IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APEAL NO. 20 OF 1995

(Being Civil cause No. 2187 of 1994)

BETWEEN:

THE PRESIDENT OF MALAWI……..1ST APPELLANT

- and -

SPEAKER OF NATIONAL ASSEMBLY…….2ND APPELLANT

- and -

R B KACHERE AND OTHERS…….RESPONDENTS

BEFORE: THE HONOURABLE MR JUSTICE MTEGHA, J.A.
THE HONOURABLE MR JUSTICE KALAILE, J.A.
THE HONOURABLE MR JUSTICE CHATSIKA, J.A.

Matenje/Chatsika Counsel for the Appellants
M Msisha, Counsel for the Respondents
Chigaiu, official, Interpreter
mikanda, official Recorder

JEDGEMENT

Mtegha, J.A.

My Lords, this is an appeal against Mkandawire, J's ruling of 12th April, 1995.

I have had the opportunity to read my brother Judge's opinions. I entirely concur with these opinions. However, let me say these few points.

Perhaps it would be prudent, at this juncture, if I briefly outline the history of this matter. The Respondents, who are the Plaintiffs in the action and have labled themselves as the "citizens of Malawi", commenced an action-by Originating Summons seeking the Court's determination on a number of issues. These issues are as follows:

"1. Have the Defendants not violated the constitution of Malawi in failing to ensure compliance with section 96(2) of the constitution before the presentation of an Executive Branch (government) Bill or Bills to amend the Constitution?

2. Can the Constitution of Malawi be amended by the National Assembly in this period of provisional application before the National Constitutional Conference is held in view of the provision of section 212 of the constitution of Malawi?

3. Has the President of Malawi failed in his duty to uphold and defend the Constitution by allowing the presentation of an Executive Branch (government) Bill or Bills for amendment to the Constitution, in contravention of his obligations under section 88 of the Constitution of Malawi?

4. Have, the President and his cabinet not violated the Constitution by not disclosing their assets, liabilities, business interests or those of their Spouses or held on their behalf upon election as required by section 88(3) of the Constitution?

5. can the Attorney General be a Member of Parliament at the same time as he serves in the capacity of Attorney General?

1. (1) Has the President of Malawi not violated the Constitution in appointing a Minister of Justice who is a member of the Cabinet and a member of Parliament in view of the provisions of sections 50(2)(e) and 98(6) of the constitution of Malawi?

(2) Has the President of Malawi not effectively created two ministers to head one Ministry of the government, namely, the Ministry of Justice?

7. Has the President of Malawi not violated the letter and spirit of the constitution of Malawi in appointing members of cabinet from sitting Members of Parliament in view of the provisions of sections 51(2)(e) and 94(2)(e) of the constitution of Malawi?

8. Has the President of Malawi failed in his duty to defend and uphold the Constitution in appointing one person as minister of Justice and a member of the cabinet and another person as- Attorney General and a member of -the cabinet as well in view of the provisions of section 98 of the Constitution of Malawi?

9. Does the National Assembly or Parliament have the competence to amend the constitution in the manner it did in view of the provisions of section 212 of the Constitution of Malawi?

10. Does the President of Malawi have the competence to assent to the Bill for the amendment of the Constitution of Malawi?

11. Does the National Assembly or Parliament have the competence to create high offices of State which are not elective in view of the preamble to the constitution and in view of the provisions, of section 6 of the Constitution?

12. Have the President of Malawi and Executive Branch not violated the letter and spirit of the Constitution of Malawi generally and of the provisions of section 7 of the constitution of Malawi in presenting a Bill for the amendment of the Constitution of Malawi without first ascertaining the EXPRESS wishes of the people of Malawi?

13. Has the National Assembly or Parliament not violated the letter and spirit of the Constitution of Malawi generally and section 8 by passing a Bill amending the Constitution of Malawi to provide for an appointed 2nd Vice President when it is a fundamental democratic principle that all high offices of State must be elective and when the constitution of Malawi already provides for an elected vice President?

14. Has the Government complied with section 146 of the constitution by not calling for Local Government Elections?

11. Have the President and the National Assembly complied with the constitution by not establishing the senate?”

When the matter came up for hearing before Mkandawire, J. in Chambers, Mr Matenie, the learned Solicitor General, raised some preliminary objections. Firstly, the learned Solicitor General submitted that the President and the Speaker were the wrong parties to the action; secondly, that in terms of section 3(i) of the Civil Procedure (Suits by or against the Government or Public Officers) Act (Cap 6:01) the originating Summons should have been taken against the Attorney General and not the President of the Republic of Malawi or the Speaker of the National Assembly personally. Mr Matenje also submitted that the President of the Republic under section 91 of the Constitution cannot be sued in any civil proceedings, and since this action is ,a civil one, the inclusion of the President is wrong. Finally, Mr Matenje had submitted that the plaintiffs had no **locus standi** in the matters which were raised by the originating Summons.

After heaiing argument from both Mr Matenje and Mr Msisha, Counsel for the Plaintiffs, the learned Judge ruled in favour of the Plaintiffs and held that he could proceed to hear the originating Summons against the President and the Speaker. This appeal is against that order..

Mr Matenje filed ten grounds of appeal, viz:

(1) The Judge erred in holding that the President and the speaker are the right parties to the proceedings.

(2) The Judge erred in holding that the President and the Speaker are public officers and are capable of being sued in that capacity.

(3) The Judge erred in holding that because the President as Head of Government is not himself the Government he can be sued as a public officer.

(4) The Judge erred in holding that the application of section 3 of the Civil Procedure (Suits by or against the Government or Public officers Act) (Cap 6: 01) is limited by section 2 of the same Act.

(5) The Judge erred in holding that the President is not indemnified by the Constitution with respect to suits based on matters arising from the Constitution.

(6) The Judge erred in holding that the Speaker can be sued in a representative capacity.

(7) The Judge erred in holding that there is no procedure for referring constitutional

matters to the Court and, in so holding, erred in failing to specify the procedure for taking out such matters to the court.

(8) The Judge, having found that this is not a matter for administrative law, erred in holding that the plaintiffs have **locus standi** in this matter merely on the basis that they are questioning the constitutionality of certain acts of the President and the Speaker.

(9) The, Judge erred in making, before full trial, findings (based on the substantive matters in the Originating Summons) which suggest that the President and the Speaker have violated the Constitution.

(10) The Judge erred in failing to address his mind separately on, and give due weight to, each of the issues raised in the preliminary objections on behalf of the Attorney General.

I will not consider the grounds in the order in which Mr Matenje presented them. They are closely related. I. have, therefore, considered them as they appeared convenient to me.

Mr. Matenje took up the issue of the President first. He has argued before us that by virtue of section 78 of the Constitution, the President of the Republic is both Head of State and Head of Government. His powers and duties are enumerated in section 89 of the Constitution. Those powers and duties are to be performed as Head of State or Head of Government. Therefore an action against him must relate to the capacity in which the President has acted, either as Head of State or Head of Government. In this respect, Mr Matenje's argument is two-pronged. He submits that if he was sued as Head of Government, the proper procedure would have been to commence these proceedings against the Attorney General - section 3(l) of the Civil Procedure (Suits by or against the Government or Public officers) Act.

Mr Msisha, however, has submitted that section 3(l) of the civil Procedure (Suits by or against the Government or Public officers) Act does not oblige anybody to sue the Government through the Attorney General only, but anyone can sue the Public officer personally. In the instant case, Respondents decided to sue the President as a Public officer personally. It cannot be said, therefore, that the President is a wrong party, Mr Msisha submits.

Section 3(l) the Act cited above stipulates:

"3 - (i) save as may be otherwise expressly be provided by any Act, suits by the government shall be instituted by or against the Attorney General..."

I think the question to be determined first is whether the President, in his capacity as Head of State and Government, he is a Public officer. I think not. Section 2(1) of the General Interpretation Act states:

"In this Act, and subject to section 57, in every other written law enacted, made or issued before or after the coming into operation of this act, the following words and expressions shall have the meanings respectively assigned to them unless there is something in the subject or context,inconsistent with such construction or unless it is otherwise provided, President means the president of the Republic", "Public office" means any office the holder of which is invested with or performing duties of a public nature, ,Public officer" means a person holding or acting in any

office."

Mr Msisha seems to say that since the duties of the President are' of a public nature he is a public officer, especially that -he draws his remuneration from the public funds and he sees no reason why there should be a restriction on the interpretation of a "public office" or "public officer". It was his submission that the meaning attributed to the "President" in the old constitution is inconsistent with the present Constitution, in that the President at the moment is the custodian of the constitution and, therefore, he can personally, as well as through the Attorney General, be sued in case he contravenes the constitution.

This is an ingeneous way of interpreting the Constitution. I have indicated earlier on the meanings attached attached to the words "President" and "Public" officer" by the General Interpretation Act. Applying the definition to the issues before us, there is no reason why we should construe the word "president" to mean also a public officer. Even in the present constitution a "public office" has been designated by the constitution itself and there is no provision in the Constitution which says the President is a Public Officer. In the present constitution, where a public office is created, the provision creating that office clearly stipulates that, that office is a public office. For example, sections 99, 154 and 163 of the constitution clearly stipulate that the DPP's, Inspector General's and Prison Commissioner's offices respectively are public offices and, therefore, the holders of these offices are public officers. Similarly, the offices of a Minister, Deputy Minister, the chief Justice, Judges and Members of the Civil service commission, for example, are not public officers in terms of the Constitution, although these officers perform functions of a public nature. I see no reason why the courts should interpret these provisions widely as Mr Msisha is advocating. Applying the principles, the President is clearly not a public officer in the context of the Constitution. It appears to me, therefore, that if one wants to sue the President in his official capacity as Head of Government, he should commence one's proceedings against the Attorney General. He cannot be sued personally while acting in his capacity as President. The same principles apply to the Speaker of the National Assembly . In dealing with this issue, the Judge in the lower Court also raised other

points, which need consideration. He said:

"In terms of section 3 (1) of the Civil Procedure (suits by or against the Government or Public Officers) Act), an action can only be instituted against the Attorney General when there is a claim against the Government. It is clear in my mind that although the President is Head of Government, he is not the Government. It is therefore, important to distinguish which action can properly be commenced against the Government and which ones against public officers, I think that learned Counsel should have taken a closer look at section 2 of the Act. I think the claims envisaged under section 2 are claims arising in contract or tort, claims which could arise against a subject. The matters raised in the Originating Summons do not arise out of tort or contract .... They are certainly matters which cannot be taken against a subject. . the matters raised in the Originating Summons cannot properly be taken against the government . . . the plaintiff's were right in going against the public officers...."

I think there was clearly an error by the Judge on this point. It is quite clear to me that the Government can be sued in the civil suits other than contract and tort. Section 2 of this Act does not, therefore, limit the actions to be taken against or by the Goverment to issues arising out of tort or contract only. There is no reason why we should interpret the words "civil suits," as limited to tort and contract only. There may be other situations, other than those involving contract and tort, where the Government can be sued, for example cases of judicial reviews. These are civil in nature. we must interpret the words of an Act in such a way that they convey their ordinary and natural meaning unless there is some inconsistency. In the present case, "Civil Proceedings', means civil proceedings other than,criminal proceedings". The present proceedings are clearly "civil proceedings".

The second prong in Mr Matenje's argument is that the President cannot be sued in terms of section 91(l) of the Constitution. Section 91(1) of the Constitution states:

"No person holding the office of the President or performing the functions of the President may be sued in any civil proceedings but the office of President shall not be immune to orders of the courts concerning rights, and duties under this constitution."

Mr Msisha has argued that since the President is the custodian of the, Constitution and he protects and guards the inalienable rights and obligations under the constitution, he is not immune from court process as far as those rights and obligations are concerned if they are contravened. If the President is immune from court process, Mr Msisha has argued, how else could the second limb of the section, namely, that the office of the President shall not be immune to orders of the courts concerning rights and duties under this Constitution" could be enforced if the -President is not made a party to the proceedings?

The latter part of section 91(1) of the constitution envisages quite a different situation.. I think the words "but the office of President shall not be immune to orders of the courts concerning rights and duties of under this constitution" envisage a situation where the court would order the President to do or not, do something. A good example was cited by Mr. Matenje. The example was in Miscellaneous Civil Application No. 55 of 19 94. In that case the court held that the removal of Mr Mc William Lunguzi, the former Inspector General of Police, from his post was illegal. Had the court ordered his reinstatement to the post, the President would have had to comply with that order. That, in my view, is the meaning of those words.

It is further contended by the learned Solicitor General, that the Judge erred in holding that the Respondents had locus standi to question the constitutionality of certain acts of the President and the Speaker. Summons in the present case is asking for declaratory judgment on the issues raised in the Summons which pertain to certain acts done by the President and the Speaker of the National Assembly. It must be pointed out here that the powers of the court to . make a binding declaratory judgment is discretionary. This being the case the plaintiff must have **locus standi,** that is, a real interest which he wants to protect. If he has no interest, such declaratory judgement may not be granted. For example, a declaratory judgment may not be granted to a plaintiff whose claim is too indirect and insubstantial and could not give him any relief in "any real sense" **Thorne District Council -v- Bunting (1972) Ch. 470.** A person who has no sufficient interest in the matter has no right to ask a court of law to give him a declaratory judgment. He must have a legal right of substantial interest in the matter in which he seeks a declaration. "Sufficient interest" is the one which is over and above the general interest. As Chatsika, J. (as he was then), stated in **UDF -v- Attorney, General Civil Cause No. 11 Of 1994:**

"...the plaintiff must show, not only that it has some interest in the matter but that, that interest is a public one. The plaintiff must show that it represents the people of Malawi with the only exception of those against whom the order is sought."

An American case cited to' us by Mr Matenje, Fairchild -v- Hughes (1921) 258 U S 126, is instructive in this respect. some citizens purported to bring an action for the court to declare that "the so called suffrage Amendment Bill be declared unconstitutional and void". The plaintiff sued as tax payers and members of the American Constitutional League. The American constitutional League was an organization that was engaged in diffusing knowledge as to the fundamental principles of the American constitution. The' court said at pages 129 - 130:

"Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding.... The plaintiff has only the right possessed by every citizen to require that Government be administered according to law.... obviously this general right does

not entitle a private citizen to institute in the federal courts a suit to secure, by indirection a determination whether a statute if passed or a Constitutional amendment about to be adopted will be valid."

That is the reason why the Court will not, as a general rule, decide hypothetical and academic questions: Re **Barnato (1949) 258.**

It has been argued by Mr Msisha that the present Constitution is such that every citizen has a right to see that Government runs according to the Constitution, and if that right given to the citizen, the supremacy given to citizen, if it fails to operate, then the Constitution is bound to be watered down.

I think the Constitution has given the citizen the right to challenge the Government. section 46 (2) of the constitution states:

"Any person who claims that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened shall be entitled:

(a) to make an application to a competent court to enforce or protect such a right or freedom,..."

The peitinent question is: what is a fundamental right and freedom which are guaranteed by the Constitution? I think these are found in Chapter IV of the Constitution. Now looking at the Summons, without prejudice to the substantive issues to be determined, I do not think that the issues raised in the Summons are covered under Chapter IV of the Constitution to give the plaintiffs a locus standi. The respondents have not shown that their individual right has been infringed.

I now turn to the office of the Speaker of the National Assembly which I have partially dealt with earlier. It is quite clear, reading from theconstitution that the Speaker, Deputy speaker and Members of Parliament are not amenable to any-action. The relevant Section, Section 60 of the constitution says:

"60 (1): The Speaker, every Deputy Speaker every Member of the National Assembly and every member of the Senate shall, except in cases of treason, be privileged from arrests. . and shall not, in respect of any utterance in .. the National Assembly or Senate, be amenable to any, other action or proceedings in any court, tribunal or body other than Pariament."

This provision, in my view completely exonerates the Speaker from any legal process for utterance made in Parliament.

I would venture to say that in most commonwealth jurisdictions, the Speaker, just as the Head of State, is not answerable and is not liable to be sued in any Court of competent jurisdiction for any utterances act or omission done by him in his official capacity.

For, the reasons which I have said, this appeal must succeed with costs.

Kalaile, J.A.

In this case, My Lords, there is an appeal by the Attorney General against the decision of Mkandawire, J. delivered on 12th April 1995 in which he ruled, inter alia, that the President and the Speaker of the National Assembly can be sued in so far as they are public officers, and further that, a plaintiff is not bound to sue any of these public officers through, the office of the Attorney General under the provisions of the civil Procedure (suits by or against the Government or Public officers) Act. The grounds of appeal by the Solicitor General are fully reproduced in Mtegha,,JA's judgment and I shall not repeat them here.

The Solicitor General, Mr Steve Matenje, filed 10 grounds of appeal and argued them **seriatim**. I shall not follow the line of argument adopted by the learned Solicitor General but shall centre my judgment on whether the State President and the Speaker of the National Assembly are indeed public officers. I also intend to deal in detail with the point of immunity in so far as it relates to the State President and the Speaker.

Before dealing with the point whether the State President or the Speaker of the National Assembly are public officers, I shall cite the pertinent provisions of the Civil Procedure (suits by or against the Government or Public officers) Act, and these are

section 113-(1) save as may otherwise expressly be provided by any Act, suits by or against the Government shall be instituted by or against the Attorney General. Such suits shall be instituted and tried in the same manner as suits to which the Government is not a party.

(2) The Attorney General or other person authorised by the Attorney General to act for the Government in respect to any judicial, proceedings shall be deemed to be the recognized agent by whom appearances, acts and applications may be made or done on behalf of the Government.

(3) All documents which in a suit of the same nature between private parties would be required to be served on the defendant shall be delivered at the office of the Attorney General or other person authorized to act on behalf of such judicial proceeding."

The remaining relevant section is S.7, and it reads:

"7. (1) Where the Goverment undertakes the defence of a suit

against a public officer, the Attorney General or other person appointed for that purpose by the Government, upon being furnished with authority to appear and defend, shall apply to the court, and upon such application the court shall cause a note of his authority to be recorded."

It should be noted that the above cited Act does not define a "public officer". However, the General Interpretation Act (cap 1:01) defines a "public officer" as a person holding or acting in any public office. It was submitted by Mr Msisha, Counsel for the Respondents, that this definition includes persons such as the State President and the Speaker of the National Assembly. Prima facie, this is correct. But this definition is qualified by the words appearing in S.2(1) of the General Interpretation Act, which state as follows:

"In this Act and, subject to section 57, in every other written law enacted, made or issued before or after the coming into operation of this Act, the following words and expressions shall have the meanings respectively assigned to them, unless there is something in the subject or context iincosistent with construction or unless it is therein otherwise provided (emphasis supplied)."

It was argued by the learned Solicitor General that the underlined words in s.2(l) of the General Interpretation Act emphasize that any of the listed definitions should be read and understood in their context. The Solicitor General, further argued, in support of this point, that the Constitution states in S.98(5) that the office of the Attorney General may either be the office of a Minister or may be a public office. This clearly shows that the office of the Attorney General can be held by a politician or a civil servant. Another example cited by the Solicitor General is that of S. 94 (3) (e) of the constitution which relates to the appointment of ministers. That section provides that notwithstanding subsection (2), no person shall be qualified to be appointed as a minister or Deputy Minister who holds or acts in any public office or appointment, except where this Constitution explicitly provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment, or where that person resigns from that office in order to stand.

The words "Public office" do not appear anywhere in the definition of the office of President or the Speaker. However, it is interesting to note that the office of Inspector General, the Chief Commissioner of Prisons, the ombudsman, the Director of Public Prosecutions and Auditor General are specifically designated 'public offices, under the constitution, where as those of the state President, Speaker of the National Assembly, Chief Justice and Judges of the High Court and Supreme Court of Appeal are not so designated, and, furthermore' the latter have immunity for anything performed in the course of official duties. This occurrence did not happen by inadvertence, but was so made on sound policy grounds to avoid the kind of litigation now before us.

Clearly, the constitution draws a distinction between political posts held by those who are elected under constitutional provisions as well as the Parliamentary and Presidential Elections Act from persons who hold their posts pursuant to the provisions of the Public service Act. (Act No. 19 of 1994).

Furthermore, the Solicitor General brought to the attention of this court the provisions of s.51(2)(e) of the Constitution which lays down that no person shall be qualified to be nominated or elected as a Member of Parliament who holds, or acts, in any public office or appointment, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that appointment or where that person resigns from that office in order' to stand.

This is yet another manifestation of the clear intention of the framers, of the constitution's intention to draw a line between public offices from political office holders.

When this Court asked Mr Msisha what legal disability would afflict his clients by suing through the office of the Attorney General as opposed to suing the State President or the Speaker of the National Assembly directly, he was unable to give any convincing reasons on the point.

I share the same viewpoint as the Solicitor General, that the proper official to be sued in the circumstances of the present case is the Attorney General and not, the State President or the Speaker of the National Assembly. In this regard, I am further fortified in holding this viewpoint by the argument put forward by the Solicitor General, that, if it was intended to make the state President or the Speaker of the National Assembly a "corporation- sole", then Parliament or the framers of the constitution would have adopted the same approach as they did with the Controller of customs and Excise, wherein s.154 provides that under the provisions of the customs laws any proceedings may be brought by or against the Controller, furthermore the Controller may sue or be sued by the name of the Controller of Customs and Excise, and may for all purposes be described by that name.

Similarly, s.53 of the Finance and Audit Act prescribes that the Secretary to the Treasury and his successors in office shall be a body corporate under the name of "Secretary to the Treasury, Malawi". And s.53(2) of the said Act further provides that the corporation may sue and be sued in its said name and shall have perpetual succession and a common seal..." Similar provisions exist for the post of Administrator General: see s.2(1) of the Administrator General's Act (Cap 10:01). Mr Msisha's attempts to convince me that the State President and the Speaker are a corporationsole were to me not convincing.

Consequently, I hold that the State President or the Speaker cannot be sued as public officers but may be so sued for anything they perform in their official capacities through the office of the Attorney General. This is particularly so since s.98(l) of the constitution lays down that there shall be the office of the Attorney General who shall be the Principal legal adviser to the Government, and, s.78 of the Constitution provides that there shall be a President of the Republic who shall be Head of State and Government and the Commander in Chief of the Defence Forces of Malawi. In conclusion, I hold that the definition of a "public officer" as stated in the General Interpretation Act is inconsistent with the provisions and or, context, of the Constitution so that it does not apply to any part of the Constitution other than Chapter XX which deals exclusively with the Civil Service and those parts which deal with the offices of the Inspector General, Chief Commissioner of Prisons and those other offices which I have listed down earlier on.

I now change tack and take on the issue of immunity so far as it relates to the State President and the speaker of the National Assembly. section 91(1) of the constitution provides that no person holding the office of President or performing the functions of President may be sued in any civil proceedings but the office of President shall not be immune to orders of the courts concerning rights and duties under this constitution.

It was argued by the Solicitor General that the operation of this section is distinctly demonstrated by Lunguzi -v- Attorney General (High Court civil Cause No. 55 of 1994). In that case, the High Court held that Mr Mc William Lunguzi, a former Inspector General of Police, was unconstitutionally removed from office but it refused to issue an order re-instating him to his former status. But had the High court issued an order re-instating Mr Lunguzi to his former post of Inspector General, then the Government would have been obliged to comply with such order.

Mr Msisha countered this submission by arguing that the President can only be made to comply with provisions prescribed for in s.46 of the constitution which is limited to rights covered by chapter IV of the Constitution. Section 46(2) of the constitution provides that any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled -

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

(b) to make application to the ombudsman or the Human Rights commission in order to secure such assistance or advice as he or she may reasonably require.

Now, Chapter IV of the Constitution deals exclusively with Human Rights, but Chapter III deals with fundamental rights. It was argued by Mr Msisha that for any rights not covered by Chapter IV of the Constitution, no enforcement measures are prescribed. This argument does not hold. Enforcement provisions are prescribed for under the Courts Act (Cap 3:02) in s.11(a)(vi) which specifically spells out enforcement provisions by the High Court. section 91(1) of the Constitution does not state that the "President shall not be immune to orders of the courts concerning rights and duties under this Chapter but it states that the "Office of President. shall not be immune to orders of the courts under this Constitution. what is more, s.4 of the constitution provides that this constitution shall bind all executive, legislative and Judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal Protection. of this constitution and laws made under it. The Courts Act falls under the wings of the phrase "and laws made under it" see s.200 of the Constitution which stipulates that except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution.

As for access to justice and legal remedies, s.41 of the Constitution provides that every person shall have a right to recognition as a person before the law. It also stipulates that every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues. Lastly, that section states that every person shall have the right to an effective remedy by a court of law, or* tribunal for acts violating the rights and freedoms granted to him by the Constitution or any other law. I cannot,. therefore, accept the argument that. only those rights covered by Chapter IV of the constitution can be enforced through the courts.

In the Lunguzi case, it was the President who removed Mr Lunguzi from office but it was the office of the Attorney General which was sued.

Up to now,I have dealt with the office of the President. I now turn to the office of the Speaker of the National Assembly so far as immunity and privileges are concerned. Section 60 of the Constitution states that, the speaker, every Deputy Speaker, every member of the National Assembly and every member of the Senate shall except in cases of treason, be privileged from arrests, while going to, returning from, or while in the precincts of the National Assembly or the Senate, and shall not, in resipect of any,

utterance that forms part of the proceedings in the National Assembly or the Senate, be amenable-to any other action or proceedinqs in any court, tribunal or body other than Parliament. Paragraphs 2, 4 and 5 (c) of the affidavit sworn by the Respondents appear to be caught by the provisions of s.60 of the Constitution in so far as those paragraphs relate to utterances made in Parliament.

When this Court asked Mr Msisha to enlighten it of any precedentwhere a Speaker of the National Assembly was sued for anything done in the discharge of his duties, he was unable to do so. It would seem that in any common law jurisdiction, a Speaker of the National Assembly has the same immunities and privileges as those prescribed for in s.60 of the constitution: see also Erskine May, 19 Edn., at pages 69-70 and also in particular at page 152.

The authors of the book entitled "The British Commonwealth The Development of its Laws and Constitution". Volume 6, at page 127, observe that "Like the President, the Head of a State is not answerable in any court for any act done by him in his official capacity." I would extend that observation to the office of the Speaker of the National Assembly.

In concluding this judgment, perhaps I should say a word or two on the nature of declaratory judgments so far as our constitution goes. What Mr Msisha is seeking in these proceedings are declaratory judgments against the State President and the Speaker of the National Assembly regarding certain functions which they have performed by virtue of their offices. The Solicitor General has dealt with this point as the seventh ground of appeal, which stated that the Judge erred in holding that there is no procedure for referring constitutional matters to the Court and, in so holding erred in failing to specify the procedure for taking up such matters to the Court. The procedure for taking up constitutional issues before the courts is provided for by s.89(l)(h) of the Constitution which lays down that the President shall have the power to refer disputes of a constitutional nature to the High Court. And s.103(2) of the Constitution stipulates that the judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence. Given the wide jurisdiction of the High Court, it cannot be said that there are no procedures for referring constitutional matters to the High Court. A further remedy is provided for under s.123(2) of the constitution which lays down that

"Notwithstanding subsection (1), the powers of the office of ombudsman under this section shall not oust the jurisdiction of the courts and the decision and exercise of powers by the ombudsman shall be renewable by the High Court on the application of any person with sufficient interest in a case the ombudsman has determined."

The modern use of declaratory actions against public authorities is rooted in the

English case of Dyson -v- Attorney General (1911),, 1 410, which dealt with property rights for the protection of which a remedy could be granted. Declaratory judgments spring from equitable jurisdiction so . that the limitations laid down in the case of Boyce - v Paddington Borough Council 88 (1903),f 1 Ch. 109, apply. The limitations are that a special private interest or injury must be proved. In UDF -v- Attorney General (Civil Cause No. 11 of 1994), Chatsika, J. also applied this very principle when considering the circumstances when a declaratory judgment may be granted by observing that

"A person who has no interest in the matter has no right to ask a court to make a declaration on the matter. It would be a departure from established principles to do so."

Now, what are these established principles? In Re Barnato (1949) 1 All ER 515, at page 520, Cohen, L.J. stated these principles thus

"I would add that one of the cases to which, the learned judge referred in the court below, the decision in Re Clay (1919) 1 Ch. 66; 119L.T. 754, seems to show that there would be no jurisdiction to make a declaratory order in a case of this kind as between subject and subject. In that case, the plaintiffs sought to obtain the decision of the court whether they were liable under a deed of indemnity to the defendant. No question of construction arose, and the defendant had, in fact, made no claim. All he had done was to reserve his rights, whatever they might be. The effect of the decision is sufficiently summed up in two short passages, the first from the judgment of Swinfen Eady, M. R., where he said (1919) 1 Ch. 7 8):

“And it is not open to a person, certainly to one against whom no claim in fact has been made, to cut the matter short by bringing an action at his own option, and saying: I wish to have it determined that you have no claim whatever against me.”

The second is from the judgment of Eve J. (ibid., 79) and is:

"So soon as it was demonstrated that no specific right had been asserted and no claim formulated, the court had, in my opinion, no jurisdiction to deal with the petition in the way in which it had been dealt with"

This appeal succeeds with costs.

Chatsika, JA

I had the opportunity of reading the opinions of my two bothers with which I fully concur and I have nothing useful to add. I would, therefore, allow the appeal.

DELIVERED in open court this 20th day of November 1995, at Blantyre.

Sgd ....

H M MTEGHA, J.A.

Sgd ....

J B KALAILE, J.A.

Sgd ....

L A CHATSIKA, J.A.