

The State (on the application of the Director of Public Prosecutions) v The Chief Justice of the High Court of Malawi)

Court:	High Court of Malawi
Registry:	Financial Crimes Division
Bench:	Honourable Justice R.E. Kapindu, PhD
Cause Number:	Judicial Review Cause No. 4 of 2025
Date of Judgment:	September 02, 2025
Bar:	Mr. K, Nyasulu, SC & Brig. Gen. G.D. Liwimbi (Rtd), Counsel for the Claimant Absent. and Defendant's Counsel.

Head Notes

Administrative Law – Judicial review – Certifying a matter as constitutional – Not a quasi-judicial or administrative act.

Civil Procedure – Certification – Chief Justice's act of certification under s 9(2) of the Courts Act is a judicial, not administrative, act.

Civil Procedure – Certification – Irregularity in certification proceedings should be addressed by the Chief Justice, not by way of judicial review.

Constitutional Law – Constitutional Matters – Jurisdiction – High Court trial judge's refusal to certify a matter does not preclude a party from directly seeking certification

from the Chief Justice.

Constitutional Law - Constitutional Matters - Jurisdiction - High Court's original jurisdiction over constitutional interpretation is not ousted by the existence of a constitutional panel.

Civil Procedure - Irregularity - Civil Procedure Rules - An allegation of irregularity in a judicial decision must be addressed to the same judge who made the decision.

Constitutional Law - Panel Composition - Courts Act - A trial judge's decision on a constitutional referral is not a final determination, as this authority is reserved for the Chief Justice

Summary

The Claimant, the Director of Public Prosecutions (DPP), sought permission to apply for judicial review of a decision by the Defendant, the Chief Justice, who had certified a criminal matter, *The Republic v Leston Mulli, Lloyd Muhara and Cliff Chiunda, Criminal Case No. 7 of 2024 in the High Court, Financial Crimes Division*, as one requiring a panel of not less than three judges under section 9(2) of the Courts Act. This certification occurred after the original trial judge had already determined that no constitutional issues were present and refused to make a referral. The accused persons in the criminal case had applied directly to the Chief Justice for certification without the involvement of the prosecution (DPP).

The Claimant (DPP) contended that the Chief Justice's certification was a procedural irregularity and that the matter was not a pure constitutional issue, but rather a fraudulent debt matter. It was argued that a direct application for certification by a party must follow a judicial process with notice and an opportunity for the other

parties to be heard, rather than being an ex parte administrative act. The Claimant further submitted that the Chief Justice, a single High Court judge, could not reverse the determination of another High Court judge and that the application was in substance an interlocutory appeal, which is impermissible in criminal cases. The Claimant sought leave to commence judicial review, among other grounds, on whether a direct application for certification requires proper commencement and service, the proceedings the Chief Justice had certified, and what specific constitutional questions were referred.

The application was dismissed by the Court. The Court reasoned that the Chief Justice's act of certifying a matter under section 9(2) of the Courts Act is a judicial, not an administrative, function. As the law vests exclusive and conclusive jurisdiction to make this determination in the Chief Justice, the decision is not amenable to judicial review. An allegation of procedural irregularity, such as the one raised by the Claimant, must be addressed to the very judge who made the decision, not through a parallel judicial review process. The Court thus found that the Claimant had not established an arguable case for judicial review, and accordingly, the application was refused. The Court made no order as to costs.

Legislation Construed

Statute

Constitution of the Republic of Malawi (s 9, 108)

Courts Act (Cap. 3:02) (s 9, 9(2), 9(3))

Corrupt Practices Act (s 25B(1), 35)

Penal Code (s 319A(d), 319B(1)(b), 404)

Supreme Court of Appeal Act (Cap. 3:01) (s 11, 21)

Subsidiary Legislation

Civil Procedure Rules (2017) (Order 2 Rule 1, Order 2 Rule 3(a), Order 5 Rule 1, Order 19, Order 19 Rule 2(4), Order 19 Rules 4 and 5, Order 19 Rules 6-7, Order 19 Rule 7, Order 19 Rule 20)

Judgment

1. This is the Court's Ruling following a without notice application brought by the Director of Public Prosecutions (DPP) (the Claimant). This Court has been invited to make an Order granting permission for the Claimant to apply for judicial review of a decision of the Honourable the Chief Justice of the Republic of Malawi (the Chief Justice)(the Defendant) to certify a matter as falling within the ambit of Section 9(2) of the Courts Act (Cap. 3:02 of the Law of Malawi).

2. By certifying the said matter, the Chief Justice has essentially expressed his satisfaction that the proceeding in relation to which the certification relates, namely, The Republic v Leston Mulli, Lloyd Muhara and Cliff Chiunda, Criminal Case No. 7 of 2024 in the High Court, Financial Crimes Division, is a proceeding that expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution.

3. On Friday, the 15th of August, 2025, this Court, being seized of the present matter,

directed that the matter should come with notice and be heard on 22nd August, 2025 at 10 O'Clock in the forenoon.

4. Regrettably, when Court convened on the return date, the Chief Justice was not represented. No Counsel from the Attorney General's Chambers, or at all, appeared and no reason was given for the absence. Whilst the Court does not wish to speculate on the reasons for the absence, it finds the absence to be unfortunate and regrettable. By directing a with notice hearing for an application for permission to apply for judicial review, which would ordinarily be decided upon without notice, the Court had desired, given the nature of the issues raised in the application, to draw from the benefit of comprehensively hearing representations from both parties before arriving at its decision. That opportunity is now no longer available to the Court on the issue.

5. The Claimant furnished proof of service on the Defendant. The proof of service, by way of return of service, had a date stamp of 19th August 2025, served on the Chief Justice's office through the Chief Registrar of the High Court of Malawi and Supreme Court of Appeal at Chichiri, Blantyre.

6. In the circumstances, notwithstanding the Defendant's absence, it remains the task of this Court to proceed, weigh the issues, facts and arguments advanced by the Claimant at this stage, and establish whether he has made an arguable case fit for further investigation at a full hearing of judicial review.

7. By way of background, the three accused persons in Criminal Case No. 7 of 2024, namely Mr. Leston Mulli, Justice Lloyd Muhara and Mr. Cliff Chiunda, were charged with various offences. I can do no better than to simply reproduce, verbatim, what the

claimant stated in the factual background to his application:

"5.Count 1 Conspiracy to Use Public Office for Advantage contrary to section 35 read with Section 25B(1) of the Corrupt Practices Act, in that the accused conspired together (and with the deceased Goodall Gondwe) to misuse high-level public offices (Treasury, President and Cabinet, and Chief Secretary) to benefit Leston Ted Mulli and Mulli Brothers Limited K10.5 billion in government funds.

6.Count 2 Conspiracy to Evade Liability contrary to section 404 read with Section 319B(1)(b) of the Penal Code in that the accused conspired to permanently evade repayment of a K5 Billion debt owed by Mulli Brothers Limited to Malawi Savings Bank through the execution of an illegal "Agreed Order".

7.Count 3 Conspiracy to Cause Loss and Damage by Fraudulent Means contrary to section 404 read with Section 319A(d) of the Penal Code in that the accused orchestrated a fraudulent scheme involving the merger of FDH Bank Limited and Malawi Savings Bank Limited resulting in the loss of Malawi Savings Bank and money worth K16.57 Billion, all property of Government."

8. It was thus alleged that the accused persons caused the preparation of an "agreed court Order" that stipulated the terms of repayment of the loan.

9. However, the prosecution argues that this document, namely the "agreed court Order", was in fact not an Order of the Court; and that it was neither issued nor signed

by the Court.

10. Further, the prosecution argues that the “agreed court Order” herein, was not signed by the Attorney General, nor by any person duly authorised on his behalf. Instead, the State submits, it bore the signatures of the Secretary to the President and Cabinet and the Secretary to the Treasury, and that neither of these two had the requisite legal authority to institute or settle court proceedings for and on behalf of the Government of Malawi.

11. The prosecution thus alleges in the criminal case to which the present application relates, that this purported “agreed court order” amounted to a fraudulent device intended to misrepresent the legal position and thereby to permit the unlawful deferral of repayment obligations. In oral argument, Senior Counsel Nyasulu stated that it was on this basis that Count 1 was framed, alleging fraud other than false pretences contrary to section 319A of the Penal Code. Observably however, in the documents filed, that count was Count 3 rather than Count 1.

12. The Claimant states that at the commencement of the trial, the accused persons herein applied to be discharged, contending that they were being prosecuted “for a debt” and that criminal proceedings could not lawfully be maintained against them for the non-payment of civil debts. In the alternative, the accused persons urged the Court to refer the matter to the “Constitutional Court” to determine whether the prosecution herein was for what was essentially a contractual debt, and thus contravening their right not to be imprisoned for inability to fulfill contractual obligations as guaranteed under Section 19(6)(c) of the Constitution. I must mention

here that the Court has put quotation marks around the term “Constitutional Court”, which the Claimant has used throughout his application, because, as this Court has observed on a number of occasions, reference to that term should only be considered loose, because strictly speaking, Malawi does not have a Constitutional Court. What is ordinarily referred to as the “Constitutional Court” is in earnest, the High Court of Malawi sitting on a constitutional matter with an increased panel of not less than three judges rather than by a single judge.

13. The Claimant states that when the application was brought before the trial Judge, the prosecution resisted the same. He states that the prosecution submitted that the accused persons herein were not being prosecuted for the mere owing of a debt. Rather, that they were being prosecuted for fraudulent conduct whose aim was to defeat or delay repayment of the debt.

14. After hearing arguments from both parties, the Claimant states, the trial (original) Court upheld the prosecution’s submissions, and determined that no constitutional issue meriting a referral of the matter to the Chief Justice for certification as a constitutional matter had been made out, and thus the said Court refused to make the requested referral. The trial Judge held that the matter was a pure criminal matter.

15. At the subsequent hearing of the case, however, the 1st accused person tendered before the Court a certificate issued by the Honourable the Chief Justice, certifying the matter as one that fell within the ambit of Section 9(2) of the Courts Act, and hence to be heard and disposed of by not less than three High Court Judges. The Chief Justice’s

certificate bore the designation “Reference No. 6 of 2025”, but it also described the same matter as “being criminal case number 7 of 2024.” The original Court accordingly adjourned the proceedings sine die, pending determination of the matter by a panel of not less than three judges to be constituted for the purpose.

16. Senior Counsel Nyasulu for the Claimant raised a number of issues in support of the application for permission to apply for Judicial Review herein. Senior Counsel argued that it was the act of certification by the Chief Justice that forms the basis of the present application by the Claimant for judicial review.

17. Firstly, Senior Counsel raised the question of whether the Chief Justice had certified the trial proceedings themselves, that is to say criminal case number 7 of 2024, or whether he had certified a separate reference proceeding, namely Reference No. 6 of 2025. He submitted, in this regard, that the CPR, 2017, particularly under Order 19 thereof, clearly delineate the process by which matters are certified for determination by the “Constitutional Court”. He contended that there is a fundamental distinction to be drawn between the original proceedings before the trial court and the separate reference proceedings before the Chief Justice. Senior Counsel submitted that certification by the Chief Justice is not directed at the original proceedings, which are separate, but rather at the reference proceeding initiated either by referral from a court or by referral from the President, in which the specific constitutional questions are identified for determination by the “Constitutional Court”.

18. Senior Counsel however conceded, upon being engaged by the Court, that in the present case, the certificate issued by the Chief Justice described the proceeding both

as Reference No. 6 of 2025 and as being “Criminal Case No. 7 of 2024,” thus suggesting that the two are one and the same proceeding. Senior Counsel Nyasulu proceeded to argue however, that combining the two was not in the spirit of Order 19, since a criminal trial cannot itself be the subject of certification but that rather, it is the specific constitutional question identified in a referral that falls for certification.

19. Senior Counsel also conceded that section 9 of the Courts Act does not limit applications for certification exclusively to referrals made by the court or by the President. He acknowledged that a party to any proceedings may apply directly to the Chief Justice for certification of a matter. However, in such a case, the Claimant argued, the normal procedure for commencing proceedings, as prescribed by Order 5 of the CPR, 2017, must be followed. This, he contended, entails filing summons as the originating process, serving the same on the other party or parties to the original proceedings, and affording them an opportunity to respond.

20. The Claimant went on to argue that such procedural safeguards are essential in order to ensure fairness, particularly where the issues arise in a criminal trial, since the prosecution has an obvious and direct interest in the constitutional questions that are said to arise.

21. In the present instance, the Claimant stated that he (the Claimant) had not been served with any application for certification. He contended that the Chief Justice proceeded to issue the certification without the involvement of the prosecution. This, it was submitted, constituted a procedural irregularity and that it as was contrary to the interests of justice.

22. Senior Counsel then sought to distinguish between two types of certification, namely:

- 1) Certification arising from a referral by a court or by the President, which is governed by Order 19, Rules 6-7 of the CPR, 2017, and which, he argued, may properly be characterised as an “administrative act,” in that the parties will already have been heard on whether a referral is appropriate; and
- 2) Certification arising from a direct application by a party, which necessarily requires the Chief Justice to examine whether the application genuinely raises issues of constitutional interpretation or application. Such a process, it was submitted, must be judicial in nature, not administrative, and that the normal procedure for commencing such a proceeding is to follow the summons process as prescribed under Order 5 of the CPR, 2017.

23. In either case, however, the Claimant contended, service of the application on the other party is required as a matter of fairness. Senior Counsel argued that under a certification proceeding arising from a direct application by a party, such as in the instant case, even if the Chief Justice were to treat the process as administrative, which he firmly contended should not be the case, the other parties should at least have been served and given an opportunity to be heard.

24. Senior Counsel went further to submit that the trial Court (original Court) herein had already made a judicial determination that no constitutional issue arose. As such, he argued, the Chief Justice could not, by means of certification, reverse or quash that

decision. To do so, he contended, would be to exercise appellate jurisdiction, which the Chief Justice did not possess under the circumstances. In this connection, Senior Counsel further contended that the accused's application to the Chief Justice was, in substance, an interlocutory appeal against the trial (Original) Court's refusal to make a referral. He was forceful that this could however not be legally tenable because interlocutory appeals in criminal matters are not permitted under section 11 of the Supreme Court of Appeal Act (Cap. 3:01 of the Laws of Malawi).

25. Moreover, he invited this Court to note, the application before the Chief Justice had not been brought under the Supreme Court of Appeal Act at all, but instead under the CPR, 2017. It therefore did not even purport to invoke the appellate jurisdiction of the Supreme Court.

26. The Claimant pointed to Order 19 Rule 7, which provides that when a court itself refers a matter for certification, the proceedings before it are stayed pending the determination of the constitutional issue. This, Senior Counsel stated, made sense, since the referring court itself is the one that judicially determines that guidance from the "Constitutional Court" is needed.

27. By contrast, he contended, where the Court has expressly refused referral, and determined that no constitutional issue exists, such as in the instant case, an application by a party should not operate to stay proceedings.

28. Senior Counsel invited the Court to note that the certificate that was issued by the Chief Justice in the present case did not direct a stay of the trial proceedings.

Accordingly, he prayed, if permission to apply for judicial review is granted, for an interim Order that the trial (Original) Court should be at liberty to proceed with the trial herein, pending the determination of the judicial review proceedings that would ensue.

29. The Claimant therefore sought judicial review to resolve three questions:

- 1) Whether, in circumstances where there is no referral by the court or by the President, an application for certification must be properly commenced under Order 5 and duly served on the other party;
- 2) Which proceeding the Chief Justice in fact certified, whether the criminal trial itself or a separate reference; and
- 3) What specific constitutional question was referred to the Constitutional Court.

30. The Claimant emphasised that clarity on these issues was vital, since in recent instances, the “Constitutional Court” had dismissed matters or remitted them back due to uncertainty about the questions certified.

31. The Court must also point out that Senior Counsel for the Claimant had initially sought to present argument on the claim that the prosecution herein was caught by statutory time-limits for the institution of prosecutions under sections 261 and 302A of the CP & EC. However, upon the Court’s prompting, the Claimant conceded that these provisions did not apply, as the offences charged herein carried a potential penalty exceeding three years’ imprisonment. The Claimant therefore did not pursue that matter further.

32. Such were the arguments that the Claimant herein presented in support of his application for permission to apply for judicial review.

33. Before proceeding much further, it is important to mention that before the passing of the Courts (Amendment) Act No. 2 of 2004, the state of the law in Malawi was that, unless otherwise provided by the Courts Act (Cap. 3:02 of the Laws of Malawi), or by any other Act for the time being in force in the Republic, every proceeding in the High Court and all business arising thereout had to be heard and disposed of by or before a single Judge. It did not matter whether the issues to be dealt with were very weighty or constitutional in character.

34. The adoption of the Constitution of the Republic of Malawi, 1994 (the Constitution), with the principle of constitutional supremacy that it firmly entrenched, significantly heightened the status and premium of constitutional law in Malawi, and there was a concomitant sharp rise in the status, importance and frequency of constitutional litigation.

35. Constitutional supremacy basically entails that all laws and all governance provisions, systems and structures in the country, must be consistent with and, in a word, bow to the ultimate authority of the Constitution. Clarifying on the legal import of the doctrine of constitutional supremacy, in *Taipi v Republic*, MSCA Criminal Appeal No. 9 of 2014, the Supreme Court of Appeal stated that:

“We find it important to reiterate...the supremacy of the Constitution over all other forms of law in our land. Section 5 of the Constitution is abundantly clear in its

demand, inter alia, that any law that is inconsistent with the Constitution shall, to the extent of such inconsistency, be invalid. From this we surmise that any statutory provision...ought to be subservient to the Constitution."

36. The Court went further to state that no laws in Malawi can ever:

"be so potent as to set the boundaries within which the [Constitution] should operate...they must of necessity be viewed as being subservient and obedient to the said Constitutional provisions. If instead of being so subservient they are rebellious, then they lose their validity as pieces of law."

37. In the result, following the passage of the Constitution, and after a decade of the teachings of experience gained through constitutional litigation, it dawned on all the three principal organs of the State, namely the Executive, the Judiciary and the Legislature, that the principle of constitutional supremacy, and the far-reaching implications that court decisions premised on constitutional provisions tend to have on the national fabric, it was important that when the final determination of a judicial proceeding calls for a significant and substantive pronouncement of the Court relating to the interpretation or application of the Constitution, the court must have the benefit of the collective wisdom of several judges rather than having a single judge make such a decision. This is what led to the passing of the Courts (Amendment) Act No. 2 of 2004 referred to earlier.

38. In this regard, following that statutory amendment, Section 9 of the Courts Act is now couched in the following terms:

“(1) Save as otherwise provided by this Act, or by any other Act for the time being in force, every proceeding in the High Court and all business arising thereout shall be heard and disposed of by or before a single Judge.

(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

(3) The Chief Justice shall certify that a proceeding is one which comes within the ambit of subsection (2), and the certification by the Chief Justice shall be conclusive evidence of that fact.”

39. The first issue that the Court has to deal with is as to which proceedings the Chief Justice certifies in terms of the provisions of sections 9(2) and 9(3) of the Courts Act. As pointed out above, it was the Claimant’s contention that there are two distinct proceedings, being the original proceedings and the certification proceedings which are based on the certification questions put to the Chief Justice for his or her consideration. It was the Claimant’s case that the Chief Justice certifies the proceedings with the constitutional questions that are referred to him or her only, and not the original proceedings.

40. This Court could not disagree more.

41. In arriving at its decision, the Court has considered the rich jurisprudence on the law of statutory interpretation in Malawi. For purposes of the present Ruling, it suffices

for the Court to simply reference the Supreme Court of Appeal decision in the case of Blantyre Water Board and others v Malawi Housing Corporation [2007] MLR 48 (SCA), where Mtambo, JA, delivering the unanimous decision of the Court, stated, at pages 50-51, citing with approval the learned writings of Francis Bennion, that:

“Francis Bennion, a professional legislative drafter and writer of many years, in his book entitled “Statutory Interpretation” Third Edition at page 424, comments that perhaps the biggest mistake made about statutory interpretation is that the court ‘selects’ which rule it prefers, and then applies it in order to reach the result. He then points out that there are more than just three rules of statutory interpretation as follows:

“If (which is doubtful) there ever were, there certainly are not now, just three rules of statutory interpretation. The so-called literal rule dissolves into a presumption that the text is the primary indication of intention and that the enactment is to be given a literal meaning where this is not outweighed by other factors. The so-called golden rule dissolves into one of the criteria that may outweigh the literal meaning, namely, the presumption that an absurd result is not intended. The so-called mischief rule dissolves into the presumption that Parliament intended to provide a remedy for a particular mischief and that a purposive construction is desired. There are many other considerations. So it is a pity that despite the years that have passed since the first edition of this work pointed out the truth of the matter, writers of students’ textbooks still trot out the three so-called rules as if they were the whole story.” He then says that the court does not ‘select’ any one of the many guides, and then apply it to the exclusion of the others. He says that what the court does (or should do) is take an over-all view, weigh all the relevant interpretive factors, and arrive at a balanced conclusion. Be that as it may, statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in the particular context - R. v

Secretary of State for the Environment, Transport and the Regions and another, Ex Parte Spath Holme Limited [2001] All ER 195. That is to say that the task of the court is to try and ascertain the intention of Parliament expressed in the language under consideration. And this is what we will bear in mind throughout this judgment so that when we say that any particular meaning cannot be what Parliament intended, we will only be saying that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. In other words, "We are seeking the meaning of the words which Parliament used", as Lord Reid said in Black - Clawson International Limited v Papierwerke Waldhof - Aschaffen-burg [1975] 1 All ER 810 at 814; [1975] AC 591 at 613.

42. This Court adopts this approach.

43. To recap, Sections 9(1) and 9(2) of the Courts Act provide that:

"(1) Save as otherwise provided by this Act, or by any other Act for the time being in force, every proceeding in the High Court and all business arising thereout shall be heard and disposed of by or before a single Judge.

(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges."

44. This Court takes the view that these two provisions must be read together in order for one to have a clear understanding of what Parliament intended when it expressed

itself in the language used in the provisions. The import of subsection (1) of Section 9 is clear: the general rule in the High Court is that every proceeding and all business arising out of the High Court must be heard and disposed of by one Judge. It is a provision on the composition of the High Court when discharging its judicial business. One observes that essentially, the language of “every proceeding in the High Court and all business arising thereout”, as used in subsection (1), is repeated in subsection (2). However, the language in subsection (2) is then qualified by the words “if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution”, in order to arrive at a separate composition of the High Court. Thus, subsection (2) requires that when determining the proceeding or any other business falling within the ambit of that subsection, namely, the proceeding or business of the Court, the same “shall be heard and disposed of by or before not less than three judges.”

45. In other words, all that subsection (2) does is to change the composition of the Court from one Judge to not less than three Judges in the event that the matter in issue expressly and substantively relates to or concerns the interpretation or application of the Constitution.

46. In the case of the State and another; *Ex Parte Dr Bakili Muluzi and John ZU Tembo II* [2007] MLR 310, at 313 (HC), Kalaile, AgCJ made a very apt statement of the law on this issue, stating that:

“Application of section 9(2) of the Act and the certification implies a finding by the Chief Justice that the matter cannot be determined without the necessity of

interpretation or application of a Constitutional provision. The Constitutional provision under consideration must be a core issue to the determination of the case.”

47. It seems to this Court that a faithful reading of this passage suggests that the learned AgCJ was saying, and this Court agrees, that in order to have a matter certified as constitutional under section 9(2) of the Courts Act, one must consider the constitutional issue that is up for determination in the context of the entirety of the proceeding. Upon such a consideration, one may then form the view that the determination of the entirety of the case expressly or substantively relates to the interpretation or application of the Constitution.

48. In other words, it is the entire proceeding in the original Court that gets certified or not certified as a constitutional matter, depending on whether the Chief Justice forms the opinion that the constitutional provision or provisions under consideration is or are a core issue in the determination of the case as a whole, and that the matter cannot be determined without the necessity of interpretation or application of a the Constitutional provision or provisions in issue.

49. Observably, Section 9(2) of the Courts Act does not call upon the Chief Justice to certify questions put to him or her by the original court, or by a party on application, as falling within the ambit of that section as Senior Counsel Nyasulu submitted. He or she certifies the whole proceeding, or put differently, the whole case where he or she forms the view that it meets the test of “expressly and substantively” relating to the interpretation or application of the Constitution.

50. It is this Court's view that if the certification were to relate only to specific questions raised before the Chief Justice, the question of whether the constitutional questions themselves "expressly and substantively relate to, or concern the interpretation or application of the provisions of the Constitution" would be rather superfluous. The constitutional questions as framed, if taken in isolation and not in the context of the whole proceeding (or case), will always be viewed as expressly and substantively relating to the interpretation or application of the Constitution because they will invariably be asking a direct question about the relationship between the subject matter of the question and the Constitution.

51. To illustrate the point, in the case of *Akster and Another v Director of Public Prosecutions and Another*, Constitutional Case 2 of 2021, [2024] MWHC 25, the Chief Justice certified the following questions that were referred to him as necessitating the certification of Criminal Case No. 146 of 2020 (High Court, Blantyre) and Criminal Appeal Case No. 4 of 2022 (High Court, Lilongwe) as consolidated:

- "(1) Whether section 153 (a) of the Penal Code is unconstitutional;*
- (2) Whether section 154 of the Penal Code is unconstitutional;*
- (3) Whether section 156 of the Penal Code is unconstitutional."*

52. The point is that it would be superfluous to ask the Chief Justice whether the question of "Whether section 153 (a) of the Penal Code is unconstitutional" is a question that "expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution". It obviously does and that would invariably be the response in almost every case where referral questions or

questions raised in a certification application are put to the Chief Justice for his or her consideration. But, as these courts have said on numerous occasions, it is not every matter in which a constitutional question arises that are supposed to be certified. In the vast majority of labour cases for instance, the question of safe and fair labour practices arises, but that does not mean that every case of unfair dismissal that comes to the High Court falls within the ambit of Section 9(2) of the Courts Act.

53. In the case of the State and another; Ex Parte Dr Bakili Muluzi and John ZU Tembo II, Kalaile AgCJ upheld the argument that there must be something more than mere connectivity of the Constitution to the determination of the case in order for the matter to fall within the ambit of Section 9(2) of the Constitution. Further, in *Muluzi v Anti-Corruption Bureau*, Constitutional Reference No. 2 of 2015; [2015] MWSC 442 (28 October 2015), Nyirenda, CJ stated that:

“Section 9(2) is meant...for...deserving and selected proceedings, where the circumstances of the case expressly and substantively raise a constitutional matter for interpretation or application.”

54. In the case of *Malaya v The Attorney General*, Constitutional Case 3 of 2018; MWHC (24 April 2019), N'riva, J, delivering a decision on behalf of a unanimous panel of the High Court constituted under Section 9(2) of the Courts Act, stated that:

“The Courts Act uses, in section 9 (2) the words “expressly” and “substantively” relating to, or concerning “interpretation” or “application” of the Constitution. The case before us is in the main a claim for damages and some declarations against the defendant. It does not seem to me that the fact that the claim is loaded with

constitutional provisions necessitates it to be one that is substantively Constitutional. That approach would mean, for example, to have a case of maintenance of children before a Constitutional panel just because issues of rights of women and children under the Constitution arise. It might also mean bringing before a Panel a case concerning pre-trial release just because a suspect has been in custody more than the Constitutional requisite period. That is not what section 9 of the Courts Act intended. Issues of rights arise in a number of civil and criminal cases but that does not qualify them as Constitutional proceedings. To qualify as constitutional a proceeding, the proceeding must expressly and substantively relate to or concern the interpretation or application of the provisions of the Constitution. The key words are expressly and substantively. Collectively, the words entail that the interpretation or the application must be the specific and particular fundamental issue before the Court. It must not be a side issue or an enhancement to the claim. R Burrows in *Words and phrases judicially defined*, (Butterworth, London, 1945) states that expressly 'often means no more than plainly, clearly and the like.' Likewise, J Saunders in *Words and phrases legally defined* (Lexis, London, 1969) quoting *Clarke v Wright [1953] AllER 486, CA*, suggests that 'express' suggests intention that a step must be directed, and directed specifically, to the question. In this context, a question must be specifically directed, and not peripheral, to the application or interpretation of the Constitution. To proceed with issues before Constitutional panels, just because they involve Constitutional provisions may appear like having a Constitutional panel is the default position. Cf:- *Chilumpha and another v The Director of the Public Prosecutions, Criminal Case Number 13 of 2006, and In the Matter of Bakili Muluzi and the Anti-corruption Bureau Court, Reference No 2 of 2015*"

55. Thus, in *Malaya v The Attorney General*, the Court was emphasising that not every case which happens to be "loaded with constitutional provisions" will qualify for

certification under Sections 9(2) and 9(3) of the Courts Act. Rather, the Court stated, in order “to qualify as a constitutional a proceeding, the proceeding must expressly and substantively relate to or concern the interpretation or application of the provisions of the Constitution”, and that “The key words are expressly and substantively. Collectively, the words entail that the interpretation or the application must be the specific and particular fundamental issue before the Court. It must not be a side issue or an enhancement to the claim.” This statement resonates with Kalaile AgCJ’s holding in the case of the State and another; Ex Parte Dr Bakili Muluzi and John ZU Tembo II that the constitutional issue or issues raised should be core to the determination of the whole case.

56. The decision of the Court in Malaya shows that the the certification inquiry is directed at the proceeding as a whole. The Court in Malaya asked whether the proceeding itself, in its entirety, was of a constitutional character such as to warrant treatment under section 9(2). Secondly, by holding that a case “loaded with constitutional provisions” may still fail the certification test as a constitutional proceeding, the Court was essentially confirming that the act of certification attaches to the nature of the action, that is to say the proceeding, in its entirety, and not simply to itemised questions within it. It is this Court’s considered view, that the effect of the Malaya case is to confirm that the task of the Chief Justice in the certification process is to identify whether the entire proceeding, when viewed in its overall character, purpose, and essential subject matter, meets the threshold prescribed under section 9(2) of the Courts Act. Further, the same understanding is reflected in the decision of the Supreme Court of Appeal in Mutharika Another v Chilima Another, MSCA Constitutional Appeal 1 of 2020; 2020 MWSC 1(8 May 2020). The Supreme Court of Appeal stated in that case, that:

"Upon further scrutiny of what the Court was being called upon to deal with, the Court, at the onset, found that the consolidated petitions expressly and substantially related to, or concerned the interpretation or application of the provisions of the Constitution. Upon that finding the Court referred the matter to the Chief Justice, for certification, in accordance with section 9 (2) and (3) of the Courts Act...The consolidated matter was indeed certified by the Chief Justice as a constitutional matter...Upon certification of the matter as constitutional, the petition procedure, as a process, ceased to exist, but the issues that were raised in the petitions survived, which issues would give context and form the basis of the issues that would further assist in the interpretation and application of the constitutional questions raised in the referral. It is apparent to us that all the parties acknowledged that the matter would proceed as a constitutional referral and, therefore, that the petition procedure was no longer the modus operandi. Upon that acknowledgment, the parties proceeded to a scheduling conference where a number of directions, including directions for discovery, were given. The parties also proceeded to file sworn statements, in which further issues were introduced. Therefore, the subject matter and the issues for determination by the Court below and which must be before us, are circumscribed by the petitions and the constitutional questions that were identified by the Court below. This has been the practice in constitutional referrals (see: The Attorney General Ex- Parte Abdul Pillane, Constitutional Case No. 6 of 2005 (Unreported) and Lisineti Gremu and Davie Charles Kanyoza, Constitutional Case No 1 of 2012 (unreported)." [Emphasis supplied]

57. The Court went on to say that:

"When the Judge referred the matter for certification, it was duly certified and converted into a constitutional referral disposable by a panel of not less than three

High Court Judges in accordance with section 9 of the Courts Act. A panel of five High Court Judges was duly constituted. The Court dealt with the matter to finality, disposing of the three constitutional questions and all the issues that formed the basis of the referral. It was open for the panel of five Judges to deal with all the issues in the matter, beyond the three constitutional questions in the referral, without referring it back to the single member who made the referral for final disposal of the consolidated petitions.” [Emphasis supplied]

58. It is noteworthy that the Supreme Court stated that:

“the consolidated petitions expressly and substantially related to, or concerned the interpretation or application of the provisions of the Constitution. Upon that finding the Court referred the matter to the Chief Justice, for certification... The consolidated matter was indeed certified by the Chief Justice as a constitutional matter.” [Emphasis supplied]

59. Observably, the Court stated that “the consolidated petitions expressly and substantially related to, or concerned the interpretation or application of the provisions of the Constitution”. It did not state that “the consolidated petitions contained questions that expressly and substantially related to, or concerned the interpretation or application of the provisions of the Constitution”. This is a nuanced but important difference that needs to be noted and appreciated. The former formulation by the Supreme Court makes it clear that it were the consolidated cases, as a whole, that expressly and substantially related to, or concerned the interpretation or application of the provisions of the Constitution and not just the specific constitutional questions that

the petitions raised. The Supreme Court of Appeal did not at all suggest that the Chief Justice certified isolated questions put to him that constituted separate proceedings from the original proceedings.

60. In this Court's view, to accept Counsel's argument that the certification process entails two separate sets of proceedings, comprised in the original proceedings on the one hand, and the referral questions put to the Chief Justice on the other, would be to artificially fracture what is essentially a single proceeding into constitutional and non-constitutional components, running in two parallel tracks, but with one apparently dependent on the other. One proceeding before, dealt with and disposed of by a panel of three or more Judges, and the other continuing before the original single Judge. This Court holds that such was never the intention of the legislature and that such an approach is alien to the text of the Courts Act. As the Supreme Court observed in *Mutharika v Chilima*, the whole proceeding is carried forward once certification is made. The constitutional panel is then seized of the case to finality, with power to determine not only the constitutional questions raised in the referral or separate constitutional action commenced before the Chief Justice, but also all the issues that form the basis of the referral or action.

61. It is this Court's view that the essence of the referral questions in the prescribed forms under the rules of Court, is to simply highlight the fundamental constitutional question or questions that, taken as a whole, has or have the effect of colouring the entire proceeding as one that expressly and substantively relates to the interpretation or application of the Constitution. Put differently, as Kalaile, AgCJ put it in the *State and another; Ex Parte Dr Bakili Muluzi and John ZU Tembo II*, the constitutional questions serve the purpose of helping the Chief Justice in making a finding as to

whether the matter can or cannot be determined without the necessity of interpretation or application of the Constitution.

62. In the circumstances, it is this Court's view that that Senior Counsel's attempt to narrow the import of Section 9(2) of the Courts Act to the certification of isolated constitutional questions must be rejected. The statutory language and the jurisprudence in both the Malaya case and the Mutharika v Chilima case, among many other decisions that buttress the same point, all converge upon a single conclusion that the Chief Justice certifies the original proceeding itself in its entirety. That proceeding, upon certification, is then transformed into a constitutional matter that must be heard and disposed of accordingly by a panel of not less than three Judges. To suggest otherwise is to adopt a construction that is unsupported by the text and thus departs from the original intention of the legislature when it prescribed the certification procedure under the Courts Act.

63. Senior Counsel Nyasulu stated that the Claimant was confused as to whether the Chief Justice certified Criminal case No. 7 of 2024 in the Financial Crimes Division, being the Original proceeding, or Constitutional Reference No. 6 of 2025, being the referral proceeding. From what the Court has expounded above, the Claimant should be confused no more. The Chief Justice certified one proceeding, which is the original proceeding, and upon certification, it transformed into a constitutional matter and was assigned a new Constitutional reference number. There is no magical interpretive wand here. In any event, in his Certificate, the Chief Justice characterised the certified proceeding as "Reference No. 6 of 2025, being Criminal Case Number 7 of 2024." He essentially indicates here that this is one and the same proceeding. The indication could not be clearer.

64. The Claimant then raised another issue. As pointed out earlier, he stated, through Senior Counsel, that the certification proceedings herein were irregularly commenced. Senior Counsel Nyasulu contended, correctly in my view, that since the certification process herein was not a referral, it fell under the “general proceedings” commencement procedure for constitutional matters. Under this procedure, Senior Counsel argued, commencement of the proceedings had to be by way of summons, as provided for under Order 5 of the CPR, 2017. This is in terms of Order 19 Rule 3 of the CPR, 2017. Further, notwithstanding the summons procedure under Order 5 of the CPR, 2017, the Summons procedure in respect of an application for certification is further governed by the provisions of Order 19 Rules 4 and 5 of the CPR, 2017.

65. The specific procedure under Order 19 Rules 4 and 5 of the CPR, 2017 requires, among other things, (a) that the Summons must contain a concise statement of case indicating the provision or provisions of the Constitution which the Court shall interpret or apply; (b) that a defendant who wishes to defend the whole or any part of the summons under rule 3 must, within 7 days after service of the summons, inclusive of the day of service, file his or her response; (c) that the defendant who has filed a response must serve on the claimant a defence within 14 days from the date of the response; (d) that the Court must, within 7 days from the date of the filing of the defence, set down the matter for a scheduling conference whereat the Court gives directions on the further conduct of the proceeding; (e) that the Court must hear the summons within 21 days from the date of the scheduling conference; and finally (f) that, in the absence of a defence, the Court must hear the summons within 21 days from the date of service of the summons.

66. Senior Counsel for the Claimant states that there is no indication that the above process was followed at all by the accused persons herein when applying for certification of the matter herein. Senior Counsel further referred to Order 19 Rule 2(4) of the CPR, 2017 which provides that “The certification by the Chief Justice under this rule is an administrative function and the Chief Justice shall not hear arguments from the parties nor deliver a judicial determination on the certification.” This provision in the Rules is read together with Section 9(3) of the Courts Act which provides that: “The Chief Justice shall certify that a proceeding is one which comes within the ambit of subsection (2), and the certification by the Chief Justice shall be conclusive evidence of that fact.”

67. In this context, Senior Counsel stated that there is one aspect of certification which is an administrative act and there is another which is a judicial act, and which must therefore follow a judicial process. He submitted that where there is a referral by a Court, the act of certification is an administrative act because the referring court (the original Court), would already have heard arguments from the parties concerned, and it would have judicially formed a view that there were grounds for holding that the matter falls within the ambit of section 9(2) of the Courts Act. Therefore, he contended, there is no need for the Chief Justice to open up another judicial process for argumentation for purposes of certification. He or she just has to certify as an administrative process. Senior Counsel proceeded to state that this was more so because in certification proceedings, the Chief Justice sits as a High Court Judge, as the most senior Judge thereof, but that in terms of jurisdiction, sitting in that Court, he or she may not reverse the finding of another High Court Judge.

68. On the other hand, Senior Counsel contended, if a constitutional matter is otherwise commenced under Order 19, in Part 1 (Matters under the Constitution), by way of application through the Summons procedure outlined earlier above, then it is clearly a judicial process, and the act of certification is a judicial act.

69. The Court is, to a great extent, in agreement with Senior Counsel Nyasulu's reasoning. When one examines the process prescribed under Order 19 Rules 4 and 5 of the CPR, 2017 as described above, the certification process thereunder clearly involves an elaborate legal process and the determination of legal arguments, and this represents a clear departure from the text of Order 19 Rule 2(4) of the Rules, which states, among other things, that "the Chief Justice shall not hear arguments from the parties nor deliver a judicial determination on the certification." The Court therefore agrees with Senior Counsel Nyasulu in this regard. The Court however proceeds to hold that even in the matter of a referral by a court, the act of certification remains a judicial act.

70. In *Muluzi v Anti-Corruption Bureau*, Court Reference No. 2 of 2015; [2015] MWSC 442 (28 October 2015), Nyirenda, CJ stated that:

"I have also been addressed on the role of the Chief Justice on referrals. In particular the question is whether that role is judicial or administrative....we should be concerned with any attempt to make referrals an administrative arrangement. Court referrals could very easily become an unruly horse or a runaway train if not properly regulated and judicially determined. It would be very easy for referrals to become a common practice and yet a lethal tool to stifling proceedings...referrals could cripple

proceedings if all the litigants had to do was to cry out “the Constitution”, and by it alone gag the hands of the original court as well as the Chief Justice. Referrals should therefore not be left to be as a matter of course.”

71. The point that certification proceedings are judicial in character was more strongly made in the case of Human Rights Commission v Attorney General [2011] MLR 85 (HC), where Munlo, CJ stated at pages 96-97, that:

“There is some confusion on the issue of certification which I think should be cleared. Some of the confusion which has arisen in this Court is as a result of misconception by Counsel for the plaintiff that the certification proceedings are governed or made under Rule 4 of the Rules. This is not a correct legal position. The correct legal position is that the question of certification is done under the substantive law which is subsection 9(2) as read with subsection 9(3) of the Courts Act. It is only after the Chief Justice has considered whether there are proceedings in the High Court and, if so, whether those proceedings and all business arising thereout expressly or substantively relate to, or concerns the interpretation or application of the provisions of the Constitution that he will certify the proceedings... certification is not an administrative or quasi judicial function where the discretion of the Chief Justice in deciding the matter can be fettered.”

72. On the interplay between the Rules and provisions in the principal Act, the learned Chief Justice stated, at page 98, that:

“The Rules dealing with the procedure to be followed during proceedings on the actual interpretation or application of the Constitution is a recent development which only

came into effect on 16 September, 2008. Between 2004 to 2008 a lot of matters for certification were determined by the Chief Justice under subsection 9(2) as read with subsection 9(3) of the Courts Act. That statutory legal position has remained firm and can never be shifted by subsequent subsidiary procedural legislation..."

73. He went on to state, at pages 99; 101-102, that:

"The first thing to notice is that there must be proceedings in the High Court or matters or business arising thereout and it must be further demonstrated that the proceedings referred to in subsection 9(2) are judicial in nature and only a judicial officer can examine them to see if they expressly and substantively relate to or concern the interpretation of the Constitution. Secondly the very act of deciding whether a proceeding in the High Court relates to or concerns the interpretation or application of the constitution, is, as will be shown later in this ruling, a judicial as opposed to an administrative function. Under sections 9 and 108 of the Constitution only judicial officers are empowered to interpret the laws and the Constitution. Administrators are not empowered so to do and have no business or legal authority whatsoever to certify that a proceeding in the High Court expressly or substantively relates to the interpretation or application of the Constitution...The parameters within which the Chief Justice certifies a matter are crystal clear. He must examine the court record of the proceedings from the High Court; and he must examine the originating motion, together with the affidavit in support of the originating motion and the skeletal arguments in support of the application for certification before he comes to his decision on whether the matter qualifies for certification under subsection 9(3) as read with subsection 9(2) of the Courts Act. He may even have to summon the parties to argue their case in Chambers before a decision is taken. All these are attributes of a judicial process as opposed to an administrative function or indeed quasi judicial

function. The Chief Justice must of necessity exercise his discretion and arrive at a decision when dealing with matters under subsection 9(2) as read with subsection 9(3) of the Courts Act. Much more important, the Chief Justice invariably has to examine the constitutional provisions that the plaintiff has referred to in the application for certification before he decides the question whether the proceedings in the High Court, subject matter of certification, expressly or substantively relate to or concern the interpretation or application of the constitution. Now under sections 9 and 108 of the Constitution it is only judicial officers who have the responsibility of interpreting, protecting and enforcing the laws and the Constitution of Malawi. In doing so, judicial officers are to have regard only to legally relevant facts and the prescriptions of law. All this takes out the notion that the certification process is an administrative or a quasi-judicial function in which the Chief Justice has no discretion but to certify. Misc Civil Cause Number 99/2007 The State and the President of the Republic v Ex-parte Dr Bakili Muluzi, John Tembo, where the Acting Chief Justice, Honourable Kalaile declined to grant certification is a case in point here.”

74. I pause here to state that I agree with the reasoning of Munlo, CJ in Human Rights Commission v Attorney General, above. I agree with him that the certification decision is a judicial act. As earlier shown above, the originating process for a certification application that he outlines at pages 101-102 of the Law Report, is in tandem with the procedure outlined in Order 19 Rules 4 and 5 of the CPR, 2017. The provision under Order 19, Rule 2(4) of the CPR, 2017 that certification is an administrative function and that the Chief Justice shall not hear arguments from the parties nor deliver a judicial determination on the certification, is not only inconsistent with the totality of the effect of the process envisaged under sections 9(2) and 9(3) of the Courts Act, but it is also inconsistent with the rigorous judicial process that the scheme under Order 19 Rules 4 and 5 of the same Rules for instance, sets out.

75. Back to the remarks of Munlo, CJ in *Human Rights Commission v Attorney General*, the learned Chief Justice wound up by holding that the act of certification is not amenable to judicial review. He stated, at page 102, that:

“Suppose for one moment that certification by the Chief Justice is indeed administrative in nature. This would mean that the Chief Justice’s decisions would be subject to judicial review by Judges of the High Court... If that were the intention of Parliament, why would subsection 9(3) of the Courts Act vest the power of certification to the Chief Justice instead of vesting it directly with High Court Judges in accordance with prevailing practice under the Courts Act and other laws? Why would subsection 9(3) vest this function in the senior judge, only to have its exercise supervised by junior judges contrary to section 6 of the Courts Act? The Law could not intend such absurdity which goes against express provisions of the law and a well-established judicial decorum obtaining in all major legal systems of the world.”

76. I now wish to address the argument advanced by Senior Counsel that if the certification decision of the Chief Justice is viewed as a judicial act, then it would amount to a veiled appeal against the decision of the original Court. I again respectfully disagree with Senior Counsel’s argument. When a Judge in the original Court makes a referral decision to the Chief Justice, given the statutory scheme under Sections 9(2) and 9(3) of the Courts Act, what he or she does is to form an opinion rather than a decision. The determination is made by the Chief Justice and, according to Section 9(3), it is conclusive.

77. Correlatively, and as already conceded by Senior Counsel, the scheme of Sections 9(2) and 9(3) of the Courts Act does not preclude a party in the proceedings from approaching the Chief Justice for certification, even where the Judge in the original Court forms the opinion that the proceeding does not fall within the ambit of Section 9(2) of the Courts Act. The reason is simple. The Courts Act has vested the exclusive authority to make a final decision on whether or not a matter falls within the ambit of that Section in the Chief Justice. His or her discretion may not be fettered by the opinion of the Judge in the original Court because the Judge in the original court has not been given the power to conclusively make such a decision. That is the scheme that Sections 9(2) and 9(3) of the Courts Act created.

78. Thus, approaching the Chief Justice for a certification decision after the Judge in the original Court has formed a contrary view does not amount to a veiled appeal. In the scheme of Sections 9(2) and 9(3) of the Courts Act, all that the learned Judge in the original Court would have done would be to form a non-conclusive opinion that the matter does not fall within the ambit of Section 9(2). The final and conclusive determination, as a matter of law, is to be made by the Chief Justice. It is not, in my considered view, as Munlo, CJ suggested, a matter of judicial decorum, or that a junior Judge should not review the decision of a senior Judge, even if legally mandated to do so. That, respectfully, is, to my mind, is not really the point. It is axiomatic that Munlo CJ was right that the Chief Justice is the most senior Judge in the country. In certification matters however, sits in the High Court. In the instant matter, the Chief Justice's certification clearly shows that it was made "In the High Court of Malawi, Principal Registry, Civil Division." By sitting in the High Court, save where the law explicitly provides otherwise, his or her jurisdiction is coordinate with that of all other High Court judges, irrespective of seniority. However, in certification, his jurisdiction differs from other High Court Judges, and indeed all other Judges, because the law

says so. Thus, the only real explanation is that the certification by the Chief Justice under the Courts Act must be understood as having the kind of finality discussed herein because that is what the law explicitly provides.

79. Pausing there, the Court reminds itself of the three issues for determination that the Claimant has brought up for review herein, if permission to apply for judicial review be granted. These are:

- 1) Whether the certification discloses the constitutional question to be determined by three judges sitting as a Constitutional Court;
- 2) Whether the application for certification complied with procedure and the objectives of Orders I, 5 and 19 of the Courts (High Court)(Civil Procedure) Rules; and
- 3) Whether the certification was a judicial determination overriding the ruling of Justice Chipao who determined that there was no question fit for determination by a Constitutional Court.

80. Firstly, the Court notes that at the heart of the present application and the proposed judicial review proceedings, is basically the Claimant's complaint that the certification proceedings were conducted irregularly. In essence, the Claimant is aggrieved that he was not heard. He did not have an opportunity to make representations before the Chief Justice as the rules of practice, under Order 19 Rules 4 and 5 of the CPR, 2017, demand.

81. In this regard, having already found above that the certification process is a judicial process, and more so when the procedure for general proceedings as provided for under Order 19 Rules 4 and 5 of the CPR, 2017 is adverted to, the overall import of the present application is that the Claimant is alleging that there was an irregularity in the certification proceedings. Under Order 2 Rule 1 of the CPR, 2017, any failure to comply with the rules is an irregularity which must be dealt with by the Court seized with the matter judicially and not to be dealt with as an administrative action warranting judicial review.

82. The Court opines that such allegations of irregularity as made in the instant case, ought to be brought back to the Honourable the Chief Justice who attended to the certification application and made the impugned certification decision, rather than commencing a parallel judicial process through judicial review.

83. Additionally, since, as held above, it is the Chief Justice who has been conferred with the exclusive jurisdiction to determine with finality whether a matter falls within the ambit of Section 9(2) of the Courts Act or not, it is only the Chief Justice himself, sitting in the High Court, who may unmake such a decision if he or she is satisfied that a case for a substantial irregularity or irregularities has been made warranting the setting aside of the certification proceedings, pursuant to Order 2 Rule 3(a) of the CPR, 2017. No other judicial officer has the power to unmake that decision under the law.

84. Considering that it is a judicial decision, the only avenue that would ordinarily be available would have been an appeal. However, the proviso to Section 21 of the Supreme Court of Appeal Act, provides that “no appeal shall lie where the

judgment...is a judgment which is stated by any written law to be final." Under section 2 of the General Interpretation Act (Cap. 1:01 of the Laws of Malawi), ““judgment” in relation to a court includes decree, order, sentence or decision.” Certification by the Chief Justice is a “decision” that he or she makes which the law expressly states to be “conclusive”.

85. The term “conclusive” here clearly entails that the decision is “final.” It is therefore not amenable to appeal under Section 21 of the Supreme Court of Appeal Act. Again this Court agrees with the observations of Munlo CJ stated in *Human Rights Commission v Attorney General*, that the fact that the certification decision is stated to be final does not, in any way, curtail access to justice by any of the parties involved. This is because firstly, if the Chief Justice refuses to certify the proceeding in error, and fundamental constitutional issues remain for determination, the Judge in the original court still has full jurisdiction to determine and dispose of such issues. Secondly, if the Chief Justice certifies the matter in error, the litigant is not prejudiced by having the benefit of more than one judge presiding over and disposing of the matter. Thus, the matter of certification is a purely statutory matter that does not impinge on the right of access to justice under Section 41 of the Constitution, and Section 21 of the Supreme Court of Appeal Act therefore settles the matter of the lack of amenability to appeal of the Chief Justice’s certification decision.

86. All in all, the decision of the Chief Justice being a judicial determination, and the Claimant’s claim essentially resting on the accused person herein failing to comply with the process prescribed under Order 19 Rules 4 and 5 of the CPR, 2017 when he brought the certification application before the Chief Justice, and thus alleging an irregularity in the certification proceedings within the meaning of Order 2 Rules 1 of

the CPR, 2017, the Court determines that the application herein does not raise serious arguable issues that merit further inquiry at a full hearing of judicial review.

87. In conclusion, this Court has found and hereby decides that:

(1) A proper reading of Sections 9(2) and 9(3) of the Courts Act suggests that there is only one proceeding or one set of proceedings (one case) that the Chief Justice certifies. The act of certification attaches to and transforms the original case into a constitutional matter, in which case it is then assigned a constitutional reference number. The assignment of a constitutional reference number to the case does not entail that certification creates a freestanding, parallel “constitutional reference” proceeding. The citation formulation in the certification itself, namely “Reference No. 6 of 2025, being Criminal Case No. 7 of 2024”, confirms that both citations are referring to one and the same proceeding.

(2) To the extent that Order 19 Rule 2(4) of the CPR, 2017 suggests that the act of certification is an administrative act, and that the Chief Justice “shall not hear arguments”, the same is inconsistent with the statutory scheme under the principal Act, namely the Courts Act, as well as being contrary to the fuller procedural architecture obtaining under Order 19 Rules 4 and 5 of the CPR, 2017 which provides a comprehensive procedural scheme, by which, in certification proceedings commenced by a party by way of application before the Chief Justice, as in the present case, an application is commenced by way of Summons under Order 5 Rule 1 of the Rules.

(3) A trial Judge's (the Original Court's) stance on referral takes the character of an inchoate (non-conclusive) judicial opinion rather than a final determination; and the conclusive statutory determination on certification is exclusively reserved to the decision of the Chief Justice under Section 9(3) of the Courts Act.

(4) A party to the proceedings is at liberty to approach the Chief Justice directly, under Section 9(2) as read with 9(3) of the Courts Act, for certification of a proceeding in the High Court, even where the original court has declined to refer the matter to the Chief Justice; and that where this happens, the entertainment of such an application by the Chief Justice does not amount to an appeal in disguise.

(5) The DPP's main grievance in the instant matter is that there was a procedural irregularity in terms of how the certification proceedings herein were commenced and pursued by the 1st accused person, in that the procedure where the summons originating the certification proceeding must be served on other affected parties, and the parties allowed to file any defence and arguments, and then having a hearing held, was not followed. If indeed such was the case, it entails that the underlying complaint is that there was non-compliance with the CPR, 2017 which means that there was an irregularity within the meaning of Order 2 Rule 1 of the CPR, 2017. In such a case, the appropriate forum to deal with the matter of the irregularity is the court that was seized of the matter in which the irregularity is alleged to have occurred, thus in the instant case before the Chief Justice himself who alone can consider setting aside his own certification under Order 2 Rule 3(a) of the CPR, 2017. If satisfied that a substantial irregularity justifying such a measure has indeed occurred, the Chief Justice may decide to set aside or vacate his own certification and make appropriate directions on the further conduct of the certification application herein.

(7) Since the certification decision herein is a judicial decision rather than an administrative or quasi-judicial one, and since it is stated by the law to be “conclusive”, it follows that it is not amenable to judicial review as envisaged under Order 19 Rule 20 of the CPR, 2017, and it is further not amenable to appeal in terms of Section 21 of the Supreme Court of Appeal Act.

88. The Court therefore holds, under these circumstances, that the proposed grounds for judicial review herein are not tenable, and the matter is not justiciable, by way of judicial review before this Court. The application for permission to apply for judicial review herein has not disclosed an arguable case that is fit for further investigation or consideration at a full hearing of judicial review.

89. The application therefore fails and it is hereby refused.

90. The Court makes no order as to costs.

91. It is so ordered.

Made in Chambers at Lilongwe this 2nd Day of September, 2025