



THE ELECTORAL COMMISSION

REMARKS BY MEC CHAIRMAN, JUSTICE DR CHIFUNDO KACHALE

DELIVERED DURING CAUCUS WITH CENTRE FOR MULTIPARTY

DEMOCRACY (CMD) BOARD

16th October, 2020

Umodzi Park, BICC Lilongwe

- My fellow Commissioners:
 - Commissioner Dr. Mathanga
 - Commissioner Kunje
 - Commissioner Duwa
 - Commissioner Nanthuru
- MEC Chief Elections Officer, Mr Sam Alfandika
- The Chairperson of the Centre for Multiparty Democracy (CMD) board, Hon Patricia Kaliati
- Members of the CMD Board present
- CMD Executive Director, Mr Kizito Tenthani
- Management and Staff from MEC and CMD
- Ladies and Gentlemen

Good morning

The Commission requested for this meeting today so that we can offer an update and explanations on pertinent issues related to the forthcoming by-elections and also the demarcation process in view of the judgment by the High Court on 7th October 2020 and recent media reports.

Conduct of the Demarcation Process

It was earlier announced in Parliament by the Minister of Finance that the K500 million meant for the demarcation process has been reallocated to other votes apparently on the understanding that the Electoral Commission was not ready for the exercise this year. As we meet today, the Commission wishes to inform you, our key stakeholders that the decision was revisited because in truth it wasn't fair to say we are not ready and out of the K500 million, K300million has been allocated for this exercise in the current budget which may be beefed up for during the mid-year review if necessary.

The initial budget of the Commission for this exercise is K1.3 billion. With the K300million that has been allocated, the Commission will be able to roll out some preliminary activities that can fit within the allocation with the anticipation that either during the mid-term review or during the 2021-22 financial year the remaining amount shall be allocated for the Commission to finish the exercise.

The Commission also wishes to reiterate that the demarcation exercise will be a very consultative process. All critical stakeholders will be involved. Within the planned activities are meetings with presidents of political parties, the CMD board, the National Election Consultative Forum (NECOF), and Members of Parliament. The Commission will also set up demarcation committees at the council

level which will be the main forum driving the process. This should assure all stakeholders who were anxious that there might not be a platform for them to or contribute their views, that is not entirely true. What we have resisted as the Commission is the invitation by other stakeholders to pre-emptive about how many constituencies will be created. It will be very premature for us as a Commission to say we are undertaking consultations but we already have a solution in our pockets, we don't think then the consultation will be an honest conversation. we will be sharing the plan that we have and the methodology that we are going to use in the demarcation process in the forums that we have indicated with the presidents of the political parties, secretares generals, the CMD, Members of Parliament. We will engage all those before launching the actual process and all issues that the stakeholders may have will be addressed.

Holding of 10 November by-elections

Following the judgment of the High Court in the case of *Martin Chikati Sekati Nyengo & Simeon Harrison v Electoral Commission*, which was pronounced on 7th October 2020, on 12th October the Commission held an extra-ordinary meeting where among other things, it deliberated on the conduct of the by-election on the following Constituencies and Ward;

- Karonga Central Constituency;

- Lilongwe North West Constituency;
- Mangochi West Constituency;
- Mangochi North East Constituency;
- Phalombe North Constituency; and
- Makhwira Ward in Chikwawa.

It was the initial decision of the Commission when it came up with its electoral calendar to take a more inclusive approach by allowing all eligible voters to vote and also allowing all eligible candidates to contest in all the areas where by-elections will be held. The Commission in that decision was entirely guided by the provision of the Constitution of the Republic of Malawi which provides the right to vote and contest in an election.

The right to vote in an election is provided under section 77 (1) of the Constitution in very clear terms that every eligible person has the right to vote in any election.

Section 77 (1) reads as follows:

"All persons shall have the right to vote in an election, by-election, presidential election, local government election or referendum; subject only to this section.

In a similar vein, the Constitution declares that every person has the right to "stand for election for an elective office".

It was on the basis of our understanding of that provision that it was decided to allow register new voters and eligible voters, and open up the nomination process for all candidates deemed eligible to participate in the by-elections.

However, when our interpretation was challenged in Court by some of the contestants, it has turned out that MEC was wrong in that understanding. The High Court in its decision on 7th of October 2020 has made it very clear that the decision of the Malawi Supreme Court of Appeal arising from the recent Presidential Elections contest is binding and provides the correct legal position in so far as issues of bye-elections which are necessitated by judicial nullification of electoral outcomes is concerned. Whereby elections arising from other reasons, that decision does not bind us but where they are coming from nullification of results, we are bound to follow that guidance.

And in response to the High Court judgment of 7th October 2020, the Commission met on 12th October 2020 and has resolved to conduct the elections in Mangochi West, Mangochi North East, and Phalombe North in the following manner;

1. Only the candidates who participated in the 2019 Parliamentary elections will be considered eligible to contest in the elections and their status and political party affiliations will be maintained as was the case in the 2019 elections.
2. The voters' register will be reset to the state it was on 21st May 2019, thus only those who registered ahead of the 2019 Tripartite Elections in the areas where the by-elections will be held, will be the ones eligible to vote and no transfers of voters will be allowed. All the new names that were registered in preparation for this by-election will not be included in the final voters' register. During the voter registration and update process run from 14 to 27th September, the Commission presented the 2019 voter register for verification alongside the registration process and even when the registration was suspended, we carried on with the verification. And we believe that all those that registered during the 2019 Tripartite Election did take advantage of this exercise. The Commission will not re-open a verification exercise again.

In order to ensure that the above processes are implemented smoothly, the Commission has resolved to defer all elections which are being conducted as a result of nullification of the 2019 Parliamentary elections. A new date for the by-elections will be set and announced through the usual platforms. Meanwhile the by-

elections in the other two constituencies and one ward namely Karonga Central, Lilongwe North West, and Makhwira Ward in Chikwawa will proceed on 10th November 2020 as originally planned. This is the case because those polls emanate from a scenario where either the former MP or Councillor died or otherwise vacated the office voluntarily.

The Rationale for 50% + 1 Vote Threshold for MPs and Councillors

Ladies and gentlemen, as you are aware, the Commission has also announced that the threshold for determination of a winner for both the Parliamentary and Local Government elections will be set at 50% + 1 vote of the votes cast.

The Commission thought it necessary to explain how it reached at this rather difficult decision. In the same spirit of seeking to obey judicial directions impacting upon our mandate as the Electoral Management Body in this jurisdiction, the Commission took some time to reflect upon the full legal ramifications of the recent decision of the High Court (i.e. from the 7th October 2020) vis-à-vis the rest of our electoral mandate. In the first place, it is important to acknowledge that our initial understanding had been that the Supreme Court decision of 8th May 2020 (in so far as the question of registration of new voters and candidates is concerned) was

confined to the Fresh Presidential Election; but as it has turned out we were mistaken in that belief.

Hence after some considerable discussion over the matter, we reached the position that the totality of the recent jurisprudence should be adhered to in all our functions. Under section 76(2)(d) of the Constitution enjoins the Commission "to ensure compliance with the provisions of the Constitution and any Act of Parliament." Section 96(5) of the Parliamentary and Presidential Elections Act stipulates that "in any election, the candidate who has obtained a majority of the votes at the poll shall be declared by the Commission to have been duly elected". Section 80(5) of the Local Government Elections Act has a similar provision.

The Commission noted that the recent court decisions have adopted the Black's Law Dictionary definition of 'majority' as the proper interpretation of the term within section 80(2) of the Constitution. That provision is used alongside section 96(5) of the PPE Act in declaring the winner of a Presidential poll. It is the exact same section 96(5) of the PPE Act that is used to declare a winner in a Parliamentary contest.

In our desire to adhere faithfully to the decisions of the 8th May 2020 from the Supreme Court, the Commission has, therefore, found no

basis for distinguishing the term "majority" as used in the Constitution and in the PPE Act.

The Supreme Court of Appeal affirmed the meaning of the term "electorate" as used in section 80 (2) of the Constitution of the Republic of Malawi to mean;

"those electors who have directly taken part in the process of an election. Any other interpretation would produce the absurd result that people can still be considered as having taken part in an election even though they did not bother to cast their vote and as such result in our view would not promote the values of a democratic society" that's the position of the Supreme Court.

The Supreme Court also in its jurisprudence went on to observe that the absence of run-off provisions should not be a basis for finding convenient meanings that cover or conceal the inadequacies. So, the argument was just because at the time the decision was made, there was no law in place to govern what will happen if you don't get 50%+1 vote, that wasn't the reason to dilute the meaning of the majority, that's the courts understanding. And as Malawi Electoral Commission, therefore, we cannot cite the absence of legal guidance on how to handle run-offs to ignore this meaning of 'majority' that the courts have proposed. The courts have said that

where there are deficiencies they need to be pointed out and legislated for.

And the Courts have already affirmed the meaning of "majority" as per the Black's Law Dictionary i.e. majority means 50% + 1 of the votes of the electorate and the Commission does not find any legal room left to produce a different interpretation in respect of the other elections. In other words, if the term majority has been used in Section 80 (2) is the same term that is used in Section 96(5) of the Parliamentary and Presidential Elections Act. We are constrained in how we can distinguish these terms.

Printing of ballot papers for by-elections

The Commission, through a competitive process, has identified Al Ghurair as the printer for the ballot papers. Being an international company, and with the Covid-19 travel restrictions, the Commission will not go to supervise the printing process and this will apply to all political parties and candidates. No one is sending a delegation to monitor the process. The Commission, as done last time, will share the itinerary of the plane bringing the ballot papers and all will be invited to witness the receipt and distribution process.

Conclusion

The Commission would like to emphasize that its position has been reached within the context of seeking to remain fully compliant to all judicial orders and directions. We would further like to acknowledge that as the recent court decisions on electoral matters have demonstrated, even with our best endeavours and unflinching commitment to discharge our functions in a manner that remains faithful to our oath of office, it is possible to make honest errors of judgment and the courts have been quick to correct us when we do that. In this instance, we have deemed it appropriate to pre-empt the question by disclosing our understanding on the matter early enough in order to afford anyone dissatisfied with such an understanding, an adequate opportunity to seek further judicial guidance ahead of the upcoming polls. We could be wrong like we have been shown to be wrong before, we are open to correction.

The Commission believes that such a scenario would better serve the interests of all stakeholders and ensure that the legal ambiguities that arise from such scenarios are properly adjudicated upon in order to continue to consolidate our nascent democracy.

Needless to say, of course, our strong expectation as Malawi Electoral Commission remains that all these legal issues which have been highlighted through recent judicial pronouncements will be addressed and resolved through a comprehensive and inclusive legal reform project which can more fully respond to the multiplicity

of issues which have thus far been pointed out. So, we acknowledge that our current laws governing elections are in need of serious reforms but at the moment we still have to carry on functioning with the tools at our disposal. In our view, a robust and versatile legal framework is foundational to the conduct of free, fair, and credible elections. While legal disputes are inevitable in a democratic system founded upon the rule of law there would be legitimate differences of political opinion when trying to do what's right in a democracy, people have a right to go to court. But we also believe that the institutional credibility of the body responsible for arranging such elections could suffer some harm where its decisions and actions are subject to ceaseless litigation arising from some gaps or ambiguities in critical areas of the relevant law. So where every time when MEC does something, there is always a fault in the law, MEC is always found to be in the wrong, that can undermine the credibility of the institution and that is why we believe only a comprehensive legal reform can ultimately remedy these challenges and we thought the CMD comprises the political parties that are they key actors in the arena, therefore, it will be useful to have this engagement and share our perspective on the matter and hear from yourselves, representatives of the various parties. Thank you for your kind attention.

May God Bless you all

May He bless our nation of Malawi

Thank you very much.