S.C. NO. 3/2005

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 122, 124(1), 127 and 171(15) OF THE CONSTITUTION OF SIERRA LEONE, ACT NO.6 OF 1991, TOGETHER AND RULES 89 TO 98 INCLUSIVE OF THE SUPREME COURT RULES, STATUTORY INSTRUMENT NO.1 OF 1982 AND ORDER 21, RULES OF THE SIERRA LEONE HIGH COURT RULES (1960)

IN THE MATTER OF SECTIONS 34, 35(1), (2), (4), & (8), 54(1) TO (4) INCLUSIVE; 64 (1); 76 (1) (h); AND 108 (8) AND (9) OF THE SAID CONSTITUTION OF SIERRA LEONE AND THE THIRD SCHEDULE THERETO.

IN THE MATTER OF SECTIONS 6, 14(1), 24, 27 AND 29 OF THE POLITICAL PARTIES ACT, NO.3 OF 2002, AND SECTION 13 OF THE STATE PROCEEDINGS ACT NO.14 OF 2000

IN THE MATTER OF CLAUSES IV(A)(1); IV(A)(3)(I); V(1)(C);AND VI(b) & (f), OF THE CONSTITUTION OF THE SIERRA LEONE PEOPLE'S PARTY (SLPP), DATED JULY 1995, AND ALSO OF THE PARTY CONFERENCE OF THE SAID SLPP HELD ON 3RD AND 4TH SEPTEMBER AT MAKENI.

BETWEEN

SAMUEL HINGA NORMAN **PLAINTIFF/RESPONDENT**

AND

THE SIERRA LEONE PEOPLE'S PARTY (SLPP) **1ST DEFENDANT/APPLICA**

ALHAJI U.N.S. JAH
National Chairman, SLPP **2nd DEFENDANT/APPLICANT**

JACOB J. SAFFA

National Secretary-General, SLPP **3RD DEFENDANT/APPLICANT**

(All foregoing being of 15 Wallace Johnson Street, Freetown)

ATTORNEY-GENERAL AND MINISTER OF JUSTICE 4TH DEFENDANT

CORAM:

HON JUSTICE ADE RENNER-THOMAS CJ

HON JUSTICE SIR JOHN MURIA JSC

HON JUSTICE S.C. WARNE JSC

HON JUSTICE V.A.D. WRIGHT JSC

HON JUSTICE M.E. TOLLA-THOMPSON JSC

Hearing: 7 and 16 December 2005, and 25 April 2006

Judgment: 7 September 2006

Advocates:

Dr. Bu-Buakei Jabbi for the Plaintiff

E. Halloway, D.B. Quee and A. Brewah for 1st, 2nd and 3rd Defendants

L.M.Farmah, E.Roberts, Osman Kanu and A. Sesay for 4th Defendant

JUDGMENT

Delivered this 7th **day of** September **2006**

MURIA JSC: So far as we know, Samuel Hinge Norman (the plaintiff in the present case) is the same person and plaintiff in the previous action, *Samuel Hinga Norman v Dr. Sama S. Banya (National Chairman, SLPP), Dr. Prince Harding (National Secretary-General, SLPP) and The Sierra Leone People's Party (SLPP) S.C. No.2/2005* ("SC.2/05"). The first defendant in the present proceedings is the same political party, Sierra Leone People's Party ("SLPP") and third defendant in SC.2/05. The present second and third defendants are the National Chairman and National Secretary-General respectively, of the SLPP and they replaced Dr. Sama S. Banya and Dr. Prince A.

Harding who were, respectively, the first and second defendants in SC.2/05. The parties in both cases are the same, save for the addition of the Attorney-General and Minister of Justice in the present proceedings.

The factual background

To appreciate the circumstances of the present case, S.C. No. 3/2005 (SC.3/05), it would be useful to ascertain the background leading to the present proceedings. It is important to note that the primary facts giving rise to the present case are the same as those in SC. 2/05.

In July 2005 the National Executive Council ("NEC") of the SLPP held a meeting in Freetown and decided that a Party Conference of the SLPP be held at Makeni in the Northern Province of Sierra Leone on 19th and 20th of August 2005. The SLPP is one of the political parties in Sierra Leone registered under the provisions of the national Constitution ("the National Constitution") and the Political Parties Act 2002, No.3 of 2002 – ("the Political Parties Act"). One of the purposes of the Party Conference was to elect the Party's Presidential Nominee for the 2007 elections, who under clause V (2) (C) of the 1995 Constitution of the SLPP ("the SLPP Constitution"), automatically becomes the Party Leader after such election.

The plaintiff was of the view that it was too early to choose a Presidential Nominee for the Party anytime in 2005 for the Presidential Elections in 2007. Being unhappy with the Party's National Executive Council's decision to proceed with the election of the Presidential Nominee of the SLPP at the Party Conference scheduled to be held on 19th-20th August 2005, the plaintiff commenced the proceedings in SC.2/05 seeking a number of declarations and a permanent injunction against the 1st, 2nd and 3rd defendants who are the same three defendants (in their official capacities) in the present action. The defendants by their Counsel gave an undertaking that the Party would not proceed with the proposed Party Conference and election of the Party's Presidential Nominee until the matter had been determined. The plaintiff by his Counsel gave a cross-undertaking as to damages.

The plaintiff's action in SC.2/05 was heard on 17th August 2005 and determined by this court on 31st August 2005, striking out the plaintiff's action for want of *locus standi*. Thereafter the SLPP proceeded with the Party Conference at Makeni on 3rd and 4th September 2005, at which occasion the incumbent Vice President, Solomon Ekuma Berewa was elected Leader and Presidential Nominee for the SLPP for the 2007 Presidential Elections defeating three other rivals, namely Joseph Bandabla Dauda, Charles Francis Margai and Julius Maada Bio.

As an aspirant to be Presidential Nominee for SLPP, the plaintiff is again renewing his same challenges to the actions taken by the Party. He commences these proceedings again as a private individual citizen and "in the general interest of maintaining and upholding the National Constitution" and keenly concerned that his Party (the SLPP) maintains its pristine democratic credentials and tradition consistent with the National Constitution and the rule of law generally, the same footing upon which he commenced his action in SC.2/05.

By an Originating Notice of Motion dated 27 October 2005, the plaintiff claims a number of declarations. I set out these declarations so as to appreciate the resemblance of the present action to that of SC.2/05. The declarations and orders sought are:

> *1. A DECLARATION to the effect that the nomination, election, selection, choice, or adoption, as the case may be, by the 1st Defendant herein, on 4th September 2005, at its Party Conference held at Makeni on 3rd and 4th September, 2005, of Solomon Ekuma Berewa as the Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP), whilst, at the self-same material, the said Solomon Ekuma Berewa was the Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, was and is inconsistent and incompatible with and in contravention and violation of subsections 35(4) and 76(1)(h) of the said National Constitution of Sierra Leone, and was and is accordingly*

unconstitutional, illegal, undemocratic, invalid or null and void, and so of no lawful effect whatsoever.

2. A DECLARATION to the effect that the acceptance, assumption, holding and incumbency of the position or post of Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP) by Solomon Ekuma Berewa, with effect from 4th September 2005 and up until now, whilst the said Solomon Ekuma Berewa was and has been throughout the self-same material time the Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, was and is inconsistent and incompatible with and in contravention and violation of subsection 35(4) and 76(1)(h) of the said National Constitution of Sierra Leone, and was and is accordingly unconstitutional, illegal, undemocratic, invalid or null and void, and so of no lawful effect whatsoever.

3. A DECLARATION to the effect that the nomination, election, selection, choice, or adoption, as the case may be, by the 1st Defendant herein as aforesaid, of Solomon Ekuma Berewa as the Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP), whilst, at the self-same material time, the said Solomon Ekuma Berewa was the Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, and that the acceptance, assumption, holding and incumbency of the said post or position of Leader (Presidential Nominee) for the SLPP by the said Solomon Ekuma Berewa whilst he was and still is effectively Vice-President of Sierra Leone as aforesaid, being both separately and jointly inconsistent and incompatible with and in contravention and violation of subsections 35(4) and 76(1)(h) of the said National Constitution as aforesaid, are both separately and jointly tantamount to a suspension, alteration or repeal by implication, presumptive conduct or otherwise of the said provisions in subsections 35(4) and 76(1)(h) thereof "other than on the authority of Parliament" in terms of subsections 108(8) and (9) of the said National Constitution.

4. A DECLARATION to the effect that, by offering or allowing himself to be nominated, elected, chosen, or adopted into, and/or by having ostensibly accepted, assumed, held or occupied and continued to hold or occupy up until now since 4th September 2005, or at all, as the case may be, the position or post of Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP), whilst he was and still is effectively Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, such item(s) of conduct being inconsistent and incompatible with and in contravention of the provisions in subsections 35(4) and 76(1)(h) of the said National Constitution, and by virtue thereof, Solomon Ekuma Berewa, in his capacity as Vice-President of Sierra Leone as aforesaid, has committed and is still committing a violation of the Constitution of Sierra Leone by thereby failing or refusing or neglecting to "support, uphold and maintain the Constitution of Sierra Leone as by law established" to wit, by thereby failing or refusing or neglecting, in respect of the said provisions, to comply with the oath of Vice-President as set out in the Third Schedule to the said National Constitution, which said oath he did "take and subscribe" before entering upon the duties of the said office under the provisions of subsections 54(4) of the said National Constitution.

5. A DECLARATION to the effect that the position or post of Leader (Presidential Nominee) of the Sierra Leone People's Party (SLPP) for the purposes of the 2007 national Presidential elections has, in law, stood vacant with effect from 4th September 2005 and that, in law, it still remains vacant as at the time of making this declaratory order by reason of the constitutional violations and contraventions which are the subject of the foregoing declarations herein.

6. A PERMANENT OR FINAL INJUNCTION restraining the 1st Defendant herein in all its emanations and manifestations as organs, institutions, officers, members, sessions, meetings or operations thereof, the 2nd and 3rd Defendants herein, in their respective official capacities, and the servants, agents, operatives,

privies and successors-in-office of the 1st, 2nd and 3rd Defendants, as may variously be applicable, from nominating, electing, selecting, choosing, or adopting any or the incumbent Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, at all events during any time when subsections 35(4) and 76(1)(h) of the said National Constitution and the relevant provisions of the Constitution of the Sierra Leone People's Party (SLPP) dated July 1995 are still in force in their present form and text, as Leader (Presidential Nominee) for the said SLPP whilst the said incumbent was or still is effectively Vice-President of Sierra Leone as aforesaid.

7. AN 0RDER OF MANDAMUS commanding the 4th Defendant herein, in his/her official capacity, duties and functions as the Honourable Attorney-General and Minister of Justice, to ensure that any or the incumbent Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, at all events during any time when subsections 35(4) and 76(1)(h) of the said National Constitution and the provisions of the Constitution of the Sierra Leone People's Party (SLPP) dated July 1995 are still in force in their present form and text, is properly and best advised not to (and in fact, does not) offer or allow himself /herself to be nominated, elected, selected, chosen, or adopted into, nor to accept, assume, hold or occupy, as the case may be, the position or post of Leader (Presidential Nominee) for the said SLPP whilst the said incumbent was or still is effectively Vice-President of Sierra Leone as aforesaid.

The plaintiff further seeks any other or further relief as the Court may deem just, together with costs of the action.

Questions for determination

At the hearing on 7th December 2005, the Court in the exercise of its powers under Rule 98 of the Supreme Court Rules as read with 0.52 r 3 of the High Court Rules and 0.34 r2 of the English Supreme Court Rules as contained in the 1960 Annual Practice, ordered

two questions of law, arising out of the action (SC No.3/05) to be first determined. The two questions are:

a) *Whether in the circumstances of the instant case this court can properly invoke the provisions of section 122(2) of the Constitution, Act No.6 of 1991, to depart from its decision in the matter entitled S.C.No.2/2005; as to hold that the plaintiff has capacity to bring the action herein and is not deprived of such capacity because of lack of locus standi and/or his failure to exhaust other remedies available to him? and*

b) *Whether in the event that the court were to hold that this is not a proper case to invoke the provision of section 122(2) of the Constitution, Act No.6 of 1991, to depart from its previous decision as aforesaid, this court is not bound to apply its decision in SC.2/2005 and ought not to strike out the Originating Notice of Motion herein because of lack of capacity of the plaintiff to maintain the action herein for the same reasons as contained in its decision in SC 2/2005, thus depriving this court of jurisdiction to hear and determine the matter on its merit.*

In order to facilitate the proper consideration of the questions posed for the court's determination, the court ordered further written submissions in addition to the case for the parties, with supporting case and statute laws on the matter. Counsel for the plaintiff prepared and filed the plaintiff's further written submissions on 24th January 2006.

Before I deal with the arguments as contained in the statement of the plaintiff's case and in Counsel's further written submissions, and the arguments relied on by the defendants, it is pertinent to point our that this court is the final arbiter of any question of law in Sierra Leone, as mandated by the Constitution. Thus the court has the onerous task of setting the path to follow on important legal issues such as

those with which we are concerned in this case. In this regard, I re-echo what I said in SC No.2/2005 that:

> *".... the courts in Sierra Leone, in particular the Supreme Court, will have to decide the path to follow on the standing of a party who seeks to invoke the review jurisdiction of the court in constitutional, as well as administrative law disputes. The court must do so based on legal grounds."*

In the final analysis, the position which this court takes in the present case, will result in what I have indicated above, that is, to set a path to follow on the question of *locus standi* of the party who seeks to invoke the jurisdiction of the court in constitutional law disputes, and how this court should exercise its power under section 122(2) of the Constitution of Sierra Leone. Having said that, I now turn to the submissions of Counsel for the parties.

Submissions by Counsel

From the outset, Dr Jabbi contended that the Supreme Court has the mandate to depart from its previous decisions where it is right to do so. There can be no question that this court possesses the power to depart from its previous decision. The authority to do so is section 122(2) of the Constitution which provides:

> *"(2) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears right so to do and all other courts shall be bound to follow the decision of the Supreme Court on question of law."*
>
> *(Emphasis added)*

A similar position also exists in the English House of Lords. As Dr. Jabbi of Counsel for plaintiff puts its, there is a close" textual affinity" in the statements of

the jurisdiction of the Supreme Court in Section 122 of the Sierra Leone Constitution and that of the House of Lords in the *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77 HL (UK). As with section 122(2) of the Constitution of Sierra Leone, I also set out the House of Lords *Practice Statement*:

> *Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individual can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.*
>
> *Their Lordship nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.*
>
> *In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.*
>
> *This announcement is not intended to affect the use of precedent elsewhere than in this House."*

I will return to this *Practice Statement* and section 122(2) of the Constitution later in this judgment. For the moment, I need only say that having discovered the baseline for the authority to depart from the court's previous decision, the onus is

on the plaintiff to establish the justification for such departure as was done in *Miliangos v George Frank (Textiles) Limited* [1975] 3 All ER 801.

In his submissions, both written and oral, Dr. Jabbi of Counsel for the plaintiff argued that the majority decision of the court on the issue of *locus standi* was grievously wrong and as such it was a grave denial and miscarriage of justice. Thus to "nip in the bud any suspicion of an inherent trend lurking towards any form of attempted constituticide," Counsel submitted that the court should depart from its decision in SC.2/05 soonest possible. In support of his quest for the court to change its mind on the issue of *locus standi*, Counsel relied on his 51 page statement of the plaintiff's case and the detailed 31 page further written submission, as well as his oral submission in Court.

As I understand it, Dr. Jabbi's main contention is that the court failed to decide on the issue of *locus standi* and that all that were said on the issue in SC.2/05 were *obiter dicta*. Counsel quoted the following passage in the judgment of the learned Chief Justice in support of his contention:

> *"For reasons which will soon become obvious, I do not believe it is necessary in the circumstances of the instant case for me to dispose of the issue of standing on that basis and I do not desire to do (SIC). I therefore make no pronouncement on whether or not this court should adopt the liberal approach in the inquiry for standing as advocated by Dr. Jabbi."*

That passage and the remarks by the other members of the court, on the issue of *locus standi* were effectively "reduced to mere *dicta*" argued Counsel.

Not content with the above line of contention, Counsel presented his alternative stance. He suggested that even if the views expressed by the members of the court were not mere dicta, there were serious reservations about the court's decision on the plaintiff's standing. It appears from the submissions that

according to Counsel for plaintiff, four justices misapprehended the issue of *locus standi* and only one espoused the correct concept of the *locus standi.*

Counsel, in this regard, relied on the following passage in the judgment of His Lordship, Tolla-Thompson JSC:

> *"In this regard, I am inclined to adopt a liberal approach to this question. The plaintiff is a Sierra Leonean and a fully paid-up member of SLPP. He is an aspirant for the Presidential Election in 2007. In my humble view, I think this is enough to vest the plaintiff with standing and I so hold."*

In an attempt to further buttress his client's case, Dr. Jabbi went on to contend and sought to demonstrate that the views expressed by Tolla-Thompson JSC and those of my own were "diametrically" opposed to each other. Counsel quoted the following passage from my own judgment to support his contention:

> *In the present case, if this Court were to accept the liberal approach to the test of standing urged upon it by Dr Bu-Buakei Jabbi, the plaintiff must show, not only that he has a sufficient interest in the matter that he brings to the court, but that this liberal test of "sufficient interest" is the appropriate test to be adopted in Sierra Leone. No case decided by our courts here had been cited by Counsel on this issue. However when looking at the cases on the test of standing from other jurisdictions, it is clear that the position is not uniform. Thus, the courts in Sierra Leone, in particular the Supreme Court, will have to decide the path to follow on the standing of a party who seeks to invoke the judicial review jurisdiction of the Court. The Court must do so based on legal grounds. My searches in the National Constitution, Statutes and Rules of Courts have not shown any express legislative formula in this jurisdiction for the liberal approach to standing as urged by Counsel.*

Apart from the clear test to invoke the Courts jurisdiction under section 28 of the National Constitution, the general feeling as to the approach to be taken by the Courts in Sierra Leone is one where the applicant for a judicial review in the nature here claimed, the applicant must show that he has an interest in the subject matter before the court. That interest must be one that is personal to him, and one which has been adversely affected by the action complained of. A general interest which the applicant possesses in common with all members of the public or in common with other members of a section of the community cannot confer standing on him.

As to the other two members of the court, Wright JSC and Kamanda JA, Counsel contended that they simply agreed to the learned Chief Justice's decision on the issue of *locus standi.* Counsel then contended that in the light of the lack of unanimity of views held by the members of the court in SC.2/05 on the issue of *locus standi*, this is also justification for the Court to depart from its previous decision.

On the other hand, Mr. Eke Halloway of Counsel for the first, second and third defendants submitted that as in SC.2/05, the plaintiff lacks capacity or standing to maintain the action in SC.3/05 for the same reasons as contained in the decision of the court in SC.2/05 which was not given *per incuriam.*

In addition, Mr. Halloway pointed to the fact that following the court's decision in SC2/05 the defendants proceeded to hold their Party Conference and regulate the affairs of their Party including holding elections of all the offices of the Party.

For those reasons, Counsel for the first three defendants submitted, it would not be right for the court to depart from its earlier decision made in SC.2/05, relying on the House of Lords *Practice Statement (Judicial Precedent).*

Issues

In the light of the submissions by Counsel for the parties, it seems obvious that three issues emerged for the court to determine: the first is whether the decision of the court in SC2/05 was wrong, thereby justifying departure from it; secondly, whether SC2/05 can be distinguished from the present case; thirdly, whether the court will follow its earlier decision i.e. whether the court should refuse to depart from its decision in SC.2/05.

Whether the decision in SC.2/05 was wrong.

The onus is on the plaintiff to persuade the Court that its decision in SC.2/05 was wrong, justifying a departure from it. There are numerous cases to support the proposition of law that where a previous decision of the court is shown to be erroneous, the court is permitted to depart from it. See *Distributors (Baroda) Pvt and Limited v Union of India* (1988) (1985) AIR 1585; *R v Shivpuri* [1986] 2 All AER 334; *Federal Civil Service Commission v Laoye* (1990) LRC (Const.) 443 SC (Nigeria); *O'Brien v Mirror Group Newspapers Limited* [2000] 1ESC 70 (25 October 2000); *Pendakwa Raya v Tan Tatt Eek & Anor.* (2005) MYFC 2 (3 February 2005).

The action SC.2/05 came before this Court in August 2005 and the question before the court was whether the plaintiff (the same plaintiff in the present action) had the *locus standi* to invoke the jurisdiction of the court. The main judgment was delivered by His Lordship, the Chief Justice who having exhaustively considered the arguments from both parties, concluded at pp 30-31 of His Lordship's judgment:

> *"In the circumstances of this case and based on the available affidavit evidence, to grant the plaintiff locus standi to maintain an action to ensure*

the SLPP, a political party registered under the Political Party Act, does not contravene any provision of the National Constitution, particularly section 35 thereof, would be, in my opinion to pre-empt the Commission and, as it were to allow the plaintiff to usurp the powers of the Commission particularly when there is no allegation before us that the Commission has failed to carry out its statutory duties and the Commission has not even been made a party to this action. (See the Nigerian Cases of Nwanko v Nwanko supra; Ajakaiye v Military Governor (1994) SCNJ 102 at 119; and Amaghizenween v Eguanwense (1993) 11 SCNJ 27).

For all the above reasons, I hold that the plaintiff lacks locus standi to maintain the claim for declarations sought as part of the third and fourth reliefs in the Originating Notice of Motion. The claim for this relief should be struck out".

Turning to the fifth relief sought namely that of a permanent injunction, and His Lordship continued:

"As I said earlier, in my opinion, this is a consequential relief which of necessity must flow from one of the several declarations sought. Ex facie, it is difficult to tell with which of the declarations sought this relief has a nexus. If it is to be attached to the declaration sought in the second relief in the Originating Notice of Motion then it must be struck out in view of my earlier pronouncement that the Plaintiff could not invoke the original jurisdiction of this Court to maintain an action for the second relief. The claim for an injunction ought also to be struck out for the same reason. Similarly, since I have held that despite the fact that this Court's original jurisdiction is properly invoked in respect of the third and fourth reliefs sought in the Originating Notice of Motion the Plaintiff nevertheless lacks locus standi to maintain the claim for said third and fourth reliefs and as

a result claim for the said reliefs ought to be struck out, for the same reason, the claim for an injunction as a relief consequential to the declarations sought under the third and fourth reliefs in the Originating Notice of Motion ought to be struck out."

His Lordship, the learned Chief Justice, then pronounced the orders of the court as follows:-

"(1) The claims for the 1st and 2nd reliefs in the Originating Notice of Motion are hereby struck out as they could not be granted in this Court's original jurisdiction.

(2) The claim for the 3rd and 4th reliefs in the Originating Notice of Motion are hereby struck out for want of locus standi on the part of the Plaintiff.

(3) In view of Orders 1 and 2 above the fifth relief in the Originating Notice of Motion that for a permanent injunction is struck out accordingly.

(4) The Defendants are here discharged from the Undertaking they gave to this Court on the 16th August 2005.

(5) The Cross-Undertaking as to damages given by the Plaintiff on the 16th August 2005 is to remain on the file until further Order.

(6) Each party to bear its own costs of the proceedings so far.

(7) Liberty to apply.

The above orders of the court were unanimously agreed to by all the members of the court. There were no dissenting judgments made by any of the members of the court. The Court held that as the plaintiff who has brought the action admittedly in his private capacity was asserting a public right, he lacked the *locus standi* to do so.

Secondly, in the circumstances of the case, the proper person or body with the standing to seek the remedies which the plaintiff sought in SC.2/05 would be the Political Parties Registration Commission, against whom remedies are open to an aggrieved person, should it failed or refused to perform its public functions.

It is incorrect for Counsel for the plaintiff to assert that the court was not unanimous in its decision that the plaintiff had no *locus standi* in SC.2/05. Clearly the tenor of Counsel's written and oral arguments on the issue of the plaintiff's *locus standi* in the matter, has been in part, swayed by the fact that there are three varying views on the approach to *locus standi* expressed by his Lordship, the Chief Justice, His Lordship Justice Tolla Thompson JSC and myself. Consequently, it led counsel to contend that the issue of *locus standi* was obiter in SC2/05. Quite the contrary, the central question unanimously agreed to by all the members of the court was that the plaintiff had no *locus standi* to maintain his claims' for the alleged breaches of the provisions of the SLPP Constitution, Political Parties Act and National Constitution (ss.35 (2) and (4); 42(1); 43(a) and (b); 46(1), 49(4); 76(i) (h) and 171(15)).

It is difficult to follow the rationale of Counsel's contention that the issue of *locus standi* did not form the basis of the *ratio decidendi* of the court's decision in SC2/05 when, central to the plaintiff's case, in the first place, was to establish his legal capacity or standing to invoke the jurisdiction of the court, and the court having heard the parties, unanimously ordered the plaintiff's claims to be struck out for want of *locus standi*. But, I am not surprise at all at counsel's approach to the issue, since he dissectively chose to use obiter remarks made by their Lordships in their reasoning as to the approach on the question of *locus standi* in the case.

Consequently, Counsel lost focus on the distinction between whether or not the issue of *locus standi* should be given liberal approach by the courts in Sierra Leone and whether the plaintiff has *locus standi* in the case before the court. The former is general, while the latter is specific. The varying views of the members of the court relate to the approach to the question of *locus standi*. In so far as the standing of the

plaintiff in the case (SC2/05) was concerned, there can be no room for doubt that the court was unanimously firm that he had no standing to invoke the jurisdiction of the court. That is the firm decision of the court and unless it is justified and "appears right to do so", departure from it ought not to be done readily. See *Pendakwa Raya v Jan Tatt Eek & Anor.* (above); *SCR No.2 of 1982, Re Opai Kunangel Amin* [1991] PNGLR 1.

One such justification for a departure, is that the plaintiff must show that the decision in SC.2/05 was wrong; (See the cases already cited earlier in this judgment; See also *R v Kansal* [2001] UKHL 62 (29 November 2001)) or that the decision in SC.2/05 is calculated to produce injustice (*Hinks v R* [2000] UKHL 53 (26 October 2000); [2000] 3 WLR 1590.

Apart from the assertion that the decision of the court in SC.2/05 was "seriously wrong", Counsel for the plaintiff offers very little to convince this court that its decision was wrong and that it ought to be departed from. The voluminous written submission of Counsel merely took the court through the history and the various other circumstances in other comparable jurisdictions as to the nature and variety of possible factors enabling the courts to exercise their powers to review and reconsider their decisions such as through the exercise of the court's power of self-review, as in *Eperokun v University of Lagos* (1986) NWLR 162, *Oduye v Nigeria Airways Limited* (1987) 2 NWLR 126 and *R v Shivpuri* (above); instant self-review where it is done at the instance of a person affected, as in *In re Transferred Civil Servants (Ireland) Compensation* (1929) AC 242 PC (Ireland); *Exp.Pinochet Ugarte (No.2)* [1999] 1 LRC and *Pepcor Retirement Fund v Financial Services Board and Registrar of Pension Funds* (30 May 2003) Supreme Court of South Africa, Case No.198/2002; voiding self-review or setting aside own void decision, as in *Coker v Coker* (1950-56) ALR SL 130, *Seif v Forfie* (1958) 3 WALR 274 PC (Ghana) and *Mosi v Bagying* (1963) 1 GLR 3 . The Court is indebted to Counsel for the plaintiff for his painstaking research in those areas on the court's power to review and reconsider their decisions. On the other hand, there is nothing contained

in the submissions and the cases cited by Counsel under those areas which points to the claim by the plaintiff that this court's decision in SC.2/05 was seriously wrong. That is the first hurdle which the plaintiff must overcome before he can assert that it is right for this court to depart from its earlier decision.

There is an aspect of the present case which counsel for the plaintiff sought to rely on to persuade the court to accord the plaintiff *locus standi*, thereby effectively reconsidering and departing from its previous decision in SC.2/05. Counsel now suggests that the issues now raised in the present action SC3/05 are different from those raised and determined in SC.2/05. These include alleged violations of section 35(4), 76(1)(h), 108(8) & (9), 54(4) of the National Constitution, alleged vacancy in the Office of Leader (Presidential Nominee) of the SLPP, an injunction against the 1st, 2nd and 3rd defendants from electing any incumbent Vice-President as Leader (Presidential Nominee) of SLPP, and mandamus against the 4th defendant to command him to give proper advice to the Government so as to avoid contravening section 35(4) and 76(1)(h) of the Constitution. Obviously Counsel relies on these "new" issues also to support his counter-argument on the question of *estoppel per rem judicatum* raised by counsel for the defendants.

In my judgment, for our present purpose, the issue of *estoppel per rem judicatum*, is of no moment here. It does not arise and I need not consider it. I am content to decide this case on the issue of *locus standi* and whether this court should depart from its earlier decision on this aspect of the case.

On the contention that the new issues ought to enable this court to change its mind on the *locus standi* of the plaintiff, I need firstly to say that apart from the allegation of breach of section 108(8) and (9) of the National Constitution and the claim for an order of mandamus, the other provisions referred to by counsel had already been considered in SC.2/05. They are not new issues. In reality what Counsel is now saying is that, these alleged breaches of the same provisions of the National Constitution have now been made again as a result of the SLPP Conference at

Makeni on 3rd and 4th September 2005, suggesting that the circumstances had changed from those existing up to 31st August 2005, the date of the SC.2/05 decision. In this case, and on the facts as presented to the court, I am of the firm view that the circumstances, particularly, the factual circumstances giving rise to SC2/05 and SC3/05 have not changed. The facts, the issues and the parties are basically the same. The addition of the 4th defendant in SC3/05 makes no difference as to the factual basis of these two cases which in reality are one and the same case rebound and clothed with a different colour. On that view of the facts of the two cases, it would be difficult for the plaintiff to satisfy this court that it should change its mind and depart from its previous decision on the status of the plaintiff.

However, even if, for argument's sake, new issues, namely, the alleged breach of section 108 and that of mandamus, the *locus standi* of the plaintiff does not depend on those 'new' allegations, rather his *locus standi* is determined by the factual circumstances of the case upon which he stands. A mere change of issues along the way does not confer standing on the plaintiff. The case of *Senator Abraham Adesanya v The President of Federal Republic of Nigeria & Others* [1981] 2 NCLR 358, at p. 390, supports this proposition where the court said:

> *"The fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before the court, not on the issues he wishes to have adjudicated".*

See also the *Constitutional Law of South Africa* at chap.8.2 where it is stated:

> *"The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication. The word 'standing' has been referred to as 'a metaphor used to designate a proper party to a court action'. An inquiry into standing should thus focus on the party who brings the matter before the court, not on the issues to be adjudicated"*

In the present case before us, there is no evidence whatsoever that the factual background of the plaintiff has changed from that which pertained on 31st August 2005. His status, and therefore, his standing, in my judgment, remains the same as it was in SC.2/05 as in the present SC.3/05.

Then, there is one further aspect of the case that undoubtedly affects the plaintiff's standing in this matter. It will be observed that following the decision of this court on 31st August 2005, the first three defendants proceeded to hold the postponed Party Conference at Makeni on 3rd – 4th September 2005. On 1st September 2005, the plaintiff issued a statement in writing (Exhibit 8 to the affidavit in support of the case) addressed to the people of Sierra Leone. In that statement, the plaintiff decided not to participate in the SLPP political affairs and activities during the Conference or ever. He requested all his relatives, friends, well-wishers, sympathisers and supporters, in and outside of Sierra Leone, not to attend the Party Conference with any intention of pursuing his political interest.

That is a clear demonstration that the plaintiff is severing his very interest which he purports to represent in this action, *inter alia*, as "a conscientious and active member of the SLPP who is keenly concerned that the Party maintains and enhances its pristine democratic credentials; and a person aspired to be elected Leader and 2007 Presidential Nominee." Therefore, the only capacity in which he is pursuing these proceedings is, in his own words, "as a public-spirited, law-abiding and constitution-compliant citizen of Sierra Leone … in the general interest of maintaining and upholding the National Constitution". That was the capacity in which he came before the Court in SC.2/05, when the Court found him to be lacking *locus standi* in such circumstances. The finding of the Court in the present proceedings remains the same.

There can be no suggestion here that the plaintiff can bring an action under the National Constitution in the general interest of the public, as he purported to do, unlike the position in South Africa. Under section 38 of the Constitution of South Africa, those who can bring actions under that provision for breaches of fundamental rights are specified. They include:

a. *anyone acting in their own interest;*
b. *anyone acting on behalf of another person who cannot act in their own name;*
c. *anyone acting as a member of, or in the interest of, a group or class of persons;*
d. *anyone acting in the public interest; and*
e. *an association acting in the interest of its members.*

Notably, there is a provision under the Constitution of South Africa entitling a person to bring an action in the public interest or in the interest of others for alleged breaches of fundamental rights. In the present case, the plaintiff cannot bring himself within such constitutional entitlement because there is no constitutional sanction for public interest litigation by a public spirited litigant under the Constitution of Sierra Leone for alleged breaches of fundamental rights.

The two" Gate-ways"

Dr. Jabbi of Counsel for the plaintiff has helpfully referred to two jurisdictions – Sierra Leone and Solomon Islands, in his submission on this aspect of the plaintiff's case. The '*two gate-ways*' (to use the expression in *Ulufa'alu v Attorney General & Others* [2002] 4 LRC 1, and referred to by Counsel for the plaintiff), to invoke the jurisdiction of the court to enforce the provisions of a constitution is common to many of the common law jurisdictions with written Constitutions. The case of *Ulufa'alu v Attorney General* had gone to the Court of Appeal of Solomon Islands which confirmed the High Court judgment: *Ulufa'alu v Attorney General* [2004]

SBCA 1; (2nd August 2004) CA CAC 015 OF 2001. The *two gateways* under the National Constitution of Sierra Leone are sections 28(1) and 127(1). I set out these two provisions. 28(1) provides:

> *"Subject to the provisions of subsection (4), if any person alleges that any of the provisions of sections 16 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him by any person (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person, (or that other person), may apply by motion to the Supreme Court for redress." [underlining added]*

and Section 127(1) says:

> *"A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect."*

The equivalent provisions under the Constitution of Solomon Islands are sections 18(1) and 83(1) respectively, which Counsel for the plaintiff referred to.

A person's standing under the section 28(1) "gateway" presents no qualm at all. He has to show that the alleged breach was *"in relation to him"*, as in the case of section 18(1) of the Constitution of Solomon Islands. *See Ulufa'alu v Attorney General* (above); *Dow v Attorney General* [1992] LRC (Cons.t) 623 (Botswana). We are not concerned with this "gate-way" in the present case.

If I may add, sections 38 (Enforcement of Rights under the Bill of Rights provisions) and 172 (Powers of Courts in Constitutional Matters) also provide the two "gate-ways" under the Constitution of South Africa. Apart from section 38 (set out above),

subsection (2)(d) of section 172 provides that any person or Organ of State with a *sufficient interest* may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity made by a court.

Dr. Jabbi likened the second "*gate-way*" under section 83(1) of the Constitution of Solomon Islands to that of Section 127(1) of the Constitution of Sierra Leone, and urges this court to give section 127(1) unrestricted construction so as to confer *locus standi* on any person, including the plaintiff, who alleges breaches of the provisions of the Constitution, to challenge such breaches before the court. Implicit in that submission is the contention that there is no need for such a person to show that he has an interest which is being affected or likely to be affected by the alleged breach or that he need not show that he is a *proper party*, before he could invoke the jurisdiction of the Court. It is appreciated that the width of section 127(1) is couched in the words "*a person who alleges*" which words are seemingly wide in their purport. However, to accept Counsel's contention without more would be grossly flawed for a number of reasons. First, the case law authorities show that such words do not necessarily confer limitless boundaries in their application. If it were so, the courts would be flooded with frivolous and vexatious litigations, even by "mere busy-bodies", a situation which the courts must guard against. See *R v Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617 (the *Federation of Self-Employees Case*). Secondly, it does not accord with the construction given to similar provisions in other common law jurisdictions with written constitutions where a citizen, although has the right to challenge the constitutionality of a statute or things done under it, must show that he has sufficient interest to bring the challenge in the Court. See *SCR 4 of 1980; Re Petition of Michael Somare* [1981] PNGLR 265; *Anderson v The Commonwealth* (1932) 47 C.L.R. 50; *Trethowan v Peden* (1930) 3 S.R. (NSW) 18; *Harris v Adeang* [1998] NRSC 1 (Supreme Court of Nauru); *Dow v Attorney General of Botswana* (above). Thirdly, although section 127 (1) gives no express guidance as to the ambit of the words "*a person who alleges*" used in that provision, the language of the section does not inhibit the power of this court, as the ultimate court of final appeal,

to insist on the requirement that a person who wishes to bring a constitutional challenge before the court must be a "*proper party*," since the standing to bring a matter before the court is the first procedural criteria that a person must accomplish before he can be heard on any issue he may wish to raise, however so pressing such issue may be.

The position, both in SC.2/05 and the present case, is that the plaintiff is alleging that a political party and its officers have contravened the provisions of the SLPP Constitution as well as those of the National Constitution. The law provides the statutory machinery under section 27 of the Political Parties Act which grants the Political Parties Registration Commission the right (and so, the standing) to invoke the original jurisdiction of the Supreme Court. There has been no evidence, whether before or after 31st August 2005, that the Commission had exercised its power under that section, nor is there any evidence to show that it had refused or neglected or failed to exercise its power under the Act. It would, therefore, be difficult to accord the plaintiff standing in those circumstances. He would not be the *proper party* to invoke the jurisdiction of the Court under section 127(1) of the National Constitution in this case.

The Supreme Court being clothed with the power to guard, interpret and apply the National Constitution of Sierra Leone, is entitled to provide guidance as to the operation of the provisions, such as section 127(1) of the National Constitution. In doing so, the court can only exercise its power over a person who is a proper party before it. The court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties: *Brydges v Brydges and Wood* [1909] P.187 CA. After all, if the court were to declare that the actions complained of were unconstitutional, it would only be doing so in the exercise of its duty which it owes to the person whose rights have been established, whether such person comes before the Court through section 28(1) gate-way or section 127(1) gate-way.

In the circumstances, the court was correct in coming to the decision that the plaintiff had no *locus standi* to maintain his claims in SC.2/05. The plaintiff has not shown otherwise, in the present case, to warrant a departure from it.

Whether SC2/05 can be distinguished from SC3/05.

I have already stated that the factual background giving rise to SC.2/05 and SC3/05 are the same, save perhaps, for the reframing or the repetition of the issues already dealt with in SC.2/05 and adding "new" ones, after the events of 3rd and 4th September 2005. The re-raising of those issues and adding the so-called 'new' ones do not and cannot accord the plaintiff *locus standi* since the factual foundation of the standing of the plaintiff to sue remains unchanged. In those circumstances there is no distinction between the factual basis of SC.2/05 and SC.3/05 sufficient to persuade the court to alter its position on the standing of the plaintiff. Counsel for the plaintiff referred to *R v Shivpuri (above),* where the learned law lords were able to distinguish the case of *Anderton v Ryan* [1985] 2 All ER 355, and applying the 1966 *Practice Statement*, departed from *Anderton v Ryan.* The House of Lords was there able to distinguish the two cases since they were founded on different facts giving rise to different legal issues in the cases. The case of *R v Shivpuri* concerns the appellant being charged and convicted of two counts of attempting to commit offences relating to drugs whereas in *Anderton* v Ryan the appellant was charged with attempting to handle stolen goods. The goods were not stolen, so the appellant was acquitted. One of the distinguishing factors between the two cases was that in *Anderton v Ryan* as Lord Bridge stated,

> *"The concern of the court was to avoid convictions in situations which most people as a matter of common sense, would not regard as involving criminality".*

That, regretted Lord Bridge, was not in line with the new law, *Criminal Attempts Act 1981.* There was a change in the situations of the two cases which warranted a departure from *Anderton.* That is not the position in our present case where the

plaintiff, as in SC.2/05, is still the same plaintiff and an aspirant to be Presidential Nominee for SLPP, who is again renewing his same challenges to the actions taken by the Party, commencing these proceedings again as a private individual citizen, and a public-spirited law-abiding citizen with the general interest of maintaining and upholding the National Constitution.

For my part I cannot find any justification for, nor do I accept any suggestion that material basis for the standing of the plaintiff has changed in SC.3/05 so as to accord him a change of status in the present proceedings. The findings of this court in SC.2/05 were based on those same material facts which remain unchanged in the present proceedings. See Goodharth, *"Determining the Ratio Decidendi of a Case,"* Essays in jurisprudence and the common Law (1931) 1.

Application of the doctrine of exhaustion

In his submission both written and oral, Counsel for plaintiff contended that the doctrine of exhaustion had no relevance in SC.2/05 and by resorting to it, the court was distorting the law by "mere judicial fiat." With respect to Counsel, in applying the principles of the doctrine of exhaustion in SC.2/05, there was not a stint of judicial Fiat exerted by this court. The difficulty which Counsel faces is that, he is dissectively labouring on this issue of exhaustion as though it was an isolated aspect of the case. If it can be put in blunt terms: the doctrine of exhaustion is applicable, not only in administrative actions but also in constitutional matters. It is a relevant factor for the exercise of the court's discretion whether in administrative law or constitutional law actions on the question of whether to grant or refuse *locus standi*. In *Re Petition of Michael Somare's case* (cited earlier), although the petitioner was granted *locus standi*, the Supreme Court of Papua New Guinea had not lost sight of the qualification to the general view of standing, namely, that a court should have a discretion to refuse standing where the applicant has not exhausted other methods of achieving the same thing.

At p.30 of His Lordship the Chief Justice's Judgment in SC2/05 clearly point out:

"It has not been alleged by the Plaintiff that the Commission has neglected or refused to carry out its functions under sections 6 and/or 27 of the Political Parties Act. The situation there is different from what obtained in the Nigerian case of Fawehinmi case cited earlier in this judgment. In that case it was shown by affidavit evidence that the appellant had requested the Director of Public Prosecutions to exercise the discretion granted to him by statute and it was only after the Respondent replied that he had not come to a decision whether or not to prosecute that the appellant took out the proceedings for leave to apply for mandamus. I say this because, in this country also, where a public officer or public body fails or refuses to carry out its functions or to exercise powers vested in it by statute the law provides ample remedies open to a person affected thereby".

In my own judgment at page 16, I said:

"The provisions of the Political Parties Act mentioned above, in my view, provide an aggrieved person such as the plaintiff, with the statutory machinery to deal with his complaints against the defendants over the organization, operation, functioning or conduct of the SLPP. The plaintiff has not done that in this case. Further, there was no suggestion that the available alternative administrative remedy under the provision of the Political Parties Act was inadequate nor was it dispositive. It may well be viewed as an abuse of process to allow the plaintiff to first exhaust judicial remedies and then revert to explore the alternative administrative remedy. This is a factor also relevant to the exercise of the Court's discretion".

His Lordship Tolla-Thompson JSC had this to say:

"Has he exhausted all his remedies before coming to us?

I opine not. The infraction of the SLPP constitution is intertwined with the Political Parties Act and the National Constitution and therefore Section 6(2) (d) and Section 27(1) of the Political Parties 2002 come into play.

……

"There is no evidence that the plaintiff ever approached the commission either orally, writing or otherwise in accordance with this section, If he had done, it would have been a different matter."

……

In whatever circumstance, I do not think that the plaintiff should have bypassed the commission and come straight. He should have exhausted his remedy if only for the record. If the Commission failed to act there should be evidence to that effect."

The sum total of the opinions just cited makes it quite plain that the principles of the doctrine of exhaustion are genuine factors which the court is entitled to take into consideration on the question of whether or not a person should be allowed to invoke the jurisdiction of the court, be it in constitutional or administrative action. No error can be gleaned from the application of the doctrine of exhaustion by the court in SC2/05 and this court is not prepared to depart from what it said in that case.

Whether the court should depart from its previous decision.

In so far as I can gather from the authorities on the point, the decisions taken by the courts to depart or follow previous decisions were influenced by both law and judicial policy, and so, in my view, they should be. This will enable the courts, more particularly the Supreme Court to ensure certainty and consistency in the establishment and applications of authoritative declarations of the state of the law on an issue. Prior to the 1966 *Practice Statement*, the English Courts had been taking a somewhat very restrictive approach to disturbing previous decisions of the

courts as can be seen in some of the old cases. In *Tommey v White* (1850) 3 HL Cas. 49, at p.69, Lord Truro L.C. said:

> *"It appears that judgment - a complete and final judgment - has been pronounced by your Lordship's House in this case. That judgment can only be vacated by a special Act of Parliament to enable the parties, if injustice can be proved to have been done, to be again heard."*

Again, some years later in *Thellusson v Rendlesham* (1859) 7 HL Cas. 429, at p.529.Lord St. Leonards had this to say:

> *"I protested against what I thought might be hereafter quoted as a dangerous precedent, of calling in question a deliberate decision of the House of Lords."*

Much the same was held in *London Tramways v London County Council* [1898] A.C 375 where the House of Lords determined that despite instances of individual hardship that might result in it being bound to follow its own decisions, it was thought that it was better that the door to specific legal issues be closed once and for all by the highest court. On the other hand, the High Court of Australia has, as early as 1914, in *The King -v- The Commonwealth Court of Conciliation and Arbitration and the President Thereof and the Australian Tramway Employees Association.* [1914] 18 CLR 54, not adopted such rigid rule. Griffith CJ at p.58, laid down the rule as:

> *"In my opinion, it is impossible to maintain an abstract proposition that Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when. the previous decision is*

manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was ***res integra****. Otherwise there would be grave danger of want of continuity in the interpretation of law".*

Since 1966 the English Courts have taken a less strict approach on the application of *stare decisis*. However, to show the firm adherence to judicial precedents by the English Courts, it is not until 1986 in *R v Shivpuri (above)* that the 1966 *Practice Statement* had been applied to a decision that was only a year old, that is, the *Anderton v Ryan* case. I venture to suggest that in the case of the courts in the United Kingdom and other countries that have firmly established and developed their laws for hundreds of years, the effect of their highest courts departing from their previous decisions may further enhance and strengthen the development of their laws. The same may not be the case in jurisdictions such as Sierra Leone and other developing jurisdictions that are still at their embryonic stage of developing their laws and legal system. It is in this sense that I would urge this court and in my view it should adopt the approach taken by the courts in other developing common law jurisdictions when it comes to applying the provisions of section 122(2) of National Constitution.

Provisions such as section 122(2) are not automatic doors into the field of legal adventure, rather they are visionary guides to the courts of final resort to declare and steer the development of the law with certainty and comity.

When one turns to cases in other developing common law jurisdictions, the views which I have expressed here find support. In the Papua New Guinea case of *Re*

Opai Kunangel Amin; SCR No.2 of 1982 [1991] PNGLR1, Kapi DCJ *(* as he then was) had this to say on the question of judicial precedent:

> *Counsel for the Public Prosecutor in his submission questioned the correctness of the decision Re Joseph Auna. The case was decided by a five-Member Bench in December 1980. With the exception of one Member of that Court, this Bench is made up of different judges. As a matter of practice, care should be taken when questioning the decisions of the Supreme Court in such a short time with different judges. If this is encouraged then the parties may be led to challenge the decisions of the Supreme Court before a bench composed of different judges in a short period of time. This could lead to a degree of some uncertainty of the principles of law pronounced by the Supreme Court. This is not desirable. However, where the principles of law pronounced by the Supreme Court are clearly wrong, they should be challenged as the opportunity arises, as the Supreme Court is not bound by its own decisions*

Like the Supreme Court of PNG, the Federal Court of Malaysia shares the caution against departing from an earlier recent decision of the court in *Tunde Apatira & Ors. V Public Prosecutor* (2001) 1 MLJ 259. In that case the Federal Court of Malaysia was asked to depart from its earlier decision in *Mohammed bin Hassan v PP* [1998] 2 MLJ 273. The court has this to say also:

> *"With respect, we are unable to accept the learned deputy's invitation to depart from Muhammed bin Hassan for three reasons. In tne first place, Muhammed bin Hassan is a very recent decision of this court. It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law.*

They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as R v Shivpuri [1986] 2 All ER 334.

The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in Muhammed bin Hassan has been affirmed by our courts (see, PP v Ong Cheng Heong [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example Haryadi Dadeh v PP [2000] 4 MLJ 71. If we accept the learned deputy's invitation to depart from Muhammed bin Hassan, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the court.

Lastly – and this is the most important reason – we agree with the interpretation placed by the learned Chief Judge of Sabah and Sarawak on s 37(da) of the Act. The logic and reasoning for interpreting that subsection in the way in which it was done in Muhammed bin Hassan appear sufficiently from the judgment in that case. It requires no repetition.

For the foregoing reasons, we reject the argument of the respondent to the effect that Muhammed bin Hassan was wrongly decided and ought no longer to be applied."

In another Malaysian case of *Dalip Bhagwan Singh v Public Prosecutor* (1998) 1 MLJ1, the Federal Court of Malaysia said:

"In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.

……

The rule of judicial precedent in relation to the House of Lords was stated in London Tramways v London County (1898) AC 375 that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.

……

In Malaysia, the Federal Court and its forerunner, i.e. the Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so.

Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own

previous decision has been exercised sparingly also. It is right that we in the Federal Court should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a ratio decidendi before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions."

I bear in mind, of course, that such judicial declarations by the courts of final appeal on the doctrine of precedent, do bear great weight on the state of the laws in a particular jurisdiction. This court will do the same because it has been given the power to do so under section 122(2) of the National Constitution, a provision that has "constitutionalised the doctrine of precedent" as so described by *Odoki CJ in the Uganda case of Ssemogerere v A.G.* [2005] 1 LRC 50, referring to art. 132(4) of the Constitution of Uganda, and which is in similar terms to our section 122(2) of the National Constitution.

It is also worth noting the remarks made by the Privy Council in the *Attorney-General of Ontario v. The Canada Temperance Federation* [1946] 50 C.W.N. 535 where it was said:

"Their Lordships do not doubt that in tendering humble advice to His Majesty, they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance on more than one occasion the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be cssumed will have been acted upon both by Governments and subjects." (Emphasis added).

Being mindful of our own local context and the need to develop our law firmly, this Court will not lose sight of the wisdom imparted by the eminent judicial minds in the various cases on the doctrine of precedent. I need only refer to a couple of these cases before concluding this judgment. In *Miliangos v George Frank Textiles) Limited (above)* the House of Lords departed from its earlier decision in *re United Railways of the Havana and Regla Warehouses Limited* [1960] 2 All ER 332 *(the Havana Railway case).* Lord Wilberforce, referring to the 1966 *Practice Statement* said:

"Under it, the House affirmed its power to depart from a previous decision when it appears right to do so, recognising that too rigid adherence to precedent might lead to injustice in a particular case and unduly restrict the proper development of the law. My Lords, on the assumption that to depart from the Havana Railways case would not involve undue practical difficulties, that a new and more satisfactory rule is capable of being stated, I am of opinion that the present case falls within the terms of the declaration. To change the rule would, for the reasons already explained, avoid injustice in the present case. To change it

would enable the law to keep in step with commercial needs and with the majority of other countries facing similar problems".

In the Irish case of *O'Brien v Mirror Group Newspaper Limited* [2000] IESC 70 (25 October 2000), the court was there asked to depart from its earlier decision in *De Rossa v Independent Newspapers PIC,* (30th July 1979) Supreme Court, (Unreported). Keane CJ, declining the invitation to depart from *De Rossa,* said at pp 21-22 of his judgment:

"We are being asked to hold that not merely is the carefully considered and reasoned view of Hamilton CJ wrong: we are being asked to hold that it is so 'clearly wrong' that there are now "compelling reasons" why it should be overruled and that, indeed, justice requires that it be overruled.

The court, moreover, was invited to overrule the decision less than a year after it was pronounced. There is, of course, no guarantee whatever that, were it to be so overruled, within a relatively short period of time the court might not be persuaded that this decision in turn was 'clearly wrong' and must itself be overruled. The stage would have been reached at which the doctrine of ***stare decisis*** *in this court would have been seriously weakened and the certainty, stability and predictability of law on which it is grounded significantly eroded."*

I find the guidance contained in the judgment of Henchy J. in *Mogul of Ireland v Tipperary (NR) County Council* [1976] IR 260 at p. 272 (which Keane CJ referred to in *O'Brien v Mirror Group Newspapers*) very instructive. Declining the invitation to overrule the case of *Smith v Cavan and Monaghan County Council* [1949] IR 322, Henchy J said at p.272:

"A decision of the full Supreme Court ... given in a fully argued case and on a consideration of all the relevant materials, should not normally be overruled merely because a later Court inclines to a different conclusion. Of course, if possible, error should not be reinforced by repetition or affirmation and the desirability of achieving certainty, stability, and predictability should yield to the demands of justice. However, a balance has to be struck between rigidity and vacillation, and to achieve that balance the later Court must, at the least, be clearly of opinion that the earlier decision was erroneous."

The case of *Mogul of Ireland* also supports the proposition that even if the later court is of the opinion that earlier decision was wrong, it may decide that in the interests of justice not to overrule it if it has become inveterate and if in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand. In such cases the maxim *communis error facit jus* applies.

One of the obvious features of the present case is that it is based on the same factual circumstances as those in SC.2/05. This Court had fully considered the various constitutional provisions, including section 127(1), as well as the provisions of the Political Parties Act, in SC2/05, in the light of those same factual background with which we are also concerned here. In such a situation, I respectfully adopt the words of Henchy J. in *Mogul of Ireland* where, referring to the case of *Smith v Cavan and Monaghan County Councils* [1949] IR 322 which the Court was asked to overrule, he said:

"There are no new factors, no shift in the underlying considerations, no suggestion that the decision has produced untoward results not within the range of [the] court's foresight. In short, all that has been suggested to justify a rejection of that decision is that it was wrong. Before such a volte-face could be

justified it would first have to be shown that it was clearly wrong. Otherwise the decision to overrule it might itself become liable to be overruled. In my opinion, counsel for the applicants have, at most, established no more than that the interpretation for which they contend might possibly be preferred to that which commended itself to the court in Smith's case. That is not enough. They should show that the decision in Smith's case was clearly wrong and that justice requires that it should be overruled. They have not done so. I would therefore decline the invitation to overrule the decision in Smith's case."

I have taken the liberty to quote extensively from these various case authorities in order to show the guiding thoughts and principles to be applied when an issue has been taken as to whether or not the court should depart from its previous decisions on a particular point. Unlike in the present case before us in SC3/05, all the authorities that I have been able to access involved different parties and different factual circumstances, although the issues for determination might be similar. Even where the cases involved were only a short period apart, the parties and material particulars were different save for the case of *Ex parte Pinochet Ugarte (No.2) (above)* where the period between the first Pinochet case and second one was only about three weeks. However, the basis for the quick-review of the court's earlier decision in that case was due to the fact that the court was not properly constituted. One of the members of the majority Law Lords in the Panel was a director and Chairperson of *Amnesty International Charity Limited*, an organisation connected to Amnesty International who was the Intervener in the proceedings before the House of Lords in the earlier hearing. The reasons for the setting aside the earlier order was due to the fault on the part of the court subjecting the petitioner to an unfair procedure. The circumstances in that case are different to those in the present case.

In the present case, I am not persuaded that the decision of the Court in SC2/05 was wrong. The interpretation and application of section 127(1) of the National Constitution in so far as it applies to the plaintiff in the circumstances of SC2/05 was

correct in law. Those circumstances have not changed and continue to apply to the plaintiff in the present case.

Nor do I think that SC.2/05 can be distinguished from SC.3/05 in the manner advanced by Dr. Jabbi of Counsel for the plaintiff. The distinction sought to be made and relied upon here stems from the fact that following the court's decision in SC.2/05, the SLPP proceeded to hold the Party's Conference and conducted other affairs of the Party. In my view, to confer *locus standi* on the plaintiff based on that distinction is not only artificial, but it will lead to endless arguments as to the standing of the plaintiff based on the distinction between the events before and after 3rd and 4th September 2005. Such an exercise may well be futile and ought not to be encouraged.

Simply because the members of the court in SC2/05 were at variance in their reasoning on question of whether or not the approach to *locus standi* should be liberal, the fact remains that the court was nevertheless unanimous in the result of the case that the plaintiff had no *locus standi* to maintain his action in SC2/05. The issue of the *locus standi* of the plaintiff was fully considered by this court in SC2/05 and now, in this case SC3/05 and decided upon it. As Henchy J said in *Mogul of Ireland*, the question was fully argued and answered; there are no new factors, no shift in the underlying considerations and no suggestion that the decision has produced untoward results. In fact the parties in this case (at least the defendants), have acted and conducted the affairs of their political Party acting on the correctness of the decision of the Court in SC.2/05. All that has been suggested to justify a departure from the decision in SC.2/05 is that it was wrong. That is not enough. Before such a *volte-face* could be justified, the plaintiff must first have to show that the decision of the Court in SC.2/05 was clearly wrong. In my opinion, he has not done so. I would therefore decline the invitation to depart from the decision in SC.2/05.

Conclusion and Order

In view of the number of issues raised and the voluminous painstaking research put into the case by Counsel for the plaintiff, I felt obliged to give due consideration to those

issues and the arguments (both written and oral) before coming to the conclusions, based on law, as I have done in this case. Thus, having done so, I answer the questions posed as follows:-

Question 1 In the circumstances of this case, the Supreme Court cannot and ought not to invoke section 122(2) of the National Constitution so as to depart from its earlier decision in SC.2/05. Therefore, I hold that the plaintiff lacks the capacity to maintain this action because he lacks *locus standi*.

Question 2 Having thus held that this is not a proper case to invoke section 122(2), this court declines to depart from its previous decision in SC.2/05 and is therefore bound to apply it in the present case.
Consequently, the Originating Notice of Motion herein (S.C. No. 3/05) ought to be struck out because of lack of capacity of the plaintiff to maintain the action herein for the same reasons as contained in its decision in S.C. No. 2/2005.

The Originating Notice of Motion herein, S.C. No.3/2005, is hereby struck out for the reasons set out in this judgment.

It only remains for me to thank Counsel for the plaintiff for his usual acumen in the manner in which he presented the plaintiff's case, not only in this case but also in SC.2/05. The court is most grateful and is greatly assisted by the painstaking research and submissions (written and oral) presented to the court.

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Hon Justice Sir John Muria JSC.

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(Hon Justice Dr. Ade Renner-Thomas - Chief Justice)

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(Hon Justice S.C. Warne - JSC)

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(Hon Justice V.A.D. Wright - JSC)

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(Hon Justice M.E. Tolla-Thompson - JSC)