REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

IN THE MATTER OF ADMISSION TO PRACTICE AS A LEGAL PRACTITIONER

OF ISHAMAEL GEORGE MASIYANO

-AND-

IN THE MATTER OF THE LEGAL EDUCATION AND LEGAL PRACTITIONERS

ACT, 2017

ADMISSION CAUSE NO. 59 OF 2024

REFERRAL TO A JUDGE

MSOKERA, DR:

1. Typically, a referral of documents by a registrar to a Judge flows like a quiet current, unmarked by the need for justification. It is only in the rare instance of rejection, under Order 5, Rule 13(a) of the Courts (High Court) (Civil Procedure) Rules, that reasons must be given. Yet, when Assistant Registrar Daniels, with an air of solemnity, withdrew from dealing with the petition's documents, it sparked a ripple of reflection, urging us to make the comments herein. For in matters where accountability must meet the standard of transparency, we recognize that even the smallest decision echoes through the chambers of procedure, much like grades do in the realm of learning—silent but profound markers of intent and consequence.

2. Grades are crucial in the pursuit of professional success, as they can either open or close doors to career opportunities. Unlike age, which those besotted by the fever of infatuation may proclaim to be but a mere number—a fleeting shadow that fades in the brightness of love's longing—in academia, grades are not mere symbols or figures on a page. They are the quiet testament to a mind's journey—an eloquent record of how thought has danced with knowledge, how curiosity has sculpted itself into understanding. They speak of sleepless nights, the hunger for discovery, and the relentless pursuit of clarity. Each grade is a reflection of mental agility, a mirror to a student's perseverance, their capacity to grasp the ephemeral and to anchor it in understanding. In this space of learning, every mark is a note in a symphony of intellect, a silent applause for the mind's triumphs and trials.

3. In Malawi, the gates to public universities stand resolute, guarded by the standard that no student who has not earned a credit in English on their Malawi School Certificate of Education (MSCE) or an equivalent certification may step through. This unwavering requirement, for purposes of degree programs, demands not only a credit in English but at least five others, the threshold short of which an admission becomes impossible. Such is the bastion of entry standards upheld by Malawi's public institutions of higher learning. The lone exception known concerns mature entry students, who may be admitted with a minimum of four credits, including English, along with another relevant qualification, such as a Diploma.

4. In the year 2006, when the petitioner sought admission at a foreign university, these criteria remained intact. Yet, at this foreign institution, he was granted entry into a law degree program despite failing to meet the academic benchmark of a credit in English and possessing fewer than six credits—specifically, two shy of the six needed in domestic universities. This alone is not an issue; after all, Malawi cannot regulate the entry requirements into academic programs offered outside its borders.

5. The issue that unfurls in the documents of the petition, as noted by the Assistant Registrar upon initial review prior to his recusal is that the petitioner, with MSCE grades incapable of securing him admission in a public university in Malawi, sought refuge in the easier path of enrolling at a foreign institution with more lenient standards. Yet, the Constitution of Malawi does not permit private schools or institutions of higher learning to uphold standards inferior to those mandated by public education (section 25(3)(b)). Perhaps, in the mind of the petitioner, the

absence of explicit language regarding foreign universities in the Constitution suggests a loophole—an implied allowance for the recognition of foreign institutions maintaining lower standards.

6. This inquiry beckons an essential question: Can Malawi, in both the letter and spirit of her Constitution, recognise, for purposes of entry into the profession of law, qualifications obtained from foreign institutions whose academic standards fall below those prevailing at local public universities?

7. At the heart of this deliberation lies the principle that education, while an inalienable right, is not an unrestricted privilege (Section 25(1) as read with Section 44(1) of the Constitution). The Constitution guarantees access to education but also mandates that systems of higher learning uphold standards that safeguard the quality of education and serve the public good. This is especially imperative in professional fields such as law, where the competence and ethical backbone of practitioners directly shape the fabric of justice and the rule of law.

8. It is self-evident that the Constitution guarantees equality before the law (Sections 4 and 20). Yet, equality does not demand that every individual, irrespective of academic attainment, be entitled to every field of study. Rather, it envisions that all students have an equal opportunity to meet a unified standard of admission, a benchmark that ensures the uniformity and calibre of professional competence across all educational institutions. Public universities, in setting these thresholds, fulfil their constitutional duty to maintain the standard for quality education and academic rigor within Malawi.

9. In recognising foreign institutions of higher learning and their academic certifications—particularly when these do not align with the minimum standards set by public universities—do we not risk eroding the bedrock upon which these standards are built? It is an established axiom of academic integrity that disparate standards, especially within professional fields, signal the absence of standards altogether. Is not the accepting of foreign institutions that admit students with grades far below those required by public universities a step in transforming the notion of a "standard" into an arbitrary and hollow construct, devoid of tangible value? If entry requirements can shift based on institution, then the very idea of a "standard" becomes a mirage, an illusion stripped of meaning.

10. The National Council for Higher Education (NCHE), in its Minimum Standards for Higher Education Institutions in Malawi, issued in October 2015, has set forth under paragraph 10.1.4 the mandatory requirement that both public and private institutions of higher learning in Malawi must uphold the minimum entry standards of a good MSCE, or its equivalent, with no less than six credit passes, including English. This requirement, we observe, did not set new standards; rather, it was an exercise in alignment, a formal embrace of existing benchmarks within public institutions. The NCHE, in essence, stitched policy to the fabric of law, a harmonization mandated by constitutional duty.

11. Section 15(m) of the National Council for Higher Education Act empowers NCHE to assess, evaluate, and recognise foreign obtained qualifications. The pertinent question arises: can the NCHE in its assessment and evaluation, recognise a qualification from a foreign institution of higher learning which maintains inferior standards than those prevailing at local public universities? We opine that the answer to this question cannot both resonate in the affirmative and at the same time be in conformity with a constitution that guarantees the right to equal access to education. This argument similarly extends to the Council for Legal Education (CLE) in its statutory powers under Section 4(1)(e) of the Legal Education and Legal Practitioners Act, concerning the approval of qualifications of individuals possessing law degrees obtained abroad.

12. Education is an entitlement rather than a privilege (Section 25 of the Constitution). The state is under an obligation to provide greater access to higher learning (Section 13(f)(iii) of the Constitution). This access, from a constitutional perspective, cannot be discriminatory (Section 20). The state cannot treat students of equal academic achievement with varying standards. It cannot close the door of entrance into the legal profession on the basis of grades for students whose means cannot allow them to pursue a law degree outside Malawi; and yet at the same time open that door via foreign institutions to students of equally wanting grades, even worse.

13. If a student, having earned an MSCE with six credits but only a passing mark in English, aspires to enter the esteemed profession of law and finds himself barred from pursuing higher education solely due to his grades; and if, conversely, another student, sharing the same ambition, possesses an MSCE with four credits, excluding English, has his qualifications from a foreign university recognized, does this not expose a profound inconsistency at the heart of

our educational policies? Can this inequality, which grants one individual the opportunity denied to another, be justified within a framework that champions fairness and equal access? Indeed, this is not only academically embarrassing but also legally questionable.

14. The embarrassment is glaringly visible upon examination of the Minimum Standards for Provision of Legal Education promulgated by the CLE. Rule 2.1.3.1 deems a credit in English and two other subjects at MSCE or its equivalent imperative to the study of a mere certificate in law. With that in mind, consider for a moment this perplexing conundrum: a student possessing an MSCE with four credits, but lacking one in English, finds doors firmly closed to the pursuit of even a modest law certificate in Malawi. Yet on the contrary, another student like the petitioner herein, similarly burdened by such disqualifying grades, discovers an unexpected avenue into the legal profession should his means allow him to study at a foreign institution with more lenient criteria. The former is barred from even the dream of becoming a paralegal, while the latter receives the esteemed designation of legal practitioner. Is this inequitable distinction permissible under the aegis of section 20 of our Constitution? Can we, in good faith, maintain that these distinctions are mere matters of policy rather than law?

15. To deny entry into law programs on the basis of grades while recognizing foreign qualifications with inferior standards is a contradiction that cannot be dismissed. A law or policy that permits such an inequity cannot claim legitimacy under the mantle of justice or equality. It must be questioned. Indeed, if a policy—be it in the form of law or regulation—erects barriers that welcome some while vehemently refusing others, despite equality in academic achievement, it stands to reason that such an approach is not only unjust but discriminatory. It undermines the very spirit of equality embedded within constitutional ideals.

16. If our understanding holds, as we firmly believe it does, then it follows that the petitioner's MSCE falls short of the minimum requirements necessary to pursue the study of law at an institution of higher learning in Malawi. This may also imply that the foreign university that admitted him, by that very act, preserved standards that pale in comparison to those that govern public institutions of higher learning in Malawi. Can we then say that the university and the qualification it conferred were rightfully acknowledged within the Malawian legal framework?

17. We find it intriguing that the Assistant Registrar chose to recuse himself from further handling of the petition's documents. In an act of conscientious conflict, he suggested that he lacked the

jurisdiction to interpret the Constitution, while simultaneously expressing concern over what he perceived as the incompetency of the documents submitted—an incompetency he deemed rooted in the breach of constitutional principles, thereby marring the petitioner's admission to the Malawi Institute of Legal Education (MILE). He stated that, in good conscience, he could not proceed to issue documents that would perpetuate a constitutional infraction.

18. If it is true that the faculties of constitutional interpretation are solely vested in judges (a position doubted by Mwaungulu, J (as he then was) in *Reserve Bank of Malawi v Finance Bank of Malawi Ltd and Others* Constitutional Cause No. 5/2010 (unreported) and rejected in *Malaya v Attorney General* Constitutional Case No. 3/2018 (unreported)), can it also be true that judicial officers below the rank of a judge cannot apply the provisions and principles of the Constitution?

19. All judicial officers – and indeed all state organs - are duty bound to apply and uphold the Constitution (Section 10 of the Constitution). How, we ask, can a court wield a law it cannot comprehend? But if we concede that all judicial officers are tasked with the application of constitutional provisions and principles, it must follow that they are capable of ascribing meaning to these principles, albeit within the confines of their statutory jurisdiction. While the High Court has unlimited original jurisdiction, subordinate courts operate within the parameters of the powers granted to them by Acts of Parliament, yet always within the cardinal framework of the Constitution.

20. A law, in its truest form, is not merely a string of words etched upon paper; it is an embodiment of principles and ideals, crafted to achieve justice, maintain order, and safeguard rights. These principles and ideals are embedded within the law's language, not merely in its syntax but in the deeper currents of intent, purpose, and value. It is this understanding, this essence, that must be discerned and brought to light before the law can be applied effectively.

21. To apply a law without first interpreting it would be akin to navigating an uncharted sea without a map or compass. Such an act would risk blind adherence to the letter of the law, ignoring the nuances and subtleties that inform its spirit. In the absence of interpretation, the application becomes arbitrary, devoid of context, and susceptible to the whims of personal biases and caprice. Without interpretation, the law ceases to be a living guide and instead becomes a hollow decree, devoid of relevance or justice.

22. It is true that certain laws may be straightforward, their meaning so explicit that their application might seem automatic. A law that simply prohibits an act—such as the rule that prohibits the state to keep an arrested person beyond 48 hours without the authority of the court—may appear to be self-executing, with little need for interpretation. However, even in these cases, a fundamental interpretation exists: the understanding of the law's purpose and its boundaries. The very decision to apply it without deviation or exception rests on an interpretation of its intent.

23. The act of applying a law, therefore, presupposes interpretation. It is through interpretation that we unlock the law's deeper significance, navigating the interplay between its general principles and the particular facts at hand. It is only by understanding the law's meaning that we can ensure its just and equitable application. Without interpretation, law would become no more than a mechanical tool, incapable of adapting to the complexities of human society. Hence, to assert that a law can be applied without interpretation is to misunderstand the nature of law itself. This is why in *In the Matter of Bakili Muluzi and the Anti-corruption Bureau* Court Reference No 2/2015, as quoted in the *Malaya* case, Munlo, CJ, held that constitutional interpretation or application '*run across and is always before our courts in different ways, at different levels, but all the time*.'

24. The Assistant Registrar appears to have misdirected himself in thinking that he has no jurisdiction to interpret the Constitution. All courts '*in different ways, at different levels, but all the time'* have jurisdiction to interpret, apply, and uphold the provisions and principles of the Constitution. In our view, he needed not to have recoiled from his responsibility as he did except if he had formed the view that the issues he was dealing with expressly and substantively relate to, or concern the interpretation or the application of the Constitution.

25. We must acknowledge that we sit not as a Judge in a court of unlimited original jurisdiction but as a registrar within the High Court, vested with powers defined by statute (Sections 3(1)(a) and 8(1) of the Courts Act). Yet within such powers, we are duty-bound, as per Section 10 of the Constitution, to have due regard not only to the principles and provisions of the Constitution but to the very fact that it (the Constitution) is the ultimate source of authority.

26. If the documents before us were for a petitioner who read the law at a private university in Malawi, we could argue that we would rightly invoke Order 5, Rules 10 and 11 of the Courts

(High Court) (Civil Procedure) Rules in rejecting them. For the plain reading of Section 25 of the Constitution, as dictated by the letter of the law, does not permit the preservation of academic standards inferior to those obtaining in public institutions of higher learning. Thus, we would deem the documents of the petition an abuse of court process, seeking to render the court complicit in an act of illegality by requesting it to sanctify that which the Constitution disapproves. We could possibly find the documents to be vexatious, intended to offend the parties herein, the Attorney General and the Malawi Law Society, perhaps not the office bearers, but the constitutional office and the institution itself—in an attempt to persuade them to sanction an act that the Constitution frowns upon.

27. Strikingly paradoxical, the sole reason these documents may advance beyond this juncture rests upon the fact that the petitioner procured his law degree beyond our borders. The implication of what we have just said implies discrimination. It means that the academic entry into the profession of law (beginning with MSCE certification or its equivalent) has two standards – a higher standard for those who choose to read the law in Malawi (or those who cannot afford to study abroad) and an inferior standard for those who enrol at a foreign university maintaining lesser requirements.

28. Just as the Assistant Registrar trod cautiously upon the uncertain terrain of constitutional interpretation—especially concerning the spirit of Section 25 and the shadow of discrimination that accompanies it if applied to the disadvantage of those who cannot afford an education beyond our borders for purposes of entry into the profession of law—we too find ourselves unprepared to navigate these slippery depths alone. We believe this matter, per Section 9(2) of the Courts Act, merits the wisdom of a panel of not less than three Judges, whose constitutional insight could illuminate our path.

29. In our understanding, to invoke Section 9(2) of the Courts Act, there must first be a proceeding in the High Court or a business arising thereout. Secondly, the proceeding must expressly and substantively relate to, or concern the interpretation or application of the provisions of the Constitution.

30. There is obviously a proceeding before the High Court, one petitioning the Chief Justice to admit the petitioner to practice law. It need not be said that when presiding over such petitions, the Chief Justice as per practice sits in the High Court.

31. As to the second test under Section 9(2), here, in our view are the express and substantive constitutional questions that arise from the very documents of the petition as discussed in the foregoing paragraphs and the preceding decision of the Assistant Registrar:

    31.1. Whether the CLE, in recognising or approving a foreign law qualification obtained from an institution of higher learning with inferior entry requirements, to the detriment of students with comparable and/or better academic achievement at MSCE or its equivalent who are barred from enrolling in any local institution of higher learning in Malawi, contravened Sections 25(1), 25(2)(c), and 13(f)(iii) as read with Section 20 of the Constitution;

    31.2. Whether MILE, in admitting the petitioner with a foreign qualification obtained from an institution of higher learning with inferior entry requirements, to the detriment of students with comparable and/or better academic achievement at MSCE or its equivalent who are barred from enrolling in any local institution of higher learning in Malawi, contravened Sections 25(1), 25(2)(c), and 13(f)(iii) as read with Section 20 of the Constitution; and

    31.3. If either of the above questions are answered affirmatively, whether the petitioner, having been admitted to MILE through a process that contravened the Constitution, can validly present a petition for admission to practice as a legal practitioner in Malawi.

32. We believe that unless these questions are diligently addressed, to simply accept and issue the documents of the petition before us presents a significant risk of being perceived as participants in a process that is constitutionally suspect, potentially abusing the law and court process. We contend that the legal profession stands at a constitutional crossroads, and guidance from a panel of no fewer than three judges may provide the clarity necessary to navigate our path forward.

33. We remain mindful of the procedures established under Order 19 of the Courts (High Court) (Civil Procedure) Rules, which deals with matters pertaining to the Constitution. It appears that the procedure under Order 19 did not foresee the situation in which we currently find ourselves—namely, that a registrar would refer a matter to the Chief Justice for certification as expressly or substantively relating to the interpretation and application of the Constitution, when the Chief Justice simultaneously serves as the presiding judge for the substantive petition

of admission. We hold reservations regarding whether, under the provisions of Order 19, the Chief Justice (who in this proceeding we are acting for – *Liphava v Mbaula and Prime Insurance Company Limited* MSCA Civil Appeal No. 40/2019) can refer a case to himself for certification.

34. But it is not our understanding that Order 19 is capable of constraining the express provisions of a statute, thus, Section 9(2) of the Courts Act. The requirements set forth under Section 9(2) are twofold and no more than that: first, there must be a proceeding in the High Court or a business arising thereout; secondly, this proceeding must expressly and substantively relate to, or concern the interpretation or application of the provisions of the Constitution.

35. We are convinced that the documents of the petition meet the exceptional criteria established by Section 9(2). Furthermore, it is our belief that the Chief Justice, while sitting in the High Court in a petition for admission to practice as a legal practitioner, possesses the authority to certify that certain issues arising from that proceeding align with the parameters of Section 9(2) of the Courts Act.

36. Concerning Order 19, Rule 2(4), which suggests that the certification role of the Chief Justice is an administrative function—an interpretation some have posited as meaning that the Chief Justice cannot reject a referral for certification—we assert that our referral to the Chief Justice does not stem from Order 19. Instead, it is grounded in statute, specifically Section 9(2) of the Courts Act.

37. Moreover, we express doubt that the provisions of Order 19, Rule 2(4) can render the Chief Justice a mere automaton, compelled to rubber-stamp every submission without engaging his judicial intellect. After all, how can the Chief Justice arrive at an informed view on the certification if he is unable to apply his legal interpretive faculties regarding whether he concurs with the original court's assessment? If, indeed, the intent behind Section 9(2) of the Courts Act was to bind the Chief Justice in an unyielding manner to merely certify, we must question the necessity of such a requirement in the first place.

38. If the law's intention were to bind the Chief Justice's hands, compelling him to certify even unqualified and misguided referrals, then it would reduce him to a mere vessel and potentially a conduit for error, stripped of discretion. It would mean that, confronted with obviously baseless referrals, the Chief Justice is duty-bound to grant certification. Such an interpretation

would render Order 19, Rule 2(4) as an edict that stifles the very principles it seeks to uphold, turning Section 9(2) of the Courts Act into an instrument of mindless procedure.

39. What we maintain is that referring the petition's documents to the Chief Justice does not ensnare that esteemed office in a straitjacket, compelling it to act without reflection. Rather, it remains within the Chief Justice's purview to either concur with our assessment or to offer alternative guidance on the treatment of the petition's documents.

40. Procedurally, with Section 9(2) of the Courts Act kept in mind, we have elected to invoke Order 5, Rule 11 of the Courts (High Court) (Civil Procedure) Rules to refer the documents of the petition to a Judge (in this instance, the Honourable Chief Justice) for guidance, mindful of our views concerning the constitutional issues surrounding the petition's documents.

41. Having arrived at this juncture, we find it unnecessary to summon the philosophical spectre of Socrates, as did the Assistant Registrar, in our quest for legal clarity. Rather, we stand assured in the unwavering strength of the law itself, content to embrace its guidance as we move forward.

42. The documents of the petition are hereby referred to the Chief Justice.

Made in Chambers this Friday, 6th day of December, 2024 at Blantyre, Malawi.

Chisomo Msokera
ACTING DEPUTY REGISTRAR