



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
ELECTION CASE No. 3 OF 2014

IN THE MATTER OF REFERRAL BY THE ELECTORAL COMMISSION

In matter between:

THE ELECTORAL COMMISSION

REFERRING AUTHORITY

and

Dr. SAMUEL DUMBA SAFULI

RESPONDENT

RULING

nyaKaunda Kamanga, J.

In a letter addressed to the Registrar of the High Court dated 12 March 2014, the Electoral Commission has referred its decision rejecting Dr. Safuli's nomination to contest as a parliamentary candidate sponsored by the People's Party for Nsanje Central constituency to the High Court for hearing in terms of s 40(1) of the Parliamentary and Presidential Elections Act.¹ The abovementioned statutory provision confers jurisdiction on the High Court to determine an election dispute pertaining to the rejections of nominations.

The date stamp from the Registrar's office indicates that the abovementioned referral letter and the supporting documents were received by his office on the 17 March 2014. When the Judge in Charge of the High Court of Malawi, Principal Registry, was allocating the matter he indorsed on the said letter that this court should 'act on this matter, remembering the need for dispatch and the summary powers under the section'. Indeed timeliness in handling electoral disputes is of essence under Practice Direction No. 2 of 2009.² Accordingly, on 17 March 2014 this court gave initial directions that the

¹ Act 31 of 1993, chapter 2:01 of the Laws of Malawi.

² Issued on 6 February 2009. On Abridgement of Time Periods in Cases of Election Petitions and Other Complaints Under the Parliamentary and Presidential Elections Act.

matter should be set down for hearing on Thursday the 20 March 2014 and that the Electoral Commission and the Dr. Safuli should file their skeleton arguments by 16:00 hours on Wednesday the 19 March 2014. This court commends both counsel representing the referring authority and the respondent for complying with those directions and in conducting themselves in a time conscious manner during these proceedings. This court has also found the skeleton arguments that were filed in advance of the hearing very helpful and have been referred to in this decision.

This court in considering the referral matter will outline the issues and the legal framework before considering the affidavit evidence and determining the issues in this pre – election dispute.

The Issues

The factual issues relating to the pre-election dispute are contained in the two affidavits that have been filed in this matter by both the referring authority and the respondent. The gist of the argument of the Electoral Commission is that the respondent is a civil servant as he is in the employ of the Mzuzu University, a creature of statute and one of the functions of government, and is therefore a holder of a public office. The referring authority contends that since the respondent merely took a leave of absence, which is not the same as resigning, from his post as lecturer he did not satisfy the requirements of s 51(2)(e) of the Constitution as at the time of presenting his nomination papers he was, and still is, in the employ of the Mzuzu University.

The respondent is dissatisfied with the decision of the electoral body and contends that the Constitution does not designate the position of a lecturer at the Mzuzu University or a member of staff as a public officer or a civil servant. The respondent submits that the Mzuzu University is not a public office or in the category of civil service as provided in the Constitution or any other legislation. The counsel for the respondent asserts that if the court should find that the lecturer is a public officer then the leave of absence which the respondent obtained creates a resignation.

An examination of the affidavit evidence, the skeleton arguments that have been filed by both sides as well as the oral submissions demonstrate that there are three main issues that this court has been called upon to determine: first, whether or not the respondent by being a lecturer at the Mzuzu University is a public officer, secondly, whether or not the respondent can be said to have resigned from the Mzuzu University by taking leave of absence and lastly the costs occasioned by this pre-election dispute.

The relief that the referring authority seeks is for this court to maintain its decision while the respondent requests this court that the decision of the

Electoral Commission rejecting his nomination forms be quashed. The Electoral Commission has a burden to adduce evidence on a balance of probabilities proving that the respondent was wrongly nominated and that he cannot stand as a parliamentary candidate in the coming general elections.

The legal framework

The law that should determine the framework and approach of this pre-election dispute is the Constitution, several statutes and case law discussed below, most of which were cited to by the counsel for the parties. That the Constitution is the supreme law of this country must inform any decision of this court. The relevant provision in the Constitution with respect to the eligibility of member of parliament is s 51(2)(e) of the Constitution. The abovementioned constitutional provision on qualifications of members of Parliament states as follows:

‘ (2) Notwithstanding subsection (1), no person shall be qualified to be nominated or elected as a member of Parliament who—
 13 of 2001(e) 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 office or appointment or where that person resigns from that office or appointment in order to stand;’

The legislature enacted the Parliamentary and Presidential Elections Act³ in order to ensure that the Electoral Commission conducts elections for members of Parliament in accordance with the framework established in the Constitution. The rejection of nominations papers is provided under s 40 of the Parliamentary and Presidential Elections Act.⁴ The provision lists several grounds under which after the close of the period allowed for nominations but before the polling day, the returning officer may reject the nomination of a candidate.

I now refer to the statute of General Interpretation⁵ that define public office as the meaning of this term is an issue in these proceedings. Section 2 of the General Interpretation Act⁶ defines “public office” as ‘any office the holder of which is invested with or performing duties of a public nature’ while “public officer” is defined as ‘a person holding or acting in any public office’. Public office has been broadly defined under the General Interpretation Act⁷ and the Public Service Act⁸ offers no definition. As the Supreme Court of Appeal, hereinafter SCA, observed in the case of *Simwaka v The Attorney-General*⁹ ‘the Public Service Act does not define a public servant, a public officer or a civil

³ Act 31 of 1993, chapter 2:01 of the Laws of Malawi.

⁴ Act 31 of 1993, chapter 2:01 of the Laws of Malawi.

⁵ Act 36 of 1966, Chapter 1:01 of the Laws of Malawi.

⁶ Act 36 of 1966, Chapter 1:01 of the Laws of Malawi.

⁷ Act 36 of 1966, Chapter 1:01 of the Laws of Malawi.

⁸ Act 19 of 1994, Chapter 1:03 of the Laws of Malawi.

⁹ [2004] MLR 349 (SCA).

servant. There is no doubt however, that the Act applies to a civil servant.¹⁰ Section 15 of the Public Service Act¹¹ may render some guidance in that it provides for the constitution and abolition of public offices in the following words:

- (1) ‘Subject to the Constitution and to any other written law, the power to constitute or abolish public offices and to designate the titles thereof shall be exercised by the Minister by order published in the Gazette.’

Under the Public Service Act¹² a public office is constituted by order published in the Gazette. In *Mchawi v Minister of Education, Science and Technology*¹³ the court stated that

‘public servants have their own conditions of service and public service regulations which regulate and guide their duty performance and conduct from day to day under the control of the Public Service Commission. On matters of misconduct and discipline they have their set rules under the public service regulations which must be followed by all. The machinery is all in place and is controlled by the Public Service Commission which holds the power to hire and fire public servants.’

The position of public officers under the law is explained in several cases that have come before the court in this country. In the case of the *President of Malawi and another v Kachere and others*¹⁴ the court highlighted that

‘even in the present Constitution a “public officer” 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...’¹⁵

In the case of *Nseula v Attorney General and another*¹⁶ the High Court, in considering whether or not a cabinet minister is a public officer, was of the opinion that:

‘I think the phrase “public office” must be given its ordinary meaning. I do not agree with the suggestion that only those that have been declared to be, are public offices. It may be necessary to specifically declare some. It does not follow however that the rest of the public offices should be spelt out. The Constitution has not said that they are public offices only those that have been so declared. The phrase “public office” must

¹⁰ [2004] MLR 349 (SCA) at 354.

¹¹ Act 19 of 1994, Chapter 1:03 of the Laws of Malawi.

¹² Act 19 of 1994, Chapter 1:03 of the Laws of Malawi.

¹³ [1999] MLR 167 (HC).

¹⁴ [1995] 2 MLR 616 (SCA).

¹⁵ [1995] 2 MLR 616 (SCA) at 621-622.

¹⁶ [1997] 2 MLR 294 (HC).

therefore be given its ordinary meaning. In light of the cases referred to anybody is a public officer who is paid from national funds, and does duties conferred on him by the Constitution or legislature. The office must exist by force of the Constitution or legislation. The public office in point must be permanent and not temporal and ad hoc. The officer must exercise some aspect of sovereign functions. Under this definition the President and members of his cabinet are public officers.¹⁷

The SCA in *Nseula v Attorney General and another*¹⁸ over ruled the decision of the lower court in *Nseula v Attorney General and another*¹⁹ and settled the meaning attributed to the term public office. Having noted that the Constitution has not defined the word “public office” the SCA referred to ss75(2) and 98(5) of the Constitution in order to discover the meaning which Parliament intended to ascribe to the term public office. The SCA was of the considered view that

‘We find the provisions of section 75(2) and section 98(5) of the Constitution rather instructive. It is our view that section 98(5) makes very clear that the office of the Attorney-General can either be the office of a Minister and therefore political or it can be a public office. “Public office” in this context can only mean the office in the civil service, thereby making a distinction between a political office and a civil service one. Similarly, section 75(2) makes a distinction between a political office and civil service office’.²⁰

After the SCA had applied the test that establishes the essential characteristics of a public office they reached the conclusion that a cabinet minister is not a public office. The court made the following pertinent decision,

‘We have considered the Constitution as a whole and have looked at the use of the word “public office” where it appears in several sections. We are satisfied that having regard to the tradition and usages which have been given to the meaning of the word “public office” the interpretation which should be given to its use in the Constitution is in the strict sense of “public office” in the civil service. The “public office” does not connote “any public office of whatever description” as the Judge in the lower Court finds. It is too wide and it is not correct and certainly it is not in the manner in which it is used in the Constitution.’²¹

Earlier this week the High Court of Malawi, Principal Registry, delivered two decisions on a similar issue to the present matter, these are, the matters of *Malawi Electoral Commission v Mathews Ngwale*²² and *In the matter of referral by the Malawi Electoral Commission v Dr. Jessie Kabwila*.²³ As of today I have only accessed a document on the latter case which is called a “Press Release” and I have failed to access the ruling because I am informed that the Honourable Judge who delivered it has not yet perfected the decision and is currently out of town on duty. Unfortunately, I am constrained from referring to the ruling of *In*

¹⁷ [1997] 2 MLR 294 (HC) at 313.

¹⁸ [1999] MLR 313 (SCA).

¹⁹ [1997] 2 MLR 294 (HC).

²⁰ [1999] MLR 313 (SCA) at 326.

²¹ [1999] MLR 313 (SCA) at 328.

²² HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014).

²³ HC/PR Misc Election Petition No. 2 of 2014 (unreported 26 March 2014).

*the matter of referral by the Malawi Electoral Commission v Dr. Jessie Kabwila*²⁴ in this decision. Only to note that the press release indicates that the

‘High Court determined that Dr. Jessie Kabwila was a public officer under section 51(2)(e) of the Constitution and since her permission for leave of absence under the statutes and conditions of the University of Malawi was without assurance of return, Dr. Jessie Kabwila was not in the employment of the University of Malawi and was not, therefore, holding or acting in a public office. The High Court held that the Electoral Commission was right that Dr. Kabwila, as academic staff of a public constituted university, created by and under an Act of Parliament and financed by government and public funds, was a civil servant and, therefore, in public office under the Constitution’.²⁵

However, the court has benefitted from the decision of the High Court in the *Malawi Electoral Commission v Mathews Ngwale*²⁶ which was delivered on Monday this week. After considering the judgment in *Nseula v Attorney General and another*²⁷ the High Court in the case of the *Malawi Electoral Commission v Mathews Ngwale*²⁸ made a finding ‘that the word public office when used in the Constitution connotes public office in the civil service as decided by the Malawi Supreme Court of Appeal in its decision that has a binding effect on this Court.’²⁹ Further, the court was of the view that the University of Malawi was not an administrative branch of government and could not therefore be part of the civil service.³⁰ After noting the restricted scope of the word civil service as compared to the word public service the judge was of the considered opinion that

‘...the membership of the civil service is restricted to Departments of Government. Clearly, the University of Malawi is not a Department of Government for one to consider its members of staff as civil servants or service in the University of Malawi as civil service. I would add that by analogy one would consider a Crown servant to be akin to a public servant employed by the State in Malawi and holding public office. Within the category of public servants holding public office we have a sub category of civil servants in the civil service. Employees of the University of Malawi may be public servants holding public office, being servants of a public body, but they cannot certainly be called civil servants or be considered to be in the civil service.’³¹

The grounds upon which the referral is founded and the determination of the issues

As has already been mentioned, after rejecting the nomination papers of the respondent the Electoral Commission lodged a statement and a bundle of nomination documents with the court in conformity with s40(1) of the

²⁴ HC/PR Misc Election Petition No. 2 of 2014 (unreported 26 March 2014).

²⁵ A Press Release in HC/PR Misc Election Petition No. 2 of 2014 (unreported 26 March 2014).

²⁶ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014).

²⁷ [1999] MLR 313 (SCA).

²⁸ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014).

²⁹ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014) at 6.

³⁰ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014) at 7.

³¹ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014) at 8.

Parliamentary and Presidential Elections Act.³² In addition, the referring authority has filed an affidavit in the present matter which was sworn by the institution's Senior Electoral Services Officer (Legal and Administration), Mr. King Norman Rudi. The affidavit describes the processes that were undertaken by the referring authority in order to ascertain the employee status of the respondent. Mr. Rudi deposes from paragraph 4 of the said affidavit as follows:

4. 'THAT by letter dated 28th February, 2014 we wrote to the University Registrar of Mzuzu University enquiring about the employee status of the Petitioner.
5. THAT the university Registrar by letter dated 11th March 2014 informed us that the petitioner was on prolonged annual leave until 5th March, 2014 when he applied for unpaid leave of absence. Exhibited herewith is a copy of the said letter marked "KNR"
6. THAT the petitioner at the time of his nomination papers was still a lecturer at the Mzuzu University but was on prolonged leave and applied for and was granted leave of absence from the college after presenting his nomination papers but he did not resign from the post.'

The Electoral Commission's legal analysis to justify the decision to reject the nomination papers of the respondent are contained in the skeleton arguments and were expounded upon during the oral submissions. The referring authority contends that although 'a public office may be defined as any office the holder of which is invested with or performing duties of a public nature and of public officer may be said to be holding or acting in any public office' the definition is not as simplistic at law. The referring authority posits the High Court decision in the case of *Nseula v Attorney General and another*³³ to argue that there are several elements indicative of what constitutes a public office. The referring authority contends that other jurisdictions have defined what a public office is through case law. The foreign case law being referred to by the electoral body are the foreign judgments that are cited in the High Court judgment of *Nseula v Attorney General and another*.³⁴ The referring authority has extracted the characteristics of public office from the case of *State v Taylor*³⁵ to be as follows:

1. 'The position must be created by the constitution or legislature
2. A portion of the several power of government must be delegated to that position.
3. The duties and powers must be defined, directly or implied, by the legislature or through legislative authority.
4. The duties must be performed independently and without control of a superior power other than law.
5. The position must have some permanency and continuity, and not only temporary and occasional.'

³² Act 31 of 1993, chapter 2:01 of the Laws of Malawi.

³³ [1997] 2 MLR 294 (HC).

³⁴ [1997] 2 MLR 294 (HC).

³⁵ 260 Iowa 634, 144 N.W. 2d 289,292.

The referring authority posits the SCA decision in the case of *Nseula v Attorney General and another*³⁶ and states that the Supreme Court of Appeal reiterated the sentiments of the High Court in the case of *Nseula v Attorney General and another*³⁷ by stating that

‘there is no doubt in our view that a “public office” must have some permanency or continuity of service. There must be a fixed term of office.’

The counsel for the referring authority points out that the SCA decision in the *Nseula v Attorney General and another*³⁸ differed with the decision of the High Court in *Nseula v Attorney General and another*³⁹ in that the SCA restricted the connotation of public office to civil service. The referring authority submits that the SCA *Nseula v Attorney General and another*⁴⁰ did not define what is meant by civil service in the abovementioned judgment. The referring authority argues that according to Black’s Law Dictionary civil service relates to all functions under the government except military functions. The observation of this court is that the dictionary is a useful tool but it will only provide the day to day legal meaning of particular words and as a precaution that such definition should be weighed against the relevant legislation which would help to guide us on the intention of the legislature.

It is the opinion of the referring authority that the Mzuzu University is one of functions of government particularly under the Ministry of Education and therefore it is in civil service and as such the staff of the University are civil servants. The referring authority asserts that following from the *Nseula cases* and the essential characteristics of a public office provided therein, the posts of lecturer are conferred by law as they are members of the academic staff of the Mzuzu University. The referring authority contends that by virtue of being a member of the academic staff of the Mzuzu University, a creature of statute and one of the functions of the government, lecturers are in the civil service and therefore holders of public offices.

The respondent having been dissatisfied with the decision of the Electoral Commission in rejecting his nomination papers on 14 March 2014 he indicated on exhibit SS3 his intention to appeal against the decision of the electoral body. The full facts are set out in an affidavit that the respondent prepared and filed in support of the fact that he is not a public officer. The respondent deposes from paragraph 4 of his affidavit as follows:

³⁶ [1999] MLR 313 (SCA).

³⁷ [1997] 2 MLR 294 (HC).

³⁸ [1999] MLR 313 (SCA).

³⁹ [1997] 2 MLR 294 (HC).

⁴⁰ [1999] MLR 313 (SCA).

4. 'I have been working with Mzuzu University since March 2008 as a lecturer until when I applied for UNPAID LEAVE OF ABSENCE early, February, 2014 in order to contest as a Parliamentary candidate for Nsanje Central.
5. Prior to joining the Mzuzu University, I worked as civil servants in the Ministry of Education from 1974 to 1984.
6. UNPAID LEAVE OF ABSENCE in the Mzuzu University is just as good as resignation and a person in that status is free to take any public service or appointment. See the copy marked SS1 of conditions of services attached particularly section D.18 titled LEAVE OF ABSENCE TO ACCEPT PUBLIC OFFICE
7. In that status, I do not hold or act in any public office or appointment or get any benefit from public office.
8. The Registrar of Mzuzu University categorically communicated to the Electoral Commission this status quo that am no longer affiliated to the Mzuzu University and free to apply for a public service.
9. I submitted my nomination papers to the Malawi Electoral Commission.
10. On 4th March, 2014 got communication per section 41A of the Parliamentary and Presidential Act that I have been validly nominated for election as Member of Parliament. See the copy of the communication marked SS2
11. However, on the 14th March, 2014 I got a letter, dated, 12th March, 2014 from the Electoral Commission that my nomination has been rejected on the ground that I am a public servant. See the copy of the letter marked SS3.
12. As the acceptance signed by the Chairperson, His Lordship Justice Maxon Mbendera SC dated 28th February, 2014 came before the letter of rejection dated 12th March, 2014 I presume the mistake or an oversight was corrected.
13. I state, with emphasis, that am not a public servant and nomination papers have been condemned without being given an opportunity to be heard.
14. I do solemnly, sincerely and truly declare and affirm that information given above is the truth, the whole truth and nothing but the truth AND I MAKE this solemn declaration, conscientiously believing the same to be true and by virtue of the Oaths, Affirmations and Declaration Act.

Therefore: I request the Malawi Electoral Commission to accept my nomination forms or maintain me on the list of validly nominated parliamentary candidates by the Chairperson, His Lordship Justice Maxon Mbendera SC dated 28th February, 2014.'

The respondent, on the other hand, contends the opposite by arguing that the Constitution does not designate the position of a lecturer at the Mzuzu University or a member of staff as a public officer. The respondent asserts that such position was rejected in the decision of the Malawi Supreme Court of Appeal in the case of the *President of Malawi and another v Kachere and others*.⁴¹ It is the opinion of the respondent that in the present matter, there is no any provision in the Constitution which creates the Mzuzu University as a public office such that the holders or actor in that capacity are public officers. According to the respondent the Mzuzu University Act establishes the university as a body corporate. It is contended by the respondent that if the contrary was intended, the university would have been established as a public office. Further, the respondent argues that in the cases of *President of Malawi and another v*

⁴¹ [1995] 2 MLR 616.

*Kachere and others*⁴² and *Nseula v Attorney General and another*⁴³ the Supreme Court of Appeal stated that the interpretation which the word public office ‘should be given to its use in the Constitution is in the strict sense of “public office” in the civil service’.

The respondent argues that the Electoral Commission was wrong to hold that the position of the lecturer at Mzuzu University is a public office. The respondent’s view is that if the intention of Parliament was to make the Mzuzu University a public office, that intention would have been provided for in the Constitution or in the Mzuzu University Act. Further, the counsel for the respondent asserts that Mzuzu University lecturers are not the category of civil servants who are controlled by the Malawi Public Service Regulations as they have their own Conditions of Service. The respondent propounds the judgment of the Supreme Court of Appeal in the case of *Nseula v Attorney General and another*⁴⁴ to assert that it is an elementary principle of interpretation which is encapsulated in the maxim *expressio unius est exclusio alterius* - the expression of one thing implies exclusion of other things or person- that something which is excluded cannot be implied into an express provision.

Determination of issue one: whether or not the respondent by being a lecturer at the Mzuzu University is a public officer

Since elections are of interest not only to the respondent, but also to the voters and the public at large it was critical that the Electoral Commission be certain of the employment status of the respondent before it included his name in the published list of parliamentary candidates, which appears as exhibit marked SS2. The evidence shows that the nomination period was between 10 February and 14 February 2014.⁴⁵ The respondent presented his nomination papers on 13 February 2014.⁴⁶ An examination of the respondent’s nomination papers which were accepted by the referring authority on 13 February 2014 shows that the respondent gave two contact details:⁴⁷ the residential address is indicated at Dumba Village, T/A Tengani in Nsanje district while his postal address is indicated as Mzuzu University, P/Bag 201, Luwanga, Mzuzu 2. In regard to qualifications for nomination the respondent declared before a commissioner for oaths on 9 February 2014 that he does ‘not work in the civil service’.⁴⁸

In terms of s 41A of the Parliamentary and Presidential Elections Act the Electoral Commission had 14 days after receiving the nominations to verify and publish the list of validly nominated candidates for the general election as

⁴² [1995] 2 MLR 616.

⁴³ [1999] MLR 313 (SCA).

⁴⁴ [1999] MLR 313 (SCA).

⁴⁵ Exhibit marked SS2 at 1.

⁴⁶ Page 1 of the nomination form attached to the referral letter.

⁴⁷ Page 3 of the nomination form attached to the referral letter.

⁴⁸ Page 5 of the nomination form attached to the referral letter.

members of Parliament. The issuing of a list of validly nominated parliamentary candidates on 28 February 2014 and its publication on 4 March 2014 which activities were followed by the issuing of a rejection letter to the respondent in less than two weeks⁴⁹ after the publication, has the potential to raise questions as to the integrity and efficiency of the electoral process, which is being conducted by the referring authority. Especially in a situation where the Electoral Commission has not given a reasonable, if any, explanation to the court as to why they delayed in inquiring from the Mzuzu University about the employee status of the respondent.

Although s 40 of the Parliamentary and Presidential Elections Act authorises the Electoral Commission to reject the nomination papers of a candidate at any time before polling day, if the Electoral Commission receives any evidence that the candidate was wrongly nominated, the letter of inquiry to the University of Mzuzu⁵⁰ should have been done in a timely manner and definitely before the publication of the names of validly nominated candidates. The electoral body had the responsibility to scrutinise the nomination papers in a timely manner to ensure that the candidates conformed to the requirements of the Constitution and other laws and that they were qualified for nomination as candidates for members of Parliament. There is no evidence before this court as to what prompted the Electoral Commission, which has been entrusted to conduct the tripartite elections, to act in this discordant manner on 28 February 2014 by including the respondent on a list of validly nominated candidates and on the same day searching for evidence in regard to his employment status by sending a letter of inquiry to the Mzuzu University. Understandably, it is this situation which led to the respondent to wondering whether the electoral body had made a mistake in issuing a rejection letter to him.⁵¹ The manner in which the respondent's nomination papers have been managed casts doubts on the electoral body's capability to discharge its duty of verifying nominated candidates in an efficient and effective manner before their names are gazetted.

On the basis of exhibit marked "KNR" the referring authority are arguing that the respondent is a civil servant and therefore a holder of public office, which argument is denied by the respondent. Apart from satisfying the several elements indicative of what constitutes a public office as argued by the counsel for the referring authority, it is well established that organs of state and institutions that performs or exercises public power would fall within the meaning of public office. In other jurisdictions the approach taken in administrative law to determine whether an institution is a public or private body is to satisfy the test whether the body is subject to judicial review: *M & G*

⁴⁹ On 12 March 2014.

⁵⁰ Refer to paragraph 4 of the affidavit of Mr. Rudi.

⁵¹ Refer to paragraph 12 of the affidavit of Dr. Safuli.

Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another.⁵² Being a public body therefore depends on the nature of the powers and functions that an institution performs in terms of any legislation.⁵³

Bearing in mind that the judgment of the SCA in *Nseula v Attorney General and another*⁵⁴ settled the meaning of the term public office, as referring to civil service, this court being subordinate to the SCA is bound by that decision and thereby constrained from conducting a test to determine whether or not the Mzuzu University is a public office. Until the SCA has an opportunity to reverse itself on the meaning of the term public office or the High Court is courageous enough to effectively distinguish the case of *Nseula v Attorney General and another*,⁵⁵ the High Court has to uphold legal principles and follow the *ratio decidendi* of the SCA in its narrow interpretation of the term public office.

The question we need to pose then is in regard to the definition of the term civil service which was introduced by the SCA in the judgment of *Nseula v Attorney General and another*.⁵⁶ In this matter we need to know whether the lecturers of Mzuzu University fall under the operations of the Civil Service Commission which is established under chapter 20 of the Constitution whose operations are bound and guided by the provisions of the Public Service Act? An examination of the law reveals that the Mzuzu University is a creature of statute established under s 3 of the Mzuzu University Act.⁵⁷ The Council of the University as the governing body of the Mzuzu University is a body corporate with perpetual succession and a common seal and capable of suing and being sued.⁵⁸ If the Mzuzu University was in civil service as a public office, as contended by the electoral body, then it would be sued through the office of the Attorney General in compliance with the Civil Procedure (Suits by or against the Government or Public Officers) Act. What is coming out clear from the submissions is that the Mzuzu University has its own conditions of service and that the Public Service Act has no application to those persons employed in the Mzuzu University.

The term public office could be wider in scope than the term civil service, as noted in the case of the *Malawi Electoral Commission v Mathews Ngwale*.⁵⁹

⁵² (2011) (5) SA 163 (GSJ) [2010] ZAGPJHC available at <http://www.saflii.org/za/cases/ZAGPJHC/2010/43.pdf>, accessed on 26 March 2014 at 50.

⁵³ (2011) (5) SA 163 (GSJ) [2010] ZAGPJHC available at <http://www.saflii.org/za/cases/ZAGPJHC/2010/43.pdf>, accessed on 26 March 2014 at 52.

⁵⁴ [1999] MLR 313 (SCA).

⁵⁵ [1999] MLR 313 (SCA).

⁵⁶ [1999] MLR 313 (SCA).

⁵⁷ Act 12 of 1997, chapter 30:09 of the Laws of Malawi.

⁵⁸ ss 8, 9 and 10 of the Mzuzu University Act.

⁵⁹ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014) at 30.

If this court were to accept the arguments of the referring authority the danger is that it leads to net-widening and one of the consequence will be that ‘enlarged meaning has the effect of bringing within a definition something that would not ordinarily have been included...’: *Sabwera and another v Attorney-General*.⁶⁰ This is the negative outcome that the case of *President of Malawi and another v Kachere and others*⁶¹ highlighted against. This court is not persuaded by the reasons advanced by the referring authority for arguing that the respondent as a lecturer at the Mzuzu University is a public officer in terms of the definition of “public officer” according to its interpretation of that term by the SCA in *Nseula v Attorney General and another*.⁶² This court is inclined to follow the explanation of civil service advanced by the High Court in the case of the *Malawi Electoral Commission v Mathews Ngwale*.⁶³ Considering our case law, there is merit in the finding in the abovementioned case that university lecturers are not civil servants although they are employees of a public body.

The allegation that the respondent is a civil servant and therefore a public officer has not been proved. This court therefore finds that the respondent as a lecturer at the Mzuzu University is not a civil servant as argued by the counsel for the referring authority.

Determination of issue two: whether or not the respondent can be said to have resigned from the Mzuzu University by taking leave of absence

The referring authority asserts that s 51(2)(e) of the Constitution requires that holders of public offices, such as the respondent, must first resign before being nominated or elected as a member of parliament. According to the referring authority resignation is not the same thing as taking leave of absence for the following reasons. Leave of absence entails a real possibility of return to employment whilst by resignation an officer renounces the further exercise of his office. After examining the Conditions of Service that govern the employment of the respondent, such as regulation number D.18.5, the referring authority are of the opinion that the Conditions of Service make a clear distinction between leave of absence and resigning. In that with leave of absence the respondent’s position with the university is still secure in that he can still return to his post and he continues to benefit from the system through the accumulation of pension. The Electoral Commission submits that it correctly rejected the respondent’s nomination papers as a candidate for member of Parliament for Nsanje central constituency.

The respondent submits that if the court is of the view that a lecturer is a public officer, then the leave of absence as provided in section D.18 of the

⁶⁰ [2004] MLR 315 (HC) at 344.

⁶¹ [1995] 2 MLR 616 (SCA).

⁶² [1999] MLR 313 (SCA).

⁶³ HC/PR Misc Election Petition No. 5 of 2014 (unreported 24 March 2014).

Mzuzu University's Condition of Services coupled by the Registrar's explanation creates a resignation. The respondent states that with leave of absence, the employee does not get salary or any benefit from the University and the University allows that person to take position in public office. In addition, the respondent submits that this is a human rights issue where the substance should be of paramount importance. It is the view of the respondent that the date of obtaining the said leave of absence should be considered by the court in the internal administrative procedures of the institution. The respondent contends that the Chairperson of the Electoral Commission communicated through a newspaper, exhibit marked SS 2 that the respondent was validly nominated, on the 4 March 2014. The respondent contends that at this juncture it is necessary for the Electoral Commission to follow principles enunciated in s43 of the Constitution by giving him an opportunity before being condemned. The respondent contends that the referring authority violated s 43 of the Constitution.

Black's Law Dictionary⁶⁴ defines resignation as 'the act by which an officer renounces the further exercise of his office and returns the same into the hands of those from whom he received it'. On the other hand leave of absence is the term that applies to a temporary absence away from work due to a long illness or a holiday. This court agrees with the exposition of the referring authority that the respondent had not resigned from his office. There is indeed a conceptual difference between the terms leave of absence, which entails a real possibility of return to employment, and resignation which results in the termination of the employment at the instance of the employee. If such were not the case the Conditions of Service of the Mzuzu University would not contain regulation D.18.5 which requires a lecturer who is on leave of absence to accept public office to resign if such lecturer wants to continue in public office after a period of five years of leave of absence.

Determination of issue three: whether or not the respondent can be entitled to costs occasioned by these proceedings

Since the Parliamentary and Presidential Elections Act⁶⁵ has no provision in regard to costs, I take it that this would be in the discretion of the court. What is noted in this matter is that the issue of costs arose at the conclusion of the hearing and it was neither pleaded nor contained in the documents that were filed by either of the parties. The outcome of this matter also shows that issue one has been determined in favour of the respondent while the referring authority has succeeded on issue two, I therefore exercise my discretion and order that each party will bear its own costs.

⁶⁴ The Law Dictionary: Black's Law Dictionary - Free Online Legal Dictionary available at <http://thelawdictionary.org/resignation/> accessed on 26 March 2014

⁶⁵ Act 31 of 1993, chapter 2:01 of the Laws of Malawi.

⁶⁵ Act 31 of 1993, chapter 2:01 of the Laws of Malawi.

Conclusion

Considering the seriousness of a general election it is critical that the electoral disputes are handled in a manner that embodies fairness and legitimacy. It is the mandate of the court to ensure that the electoral laws are respected as the election process is an exercise that seeks to serve public interest and not necessarily benefit the respondent. Upon hearing both the counsel for the referring authority and the respondent, as well as evaluating the evidence in light of the law this court has reached the following findings: first, the nomination papers of the respondent met the requisite threshold as the respondent is neither a public officer nor employed in civil service; secondly, the respondent has not resigned from the Mzuzu University by taking leave of absence. However, having found that the respondent is not a public officer or employed in civil service his failure to resign from the University of Mzuzu is of no legal consequence in this electoral process.

Following this decision and in terms of s 40(4) of the Parliamentary and Presidential Elections Act⁶⁶ I direct that the returning officer of the Electoral Commission must reverse his decision and do accept the nomination papers of the respondent to contest as a parliamentary candidate sponsored by the People's Party for Nsanje Central constituency in the upcoming tripartite elections. It is further ordered that the original bundle of nomination papers that were submitted to the court with the referral letter should be returned to the electoral body to facilitate the compliance of this order before noon today and that the court should only retain on its case file a copy of those said documents.

Dated and delivered in open court at Chichiri, Blantyre
 this 28th day of March 2014.

Dorothy nyaKaunda Kamanga
 JUDGE

<i>Case information</i>	:	
Date of hearing	:	20 March 2014
Date of ruling	:	28 March 2014
Counsel for the Referring authority	:	Mr. Noel Chalamanda
Counsel for the Respondent	:	Mr. Christon Ghambi
Court Clerk	:	Mr. N. W. Phiri

⁶⁶ Act 31 of 1993, chapter 2:01 of the Laws of Malawi.