JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NOs 22, 411 and 662 of 2011

THE REPUBLIC

Versus

Mussa Chawisi

THE REPUBLIC

Versus

Mathew Bello

THE REPUBLIC

Versus

Amon Champyuni

In the First Grade Magistrate Court sitting at Limbe, Criminal Case No 1160 of 2010; in the Principal Resident Magistrate Court sitting at Blantyre, Criminal Case No. `134 of 2010;and in the First Grade Magistrate Court sitting at Limbe, Criminal Case No 274 of 2011

CORAM: JUSTICE D MWAUNGULU

Nkhata, Kankhuni, Khonyongwa, Mamburasa, Manareta and Phiri, Counsel for CEDEP, HRR and Law Faculty

Dzonzi, Counsel for UNAIDS,

Silungwe, Banda, Ngumba and Banda, Counsel for the Malawi Law Society

Pastor Chakwera, unrepresented

Mr Matumbi, unrepresented

Namanja and Itimu, Senior State Advocates, for the Attorney General

Mwanyongo, Official Court Interpreter

Mwaungulu J

JUDGEMENT/ORDER

Précis

The certification under section 9 (3) of the Courts Act could arise in many contexts because of the judicial duty under sections 4 and 15 of the Constitution. Broadly, certification is not required for others who have a similar duty but for proceedings in the High Court by section 9 (2) and (3) of the Courts Act:.

> (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 there out shall be heard and disposed of by or before a single Judge.
>
> (2) Every proceeding in the High Court and all business arising there out, 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) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

The question when setting the Mussa Chawisi, Matthews Bello and Amon Champyuni cases for under review, was whether, constitutionality of section 153 of the Penal Code at askance, a Chief Justice under section 9 (2) of the Courts Act was necessary. I determined that it is not in all cases, save where there is doubt or a challenge about whether the case falls in the ambit of section 9 (2) of the Courts Act, that the Chief Justice's certification may be necessary. Otherwise, a Chief Justice's certificate under section 9 (3) of the Courts Act is *abundanti cautela.* Under section 9 (2) of the Courts Act the Registrar or the judge in charge must empanel more than three judges where the case passes the muster. When the High Court constitutes itself into a panel of no less than three judges, there is no referral because the High Court has no power and cannot refer a matter to itself. The Attorney General thinks that there should be a Chief Justices certification all the time.

The duty to apply and interpret the Constitution

Section 4 of the Constitution

Section 4 of the Constitution binds executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi and entitling all citizens to equal protection of the Constitution and laws made under it:

> This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.

Section 15 of the Constitution

Section 15 is context specific; dealing with enforcing human rights in the Constitution, as opposed to general provisions in the Constitution and other laws. The section envisions the governors and the governed. For the governed, section 15 (1) of the Constitution enjoins the executive, the legislature, the judiciary and all other organs of government to respect and uphold human rights and freedoms enshrined in the Constitution. Section 15 (2) empowers the governed to ensure the responsibility of the governors:

> (1) The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.
>
> (2) Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and

> other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.

The epithets 'Judicial organs' in sections 4 and 'Judiciary' in section 15 of the Constitution encompass all cadres of the judiciary in sections 104, 108 and 110 of the Constitution. The Supreme Court, the High Court and all courts subordinate to it are required to interpret and apply the Constitution in matters within their purview. That is why, respecting constitutional responsibilities of the judiciary's echelons, section 9 (2) only applies to 'proceedings in the High Court' and no other.

The power to review decisions in criminal cases from courts of first instance

The court acted under the right of an accused person under section 42 of the Constitution to review any judgment from a court of first instances, the right of any person against discrimination and the right to privacy under section 20 and 21 of the Constitution, respectively. This court in *Republic v George* (2013) Confirmation Case No 290 (HC) (PR) (unreported) examined section 42 of the Constitution suffice to say that the word 'or' between appeal and review raises the question whether it is sufficient if the laws provide for one of them. In *Republic v George* (2013) Confirmation Case No 290 (HC) (PR) (unreported), tentatively, it was held that the law could provide for both. Section 42 (2) (f) (viii) of the Constitution provides:

> Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right … as an accused person, to a fair trial, which shall include the right … to have recourse by way of appeal or review to a higher court than the court of first instance …

The powers of this court under the Courts Act providing for right to appeal and review criminal proceedings by High Court (sections 15, 25 and 26) and the Criminal Procedure and Evidence Code (sections 15, 346 and 362) are condign and soigné. Such proceedings are proceedings in the High Court for sections 9 (2) and 9 (3) of the Courts Act.

The four accused persons were convicted and sentenced for sexual offences under the Penal Code that generally prohibit sexual conduct against the order of nature. Section 153 of the Penal Code provides:

> Any person who—
>
> (a) has carnal knowledge of any person against the order of nature; or
>
> (b) has carnal knowledge of an animal; or
>
> (c) permits a male person to have carnal knowledge of him or her against the order of nature,
>
> shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

The right against discrimination

The right against discrimination arises from the wording of section 20 (1) of the Constitution:

> Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

On the face of it, the accused persons have an orientation, they are homosexual. In this review, there is no questioning of the power of the legislature in determining what is criminal; that has always been the function of the legislature, not the courts. Neither is the issue about whether criminal laws must or must not regard morality or culture. These are political and moral questions which are scarcely competent for a court, given its limited scope of inquiry and the constriction on the judiciary in section 9 of the Constitution that courts determine on the facts of a particular case and the law applicable to those facts. The legislature has the withal to conduct better and more inquiries. Where, therefore, penal provisions infringe on people's rights, beyond just criminality, the state has responsibility to justify those laws not on general moral criteria but democratic morality, to determine what, on objective criteria is or is not criminal. Laws must be justified on the constitutional criteria. The state has to justify laws based on the constitutional criteria. Section 44 (1) and (2) provide:

> (1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.
>
> Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

The point for review is really that the legislature, even with the best of intentions, could pass laws that would undermine certain rights or others. In the context of this matter, prohibiting or criminalizing the conduct in section 153 of the Penal Code, even though deemed criminal, could be discriminatory based on sexual orientation or an invasion of the right to

privacy. Setting down the case for review would enable justification of these penal provisions or their being declared unconstitutional.

Unlike section 8 of the South African Constitution, which but for sexual orientation, is *pari materia* with our section 20 of the Constitution, the words 'sexual orientation' are not in section 20 (1) of our Constitution which proscribes discrimination on other grounds, including sex. The words 'other status or condition,' absent in section 8 of the South African Constitution, may be broad enough to include sexual orientation. Moreover, the word 'sex' has been understood to be broad enough to include sexual orientation (*Toonen v Australia* U.N.

The right to privacy

The right to privacy is in section 21 of the Constitution. Section 21 of the Constitution provides:

> Every person shall have the right to personal privacy, which shall include the right not to be subject to—
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> (a) searches of his or her person, home or property;
>
> (b) the seizure of private possessions; or
>
> (c) interference with private communications, including mail and all forms of telecommunications.

Human Rights Commission No. 488/1992. Criminalizing sodomy etc has been held to violate other rights, the right to privacy, for example ((*Dudgeon v United Kingdom* (Application 7525/76) judgment of 22 Oct 1981, Series A, vol 45; *Norris v Ireland* (Application 10581/83) judgment of 30 Nov 1987, Series A, vol 142; *Modinos v Cyprus* (Application 15070/89) judgment of 22 Apr 1993, Series A, vol 259).

Background

These considerations arise in the convictions coming under review under section 42 (2) (f) (viii) of the Constitution, sections 18, 35 and 26 of the Courts Act and sections 15, 346 and 362 of the Criminal Procedure and Code. Consequently, I set down four cases for review to consider whether the convictions, based on legislation that could be unconstitutional, could stand. Acting under section 9 (2) of the Courts Act I advised the Registrar to empanel five judges based on a defined selection based on gender and locality. At an advanced stage, the Attorney General objected to the proceedings because there was no Chief Justices certificate under section 9 (3) of the Courts Act.

The Attorney General never doubted that the case, as set down, involved interpretation, application and enforcement of the Constitution and, therefore, a proper case for 9 (2) and (3) of the Courts Act. At the heart of the confirmation or review in this case was the constitutionality of a statutory provision. The Attorney General thought that this court could not act under section 9 (2) of the Constitution without the Chief Justice's certificate under section 9 (3) of the Courts Act. I decided, since this court's jurisdiction on the matter was plain, orally, regarding it as a procedural objection, that there was no need for certification on the case. The reasoning was not expressed; it was unnecessary. The Attorney General appealed against my order. The single member of Supreme Court Appeal required a reasoned order before proceeding. That order was not brought to my attention in time and, when it was, I was indisposed to write it. I do so now.

The matter for determination

The question, as I understand it, is whether sections 9 (2) and 9 (3) of the Courts Act, read together, provide for mandatorily certification by the Chief Justice and certification in all cases and, if they do not, what are the circumstances where certification may be necessary. This question is

different from considering precondition in section 9 (2) of the Courts Act. Section 9 (2) of the Courts Act is very clear, in matters under its ambit, a judge cannot sit alone. The minimum is three justices; the maximum is not prescribed. Nothing in section 9 (2) of the Courts Act suggests that judges will not sit in more than three unless there is certification. The question was whether a certification was necessary and construction of sections 9 (2) and 9 (3) of the Courts Act is necessary.

Section 9 (2) of the Courts Act creates a power sui generis

Section 9 (2) of the Courts Act provides:

> Every proceeding in the High Court and all business arising there out, 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.

It is cardinal to understanding section 9 (2) and, of course section 9 (3) of the Courts Act, to appreciate the context. It is not directed to parties; it is directed to the court. The constitution of a court for determining matters between parties is scarcely a matter for the parties. It is the function of the court to properly constitute itself. In the context of section 9 (2) of the Courts Act, therefore, the duty is on the court to constitute itself after for matters in the ambit of the section. The High Court, for matters in the ambit, domain or purview of section 9 (2) of the Courts Act, cannot sit with less than three judges.

The first observation is that section 9 (2) of the Courts Act only applies to 'every' proceeding 'in the High Court.' Section 9 (2) of the Courts Act does not apply to proceedings in courts superior or subordinate to the High Court. Judges in the High Court do not normally sit in the Supreme Court or courts subordinate. Even if they did, proceedings in those courts, would not be proceedings in the High Court.

Secondly, this section escalates constitutional matters above other High Court proceedings. A single judge, after the amendment, will continue to sit in all matters not constitutional.

Thirdly, it is not, however, that a single judge may never sit alone in matters constitutional. Section 9 (2) of the Courts Act itself provides a substantiality, connectivity and manifestation test. Section 9 (2) of the Courts Act requires that the proceedings and all business arising there out 'substantively' relates to or concerns the interpretation or application of the provisions of the Constitution. Proceedings peripherally or tangentially related to interpretation or application of the Constitution will continue, because of the substantiality test, to be handled by a single judge. Any other view would, as pointed out in *Reserve Bank of Malawi v Finance Bank of Malawi Limited (In Voluntary Liquidation)* (2010) Constitutional Cause No 5 (HC) (unreported), **would** denude a single judge completely of the power in sections 4 and 15 (2) of the Constitution while retaining, subject to what I say later, it for presiding officers with less jurisdiction than a judge. This is why the substantiality test is cardinal.

The connectivity test requires that the proceeding and all business arising there out relates to, or concerns the interpretation or application of the provisions of the Constitution. Matters, therefore, that do not relate to interpretation or application of the Constitution, albeit constitutional, are not covered by section 9 (2) of the Courts Act. Application requires interpretation; interpretation does not necessarily comport application. Application of the Constitution means a myriad things and the word seems to suggest that in all cases where the Constitution is going to be applied by the courts, after the substantiality and inclusion test, are covered by section 9 (2) of the Courts Act. It was never the intention of the legislature in enacting section 9 (2) of the Courts Act that other courts, superior or inferior, would not be involved in matters constitutional. That is why section 9 (2) of the Courts Act is restricted to 'proceeding in the High Court.'

There is an inclusion test. The proceedings must 'expressly' relate or concern. The application and interpretation must not arise by implication or *aliunde*. Where matters fall outside the ambit of section 9 (2) of the

Courts Act, a judge will continue to sit and perform the constitutional obligations in section 4 and 15 of the Constitution.

Once proceedings pass the test, a judge must sit with two others at the minimum. *A fortiori* where a matter does not pass the test, a single judge sits.

Fourthly, section 9 (2) of the Courts Act applies to 'every' proceeding. Section 9 (2) of the Courts Act itself sets, besides the tests, no preconditions. It does not say that the constitution of the court for constitutional matters it describes depends on certification by the Chief Justice. It does not say, if a matter within the ambit of section does not have a certification, three judges should not sit or that the matter cannot be considered at all. Section 9 (2) should be considered *sui generis* and section 9 (3) of the Courts Act as aiding than thwarting it.

Section 9 (3) of the Courts Act

The question that arises is whether a court acting under section 9 (2) of the Courts Act requires a certification from the Chief Justice under section 9 (3) of the Courts Act and, if so, whether the Chief Justice has to do so all the time. The Attorney General submitted that there must be a certificate all the time. Of course, in a similar case, the Chief Justice declined to issue a certificate for different reasons. That was in *Soko and another v Republic* (2010) Misc. Appl. Cas. No 2). The Chief Justice never considered whether he could do in all circumstances. This consideration probably first arose in *Reserve Bank of Malawi v Finance Bank of Malawi Limited (In Voluntary Liquidation)*. *Soko and another v Republic*, however, is chiefly distinguished from the present case. That, unlike this case, was where the parties themselves applied before the subordinate court for certification by the Chief Justice and they did so not under section 9 (3) of the Courts Act but the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. As we see shortly, certification was not required; the proceedings were not in the High Court.

The Attorney General thinks that the Chief Justice must certify in all cases based on section 9 (3) of the Courts Act:

> A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

The wording of this section, if one accepts the rendition of the Attorney General, is probably a legislative drafting disaster. Properly read, there is nothing in this section that requires certification mandatorily and, for that matter, in all cases. When asked, the Attorney General agreed that there was nothing connoting that. If, as suggested, the legislature intended that mandatory certify and in all cases, that intention was far from, if at all, stated clearly in section 9 (2) and 9 (3) of the Courts Act.

If the legislature intended mandatory certification and in all cases, either embedded to section 9 (2) or 9 (3) of the Courts Act or disjunctively, in a separate subsection, it would have provided to the effect that the Chief Justice shall certify cases or all cases under section 9 (2) of the Courts Act. The Attorney General's rendition is *non sequiter* section 9 (3) of the Courts Act.

Section 9 (3) of the Courts Act is very clear: a certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact. There is nothing in this section that suggests that the Chief Justice shall certify all matters in the ambit of section 9 (2) of the Courts Act. Where, however, there is such a certification, it serves one useful purpose, it is conclusive evidence of that fact. The absence of that evidence does not comport that the High Court, in matters falling under the ambit, should comprise of less than three members of the High Court; for section 9 (2) of the Courts Act is peremptory for cases falling within the ambit, with or without certification and the duty is on the court, not the Chief Justice, to constitute the court.

One effect of absence of certification is that, without it, the High Court, sitting in more than threesome, can refuse to interpret or apply the Constitution because it does not fall in the ambit of section 9 (2) of the Courts Act, something the High Court cannot do if the Chief Justice has not certified. There is nothing in sections 9 (2) and 9 (3) of the Courts Act to suggest that in situations falling under the ambit of section 9 (2) of the Courts Act and where there is no such certification the High Court should be sitting with less than three judges. The other effect of lack of certification is that the High Court has everything but not the conclusive evidence when empanelling, which it must, not less than three judges for matters in the ambit of section 9 (2) of the Courts Act.

The Chief Justice's certification, on proper reading of section 9 (3) of the Courts Act, should be had *abundanti cautela.* There is nothing in section that makes the Chief Justice's certificate *sine qua nona* the High Court should not in cases under section 9 (2) of the Courts Act empanel itself as required when considering constitutional matters.

That this is the case is confirmed by that neither section 9 (2) nor section 9 (3) of the Courts Act provide for consequences of failure to do so or refusal to do so. Section 9 (3) does not state that without certification the High Court must not consider the matter at all or sit with members less than three. What section 9 (3) of the Courts Act says is that certification, if and when present, is conclusive of that the matter is in the ambit of section 9 (2) of the Courts Act. What section 9 (3) of the Courts Act does not say is that section 9 (2) of the Courts Act operates when and only when there is conclusive evidence, supplied by certification. What section 9 (3) does not say is that if there is no certification the court should conclude that there is inconclusive evidence. Neither do sections 9 (2) and 3 of the Courts Act suggests that certification is the only conclusive evidence of the fact that The Chief Justice's certificate is only conclusive of the fact where it is available. It does not follow that where there is no such certificate there is no evidence, conclusive or inconclusive, whether a matter falls in the ambit

of section 9 (2) of the Courts Act. Since neither section 9 (2) or 9 (3) of the Courts Act require conclusive evidence for the matters falling within the ambit, the duty of this court still remains to constitute itself where a matter falls in the purview of section 9 (2) of the Courts Act. A Chief Justice's certificate is desirable and beneficent; it is not a requirement.

It is inconceivable that the legislature, in passing section 9 (2), intended that the High Court should either not sit at all or seek certification based on the court's or a party's choice on whether or not to seek the Chief Justice's certification. This is a direct consequence of the Attorney General's rendition of section 9 (3) of the Courts Act. Where, as is contended, the Chief Justices' certificate must be had for more than three judges to sit, the Judge or the parties have to abstain from requesting a certification and a Judge of the High Court can sit alone or avoid raising the constitutional question all together where, for example, a substantial question of application or interpretation of the Constitution arises expressly. The intention of the legislature in passing section 9 (2) was that for matters falling in the ambit, the High Court should comprise of a minimum of three High Court Judges. Section 9 (2) does not lay certification as a precondition for High Court Judges to sit in threesome. Section 9 (3) of the Courts Act must be understood as creating an alternative rather than a prescription or proscription of other avenues, namely, three judges should sit, even without certification, where a case passes the section 9 (2) of the Courts Act threshold. Such a rendition would defeat the benevolent intention of the legislature that constitutional matters be not handled by less than three judges.

Under section 9 (2) of the Courts Act the Registrar or the Judge will constitute a court with three judges sitting based on the substantiality, connectivity and manifestation tests. There will, therefore, be a lot of satellite cases in a bid to determine whether a particular case falls within the ambit of section 9 (2) of the Courts Act. The question, no doubt will be daunting for the courts and the parties alike. In the marginal case, the

chips may fall either way. In those cases of doubt, a party or the court may be safer with a certification because, under section 9 (3) of the Courts Act a Chief Justices certification is proof, indeed *par excellence*, of a fact that the case falls within the ambit of section 9 (2) of the Courts Act. It is one among many though, probably first among equals. It is this proof aspect that necessitates section 9 (3) of the Courts Act, but only as an alternate not a mandatory requirement. As a practical matter the High Court must set down the case on its assessment and, in case of rejection request certification from the Chief Justice. Since a Chief Justice's certificate does not detract the High Court of its responsibilities where the Chief Justice refuses to certify, it is unnecessary to ask for a Chief Justice's certificate where the court, acting under its general powers under sections 4 and 15 of the Constitution, sets the case down under section 9 (2) of the Courts Act

It is one thing to say that a certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact. It is quite another thing to suggest that in every case where the court reconstitutes itself for constitutional purposes they need uncontroverted proof, by the Chief Justice's certification, that the matter falls in the ambit of section 9 (2) of the Courts Act.

Was this a case of casus omissus?

The Attorney General's rendition, given that a proper interpretation of section 9 (3) does not render itself to the conclusion that the Chief Justice's certification is compulsory and in all cases, can only be possible on the principle that the obligatory or imperative was *casus omissus* and should, therefore, be read into the provision. Was there, probably, a situation of *casus omissus*? There was none.

In the construction of statutes, *casus omissus* has a long pedigree. In circumstances where it is invoked it serves two purposes; the inclusionary or exclusionary purposes. In its inclusionary purpose *casus omissus* furthers the intention of the legislature by including matters which, by legislative drafting mistakes or omissions or for some other reason, were omitted and

should be included. Conversely where the intention of the legislature was unambiguously to exclude certain considerations, *casus omissus* gives effect to such intention. In *Crawford v. Spooner* ((1846) 6 Moore PC 1: 13 ER 562 the Judicial Committee said:

> We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend and by construction, make up deficiencies which are left there.

In the Supreme Court of India in *Petroleum and Natural Gas Regulatory Board v Indraprastha Gas Limited & Ors* (Civil Appeal No.4910 of 2015), Misra, J said:

> In this regard we may, with profit, refer to certain authorities in the field. In *CST v. Parson Tools and Plants* , the Court has held that if the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so 'would be entrenching upon the preserves of legislature'.

Application of the principles requires regarding a provision in the light of the statute and determining the actual and dominant intention of the legislature. In *S.P. Gupta v. Union of India* (1981) Supp. SCC 87), the court said:

> Thus, on a full and complete consideration of the decisions classified under the various categories, the

propositions that emerge from the decided cases of this Court and other foreign courts are as follows:

> Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of casus omissus or of pressing into service external aids, for in such a case the words used by the Constitution or the statute speak for themselves and it is not the function of the court to add words or expressions merely to suit what the courts think is the supposed intention of the legislature.

Consequently, a court should be slow to apply the principle where, on proper understanding the interpretation of the legislation, it is plain that the matter purportedly omitted is possible. In *CIT v. National Taj Traders* ((1980) 1 SCC 370) the court said:

> "In other words, under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in *Artemiou v. Procopiou* (1966

> 1 QB 878), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words"

On the other hand, where exclusion of a matter purportedly omitted is unclear or certain from the construction of the statue, the court should avoid taking the role of the legislature by reading words into the statute to give effect to an intention never meant by the legislature. This is because it is not the functions of the court, except in circumstances where the intention is clear from the legislation, to fill gaps created by the legislature. In *Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc* ((2012) 9 SCC 552.the court said

> "... that it is not the function of the court to supply the supposed omission, which can only be done by Parliament. In our opinion, legislative surgery is not a judicial option, nor a compulsion, whilst interpreting an Act or a provision in the Act. The observations made by this Court in *Nalinakhya Bysack* would tend to support the aforesaid views, wherein it has been observed as follows:
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> > ". … It must always be borne in mind, as said by Lord Halsbury in Commissioners for Special Purposes of *Income Tax v. Pemsel*, that it is not competent to any court to proceed upon the assumption that the legislature has made a mistake. The court must proceed on the footing that the legislature intended what it has said. Even if there is some defect in the phraseology used by the legislature the Court cannot, as pointed out in *Crawford v. Spooner*, aid the legislature's defective phrasing of an

> Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a casus omissus, it is, as said by Lord Russell of Killowen in *Hansraj Gupta v. Official Liquidators of Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, for others than the courts to remedy the defect.""

Lord Diplock in *Duport Steels Ltd v Sirs* (1980) 1 WLR 142 : (1980) 1 All ER 529 (HL) said:

> … the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount.

Section 9 (3) of the Courts Act just states, without stating that it should be had all the time, that a certification that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact. Such a certificate just proves, without anything else, that a matter is within the ambit of section 9 (2) of the Courts Act. What it does not say is that lack of it absolves the High Court constituting itself in not less than three where the case is plainly within the ambit on other conclusive evidence. It does not even say that the High Court should not sit

in less than three where the Chief Justice, despite that the matter is within the ambit, refuses or neglects to issue a certificate. The dominant intention of sections 9 (2) and 9 (3) was that no less than three judges should sit in a constitutional matter and, in case of doubt, recourse should be had to a certification by the Chief Justice. Where, therefore, a matter is clearly on other conclusive evidence within the ambit to the High Court or the Registrar, certification is a mere formality at the cost of money, expedience and dispatch. This is the combined effect of section 9 (2) and 9 (3) of the Courts Act. There was no casus omissus.

The (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules

The Attorney General could have thought that this is necessary because of the High Court (Procedure on the Interpretation and Application of the Constitution) Rules. The rules, however, only apply after certification and, in many respects, are based on a misconception and are applied beyond the scope of section 9 (2) and 9 (3) of the Courts Act.

The (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules apply post facto *the Chief Justice's certification*

The starting point in the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules in relation to section 9 (2) and 9 (3) of the Courts Act is rule 2 dealing with the application of the rules:

> These Rules shall apply to all proceedings on the interpretation or application of the Constitution which <u>are</u> certified by the Chief Justice in accordance with section 9 (3) of the Act.(emphasis supplied).

First, the very reading of the section suggests that the rules are restricted only to proceedings on the interpretation or application of the constitution which <u>are</u> certified by the Chief Justice in accordance with section 9 (3) of the Courts Act. The (High Court) (Procedure on the Interpretation or

Application of the Constitution) Rules, therefore, are *post facto* the Chief Justices certification and do not relate to proceedings before the certification. That this is the case is confirmed by rule 4 of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules:

> Any proceedings under these Rules shall be commenced by an originating motion in Form 2 of the Schedule, within fourteen days after certification by the Chief Justice pursuant to section 9 (3) of the Act; but so however that—
>
> (a) in the case of a referral by the President under section 89 (1) (h) of the Constitution, the proceedings shall be commenced by a notice of referral; and
>
> (b) in the case of a referral by any other court under rule 8, the proceedings shall be commenced by a notice of referral in Form 3 of the Schedule (emphasis supplied).

Rule 2 of the High Court (Procedure on the Interpretation of the Constitution) Rules presuppose a different process for matters not certified under section 9 (3) of the Courts Act

The use of the word 'are' in the rule 2 of the High Court (Procedure on the Interpretation and Application of the Constitution rules, "These Rules shall apply to all proceedings on the interpretation or application of the Constitution which are certified by the Chief Justice in accordance with section 9 (3) of the Act," premises on that there are other proceedings which are not certified to which a procedure, besides the one under the rules, apply. Consequently, in the absence of certification, matters constitutional can proceed aliunde the procedure under the rules. These would be cases where the court thinks that, for purposes of empanelling not less than three judges, it is not necessary to obtain a Chief Justice's

certificate, where the Chief Justice has refuses or neglected to give a certificate and where the court thinks that other evidence, conclusive or not, section 9 (2) of the Courts Act has been fulfilled.

Certification under section 9 (3) of the Courts Act only applies to proceedings in the High Court, not proceedings in superior or inferior courts

Secondly, both rule 2 and 4 the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, by reference to section 9 (3) of the Courts Act, support the rendition that certification by the Chief Justice only applies to cases where a question about application or interpretation of the constitution emanating and proceeding in the High Court. The (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules would not, in my judgment, apply to cases where a court, subordinate, the High Court or Supreme Court, acting under sections 4 and 15 of the constitution, raise constitutional issues.

This rendition about subordinate courts may not be obvious because of the procedure set for such an application and the prescribed forms in the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. The ambiguities point to incoherent legislative drafting. Titles and notes are not part of the statute; they are, however, aids to interpretation. Part IV, Division 3, rule 8 reads:

> Division 3
>
> Reference by other Courts
>
> 8. Referrals by other courts
>
> (1) Where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary as determined by an original court, the Judge or Magistrate or Chairperson of the original court shall, within seven days from the date of the determination, submit the

referral in Form 3 of the Schedule to the Chief Justice for certification under section 9 (3) of the Act.

The word 'Court' in these rules has not been defined. It must, therefore, have the meaning attached to it in the parent Act, the Courts Act. Under section 2 of the Courts Act, the word 'Court' means the High Court and any subordinate court. The word 'Court' in Rule 8 of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules must mean the High Court, not the subordinate court. The High Court, under the Courts Act, remains the court or the High Court irrespective of the number of judges presiding on a matter. The words 'the Court', therefore, in Rule 8 (1) in the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules must refer to the High Court with jurisdiction under section 108 of the constitution. The words 'other courts' must therefore not relate to the High Court.

Even, however, accepting that other courts refer, as alluded to in Rule 8 (1) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, the Chief Justice has no jurisdiction to certify matters which are proceeding in subordinate courts or superior courts. The whole scheme of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules bases on section 9 (2) and 9 (3) of the Courts Act certification under section 9 (3) of the Courts Act is to require the Chief Justices certificates under section 9 (2) of the Courts Act to proceedings in the High Court. Section 9 (2) of the Courts Act is abundantly clear in relation to proceedings which are its domain. These proceedings must be proceedings in the High Court, not proceedings in subordinate courts. Rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules is, to the extent that it refers to subordinate courts, contrary to the parent Act, the Courts Act. It is, therefore, invalid by virtue of section 21 (b) of the General Interpretation Act. Sections 9 (2) and 9 (3) of the Courts Act do not refer, impliedly or

expressly, to proceedings in subordinate courts or the Supreme Court. There is, therefore, no need for certification under section 9 (2) and 9 (3) of the Courts Act of matters proceeding in the Supreme Court or subordinate Courts. References to the Chairman and the Magistrate in Forms 1, 2 and 3 prescribed in the rules are equally untenable.

A magistrate can reserve a point of law; the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and forms 1,2 and 3 base on section 9 (2)and 9 (3) of the Courts Act

A subordinate court and the Industrial Relations Court, as in other civil cases, and employment matters, respectively, to the High Court or to 'the court mentioned in the rule. There is certainly no power to the Industrial Relations Court to refer a legal matter to the High Court. Section 67 of the Labour Relations Act requires the court to resolve all legal, including constitutional questions. Under section 21 of the Courts Act a magistrate can reserve questions of law, including constitutional matter, for the High Court. Section 21 of the Courts Act provides:

> In addition to and without prejudice to the rights of appeal conferred by section 20 a subordinate court may reserve for consideration by the High Court any question of law which arises during the trial of any civil action or matter and may give any judgment or decision, subject to the opinion of the High Court, and the High Court shall have power to determine, with or without hearing argument, every such question.

The power is permissive and not compulsory. In this regard, therefore, the subordinate court reserves the right to proceed to consider the constitutional question. There is no need to refer it to the High Court. It is only in this respect that may be rule 8 (1) of the (High Court) (Procedure on

the Interpretation or Application of the Constitution) Rules would apply. Section 20 of the Supreme Court of Appeal Act provides:

> In the case of an appeal which involves a question of law alone, the Court may, if it thinks fit, request the High Court to state the question, together with all the circumstances under which the said question has arisen in such manner as may be prescribed by rules of court.

The hallmark of all these provisions is that the power to refer to the High Court is discretionary. Rule 8 (1) of the High Court (Procedure on the Interpretation and Application of the Constitution) Rules is subsidiary legislation. It cannot create a power for manadatory referral or certification.

Rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, however, is expressly, not based on section 21 of the Courts Act or section 20 of the Supreme Court Act. Rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and Forms 1, 2 and 3 base on section 9 (2) and 9 (3) of the Courts Act. Sections 9 (2) and 9 (3) of the Courts Act do not provide for referral to the High Court in constitutional matters from the Supreme Court of Appeal or subordinate courts.

Soko and another v Republic involved proceedings in a subordinate court. The Chief Justice, rejecting the certification, said:

> I have gone through the application for Certification of proceedings as a constitutional matter under section 9(3) of Courts (Amendment) Act 2004 and perused supporting affidavits as well as the skeletal arguments. Apart from the copy of the charge sheet that has been submitted, there has not been any originating motion disclosing what proceedings, if any that should be certified. Be that as it may, there

> is a charge sheet that has been filed together with this application. From the totality of the documents that are before me, I have come to the conclusion that the criminal proceedings that are before the Chief Resident Magistrate Court do not expressly and substantially relate to or concern the interpretation or application of the Constitution. The proceedings deal with criminal offences under the Penal Code, namely the offence of buggery and indecent practices these offences have no bearing on the Constitutional right deponed in paragraphs 7, 8 and 9 of the affidavit in support of the Application. In the premises certification as applied for has not been granted.

These, clearly were not proceedings in the High Court and, therefore, a certification was not necessary.

Moreover, if a question of law is reserved for the High Court the matter is referred to the High Court as envisaged in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, the question of empanelling judges under section 9 (2) of the Courts Act only arises in the High Court. It is not even the responsibility of the parties; it is the responsibility of the High Court to constitute itself and, therefore, resolve the certification problem. Since rule 8 (1) bases on section 9 (2) and 9 (3) of the Courts Act which deal with empanelling a court for proceedings in the High Court, in the absence of the need for a referral from subordinate courts in the section, rule 8 (1) does not apply to a Chairman or Magistrate where proceedings in their courts are not proceedings in the High Court. Can a Judge of the High Court refer matters to the High Court?

The High Court cannot refer to itself

The question, therefore, is whether a Judge of the High Court should solicit the Chief Justice's certification when a matter falls in the purview of sections 9 (2) and 9 (3) of the Courts Act under the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. The only basis, since sections 9 (2) and 9 (3) of the Courts Act does not say so, is rule 8 (1), for, if reasons just given, a magistrate or chairperson are not covered by section 9 (2) and 9 (3) of the Courts Act. If the words 'magistrate' and 'chairman' are, therefore removed from the section, section 8 (1) reads:

> Where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary as determined by an original court, the Judge … of the original court shall, within seven days from the date of the determination, submit the referral in Form 3 of the Schedule to the Chief Justice for certification under section 9 (3) of the Act.

This allows interpretation of the words 'judge,' 'the court', 'referral' and 'original court' in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules.

The word 'referral' arises elsewhere in the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. The word is not used in sections 9 (2) and 9 (3) of the Courts Act on which (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules premise and, consequently, sections 9 (2) and 9 (3) of the Courts Act, do not provide for a referral within the High Court. There is no suggestion in sections 9 (2) and 9 (3) of the Courts Act to refer any matter under the ambit of section 9 (2) of the Courts Act to or from any court or within the court. Section 9 (2) of the Courts Act, in its honest interpretation, requires that where a matter falls within its ambit, no

less than three judges should sit. It is envisaged that the Registrar or the Judge President, as the case may be, has to constitute the panel. The constitution of a more than three judges panel to try a matter within the jurisdiction of High Court cannot be considered a referral to 'the court' as rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules intimates.

The words 'the court' in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules mean the High Court. The (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules do not define the words 'the court' in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. The word 'Court' in these rules has not been defined. Under section 19 (a) of the General Interpretation Act, it must, therefore, have the meaning attached to it in the parent Act, the Courts Act. Under section 2 of the Courts Act, the word 'Court' means the High Court and any subordinate court. The word 'Court' in Rule 8 of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules must mean the High Court, not the subordinate court. The High Court, under the Courts Act, remains the court or the High Court irrespective of the number of judges presiding on a matter. The word 'Court', therefore, in Rule 8 must be referring to the High Court with jurisdiction under section 108 of the constitution. The words 'other courts' must therefore not relate to the High Court. The reference, therefore to the word 'Judge' in Rule 8 (1) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules comports ambiguity.

On the same score, the High Court cannot be the 'original court;' it is the court seized with the matter and powers under section 9 (2) of the Courts Act. This is underlined by the use of the words 'Where a referral to the court.' The court here is the High Court. The word Judge is not defined in the rules and, therefore, carries the meaning under the Act. Rule 8 (1) of the Courts (High Court) (Procedure on the Interpretation or Application of

the Constitution) Rules, therefore, refers to a High Court Judge, not a magistrate or chairman, who, in truth, is presiding proceedings in the High Court under section 9 (2) of the Courts Act. Reference to a 'Judge' and 'original court' in the section, if not ambiguous, therefore, must be referring to where a Judge (of the High Court) sits in an 'original court' which is not the High Court as, for example, as a Judge Advocate in a martial court under section 132 (1) of the Defence Force Act. Per force, since a judge in matters proceeding in the High Court there is no referral, the only duty left to the High Court is that of empanelling the court.

The constitution of the High Court panel, whether of a single judge or more than three is not a function of a judge but of the Registrar or the Judge in charge. It is difficult, therefore, to imagine when a judge (the High Court) has to refer the same case to the same court. The matter is already with the court. All that is needed is for the judge in charge or the registrar to constitute a panel of more than three judges. Normally empanelling as require by section 9 (2) of the Courts Act, occurs after the case is ready for trial it is at this stage when the court, not the parties, has to decide whether, expressly the matter before it is section 9 (2) of the Courts Act compliant and empanel the High Court as required by the rule. In Commercial Division assignment of the case is at the beginning of proceedings. Whatever the case, however, as long as proceedings are section 9 (2) compliant the Court must at the hearing stage constitute itself as required by the section. In that case the court is not referring a matter to any court but just constituting itself. Consequently, the practice, therefore, where parties apply for certification is not premised on section 9 (2) of the Courts Act because it is not the duty of the parties either to seek the Chief Justice's certificate or empanel the court. Squarely, therefore, the court must constitute itself. It is, therefore, only when the case in doubt that the court, not the parties must seek for certification. This is why Rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules provides that when the court determines that referral is necessary. That necessity only arises where there is a referral. There is no

referral when the High Court constitutes itself into a panel of not less than three judges.

Rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, however, premises on there being a referral. As we have seen neither section 9 (2) nor section 9 (3) of the Courts Act talk about a referral. Specifically section 9 (2) of the Courts Act only requires the court to constitute itself in a panel not less than three. This is not a referral. In any case, besides section 9 (2) and 9 (3) of the Courts Act there is no power for the High Court to refer a case to itself.

Even if section 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules applied to the High Court, the court's responsibility under section 9 (2) normally arises later in the proceedings, when a case comes for trial or hearing. It is at that stage when the incidence of section 9 (2) of the Courts Act occurs. Even where a judge is assigned to a matter at commencement, as happens in the commercial division of the High Court, it will be at the trial or hearing that, examining the file, the court has to be constituted, depending on whether the hearing in the High Court complies with section 9 (2) of the Courts Act, as a single member judge or a three member judge. If section 8 (1) will have to be followed, it is at this stage that the court, not the parties, have to seek certification.

Section 8, therefore, must not be understood as requiring that a certification must be sought by the High Court. Certification is only necessary 'where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary.' The High Court, where proceedings are before it, is the court seized with the proceedings and cannot refer them to itself. All that the court has to do is constitute itself into a panel of not less than three judges. The requirement in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules 'where a referral to the Court in

relation to any matter on the interpretation or application of the Constitution is necessary' serves two purposes.

First, it confines the requirement of the Chief Justice's certificate to where that court has jurisdiction to refer natters to that court. The rule cannot and should not create the power to refer. Moreover, that power cannot be created by rules of court. Secondly, it preserves the duty of every court under sections 4 and 15 of the Constitution to apply and interpret the Constitution in all matters before them. In relation to subordinate courts, because of section 21 of the Courts Act, reserving a question of law is discretionary and not mandatory. It means that a subordinate court, just like the industrial relations court, can interpret and apply the Constitution, even though only a subordinate court may reserve a constitutional question of law for the High Court. Consequently, the need for certification is not made compulsory by rule 8 (1) of the of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. Rule 8 (1) of the of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules requires certification where a court determines that a referral is necessary. There cannot be a referral within the High Court. The High Court, under sections 9 (2) and 9 (3) of the Courts Act is only required to constitute itself, normally when the case is ready. The court, not the parties, may *abundanti cautela*, when empanelling itself, request a certification by the Chief Justice.

The use of the word 'the court' in rule 8 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules and elsewhere in the rules suggests a conceptual misunderstanding. That misunderstanding, in my judgment, emanates from that, prior to legislating sections 9 (2) and 9 (3) of the Courts Act, suggestions to create a constitutional court, like in South Africa, failed because, under section 103 (3) of the Constitution, there shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court. More importantly, under section 108 (2) of the constitution, the High Court

shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution. It was for these reasons that, on constitutional within the ambit of section 9 (2) of the Courts Act, that the legislature increased the minimum panel from one to not less than three. In so doing, the legislature was not creating a 'constitutional court' or 'another court.' The (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, probably borrowed, proceed on that there is 'the court' or 'original court' within the High Court. There is no such court. Consequently, there cannot be referralS rules within the High court. All that section 9 (2) of the Courts Act requires is that the court empanels itself to not less than three judges for matters within the ambit of section 9 (2) of the Courts Act. When, therefore, the High Court constitutes itself to not less than three judges, it may *suo motu* or on application of the parties seek, if necessary, conclusive evidence, satisfied by section 9 (3) of the Courts Act

In the matter before me the question of constitutionality of the statute arose. That, according to section 108 (2) of the Constitution can only be handled from this court and under criteria rule 3 of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules the Chief Justice would have been compelled to certify. Rule 3 (1) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules does not lay down the circumstances of certification since those are already stated in section 9 (2) of the Courts Act:

> (1) The Chief Justice shall certify proceedings under section 9 (3) of the Act if the proceedings involve—
>
> (a) a matter under section 89 (1) (h) of the Constitution;
>
> (b) the determination of the constitutionality of an Act of Parliament or part thereof;

(c) the determination of the constitutionality of an act or omission of an organ of State or other person;

(d) a dispute between organs of State or public authorities concerning the status, powers or functions of those organs of State or public authorities as provided by the Constitution;

(e) the determination of the relationship between the Constitution and a treaty or part thereof; or

(f) the enforcement and protection of the Constitution.

(2) The certification by the Chief Justice under subrule (1) shall be in Form 1 of the Schedule.

Rule 3 of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules of creates situations where it will be mandatory for the chief justice to certify. If it were otherwise, the list in rule 3 of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, which is not exhausted as shown in *Reserve Bank of Malawi v Finance Bank of Malawi Limited (In Voluntary Liquidation)*, would be limiting the domain of matters where interpretation and application of the constitution is necessary. The use of the word 'if' as opposed to the word 'when' suggests that, where there is such an application or request by the High Court acting *suo motu* or on application of the parties, The Chief Justice must certify. More importantly, the matters raised in rule 3 are not the basis of certification. The basis of certification is in section 9 (3) and adumbrated in the certificate, Form 1 of the of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. Section 9 (3) of the Courts Act lays the required certification: a certification by the Chief Justice that a proceeding is one

which comes within the ambit of subsection (2). Section 9 (b) of the Courts Act delineates cases that are within its ambit: (a) every proceeding in the High Court and all business arising there out, (b) expressly and substantively relates to, or concerns (c) the interpretation or application of the provisions of the Constitution.

Since, under rule 3 (1) (b) of the (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules the Chief Justice was going to certify anyway, it was not necessary for the court, even acting *abundanti cautela,* request the Chief Justice for a certification which, for all intent and purposes, was only needed as conclusive proof. There is nowhere in sections 9 (2) or 9 (3) to suggest that when empanelling for purposes of section 9 (2) there is need for concrete proof, concrete proof is only desirable. In any case, certification was not declared by section 9 (2) and 9 (3) of the Courts Act as the only proof or conclusive proof that matters are in the ambit of section 9 (2) of the Courts Act. It was no in this case which clearly fell into the domain of this court under section 108 (2) of the Constitution and would have been certified by the Chief Justice without fail.

I must confess that I was and am the most reluctant to think that certification is necessary in all cases and mandatory from a provision that states, without more, that one way, among many, is conclusive evidence of a fact, where, like here, the provision does not state that it is not the only evidence, conclusive or otherwise, of proving a fact required. Empanelling not less than three judges is a judicial act and, based on section 9 (2) and 9 (3) of the Courts Act, is an activity which the court itself must undertake subject to certification *suo motu* or application by the parties at the point of constituting the court for hearing or trial and only abundanti cautela. There is nothing in sections 9 (2) and 9 (3) of the Courts to suggest that certification is necessary all the time. On the contrary, the High Court cannot abnegate its duty, if the matter falls in the ambit of section 9 (2), to constitute the court it in no less than three judges. Section 9 (3) just asserts

that certification is conclusive evidence. It does not state that that is the only evidence necessary for determining whether a matter falls in the ambit of section 9 (2) of the Courts Act.

I, therefore saw no benefit, on the circumstances of this case, to seek the Chief Justices certification.

Made in open court this 19th Day of February 2016

D. F. Mwaungulu

JUDGE