application of the treaty – not legislation which these regulation are. Indeed, while national legislation is clear that its trend is towards abolition of plastics all together, SADC legislation is at different stages towards that. In one sense, African legislation is far ahead of other continents. Uniformity will only be achieved where there is total ban. There is indeed no SADC treaty or protocol on thin plastics.

An international treaty, convention or agreement cannot, without compromising the sovereignty of a member State to make laws, cover the minutia and detail of environmental law. So much so that, even the requirement in section 8 (2) (j) and (k) of the Act that the Minister may recommend to the Government, on the advice of the Council, international or regional treaties, conventions or agreements relating to the protection and management of the environment and the conservation and sustainable utilization of natural resources to which Malawi should become party and promote international and regional cooperation in the protection and management of the environment and the conservation and sustainable utilization of natural resources shared between Malawi and other countries, can only be referring to broader issues not the detail, for our purposes, of determining what, given fluidity in the science and variegated social and economic status among nations, what microns are better covered by a ban. Any suggestion to the contrary is gainsaid by that SADC States determine that at different levels.

The appellants, however, argue that failure by the Minister to align legislation with most SADC countries made the decision for a higher minimum unreasonable in the *Wednesbury* sense. The respondent's response, accepted by the Court below, following the statement by Roskill, LJ, in *Council of the Civil Service Union v Minister for the Civil Service*, is that this was a policy matter and out of the purview of the Courts. As a matter of principle, courts should be very wary of succumbing to the suggestion that our laws and administrative actions will be considered unreasonable in the *Wednesbury* sense by comparison with legislation,

actions and decisions alien to our own. Conversely, words used by a judge or court in a judicial pronouncement should not attract strict interpretation required o legislation or legal instruments that courts are invited from time to time to interpret. Judicial pronouncements are generally written in prose and never intended to subjection to interpretation rules peculiar to legislation, contracts, wills or deeds. The bid to understand the word 'reasonable' used by Lord Greene, LJ, in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 has had mixed results that lead in uncertainty or Thesaurus or dictionary searches for meaning.

The statement by Lord Roskill, LJ, in *Council of the Civil Service Union v Minister for the Civil Service* that courts cannot consider fairness of policy, albeit brief, is problematic. First, because it suggests that fairness is not an aspect of reasonableness or vice versa. It suggests that the words are mutually exclusive. There is some amount of fairness in reasonableness; there is an amount of reasonableness in fairness. The explanation of the test by Diplock, LJ in *Council of Civil Service Unions v Minister for the Civil Service* seems to consign the word reasonable to the cognitive and the ethical:

> By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness". ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

Secondly, we are generally never agreed on what is the basis of morality. Something can be logical but disagreeable or unacceptable. The meaning of words is a question of fact and can be ascertained from dictionaries and usage and in the context of its use or circumstances. That does not make it clearer. It was not intended to be.

In this case, if the argument is that the Minister acted unreasonably by not adopting regulations in the SADC region, there is very little to go by. The appellants have not demonstrated how the Minister's decision was unreasonable in the *Wednesbury* sense. On the contrary, the Director demonstrated that, on the Malawi situation, the benefit of setting the minimum at 60 micrometers was the reasonable and setting the minimum at 30 micrometers, the industry suggested was unreasonable, all matters considered. In '*Associated Provincial Picture Houses Limited v Wednesbury Corporation* Greene, LJ, actually lays two tests:

> The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.'

A court must first decide that the authority considered all pertinent factors or circumstances: not overlooking or undermining important ones or stressing unimportant ones. The court must not consider irrelevant circumstances. If the authority offends this first test, the decision may be unreasonable unless, of course, the decision is reasonable nevertheless. In other words, on the second test, even if the authority took all pertinent matters into account, the decision can nevertheless be unreasonable.

The first test covers the process – the traditional view of judicial review – and the second the reasonableness – the *Wednesbury test*. Considering the first aspect in relation to the two aspects of judicial review, the Director was immaculate. The Act, does not suggest that the Director of inform or consult with the malefactor about the penalty imposed. On the contrary, the Act just requires the Director to specify the penalty to be imposed and provides for an appeal procedure against the order by the Director of Environmental Affairs. Section 33 (1) of the Act:

> The Director shall have power to issue environmental protection orders against any person whose acts or omissions have or are likely to have adverse effects on the protection and management of the environment and the conservation and sustainable utilization of natural resources, and the environmental protection orders shall be in the prescribed form and, if no such form is prescribed, in such form as the Director may determine.

Section 31 (3) (d) of the Act provided for penalties and inclusion and specification in the protection order:

> An environmental protection order issued under subsection (1) shall, in addition to the matters referred to in that subsection, specify … the

penalties which may be imposed for non-compliance with the environmental protection order

Section 33 (6) of the Act provided for the appellant to appeal to the Environmental Appeals Tribunal:

> Subject to subsection (5), any person aggrieved with the environmental protection order may, within thirty days from the date on which it is made, appeal to the Tribunal, and the appellant shall indicate whether the appeal is against the whole environment protection order or against only a part or parts thereof and, if so, which part or parts.

Section 33 (5) of the Act prohibits legal proceedings unless the Director acted in bad faith.

The Act just requires that the Director specify the penalty in the protection order. The protection order is served on the malefactor. The Director never violated the appellants' right to be heard. The legislature many times requires an authority to impose fines in the absence of the offender – subject to an appeal or hearing. The Act did so. The Directors' actions were, therefore, *in limine* not reviewable and leave should not have been given in the first place. For our purposes, the Director's actions concerning violation of the right to be heard were apposite under the first limb of and were, no doubt, reasonable under the second limb. The Director just specified in the order as required by the Act. These orders were according to the law. The director cannot be acting in bad faith if all the Director does is do what is lawful lawfully. The judicial review was, therefore, incompetent.

On the second aspect, the Minister, on the first limb of *Associated Provincial Picture Houses Limited v Wednesbury Corporation,* was equally flawless. The Minister, when promulgating the regulations, did, although he had not to, consult with stakeholders and compared legislation in the SADC region and determined that the ban should be at 60 micrometers and not 30 micrometers. Was this decision unreasonable?

This is question is not condign for the Court viz-a-viz legislation – that is not subsidiary legislation. Legislation can only be reviewed for constitutionality. Our legislation cannot be judged on reasonableness. Courts actually presume that the legislature acts reasonably and is aware of laws of the land. Of course limitations under the Constitution will need to be reasonable under section 44 (2) of the Constitution – that is a different consideration. Our legislation cannot be reviewed

for compliance with subservient law to it or the Constitution which is what treaty law – the Convention and Treaty are. Section 48 (2) of the Constitution cannot be clearer: "An Act of Parliament shall have primacy over other forms of law, but shall be subject to the Constitution." There was no suggestion in the application, the submissions or argument that the 2015 Regulations are unconstitutional. Our legislation cannot be challenged based on foreign legislation. Consequently, it must have been obvious right at the beginning that the legislation was not being challenged for constitutionality.

Clear evidence in the regulations for other SADC disregarded by the Director of Environmental Affairs.

The Minister, in arriving at the 60 micrometers, considered SADC legislation. The appellants' body, despite hardships that the decision would cause to the industry and the citizen and customer, agreed that the decision was right. It only prayed for more time for it to set alleviation by bringing alternatives. That time was allowed without complaint that it was inadequate. The Director of Environmental Affairs was informed by SADC Regulations.

To suggest that courts cannot review policy is oversimplification. Generally, policy – and if it ends there – cannot and should not be reviewed by courts. This opens up for review myriads of policies that would make government or governing impossible. More importantly, most policies would not be carried out anyway and could be revised at implementation. The exhaustion principle – dominant in judicial review – would restrain judicial review. More importantly, it is when those policies result in laws, decisions and actions that judicial review is necessary to question legality and the process of arriving at them for fairness and effect on rights.

It is significant that the High Court's review power under section 108 (2) of the Constitution excludes policy review. Under section 7 of the Constitution, the Executive branch is responsible for formulation of policies. This is considered its "separate status, function and duty." Some policies have not to end as laws. The word 'law' in section 108 (2) of the Constitution is broad enough, because of section 11 of the Constitution, to include common law, customary law and international law. Section 108 (2):

> The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall

have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Characteristically, policies are excluded. Instead, laws, actions and decisions are reviewable by the High Court. Laws, decisions and actions are reviewable as such. Laws, actions and decisions are often policies or product of policies as such. When laws, actions and policies are products of policies, as a matter of principle, policies and processes to arrive at them are not amenable for judicial review precisely because, on the exhaustion principle, there are steps before the final law, decision or action is taken. On the other hand, when actually finally culminating into laws, actions or decisions, policies are reviewable as such laws, actions or decisions under section 108 (2) of the Constitution. They will be so reviewable if they impinge on rights – rights under Part IV of the Constitution.

In this case, the matter passed the policy formulation level and culminated into legislation, the Environment Management (Plastic) Regulations 2015. Certain actions occurred. The Director issued a protection order and closure of premises. The appellants contend that the actions and legislation violated their rights under the Constitution.

Concerning, closure of premises, the appellants contend that their rights to property and be heard are violated. They are not querying the power under the Act to close premises or to impose a fine. The rights to property and to be heard can be limited or derogated from. Criminal laws imposed to better enjoy the right are neither limitations nor derogation from rights. They protect rights. Sentences imposed, whether to imprisonment, forfeiture or closure or fines limit rights and, therefore, on the face of it unconstitutional. Punishments for crime, however, must pass the constitutional musters in the Constitution. The criminal process, however, requires a person to be heard before punishments are imposed. In relation to closures, the Director of Environmental Affairs afforded the appellants the right to be heard. Closures, as punishments, are punishments or sentences and the legislature can provide that they be meted without a hearing on them. The authority can impose them without a hearing and only subject to appeal or proposed procedure to review them. The fines are imposable directly subject to an appeal to the Environmental Appeals Tribunal. The respondent, therefore, never violated the appellants rights to property or be heard. The appellants can resort to procedures set.

Actions of public officers can be faulted for fraud or bad faith (*Smith v East Elloe* [1956] AC 571). Courts can vitiate administrative or legislative actions where

there fraud even where there is immunity in a legislation. "Fraud," Parker LJ, said in Lazarus Estates Ltd v Beasley [1956] 1 Q.B. 702, 722.(Parker L.J.: 'vitiates all transactions known to the law of however high a degree of solemnity.'' Legislation can, however, oust legal proceedings on account of bad faith, it is a matter of construction in each case whether the legislature intended proceedings no to commence. In *R v Secretary of the Environment, ex parte Ostler* ([1977] Q.B. 122) the Court held that legislation prevented legal proceedings. Fraud, like bad faith, need strict proof. No proof avails here.

Subsidiary legislation is reviewable by Courts – even for reasonableness. Reasonableness, however, is confined to matters Russel, LJ, stated in *Kruse v Johnson.* Russel first starts by defining what subsidiary legislation – byelaw – is:

> A by-law of the class we are here considering I take to be an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not to do as they pleased. Further, it involves this consequence - that, if validly made, it has the force of law within the sphere of its legitimate operation-see Edmonds v Watermen's Co.

Lord Russel then refers to two types of regulations and discusses the oversight of the powers:

> In the present case we are dealing with a by-law made by a local representative body - namely, the County Council of Kent - which is created under the Local Government Act 1888 and is endowed with the powers of making by-laws given to municipal corporate bodies under the Municipal Corporations Act 1882.... We thus find that Parliament has thought fit to delegate to representative public bodies in towns and cities, and also in counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards; there must be antecedent publication of the by-law, with a view, I presume, of eliciting the public opinion of the locality upon it, and such by-laws shall have no force

until after they have been forwarded to the Secretary of State. ... I agree that the presence of these safeguards in no way relieves the court of the responsibility of inquiring into the validity of by-laws where they are brought in question, or in any way affects the authority of the court in the determination of their validity or invalidity. It is to be observed, moreover, that the by-laws having come into force they are not like the laws, or what were said to be the laws, of the Medes and Persians-they are not unchangeable. The power is to make by-laws from time to time as to the authority shall seem meet, and if experience shows that in any respect existing by-laws work hardly or inconveniently the local authority, acted upon by the public opinion, as it must necessarily be,- of those concerned, has full power to repeal or alter them. It need hardly be added that should experience warrant that course, the legislature, which has given, may modify or take away the powers it has delegates. 1 have thought it well to deal with these point in some detail, and for this reason-that the great majority of the cases in which the question of by-laws has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage.

The power of the legislature changing the bye-law or rescinding the power to make bye-laws applies *mutatis mutandis* to other subsidiary legislation which is like the one under consideration:

> But when the court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-laws so made under such conditions on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson* - an analogous case - I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only as I conceive, that the question of unreasonableness can properly be regarded.

Subsidiary legislation can only be unreasonable in parameters suggested and courts must not substitute their assessment on their own conception and must defer to the conceptualization of the administrative or legislative body to who the legislature delegates the power to make subsidiary legislation.

> A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which

> some judges may think ought to be there. Surely it is not too much to say that, in matters which directly and mainly concern the people of the county who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges....

The reasonableness of our subsidiary legislation cannot be challenged based on legislation from without the jurisdiction. The judgment of the Minister was just as good as this Courts and the Court below. The Court must defer to the Minister. The Minister did not act in bad faith.

The right to a decent environment or clean healthy environment are only statutory and not Part IV rights. They are not reviewable under the Constitution. They are not against any specific constitutional provision. They in fact support the fundamental principle in the national policy of the Constitution and not reviewable on any basis.

Disposal

The appeal, therefore, is dismissed. The costs matter has concerned my mind. The incidence of costs is a public policy and interest matter. Consequently, costs, in this Court, are supposed to be assessed by this Court first and only ordered to be taxed by the Registrar if the Court cannot make a determination. Consequently, parties are supposed to file their bills for this Courts examination. This rule is obeyed in breach. This Court has not received any bill.

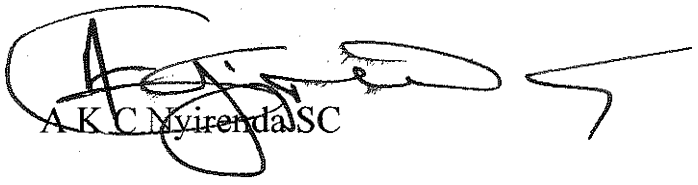
On the other hand, costs must follow the event, as a matter of course, in the court's discretion. The matter should not have been commenced without establishing bad faith. In any case, judicial review should not have had permission in view of the clear alternate remedy or procedure before resorting to judicial review. On the other

hand, under sections 69 (a) and (e) and of the Environment Management Act, the Director of Environmental Affairs should have referred the matter to the Environmental Appeals Court. Just as the Director of Environmental Affairs could have invoked immunities under sections 33 (3) (5) and 68 of the Environment Management Act. The respondent will have 60% of the costs here and below. The respondent should immediately file the cost statement for the Court to determine the costs.

Kamanga, JA

I concur with the judgment and the order of costs Justice Mwaungulu makes.

Made this 31st Day of July 2019

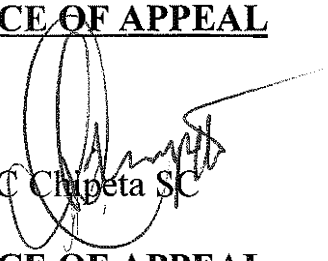


A K C Nyirenda SC

CHIEF JUSTICE

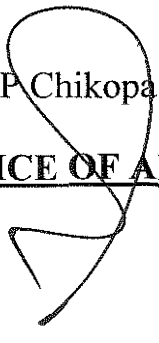
R R Mzikamanda SC

JUSTICE OF APPEAL



A C Chipeta SC

JUSTICE OF APPEAL

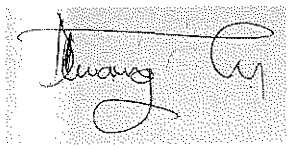


L P Chikopa SC

JUSTICE OF APPEAL

F E Kapanda SC

JUSTICE OF APPEAL



D F Mwaungulu SC

JUSTICE OF APPEAL

A D Kamanga SC

JUSTICE OF APPEAL