



THE LAW SOCIETY
OF ZIMBABWE

HANDBOOK

ON CONSTITUTIONAL &
ELECTORAL LITIGATION
IN ZIMBABWE

Context, Legal Framework
and Institutions

HANDBOOK ON CONSTITUTIONAL & ELECTORAL LITIGATION IN ZIMBABWE

Context, Legal Framework and Institutions

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Foreword

The handbook on constitutional and electoral litigation in Zimbabwe was produced by the Law Society of Zimbabwe with funding from the European Union. It is a product of a careful collation of relevant provisions of the Constitution and Constitutional Court rules on the structure, practice and procedures of constitutional adjudication.

The process of constitutional adjudication identifies itself with pertinent constitutional principles and values such as supremacy of the constitution, the rule of law, fundamental human rights and democracy. It is the cornerstone for the protection and enforcement of the constitution and constitutional order. The achievement of a vibrant and democratic society in which fundamental human rights and freedom are respected, protected and promoted is realised if citizens are able to vindicate their rights in court. This is particularly significant with the new Zimbabwean constitution which has an expansive bill of rights. The handbook therefore becomes relevant as it gives a guide to legal practitioners and judicial officers on the law relating to practice and procedure of constitutional litigation.

The handbook is proof of the fulfilment of a constitutional mandate. Legal practitioners and judicial officers engaged in constitutional adjudication are required to exhibit the capacity and ability to converse with constitutional issues. The areas that are covered in this handbook cultivate a deeper and better understanding of the constitution as the foundation of an objective order of principles and values defining the social, economic and political development of a democratic society. The handbook exposes the reader to a better appreciation of the fact that the constitutional order needs a system of effective remedies for the vindication of fundamental rights.

As the authors of the handbook observe, constitutional remedies are forward-looking, community oriented and structured rather than backward-looking, individualistic and corrective or retributive. The very notion of constitutional adjudication raises questions of fundamental importance about the conception of the role of the judiciary and the Constitutional Court in particular in the scheme for the protection and enforcement of human rights. The Constitutional Court should be seen as a specialist court created by the constitution for the sole purpose of interpreting, protecting and enforcing the constitution. The court is correctly presented throughout the handbook as the central player in the constitutional adjudication process.

The handbook follows a clear and consistent approach in the elucidation of matters relating to constitutional litigation. The rich constitutional jurisprudence local courts have produced over the years inspired the content of the publication. The subject matter relating to the various stages of constitutional litigation are dealt with in sufficient detail to give the reader a quick but accurate glance of the process and in many cases dispensing with the need to consult further sources.

The areas of discussion chosen demonstrate a clear appreciation by the authors of the litigation that goes on in the Constitutional Court. The manner in which the areas or sections are interconnected is to emphasize the unique place occupied by constitutional litigation in the whole scheme of constitutional review. This places constitutional adjudication in its proper context in the protection and enforcement of constitutional provisions especially the bill of rights.

A study of the handbook will certainly enrich anyone with interest in constitutional law with in depth knowledge of constitutional litigation. I recommend the reading of the handbook, as well as commend and congratulate the authors for a job well done.

Honourable Luke Malaba

CHIEF JUSTICE OF THE REPUBLIC OF ZIMBABWE

Acknowledgements

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This project would not have been realized without the financial support from the European Union. The Law Society remains indebted to the European Union for its continued support towards the good of the legal profession in Zimbabwe.

The Law Society of Zimbabwe would also like to acknowledge the contribution of Dr. Tarisai Mutangi who conducted research and drafted this *Handbook*. He also conducted training of lawyers in Mutare, Gweru, Harare, Bulawayo and Chinhoyi in partnership with Advocate Tazorora Musarurwa as part of the constitutional and electoral litigation sensitization exercise. These trainings produced useful experiences and comments that the researcher incorporated into the final version of this publication.

Table of cases

Locus Standi

Chawira & 13 Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 3/17

Chihava & Ors v The Provincial Magistrate Francis Mapfumo N.O & Anor CCZ 6/15

Katsande & Anor v Infrastructural Development Bank of Zimbabwe CCZ 9/17

Mawarire v Mugabe & Anor [2013 ZWCC 1] CCZ 1/13

Moyo v Chacha & Ors CCZ 14/17

Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors CCZ 12/15

Nkomo v Minister of Local Government, Rural & Urban Development & Ors CCZ 6/16

Tour Operators Business Association of Zimbabwe v Motor Insurance Pool & Ors CCZ 5/15

Zinyemba v The Minister of Lands & Rural Settlement & Anor CCZ 3/16

Jurisdiction of courts in constitutional matters

Nyamande & Anor v Zuva Petroleum CCZ 8/15

Prosecutor- General, Zimbabwe v Telecel Zimbabwe (Private) Limited CCZ 10/15

Chawira & 13 Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 3/17

The Cold Chain (Private) Limited t/a Sea Harvest v Makoni CCZ 8/17

Katsande & Anor v Infrastructural Development Bank of Zimbabwe CCZ 9/17

Chiite & 7 Ors v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust CC 10/17

Moyo v Chacha & Ors CCZ 14/17

Mushapaidze v St Annes Hospital & Ors CCZ 18/17

Ruvinga v Portcullis (Private) Limited CCZ 21/17

Electoral litigation

Mawarire v Mugabe & Anor CCZ 1/13

Zimbabwe Development Party v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 11/17

Bukaibenyu v Zimbabwe Electoral Commission Chairman & Ors CCZ 12/17

Tsvangirai v Robert Gabriel Mugabe & Ors CCZ 20/17

Zimbabwe Electoral Commission & Anor v The Commissioner General Zimbabwe Republic Police & 19 Ors

Citizenship

Mawere v Registrar- General & Ors CCZ 4/13

Madzimbamuto v The Registrar- General & Ors CCZ 5/14

Remedies

Majome v Zimbabwe Broadcasting Corporation & Ors CCZ 14/16

Chawira & 13 Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 3/17

Katsande & Anor v Infrastructural Development Bank of Zimbabwe CCZ 9/17

Makaza & Anor v The State, Gumbo & Anor v The State CCZ 16/17

Declaration of Rights

Muzanenhamo v Officer In Charge CID (Law & Order) & Ors CCZ 3/13

Mawere v Registrar General & Ors CCZ 4/15

Tour Operators Business Association of Zimbabwe v Motor Insurance Pool & Ors CCZ 5/15

Danis David Konson v The State CCZ 7/15

Sister Berry (Nee Ncube) & Anor v The Chief Immigration Officer & Anor CCZ 4/16

Makani & Ors v Arundel School & Ors CCZ 7/16

Makoni v Commissioner of Prisons & Anor CCZ 8/16

Wekare v The State & Ors CCZ 9/16

Madzimbamuto v The Registrar- General & Ors CCZ 5/14

Williams & Ors v Co-Minister of Home Affairs & Ors CCZ 4/14

Declaration of Invalidity

Glen Removals & Storage Zimbabwe (Pvt) Ltd v Mandela CCZ 6/17

Madanhire & Anor v The Attorney- General CCZ 2/15

Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors CCZ 12/15

Mpofu & Anor v The State CCZ 5/16

Makoni v Commissioner of Prisons & Anor CCZ 8/16

Wekare v The State & Ors CCZ 9/16

Murray v Donald Ndirowei N.O & Ors CCZ 2/17

Rusike v The State CCZ 17/17

Madanhire & Anor v Attorney- General CCZ 2/14

Permanent stay of prosecution

Manyara v The State CCZ 3/15

Mutsinze v Attorney- General, Zimbabwe CCZ 13/15

Constitutional referrals in terms of s175(4) of the Constitution

Chikumbu v The State CCZ 1/15

Manyara v The State CCZ 3/15

Chihava & Ors v The Provincial Magistrate Francis Mapfumo N.O & Anor CCZ 6/15

Sibanda v The State CCZ 4/17

Nyamande & Anor v Zuva Petroleum CCZ 8/15

Mwonzora & Ors v The State CCZ 9/15

Prosecutor- General, Zimbabwe v Telecel Zimbabwe (Private) Limited CCZ 10/15

Mutambara v Attorney- General & Anor CCZ 11/15

Stander v The State CCZ 1/16

Mutanda v The Prosecutor- General, Zimbabwe & Ors CCZ 1/17

Sibanda v The State CCZ 4/17

Tom Beattie Farms (Private) Limited aka Chigwell Estate & Anor v Mugova & Anor CCZ 7/17

Katsande & Anor v Infrastructural Development Bank of Zimbabwe CCZ 9/17

Williams & Ors v The State CCZ 14/17

Mushapaidze v St Annes Hospital & Ors CCZ 18/17

Dhlamini & Ors v The State CCZ 1/14

Mwonzora & 31 Ors v The State CCZ 9/15

Taylor- Freeme v The Senior Magistrate, Chinhoyi & Anor CCZ 10/14

Mataishe v The Honourable Magistrate Mahwe N.O & Anor CCZ 12/14

Costs in constitutional litigation

Tour Operators Business Association of Zimbabwe v Motor Insurance Pool & Ors CCZ 5/15

Prosecutor- General, Zimbabwe v Telecel Zimbabwe (Private) Limited CCZ 10/15

Makani & Ors v Arundel School & Ors CCZ 7/16

Chawira & 13 Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 3/17

Chiite & 7 Ors v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust CC 10/17

In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control CCZ 13/2017

Constitutional Interpretation

Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors CCZ 12/15

Makoni v Commissioner of Prisons & Anor CCZ 8/16

Madzimbamuto v The Registrar- General & Ors CCZ 5/14

Table of contents

CHAPTER 1:INTRODUCTION & BACKGROUND.....	1
1.1 Introduction	1
1.2 What is constitutional adjudication?.....	1
1.3 Purpose of the publication	2
1.4 Preparation methodology.....	3
1.5 Structure of the <i>Handbook</i>	3
CHAPTER 2: JURISDICTION OF COURTS IN CONSTITUTIONAL MATTERS.....	6
2.1 Introduction.....	6
2.2 Jurisdiction.....	7
2.2.1 Exclusive jurisdiction of courts.....	7
2.2.2 Concurrent jurisdiction	8
2.2.4 Supreme Court	12
2.2.5 High Court	12
2.2.6 Jurisdiction of other courts.....	13
2.3 General powers of courts in constitutional matters	13
2.3.1 Order or declaration of constitutional invalidity	14
2.4 General principles of declarations of invalidity of legislation.....	15
2.5 Constitutional referrals	16
2.6 Conclusion.....	18
CHAPTER 3: PARTIES/ LOCUS STANDI IN CONSTITUTIONAL ADJUDICATION.....	19
3.1 Introduction	19
3.2 Standing to enforce the Declaration of Rights.....	20
3.3 Conclusion.....	25

CHAPTER 4: ACCESSING THE CONSTITUTIONAL COURT OF ZIMBABWE.....	26
4.1 Introduction	26
4.2 Accessing the Constitutional Court directly	28
4.2.1 Disputes concerning an election to the office of President or Vice-President	29
4.2.2 Disputes relating to whether or not a person is qualified to hold the office of	30
4.2.3 Referrals from a court of subordinate jurisdiction	31
4.2.4 Determinations on whether Parliament or the President has failed to fulfil a.....	33
4.2.5 Appeals in terms of section 175 (3) of the Constitution.....	33
4.2.6 Where the liberty of an individual is at stake.....	34
4.2.7 Challenges to the validity of a declaration of a State of Public Emergency or an	35
4.3 Other ways of accessing the Constitutional Court.....	35
4.3.1 Applications for direct access to CCZ	36
4.3.2 Appeals to the Constitutional Court.....	37
4.4 The Amicus procedure	39
4.5 Accessing the High Court with constitutional matters	41
4.6 Conclusion.....	41
CHAPTER 5: REMEDIES IN CONSTITUTIONAL ADJUDICATION.....	43
5.1 Introduction	43
5.2 Conceptualizing a remedy	43
5.3 Purpose of constitutional remedies.....	45
5.4 Concept of appropriate relief.....	46
5.5 Sample remedy - Declaration of invalidity of legislation.....	48
5.5.1 Severance	50
5.5.2 Reading- in.....	51
5.5.3 Managing the retrospective impact of orders of invalidity	52
5.6 Structural Interdicts	55
5.7 Constitutional damages	58

5.7.1	General principles regarding constitutional damages	59
5.8	Conclusion.....	61
CHAPTER 6: COSTS IN CONSTITUTIONAL ADJUDICATION		63
6.1	Introduction	63
6.2	General approach to costs in litigation	64
6.3	General rules governing costs	64
6.4	Costs in constitutional litigation.....	65
6.5	Conclusion.....	70
CHAPTER 7: ELECTORAL DISPUTE RESOLUTION.....		71
7.1	Introduction	71
7.2	General principles behind EDR.....	71
7.2.1	Political rights	72
7.2.2	Right to a fair hearing	74
7.2.3	Right to access to courts.....	75
7.2.4	Public interest inherent in EDR.....	75
7.3	The legal framework regulating elections in Zimbabwe	75
7.4	Conclusion.....	78
CHAPTER 8: THE PRESIDENTIAL ELECTION PETITION PROCEDURE.....		79
8.1	Introduction	79
8.2	The legislative and institutional framework in presidential petitions.....	80
8.3	Locus standi to lodge a presidential petition.....	81
8.4	Procedure for filing a presidential petition.....	81
8.4.1	Prevailing jurisprudence in presidential petitions	82
8.4.2	The form of a presidential petition.....	84
8.4.3	Withdrawing an electoral petition.....	84
8.5	Conclusion.....	85

CHAPTER 9: THE PRACTICE AND PROCEDURE OF OTHER ELECTORAL PETITIONS 87

9.1	Introduction	87
9.2	<i>Locus standi</i> to file a petition/the parties to an election petition	87
9.3	Proper respondents in a petition	88
9.4	Formalities when filing a petition.....	89
9.4.1	Other requirements.....	91
9.4.2	Service of petitions.....	93
9.4.3	Service of notice and proof of costs	95
9.4.4	Withdrawing an electoral petition	96
9.5	Strict versus substantial compliance in electoral petitions	97
9.6	The determination of a petition	97
9.7	Appeals against decisions of the Electoral Court	98
9.8	Practical steps or points to note on adjudication of petitions	98
9.9	Conclusion.....	100
CHAPTER 10: ANNEXES.....		101

CHAPTER 1: INTRODUCTION & BACKGROUND

1.1 Introduction

This *Handbook on Constitutional & Electoral Litigation in Zimbabwe* would dismally fail to accomplish its purpose if it falls only in the hands of judges, lawyers, teachers of the law and their law students, but not in the hands of those to whom the Constitution of Zimbabwe (Amendment Act No. 20) ultimately belongs – the public. For this reason, it has been written in the most accommodative language to ensure that it is stirred away from legalese jargon and is useful and friendly to its users notwithstanding their profile. The other reason is the constitutional philosophy that underpins it; that the enforcement of the constitution through constitutional litigation seeks to redeem violations of the Constitution, and this is a matter of public interest. This is because the Constitution is the vehicle through which any community could attain a democratic society. Accordingly, any infringement of constitutional provisions undermines this common project hence the public has interest in redeeming it in a manner that guarantees non-recurrence.

This *Handbook* should be understood as foundational in nature. Much as it has delved into matters related to constitutional litigation with commendable depth, it only provides a base upon which a more detailed publication will be developed. This publication represents the beginning of a sequel of constitutional texts; one on constitutional litigation especially tackling specialized proceedings such as constitutional referrals, and state of public emergency. The succeeding publication will further explore the specialized process of prosecuting electoral disputes locating this process in comparative constitutionalism, foreign practice and adherence to international standards.

1.2 What is constitutional adjudication?

This Manual seeks to deepen the discussion on the meaning of constitutional litigation. Suffice to state that it is the sum of those legal proceedings concerning themselves with adjudication of constitutional issues or questions. In section 332 of the Constitution a constitutional matter is defined as ‘a matter in which there is an issue involving the interpretation, protection and enforcement of this Constitution’.

In other words, whenever a court finds itself having to interpret, protect or enforce the Constitution, such proceedings qualify as constitutional adjudication. This Manual applies to these proceedings, which proceedings deal with a ‘higher law’, meaning the law of the Constitution as the supreme

and fundamental norms in the order of legal principles. It is in fact the impugning of constitutional provisions in legal proceedings that distinguish constitutional and common law litigation, among other factors which separate these two forms of litigation.

1.3 Purpose of the publication

Constitutional litigation has a rich history in the country. In spite of a restrictive approach to *locus standi* in the Lancaster House Constitution, the Declaration of Rights continued to be largely litigated before national courts at the instance of individuals, corporate bodies as well as non-state litigators commonly referred to as civil society acting in public interest. The authors of this Manual have taken the view that with an expanded or benevolent approach to standing in the 2013 Constitution, more attempts to enforce the Constitution will be observed hence the need for a quick reference guide to both practitioners taking their very first instructions on constitutional litigation and seasoned ones finding themselves having to contend with a radically changed constitutional framework in the country.

With similar gravity, the Manual is intended for use by state counsels. A point is made somewhere in this Manual that the process of defending constitutional applications is an exercise by state counsels of public power. In fact, it is proof of fulfilling a constitutional mandate. Constitutional litigation holds government accountable. To that end, state counsels are required to exude unquestionable ethical conduct, capacity and ability to converse with constitutional issues and are saddled with the duty to place before courts ‘relevant evidence’ especially when proving or seeking to justify limitations placed on the enjoyment of rights and freedoms in the Declaration of Rights.

Therefore, the purpose of this publication and its succeeding editions is to discuss the practice and procedure of bringing cases of a constitutional nature before the courts of law. The constitutional matters are of a general nature transcending from the Declaration of Rights to other provisions in the Constitution. The Manual, as alluded to earlier on, serves as a quick reference to those players involved in the litigation process and those with the desire to follow and understand constitutional proceedings. Instead of generalizing constitutional litigation as it does in Part I, the *Handbook* goes on to demonstrate the practice and procedure of constitutional litigation by focusing exclusively on electoral dispute resolution (EDR), which by nature are constitutional litigation processes.

1.4 Preparation methodology

The rich constitutional jurisprudence Zimbabwean courts have produced over the years inspired the content of this publication. While a fully indexed list of constitutional cases will be attached to subsequent publications, an effort was made to illustrate the practice and procedure by referring to leading case law. Another source of data was the vast practical and invaluable experience of counsels, judges and litigants who voluntarily shared their knowledge as a way to preserve it. These and other sources will also inform forthcoming publications with the ultimate objective of consolidating sustainable rule of law and constitutionalism in Zimbabwe.

Further, the Law Society of Zimbabwe (LSZ) conducted five training sessions of its membership across the country on constitutional and electoral adjudication. This was a form of validating the Manual in the fraternity of lawyers. Such an exercise proved to be crucial as the feedback pointed to critical missing parts that were subsequently developed and added to the final draft of the Manual. The other output of these sessions was the evidence of the extent to which lawyers have keen interest in constitutional and electoral adjudication. With such interest already aroused through trainings, this Manual would prove to be an invaluable resource in the hands of such a legion of lawyers consumed with the hunger to make a difference in their society.

1.5 Structure of the *Handbook*

The *Handbook* follows a logical sequence of chapters dealing with constitutional litigation with sufficient detail to give the reader a quick but accurate glance of the process and in many cases dispensing with the need to consult further sources. The sequence is set off by introductory parts laying a foundation by defining the scope of constitutional litigation vis-à-vis other forms of dispute resolution. The final part of the publication discusses costs in constitutional adjudication, which is progressively achieved via a chain of constitutional discussions provisionally interrupted by the electoral adjudication interlude. The general tenor of the interconnected sections is to emphasize the unique place occupied by constitutional litigation in the whole scheme of adjudication of disputes in Zimbabwe.

Chapter 2 focuses on the jurisdiction of courts in constitutional matters. It, among other things, identifies courts with constitutional jurisdiction and emphasises the parameters of such competence as the Constitution and other related statutes define them. The chapter helps potential litigants and their lawyers to approach the appropriate forum for the resolution of constitutional

disputes. **Chapter 3**, further expands on the preliminary issues raised by succinctly but sufficiently accounting for the legal competence (*locus standi in judicio*) of persons to institute legal proceedings for the adjudication of constitutional issues. It makes a clear distinction between standing by person(s) when enforcing the Declaration of Rights (DoR) and any other parts of the 2013 Constitution. Such distinction is even more important when regard is accorded to the expanded grounds for approaching the courts to enforce the DoR while a restrictive approach persists regarding other provisions of the Constitution.

Chapter 4 makes a huge assumption that access to the High Court and Supreme Court with constitutional issues is a matter within the ordinary knowledge of a practitioner without need for specific interest or knowledge in constitutional litigation. This assumption is discussed under jurisdiction in Chapter 2. Accordingly, Chapter 4 dedicates the entire space to ventilating issues regarding access to the Constitutional Court of Zimbabwe (CCZ). At the heart of the discussion is emphasis on the dichotomy between direct and indirect access to this Court. The exposition was necessitated by the adoption of the CCZ Rules in 2016 thereby bringing to an end the era of ‘free-for-all’ in terms of accessing the CCZ with constitutional, and in some instances, purported constitutional cases.

Chapter 5 is an embodiment of the essence of litigation – effective relief or remedies at the end of adjudication. Invariably, a litigant commits resources into prosecuting a claim with the ultimate goal of obtaining a judicial pronouncement that speaks to his or her circumstances. In the case of constitutional litigation, remedies seek to reverse all the negative consequences of a violation and to guarantee non-recurrence of it. Therefore, Chapter 5 digs into constitutional principles on the nature of constitutional remedies before discussing a few of them for illustrative purposes. However, the major highlight in this Chapter is that constitutional remedies are different from public law or common law remedies.

If an argument was ever made in the Handbook that constitutional litigation is a special procedure, **Chapter 6** propels the argument further by introducing electoral dispute resolution (EDR) which is yet another specialised procedure within constitutional adjudication. The discussion is confined to disputes involving challenges to an election result because of any reason whatsoever. The Chapter makes the argument that EDR is rooted in s67 of the Constitution thereby seeking to enforce constitutional rights. It sets off from the premise that EDR is, to quote the language of our

courts, *sui generis*! The Chapter goes ahead to demonstrate this characterisation of the procedure by discussing adjudication of electoral petition involving election to the office of President or Vice-president.

Chapter 7 continues in the same vein of its predecessor but with the intention to bring to finality the discussion on EDR by focusing on other forms of petitions. It focusses on those petitions involving the election to the office of Member of Parliament or local authorities. Its intention is to expose the blind spots in the practice and procedure that have claimed the lives of many petitions of this nature. The Chapter alerts the practitioner to the presence of such technical aspects while it, with similar emphasis, reminds the adjudicator that there is so much at stake in electoral petitions hence the need to prioritise adjudication of petitions speedily and on merits. In conclusion, the Chapter briefly discusses practical steps that a litigant, lawyer and adjudicator need to be conscious of in respect of the preparation and adjudication of an electoral petition. It is a discussion on the environment in which EDR takes place.

Chapter 8 is the final substantive chapter. It deals with the issue of costs in constitutional adjudication. It traces the general principles of costs, namely, their purpose, the rule that costs follow the successful party and the courts' discretion in making costs orders. The Chapter highlights the point of departure when a constitutional issue is concerned. Overall, the Chapter successfully makes the point that every rule in the CCZ Rules including those on costs depict or represent a deeper and profound constitutional principle. These are discussed in order to empower the reader with knowledge that looks beyond the rules and regulations.

CHAPTER 2: JURISDICTION OF COURTS IN CONSTITUTIONAL MATTERS

167 Jurisdiction of Constitutional Court

- (1) The Constitutional Court—
(a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;
(b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(b) and paragraph 9(2) of the Fifth Schedule; and
(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- (2) Subject to this Constitution, only the Constitutional Court may—
(a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;
(b) hear and determine disputes relating to election to the office of President;
(c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or
(d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.
- (3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force.
- (4) An Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court.
- (5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court—
(a) to bring a constitutional matter directly to the Constitutional Court;
(b) to appeal directly to the Constitutional Court from any other court;
(c) to appear as a friend of the court.

2.1 Introduction

The provisions on enforcement of the bill of rights are a dead letter unless institutions exist to give effect to the substantive entitlements contained therein. Section 165(1) (c) affirms the role of courts as ‘paramount in safeguarding human rights and freedoms and the rule of law’. Accordingly, this Chapter sets the scene for all subsequent discussions on the matter by exposing the constitutional competence of courts to deal with constitutional issues. Choice of forum is as important as the legal principles to be argued.

While focus is placed on the CCZ, the Chapter also discusses other courts in order to fully expose the hierarchy of courts when adjudicating upon constitutional issues. Such appreciation has a bearing on subsequent discussions on access to courts including instances of shared or exclusive competences. Suffice to state that focus is on constitutional provisions vesting such courts with

constitutional competence. Once the competence is cleared, the focus shifts in the next chapter to dealing with *locus standi* as a corollary of jurisdiction.

2.2 Jurisdiction

Jurisdiction is the converse of standing. It refers to a court's competence to preside over a legal dispute while standing focuses on the capacity of an individual to move the court and be seized with a dispute. Every court is a creature of statute. Invariably, the law provides for the parameters within which jurisdiction is exercised by any court of law beyond which anything done by that court is *ultra vires* its powers.

Matters of jurisdiction are procedural in nature. Jurisdictional challenges are usually raised as points *in limine* before the court delves into the substantive grounds of the motion. Akin to motions requesting the recusal of a judge on the basis of factors such as bias and conflict of interest, it is the court whose jurisdiction is being challenged that determines that motion.¹

A decision on jurisdictional challenge is interlocutory because of its provisional nature. It does not definitively deal with or settle the subject matter of the dispute. It may only be appealed against once the proceedings in respect of which it was raised have been terminated, or where a court rules that it has no jurisdiction whereupon the aggrieved party appeals.²

2.2.1 Exclusive jurisdiction of courts

The 2013 Constitution has ushered in a substantial departure by taking numerous changes to the legal framework that confers courts with specific powers. One of the dramatic changes is the introduction of the concept of 'exclusive' and 'concurrent' jurisdictional approaches. While the Constitution does not make use of these terms, the former is where a single court is vested with competence to deal with certain disputes which no other court could entertain. The Constitution leaves no room for confusion as it clearly provides for matters of exclusive jurisdiction of courts in the creating statutes or the Constitution.

¹Insert source

² See *Morgan Tsvangirai & Ors v Robert Mugabe & Others* SCH/2013. In that case the Electoral Court ruled that it had no jurisdiction to preside over an electoral petition challenging a presidential election after ruling that the matter was not urgent.

2.2.2 Concurrent jurisdiction

Concurrent jurisdiction refers to a scenario where more than one court is empowered by law to preside over listed disputes or matters mentioned in the creating statute or the Constitution. This could be viewed as a form of competing jurisdictions taking into account that proceedings could be instituted in any one of the courts. Concurrent jurisdiction often does not manifest at the appellate level. The appellate competence of courts is usually clearly provided for such that there is no confusion as to which court deals with the said appeals.

2.2.3 Constitutional Court

Sections 166 & 167 of the 2013 Constitution provide for the framework for the competence of the Constitutional Court (herein CCZ). The CCZ is a specialist court in that it deals exclusively with constitutional matters.³ This court only decides constitutional matters and issues connected with decisions on constitutional matters. It is the highest court in all constitutional matters and its decisions on such matters bind all other courts'.⁴

It is for this court to decide with finality if a matter is constitutional or whether an issue is connected with a decision on a constitutional matter. ⁵The 2013 Constitution defines a constitutional matter as 'a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution'.⁶ Therefore, constitutional matters arise in all proceedings involving an attempt to establish the meaning of a constitutional provision⁷; safeguarding the constitutional or approaching courts for orders to re-align or redeem a constitutional infraction.

The CCZ has determined a few cases making the distinction between constitutional and other matters. Its counterpart, the CCSA has also dealt with this issue in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa*⁸. Its decision was interpreted to mean that 'any challenge to the exercise of public power is a constitutional matter

³ Section 167(1)(b) of the 2013 Constitution.

⁴ Section 167(1)(a) of the 2013 Constitution.

⁵ Section 167(1)(c) of the 2013 Constitution.

⁶ Section 332 of the 2013 Constitution of Zimbabwe.

⁷ This is often referred to as 'constitutional interpretation'.

⁸ 2000 (2) SA 674 (CC) at page 20. See also *S v Boesak*

and is ultimately susceptible to the Constitutional Court's jurisdiction'.⁹ However, in *Fraser v Absa Bank Ltd*,¹⁰ the same court held that '....philosophically and conceptually, it is difficult to conceive of any legal issue that is not a constitutional matter...' Other matters regarded as constitutional in nature include:

- (i) Challenge to the exercise of public power;
- (ii) Challenge on the consistency of any law or conduct with the constitution;
- (iii) Issues regarding the status, powers and functions of an organ of the state;
- (iv) Development of common law to conform to the spirit and purpose of the Constitution;
- (v) Matters involving application of legislation adopted to give effect to the Constitution; and
- (vi) The validity of the extradition of a citizen to stand trial in another country.

a) Exclusive jurisdiction of the CCZ

The CCZ enjoys exclusive jurisdiction in a number of cases. It is the court that can advise on the constitutionality of any proposed legislation that has been referred to it for instance by the President in terms of Section 131(8)(b) or paragraph 9(2) of the Fifth Schedule of the 2013 Constitution.

When Sections 93(3) & 167(2)(c) are read together, it is only the CCZ which can preside over disputes relating to the election to the office of President or Vice President. This includes the determination of preliminary issues up to the presidential election petition itself.¹¹

Disputes relating to the qualification of a person to hold the office of Vice President of Zimbabwe also fall within the exclusive domain of the CCZ. So are disputes relating to whether Parliament or the President has failed to fulfil a constitutional obligation.¹² These obligations relate to the responsibilities of the office of the President as established by the 2013 Constitution and not necessarily violation of the provisions of the bill of rights.

⁹ I Currie & J de Vaal *The Bill of Rights Handbook* (2013) at page 98.

¹⁰ 2007 (3) SA 484 (CC).

¹¹ See *Morgan Tsvangirai v Robert Mugabe & Others* CCZ 003/2013.

¹² Section 167(2)(d)

The CCZ has a final say on whether an Act of Parliament or conduct of the President or Parliament is constitutional. It is also vested with authority to confirm as final an order of constitutional invalidity (OCI) made by any other court with such competence before the order could assume any legal force.

There is a considerable amount of difficulty in determining circumstances in which the President or Parliament could be deemed to have failed to fulfil a constitutional obligation. The CCSA was not spared of this legal difficulty until it came up with a test in *Doctors for Life International v Speaker of the National Assembly*.¹³ The CCSA held that exclusive jurisdiction in relation to President or Parliament's failure to fulfil a constitutional obligation is invoked where a dispute concerns questions relating to sensitive areas of separation of powers. Therefore, the closer the issue is to the sensitive areas of separation of powers, the high likelihood it falls within Section 167(2)(d) and only the CCZ can decide it. However, questions dealing with inconsistency of legislation with the bill of rights, or failure by parliament to comply with the legislative process when enacting laws are not matters of this kind of exclusive jurisdiction.

Matters over which only the CCZ may decide as summarized in Rule 21(1) of the CCZ Rules of Procedure (CCZ Rules) include:

- (a) disputes concerning an election to the office of President or Vice-President;
- (b) disputes relating to whether or not a person is qualified to hold the office of President or Vice-President;
- (c) referrals from a court of lesser jurisdiction;
- (d) determinations on whether Parliament or the President has failed to fulfil a constitutional obligation;
- (e) appeals in terms of section 175 (3) of the Constitution, against an order concerning the constitutional validity or invalidity of any law;
- (f) where the liberty of an individual is at stake;
- g) challenges to the validity of a declaration of a State of Public Emergency or an extension of a State of Public Emergency.

¹³ 2006 (6) SA 416 (CC).

b) Accessing the CCZ

There is a whole chapter dedicated to the issue of access to courts in constitutional matters. Section 167(5) of the 2013 Constitution vests in potential litigants the right to access the CCZ directly with or without leave of this court. Similarly, a litigant could appeal directly to the CCZ ‘from any other court’. In that case the litigant is not required to follow the traditional hierarchical order of courts. The provision allows a litigant to by-pass any other court or courts that are immediately superior to the one dealing with his or her matter, and seize the CCZ. For instance, a litigant could appeal directly from the Magistrates’ Court to the CCZ without knocking on the doors of either the High Court or Supreme Court.

Finally, friends of the court could appear in this court where they possess special expertise. It is important to note that the preconditions to the access options discussed above are in the ‘interest of justice’. If it is not in the interest of justice then direct access will be denied, direct appeal from any other court will be streamlined and friends of the court status will not be granted. The CCZ will have to develop its jurisprudence regarding the meaning of the phrase in the ‘interest of justice’.

What amounts to ‘interest of justice’ for purposes of direct access presents challenges. Direct access is restricted on a number of grounds, two of which are prominent. First is the doctrine of constitutional avoidance. As was held in *Fredricks v MEC Education and Training, Eastern Cape*, where a matter raises both constitutional and non-constitutional matters, it is desirable that where possible, non-constitutional matters must be disposed of first.¹⁴ This approach has been in place since *Zimbabwe Township Developers (Pvt) Limited v Lou’s Shoes (Pvt) Limited*,¹⁵ where the court reasoned that an attempt must be made to employ an interpretation that does not bring the impugned law in conflict with the Constitution on the basis of presumption of constitutionality. Only when such an approach is not possible then questions of constitutionality could be dealt with.

It then follows that non-constitutional matters will be dealt with by courts with relevant jurisdiction such as the High Court and the Supreme Court. By the time an appeal is lodged with the CCZ, only the constitutional aspect of the matter would be subject to final determination. Whereas if the

¹⁴ 2002 (2) SA 693 (CC) at page 11.

¹⁵ 1983 (2) ZLR 376 (SC). See also *Attorney-General of Trinidad and Tobago v Ramesh Mootoo* (1974) 28 WIR 304; *Crowell v Benson* (1931) 285 US 22.

matter starts off in the CCZ, it means this court will have also to determine the non-constitutional element of the dispute in respect of which it might not have jurisdiction.

Secondly, the need for the CCZ to benefit from the wisdom of other courts makes it imperative that disputes, including constitutional ones, be heard by other courts before the CCZ is called upon to make a final determination on issues brought to it by way of appeal. The legal system is one; hence each court at every level, whenever allowed by the law, should participate in the development of important issues such as constitutional principles. It is also constitutionally desirable that constitutional principles develop gradually when different courts express their views on the issues rather than having the CCZ to decisively deal with the principle in finality as court of first instance.

2.2.4 Supreme Court

In terms of Section 169 of the 2013 Constitution, the Supreme Court (herein SCZ) is the final court of appeal in all other matters except those of a constitutional nature, which is the domain of the CCZ. It is important to note that the SCZ has constitutional competence with respect to those matters brought to it in the form of appeals over which the CCZ does not claim exclusive competence. This is implied by section 169 which provides that the Supreme Court is the final court of appeal ‘in all other matters’ except constitutional ones. .

Furthermore, Section 175 deals with ‘powers of courts in constitutional matters’ where reference is made to ‘a court’ over and above specific references to the CCZ. This provision admits no interpretation other than that the 2013 Constitution confers the SCZ with constitutional competence to the extent elaborated in the Supreme Court Act¹⁶ as envisaged by section 169(3) to ensure that the jurisdiction of the SCZ is clearly articulated.

2.2.5 High Court

The jurisdiction of the High Court of Zimbabwe (herein HCZ) is provided for in sections 170 & 171 of the 2013 Constitution. Among other aspects of jurisdiction irrelevant to the current discussion, the HC possesses original jurisdiction in all civil and criminal matters.

¹⁶ Source

Section 171(1)(C) of the 2013 Constitution provides that the HCZ has ‘original ‘ jurisdiction over both criminal and civil matters. However, the epitome of this provision is where it clearly confers constitutional competence to the extent that it does not usurp the powers of the CCZ. Section 171(1)(c) provides that the HCZ ‘...may decide constitutional matters except those that only the Constitutional Court may decide’.

The import of this provision is clearly what it says, namely, that constitutional matters are in the domain of the HCZ even as a court of first instance. Appeals from the HCZ on constitutional matters naturally go to the SCZ. In terms of section 171(3) while the HCZ might have different divisions such as civil and criminal divisions, each one of those is empowered to exercise the requisite jurisdiction of the HCZ.

2.2.6 Jurisdiction of other courts

It is important to note that specialised courts such as the Labour, Administrative, Magistrates’ and customary law courts have their jurisdiction spelt out in sections 172 to 174 of the 2013 Constitution. There is no mention of constitutional competence but this must not be taken to mean all these courts are divested of competence to deal with constitutional issues that arise in their proceedings.

2.3 General powers of courts in constitutional matters

These general powers are provided for in section 175 of the 2013 Constitution. This provision should be read together as an extension of section 85 to the extent that it seeks to state and define the nature of a specific remedy of order of constitutional invalidity that a court of competent jurisdiction could render. This remedy or order is important in the context of the on-going process of constitutional alignment of national legislation triggered by the adoption of the 2013 Constitution.

2.3.1 Order or declaration of constitutional invalidity

175 Powers of courts in constitutional matters

(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.

(2) A court which makes an order of constitutional invalidity referred to in subsection (1) may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of the law or conduct concerned.

(3) Any person with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subsection (1).

An order or declaration of constitutional invalidity (OCI) is simply a court order that declares certain conduct of the President, Parliament or law as contrary to constitutional provisions hence declared invalid to the extent of that inconsistency. The process draws its authority from the supremacy clause – section 2 of the 2013 Constitution. Section 175(1) empowers courts to make an OCI where a challenge to such law or conduct is brought before it for determination. However, notwithstanding the competence of a court to make such an order, the OCI will have no force of law unless confirmed by the CCZ for two reasons.

First, the determination of the constitutionality of the conduct of the President or Parliament falls into the exclusive domain of the CCZ and no other court in terms of Rule 21(1)(d) of the CCZ Rules. Second, any order of a court including an OCI in respect of a law is a constitutional matter which only the CCZ may confirm as earlier discussed.

As a matter of procedure, after issuing an OCI, a court has two options. The first one is to provide interlocutory relief to a party in those proceedings. The second option is to adjourn those proceedings, place the matter before the CCZ for confirmation of the OCI in terms of Rule 31 of the CCZ Rules. The order of the CCZ in such proceedings is final.

Furthermore, section 175(3) empowers ‘sufficiently interested’ persons to appeal or apply directly to the CCZ to confirm or vary the OCI rendered by a court other than the CCZ. This species of standing serves to speed up the definitive determination of the CCZ on the validity or otherwise of the law or conduct such that any violations that were being perpetrated at the instance of that law or conduct in the absence of law reform are terminated. However, to exclude the need to amend

rules of various courts to provide for the procedure to refer an OCI to the CCZ for determination under confirmation proceedings, Rule 31 of the CCZ Rules is decisive.

2.4 General principles of declarations of invalidity of legislation

It is important to note the remedy of constitutional invalidity must be rendered in just and equitable circumstances. The judiciary does not have the final say in whatever the court does in terms of giving a remedy even after confirmation by the CCZ, as the legislature is constitutionally empowered to effect the law reform. Generally stated, the role of courts is to declare the law as invalid and it ends there. Section 175(6)(b) requires that the court defers to the legislature the prerogative to deal with its invalid law by allowing ‘the competent authority to correct the defect’.

In dealing with such a declaration, the legislature could amend the Constitution and declare the impugned conduct as constitutional from hence forth as was done in respect of *S v A Juvenile*¹⁷ where, after declaring corporal punishment inhuman and degrading and therefore unconstitutional, parliament went on to amend section 15 of the 1980 Constitution and made corporal punishment of juveniles constitutional.

Every declaration of invalidity has what is known as ‘impact’. This refers to the inevitable legal and other consequences that flow from the declaration of a law as invalid. This is because once declared invalid, the assumption is that the law never existed. It then follows that all decisions made based on the ‘law’ ought to be reversed. Such state of affairs would result in untold burden on the state to contain the impact. Being alive to this possibility, section 175(6) empowers courts to manage the impact in any manner that is just and equitable. This is known as controlling the impact of a declaration.

The courts have a way of controlling the impact of an OCI in a number of ways. First, through severance where a court declares unconstitutional only the offensive parts of a law. The part ranges from a whole section, subsection, a phrase or word(s) leaving the rest of the provision as it was. The test as to the suitability of this approach is two-pronged as postulated in *Coetzee v Government of the Republic of South Africa*.¹⁸ In the first place the court must try separating the good from the bad. Severance is either *actual* or *notional*.¹⁹ The severance option was exercised in the case of

¹⁷ 1989 (2) ZLR 61 (SC).

¹⁸ 1995 (4) SA 631 (CC).

¹⁹ Actual severance is when actual words are cut out of a legal provision yet the latter concerns itself

The State v Chimakure, Kahiya & Zimland Publishers (Pvt) Ltd,²⁰ where section 31(a)(iii) which criminalised “publishing or communicating false statements prejudicial to the State’ was declared unconstitutional and expunged from the Criminal Code.

Secondly, the inquiry is whether the remaining parts of the provision still make sense in giving effect to the purpose of the legislation when applied. This is the difficult part of the inquiry as establishing the purpose of a law is often the most difficult part.

Third, by reading-in of words. This is when the court adds words to a provision to bring it in line with the constitutional requirements once it concludes that the source of the inconsistency is an omission of words in the statute.

Fourth, controlling the retrospective effect of OCI. It is critical to note that upon declaring a law unconstitutional, the court must seek to deprive the law of its commencement, meaning that all decisions taken under it from the time of its enactment or that of the Constitution must be reversed. However, this might cause disruptive effects should decisions be reversed hence courts have to control this against providing a remedy to the individual concerned. The middle of the road approach is for the court to make a prospective order for invalidity where it declares the unconstitutionality of the law from the time of the order thereby barring its future application. This was the case in *Mudzuru & Anor v Minister of Justice & Ors* where the CCZ gave a prospective declaration regarding a provision allowing solemnization of marriages of persons under the age of 18 years.²¹ At the same time a degree of retrospective validity is given where unconstitutionality is allowed in pending appeal or review proceedings.

2.5 Constitutional referrals

175 Powers of courts in constitutional matters

(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.

Read together with Rule 24 of the CCZ Rules

with not tampering with the words of a provision, but subjecting the provision to a defined condition when it is being applied. The latter is often utilized when the provision is overbroad and in need of restricted application.

²⁰ Constitutional Application No. SC 247/09.

²¹ Insertion

It is inexcusable for a practitioner or judicial officer to be unaware of the law and procedure relating to constitutional referrals. This is an important procedure. As the courts have said, it enforces the constitutional principle that important constitutional issues ought to be brought quickly before the CCZ for determination without being bogged down by protracted litigation.

It should be noted that constitutional referrals, regulated by section 24(2) of the 1980 Constitution, are still valid under the current 2013 Constitution. Section 175(4) vests discretion in a court to make a referral to the CCZ where a constitutional issue arises in proceedings in that court. This is a court-driven referral system. A party is also empowered to request a court to refer a constitutional issue where it arises in proceedings in which he or she is a party. Upon such a request, the court must accede to the request unless it considers the request as ‘merely frivolous or vexatious’. This is the party-driven referral system.

The law still envisages both court and party driven referrals as far back as the *Mandirwhe v Minister of State* where the court *mero motu* made a referral upon deciding that a constitutional matter required to be dealt with before terminating legal proceedings.²²

The phrase ‘frivolous and vexatious’ is one our courts have dealt with on numerous occasions. In *Martin v Attorney-General & Another*,²³ the court held that the test is whether the referral would constitute an abuse of the process of the SCZ (now CCZ) and has to be determined applying a conscientious and objective thought to the question. By making this determination, the lower court enforces the constitutional principle that only deserving and important cases ought to be allowed to get the attention of the CCZ. This explains the requirement that the lower court explicitly pronounces itself as to whether the application is frivolous or vexatious. The absence of such finding makes a referral ill-suited before the CCZ.

The referral procedure is concomitant upon the existence of live proceedings be they criminal or civil. In the absence of a charge or after state has withdrawn charges before judgment, no right to referral lies in favour of the former accused person. This was the case in *In re Kwenda*.²⁴ The referral was accordingly determined as incompetent.

²² 1986 (1) ZLR 1 (SC).

²³ 1993 (1) ZLR 153 (SC).

²⁴ 1997 (1) ZLR 116 (SC).

The timing of the referral is important. No referral lies to the CCZ once the court presiding over proceedings has already made a determination. In such circumstances, the relief available to the applicant is direct access either to the CCZ where ‘interest of justice’ demands or an application in the HCZ. This was the case in *Muchero & Another v Attorney-General*.²⁵

The referral system ought not to appear unusual in an era where many courts have constitutional jurisdiction. It must be accepted that issues that are complex or fall within the exclusive domain of the CCZ have to be dealt with by the highest court of jurisdiction. This approach also minimizes the risk of time wasting especially in respect of issues that need to be confirmed by the CCZ even though determined by a lower court. Such instances include declarations or orders of constitutional invalidity of legislation.

There is a great deal of preparations that need to be carried out at the level of the referring or subordinate court. These requirements are provided for in Rule 24 of the CCZ Rules. It provides for the requirements, which, if not satisfied, will render the referral incompetent before the CCZ.

2.6 Conclusion

This Chapter summarily dealt with the nature of jurisdiction the Constitution vests in all courts in Zimbabwe. Some courts such as the CCZ, SCZ, and HCZ seem to have clear constitutional jurisdiction. This means they may preside over disputes involving the interpretation, enforcement or protection of the Constitution. In the jurisdictional design of the Constitution, the CCZ is a specialised court. It only presides over and determines constitutional matters with a big chunk being exclusively reserved for it. Further, the SCZ and the HCZ also have clear constitutional competence provided they stay away from those matters only the CCZ may hear and determine. Yet all these courts other than the CCZ have competence to refer constitutional issues to the CCZ, which issues have arisen in the proceedings over which they preside. However, only issues with a bearing on the dispute before the lower court deserve referral. Some of the courts have competence to declare a law or conduct unconstitutional thereby enforcing the principle of the supremacy of the Constitution. However, such orders lack legal force unless ratified by the CCZ as the highest court in constitutional matters and as the court with constitutional competence to ‘speak directly to the other branches of government’ in keeping with the principle of separation of powers.

²⁵ 2000 (2) ZLR 286 (SC).

Accordingly, the next Chapter shifts focus to the profile of the individual(s) in whom the law vests competence to institute proceedings before the courts discussed in Chapter 2 (legal standing to institute proceedings).

CHAPTER 3: PARTIES/LOCUS STANDI IN CONSTITUTIONAL ADJUDICATION

85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely—

- (a) any person acting in their own interests;
- (b) any person acting on behalf of another person who cannot act for themselves;
- (c) any person acting as a member, or in the interests of a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

3.1 Introduction

Having considered the jurisdiction of courts in constitutional matters in Chapter 2, this Chapter focuses on the right of a person to bring cases before the courts of law. To the extent that the Constitution prescribes jurisdiction of courts in constitutional matters, it also does regulate the acquisition and exercise of legal standing to approach those courts. Under common law litigation,

one is deemed to have standing where he or she has substantial and peculiar interest in the outcome of the proceedings.²⁶ This is a rather restrictive approach to the principle. In the absence of such connection between the litigant and the dispute, a litigant is divested of standing to move a judicial body. The discussion below will make a distinction between legal standing to enforce the Declaration of Rights on one hand, and the rest of the Constitution on the other.

3.2 Standing to enforce the Declaration of Rights

Section 85(1) deals with a number of scenarios of *locus standi in judicio* (standing) of potential litigants to bring a matter before a court seeking to enforce any party of the Declaration of Rights (DOR). The provision does not define ‘standing’. Accordingly, reference is made to the common law meaning of standing. It is important to note that once the Constitution codified Section 85(1), all common law and legislative requirements for standing have ceased to have relevance to the extent that one alleges violation of the DOR. This is because the Constitution provides for an independent framework for enforcing the DOR.

Section 85(1) provides for a list of categories of persons with recognized standing. What this means to a practitioner is that on account of that inclusion, a person has standing notwithstanding patent lack of same by common law standards. Practitioners must note the clear and dramatic departure from the standing requirements of section 24(1) of Constitution of Zimbabwe Amendment No. 19.²⁷ In *Chombo v Parliament of Zimbabwe & Ors* the Supreme Court restated the concept of standing under the constitutional framework as it stood in the following terms

That an applicant approaching this Court in terms of s 24(1) of the Constitution must show that his individual right or rights have been infringed or put it another way that there has been a contravention of the Declaration of Rights in relation to himself is now settled. He has no right to seek redress on behalf of the general public or anyone else – in this regard attention is drawn to the decisions of this Court in *United Parties v Minister of Justice, Legal & Parliamentary Affairs & Ors* 1997(2) ZLR 254(S)...²⁸

²⁶ *Law Society of Zimbabwe v Minister of Justice & Anor* 2006 (2) ZLR 19(S).

²⁷ Section 24(1) of the Constitution of Zimbabwe Amendment No. 19 only vested standing in a person alleging the violation of fundamental rights and freedoms in respect of that person or someone in detention clearly unable to enforce the bill of rights on account of physical restriction.

²⁸ Judgment No. SC 5/2013, Constitutional Application No. SC 107/12. The Court also referred to a number of cases stressing the same point such as *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003(2) ZLR 236(S); Const. Application No. SC 107/12, *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199(S); ; *Law Society of Zimbabwe v Minister of Justice & Anor* 2006 (2) ZLR 19(S).

On the basis of the above restatement of standing, the applicant could only act for themselves and not the general public unless the other person on whose behalf action is brought is unable to act for themselves. As will be discovered later, the scope of standing has expanded in such a way that no amount of restrictive interpretation would restate the 1980 Constitution. In fact even if courts are out there guarding their institution against ‘busy-bodies’, they cannot achieve that objective by restricting access without violating the relevant provisions of the Constitution.

(a) Any person acting in their own interests

Standing is recognised in respect of a person alleging that a fundamental right or freedom ‘has been, is being or is likely to be infringed’ in respect of them. This is the meaning of standing in its traditional sense. Interest is invariably regarded as readily present and sufficient. The applicant must show that own interests or rights in respect of them have been violated and a threat so exists. The case of *Ignatius Chombo v Parliament of Zimbabwe & Ors* restated this principle.²⁹

In *Tsvangirai v Registrar General and Ors* the following was said:³⁰

“The first observation to be made is that a bald, unsubstantiated allegation will not satisfy the requirements of the section. The applicant must aver in his founding affidavit facts, which if proved would establish that a fundamental right enshrined in the Declaration of Rights has been contravened in respect of himself ...”
(p 25G–271a) .

The approach has been maintained in post 2013 era as was the case in *Majome v Zimbabwe Broadcasting Corporation & Ors*.³¹ This is a straightforward requirement where the link between the applicant and alleged violation should be established.

(b) Any person acting on behalf of another person who cannot act for themselves

Any person has authority to act for another person who cannot act for themselves on account of any reason, chief of which is detention or legal minority status. What the person acting on behalf of another needs to prove to court through a founding affidavit is that the other person on whose behalf he or she is acting cannot act for themselves. Further, the one who acts on behalf of another needs the consent or authorisation of the person on whose behalf they are acting, or demonstration

²⁹ See also *Tsvangirai v Registrar General and Ors* 2002 (1) ZLR 268 (S).

³⁰ 2002 (1) ZLR 268 (S)

³¹ CCZ 14/2016.

that they would not have withheld their consent in the given circumstances. It is hoped that courts will prefer this interpretation to the one that requires consent of the person on whose behalf action has been taken. In *Oosetlike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds*, the Court held that the applicant still needs to demonstrate that the one on whose behalf they are acting has sufficient interest.³²

(c) Any person acting as a member or in the interest of a group or class of persons

This species of standing has always been known around the world as ‘class actions’. It has always been regulated by the Class Actions Act [Chapter 8:07] until the advent of the 2013 Constitution. Class actions required High Court approval before one could set out to institute legal proceedings. What this category means is that a member of a group can act on behalf of the entire group to advance an interest common to that group or class of people. Central to this nature of standing is the shared interest. It also appears once a person proves membership to a group or class of persons, that suffices to avail them legal standing. The members of the class or group benefit from and are bound by the outcome of the litigation unless they have been formally excluded from the consequences of the process.

(d) Any person acting in public interest

Central to satisfying the requirements of this category are two elements;

- (i) That the applicant is acting in public interest;
- (ii) That the public has interest in the relief being sought on their behalf.

The public anticipated by this category goes much further than the public affected by class actions. However, public interest does not necessarily mean that the issue must have interest transcending all strata of the population. What is in public interest is colossal to prove although this aspect has always been part of Zimbabwean law. Having interest in an issue by a portion of the population suffices for a matter to have general public interest.

In *Forum Party of Zimbabwe & Ors v Minister of Local Government, Rural and Urban Development & Ors*,³³ it was held that ‘...general public interest does not mean that legislation

³² 1997 (8) BCLR 1066(T) 1076.

³³ 1996 (1) ZLR 461 (HC).

must apply to everyone in the country; it would be permissible to hold that something was in the general public interest even if applied only to a section of the population’.

The principle was fully elaborated in *Mudzuru & Another v Minister of Justice & Ors*, where the CCZ went at length explaining the parameters of public interests partly as follows³⁴

Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.

The Court further held that the primary purpose of s 85(1)(d) is to ‘ensure effective protection to any public interest shown to have been or to be adversely affected by an infringement of a fundamental right or freedom’. It is to ensure that a person who approaches a court in terms of the procedure prescribed under the rule, has the protection of public interest as the objective to be accomplished by the litigation. To that end s85(1)(d) excludes the objective of protecting ‘private, personal or parochial interests’.

In the cases of *Ferreira v Levin NO*³⁵ and *Lawyers for Human Rights v Minister of Home Affairs*,³⁶ which the CCZ quoted with approval in the *Mudzuru* case, the CCSA developed a list of factors that point to the fact that one is acting in public interest, and the list is not exhaustive:

- (i) Whether there is another reasonable and effective manner in which the challenge could be brought;
- (ii) The nature of relief being sought;
- (iii) The extent of general and prospective application;
- (iv) The range of persons or groups who stand to be directly affected by the court order;

³⁴ *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs & Ors* CCZ 12/15.

³⁵ 1996 (1) SA 984 (CC).

³⁶ 2004 (4) SA 125 (CC).

- (v) Whether opportunity was extended to the range of persons or groups to ensure they present arguments to court.
- (vi) The degree and vulnerability of affected persons
- (vii) The nature of the right or freedom allegedly affected.
- (viii) The consequences of the infringement of the right.

Regarding proof that a party is acting in public interest, the court in the *Mudzuru case* held that ‘it is not necessary for a person challenging the constitutional validity of legislation to vindicate public interest on the ground that the legislation has infringed or infringes a fundamental human right, to give particulars of a person or persons who suffered legal injury as a result of the alleged unconstitutionality of the legislation’. The import of the principle is that it is onerous to require the applicant to produce such a list. The focus in determination should be on the actual issue that the party seeks to advance in public interest.

(e) Any association acting in the interest of its members

The case of *Zimbabwe Teachers Association & Ors v Minister of Education and Culture* dealt with this ground although during the erstwhile constitutional order.³⁷ It was held that an association whose object was to represent its members certainly had direct and substantial interest in the summary dismissal of its members by the respondent employer without affording them the right to be heard.

This category of standing is to a certain extent a converse of a member of a group acting in the best interest of that group. Here it is the body corporate itself that stands as the applicant to advance the interests of its members as a collective. It must suffice for the association to prove its legal existence and membership in order to claim this specie of standing. Authorization by members is invariably irrelevant to the inquiry. Perhaps the interest being pursued in a court of law in terms of section 85(1)(e) should, to a certain degree align itself to the objectives being collectively pursued by the association in question.

³⁷ 1990 (2) ZLR 48 (HC).

3.3 Conclusion

The Constitution has expanded the spectrum of legal standing so as to ensure that more people are able to access courts of law to vindicate their rights, those of others and in public interest. This is a dramatic departure from the restrictive approach under common law and perpetuated by the erstwhile constitutional dispensation. This expanded approach is however evident in respect of cases to enforce the DOR under section 85. The rest of the provisions fall to the demands of the common law criteria of legal standing. The Chapter also discussed the specific averments that need to be made when proving legal standing before a court. Such are the requirements practitioners should master so as to be able to assert the right of litigants to institute proceedings. Now, empowered with such knowledge on legal standing, the following Chapter 4 is dedicated to discussing issues of access to the CCZ through the various options the law provides to potential litigants. Being the apex court in constitutional matters, it is imperative that all paths leading to its doorstep be ventilated and the blind spots identified and eliminated.

CHAPTER 4: ACCESSING THE CONSTITUTIONAL COURT OF ZIMBABWE

Applications for direct access

21 (1) The following matters shall not require leave of the Court-

- (a) disputes concerning an election to the office of President or Vice-President;
- (b) disputes relating to whether or not a person is qualified to hold the office of President or Vice-President;
- (c) referrals from a court of lesser jurisdiction;
- (d) determinations on whether Parliament or the President has failed to fulfil a constitutional obligation;
- (e) appeals in terms of section 175 (3) of the Constitution, against an order concerning the constitutional validity or invalidity of any law;
- (f) where the liberty of an individual is at stake;
- (g) challenges to the validity of a declaration of a State of Public Emergency or an extension of a State of Public Emergency.

- *Rule 21 of the CCZ Rules* -

4.1 Introduction

This Chapter focuses on the procedure for accessing the CCZ with emphasis being placed on jurisdiction and selected provisions in Rules of Procedure of the Constitutional Court of Zimbabwe (**Statutory Instrument 61 of 2016 - Constitutional Court Rules 2016**). The primary objective is to provide a quick reference to the applicable parent provisions in the Constitution, relevant Rules as well as any case law. This Chapter in a way complements the discussion conducted in Chapter 2 (*Jurisdiction of Courts in Constitutional Matters*), which focused on principles and substantive law behind jurisdiction of courts when deciding constitutional matters.

It has been noted that prior to the adoption of the CCZ Rules in 2016, access to the CCZ was primarily regulated by the Constitution directly and to a small degree, by the Practice Directions occasionally issued by the Chief Justice to bring in some semblance of orderly resolution of disputes. For instance, applications to enforce the DOR under section 85(1), urgent applications and appeals were dealt with under Practice Direction No. 2 of 2013. The Directive provided detail as to the form of the application; *dies induciae*, set-down for hearing and related matters. The Directive also provided for resort to the Supreme Court Rule by the CCZ when dealing with appeals from lower courts and other related matters, among other things.

We should not lose sight of the fact that the CCZ is one of the ‘new institutions’ established by the 2013 Constitution. In the past the Supreme Court would double-up as a constitutional court to hear and determine constitutional issues. However, there were no rules of procedure dedicated to such secondary competence of the Court. Generally stated, there was no clear distinction between matters over which litigants had direct access to the CCZ or those requiring leave before the adoption of the CCZ Rules. Any genuine constitutional or purported constitutional contestation would easily find its way to the CCZ, and the apex court had no procedural gate-keeping mechanism to prevent ‘undeserving cases’ approaching it.

Therefore, CCZ Rules were adopted to give effect to the constitutional obligation embodied in section 167(5) which provides that:

- (5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court—
 - (a) to bring a constitutional matter directly to the Constitutional Court;
 - (b) to appeal directly to the Constitutional Court from any other court;
 - (c) to appear as a friend of the court.

The CCZ Rules should be understood as having come to enforce a number of constitutional principles pertaining to the place of the CCZ in the constitutional scheme. First, the CCZ is the most superior and specialised court with very limited jurisdiction in that it may only deal with constitutional issues. CCZ Rules buttress this point. It is the specialization aspect in the subject matter jurisdiction of the Court that leads to the second constitutional principle.

Second, for the specialised profile and the constitutional importance of the CCZ, it is required that only deserving cases should get the attention of the apex court. In other words, the constitutional

design is such that measures are deployed in different ways to vet such cases including in constitutional referrals where a lower court should satisfy itself that the referral is not frivolous or vexatious; the appeal procedure from lower courts up the hierarchy until the cases reaches the CCZ; confirmation proceedings following an order of declaration of invalidity of legislation by the lower court; and now the CCZ Rules determining cases of direct access (exclusive jurisdiction) and criteria for direct access in the ‘interest of justice’. Taken conjunctively, it was imperative that rules of procedure be adopted to provide for these mechanisms in detail for the orderly functioning of a court presided over by the head of the judiciary – the Chief Justice.

4.2 Accessing the Constitutional Court directly

As discussed in Chapter 2 above, the 2013 Constitution provides for the exclusive jurisdiction of the CCZ. Its jurisdiction is specialised in that it ‘decides only constitutional matters and issues connected with decisions on constitutional matters’.³⁸ Further, it is this Court that has a final say as to whether a matter is a constitutional one or is related to a decision on a constitutional matter. On its part, section 332 of the Constitution defines a constitutional matter as ‘a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution’. Any dispute which involves the interpretation, protection or enforcement of the Constitution generally falls within the jurisdiction of the CCZ. Whether such an issue of exclusive or concurrent now involves the intervention of section 167 of the 2013 Constitution as read with Rule 21 of the CCZ Rules.

As stated in several places in this publication, the primary provision on jurisdiction of the CCZ is section 167 of the Constitution. It restates the principle that the CCZ is the highest court in constitutional matters.³⁹ In the case of *Prosecutor General v Telecel Zimbabwe*⁴⁰, it was held that section 167 does not confer on anyone the right to approach the CCZ directly, even if they have, or perceive themselves to have a constitutional matter needing the court’s determination. In other words it does not necessarily follow that any person with an issue that is constitutional in nature has right of access to the CCZ on account of the specialised jurisdiction of the Court. It was further held that to give full effect to s 167(1) in relation to any constitutional matter sought to be brought

³⁸ Section 167(1)(b) of the Constitution.

³⁹ See Section 167(1)(a) of the Constitution.

⁴⁰ CCZ 10/15 p5 – 7

before the court, the provision must be read in conjunction with the various provisions that do confer a right to approach the constitutional court directly or indirectly through another process. However, although the provision makes a distinction between matters over which this court has exclusive and concurrent jurisdiction, it does not expressly provide for it. Section 167(5) should be read together with the CCZ Rules making reference to access to the CCZ.

In view of these remarks on accessing the CCZ, the following is an analysis to establish the extent to which the CCZ Rules give effect to section 167(5) of the Constitution by providing for all the instances of access contemplated by this provision. These instances of direct access are given in Rule 21 of the CCZ Rules. They have a clear link to instances of exclusive jurisdiction of the CCZ as previously discussed especially in Chapter 2 of this *Handbook*.

4.2.1 Disputes concerning an election to the office of President or Vice-President

The primary provision regulating proceedings involving petitions in relation to presidential elections is section 93 of the Constitution (as read together with Part XVII of the Electoral Act) which entitles an ‘aggrieved candidate’ to lodge a petition or application “with the constitutional court within seven days” of the declaration of the result in that election.⁴¹ It is important to note that the Constitution expressly mentions the CCZ as the court in which the petition or application must be lodged. The express mention settles the jurisdiction of the CCZ in such matters. Had it been the case that jurisdiction was shared; the framers of the Constitution would have utilized the word “court” in general terms. The procedural aspects of section 93 have been codified in rule 21(1)(a) as read with rule 23 of the Constitutional Court Rule (the Rules). These were the sentiments of the CCZ in *Tsvangirai v Mugabe*.⁴² In this case, the petitioner filed an application challenging the result in the presidential elections held on 31 July 2013. The petitioner, having faced monumental difficulties in mobilising evidence to support his contentions, decided to withdraw the petition. The CCZ went on to determine on the issue as to whether or not section 93 of the Constitution confers on a petitioner the right to withdraw the petition.

The very first presidential petition to have been filed in Zimbabwe was between the same parties, in 2002, in the aftermath of the general election that took place in that year. As at the time of

⁴¹ See section 93(1) of the Constitution.

⁴² CCZ 003/2013.

publication of this *Manual*, research has revealed that the petition is still pending before the courts. It remained pending from the time of filing until both parties left offices that entitle them to participate in such proceedings. Such inordinate delay is the mischief that led to the framers of the 2013 Constitution to include time frames within which electoral petitions ought to be filed and determined,

4.2.2 Disputes relating to whether or not a person is qualified to hold the office of President or Vice-President;

Section 167(2)(c) of the Constitution vests in the CCZ exclusive jurisdiction to preside over matters in which the qualification of a candidate in relation to hold the office of Vice President is in dispute. It should be noted that the Constitution does not make reference to jurisdiction of the CCZ in relation to qualifications to hold office of the President, yet rule 21(1)(b) makes this reference. This raises the question as to whether this rule is *ultra vires* the Constitution to the extent that it incorporates reference of office of the President. It is submitted that the Constitution does not provide specifically for a gateway into challenging the qualification of a presidential candidate. However, this possibility could be read into section 93(1) that entitles a candidate to challenge the “validity of an election of a President” for any grounds whatsoever.

It is curious that the Rule brings to the fore the issue of qualifications of the Vice-President. It has been a custom in Zimbabwe politics that a Vice-President is appointed by the elected President, hence the issue of qualification did not arise. However, the 2013 Constitution has brought a new dimension to presidential elections for purposes of executive appointments. Section 92 provides as follows:

92 Election of President and Vice-Presidents

(1) The election of a President and two Vice-Presidents must take place within the period specified in section 158.

(2) Every candidate for election as President must nominate two persons to stand for election jointly with him or her as Vice-Presidents, and must designate one of those persons as his or her candidate for first Vice-President and the other as his or her candidate for second Vice-President.

(3) The President and the Vice-Presidents are directly elected jointly by registered voters throughout Zimbabwe, and the procedure for their election is as prescribed in the Electoral Law.

(4) The qualifications for registration as a voter and for voting at an election of a President and Vice-Presidents are set out in the Fourth Schedule.(5)The election of a President and Vice-Presidents must take place concurrently with every general election of members of Parliament, provincial councils and local authorities.

The import of this provision is that as from 2023, that is 10 years after the 2013 Constitution came into force, a presidential candidate shall nominate his or her running mates at the time of election and the electorate should directly vote these three into office. The constitutional principle behind such an approach probably is the public interest nature of the office of the President (including deputy presidency). Such heads of an arm of government ought to be installed by the electorate to conform to the imperatives of representative democracy. Therefore, these are the principles section 167(2)(b) as read with Rule 21(1)(b) seeks to enforce by reserving contestations arising from presidential elections to the CCZ.

4.2.3 Referrals from a court of subordinate jurisdiction

A constitutional referral is an example of specific powers vested in courts when faced with constitutional issues. On one hand is the power of the court conducting proceedings in terms of decision making related to referring a constitutional issue that has arisen in those proceedings to the CCZ. On the other hand, is now the jurisdiction of the CCZ in presiding over those referrals. The primary provision is section 175(4) of the Constitution. This provision vests in the CCZ, the competence to determine all referrals once lodged in terms of rule 21(1) (c) as read together with rule 24, which provides for the procedural requirements attendant to this type of proceedings.

Rule 24(1) provides for the procedural requirements to ensure that referrals are properly brought before the CCZ. This is commendable in that prior to the adoption to the CCZ Rules; the referral procedure was fraught with unending uncertainties and ambiguities. Lacking a statute to regulate it, the process was left to the wisdom of courts to explain it in various and isolated judgments. Much as the courts did their best in the circumstances, several referrals kept crumbling before the Supreme Court and now the CCZ. Now to the relief of everyone involved including referring courts, Rule 24 clearly articulates the procedural requirements.

Generally stated, a lower court is empowered to refer to the constitutional court a constitutional issue that arises in the proceedings, *mero motu*.⁴³The presiding officer must request parties to the

⁴³ See Rule 24(1)(a) of the CCZ Rules.

case to make submissions on the question to be referred for determination before such a referral is made.⁴⁴. Thereafter the judicial officer should articulate with clarity the ‘specific constitutional issue or question he or she considers should be resolved by the Court’.⁴⁵

In the event that a party makes an application for referral, the parties should also make submissions before the judicial officer in support or opposition to the application for referral. Such submissions are designed to facilitate the fulfilment of a constitutional duty of that court to satisfy itself that the referral is neither frivolous nor vexatious. This determination is required by section 175(4) of the Constitution.

Where a dispute of facts exists, the lower court should resolve the dispute by hearing evidence from the parties and make a finding of fact. If no dispute of fact exists, then parties should sign an agreed statement of facts. It is undesirable and therefore prohibited by Rule 24 that a referral be accompanied by an unresolved dispute of fact. The CCZ is generally not disposed to hear evidence hence the requirement that the lower court resolves all factual disputes.⁴⁶ The record of proceedings from the lower court, certified by the clerk of that court as an accurate and correct record, shall accompany the referral to the CCZ. Upon receiving same, the Registrar will invite parties to file heads of argument before the matter is set-down for determination.

All in all, the referral procedure enforces yet another constitutional principle, which is that issues of constitutional importance that arise in the course of proceedings before a court other than the CCZ (specialised court on constitutional issues) should be brought before the CCZ as expeditiously as possible, without having to go through the rigours of protracted litigation. This is because referable issues have a bearing on the determination of the dispute before the lower court. Further, while the lower court determines whether the application for referral is frivolous or vexatious, they are in fact executing a constitutional obligation to ensure that only deserving cases reach the most superior court on the land – the CCZ.

⁴⁴ Ibid.

⁴⁵ See Rule 24(1)(b) of the CCZ Rules.

⁴⁶ Patel JA succinctly explained the undesirability of bringing cases with disputes of fact to the Constitutional Court when he stated that, “Given the factual disputes alluded to earlier, it is clearly not possible for this Court to proceed with this application as it stands at this stage. Matters of evidence and credibility are generally beyond the practical remit of this Court and, without firm findings of fact, the court is unable to entertain the substantive relief sought by the applicant.” See Douglas Muzanenhano vs. Officer in Charge, CID Law and Order & 7 Ors CC 3/13 @ p7

4.2.4 Determinations on whether Parliament or the President has failed to fulfil a constitutional obligation

The key provision is section 167(2)(d) of the 2013 Constitution. The procedure related to challenges of this nature is as provided in rule 21(1)(d), read together with Rule 27. At a substantive level the cause of action is essentially that either the President has failed to execute the functions provided in Part 4 of Chapter 5 of the 2013 Constitution or any other provision of the Constitution that vests such obligations in the President. The other strand is in respect of Parliament's constitutional obligations mainly in terms of Chapter 6 of the 2013 Constitution. For the importance inherent in executive and legislative functions in a constitutional democracy, it is appropriate that the highest courts in constitutional matters be responsible for determining such matters.

4.2.5 Appeals in terms of section 175 (3) of the Constitution, against an order concerning the constitutional validity or invalidity of any law

The proceedings in which the CCZ must confirm orders by lower courts invalidating legislation (confirmation proceedings) enforce two constitutional principles in a constitutional democracy. First is the principle of supremacy of the Constitution. This is embodied in section 2, which provides as follows:

2 Supremacy of Constitution

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

In terms of this principle, courts are empowered to declare invalid any and all legislation that is inconsistent with the Constitution as part of judicial review. Second is the principle of separation of powers (SOP). Because a declaration of invalidity of legislation is such a drastic measure or indictment by one arm of state over another (judiciary over legislature), it is logical that such power be reserved for the highest court in the constitutional scheme or on constitutional matters – the CCZ.

Confirmation proceedings are regulated by Rule 21(1)(e) as read with Rule 31 of the CCZ Rules. These procedural provisions give effect to section 175(3) of the Constitution, which vests in the CCZ the exclusive competence to preside over confirmation proceedings. These are proceedings where the CCZ makes the final determination of whether a law is invalid on account of running contrary to the Constitution as ordered by the lower court.

It appears as an unintended conclusion that such proceedings are only initiated as appellate proceedings, yet section 175(3) also contemplates initiation of confirmation proceedings by way of an application, probably at the instance of an interested person who was not party to the proceedings in the lower court. Perhaps an alternative argument is to say that confirmation proceedings are initiated in terms of Rule 31(5), which also seems to anticipate the filing of an application in the place of an appeal. Of note is the distinction between appeals in terms of section 175(3) as opposed to those contemplated in section 167(5)(b) of the Constitution. This dichotomy of appeals must be well understood and not to be mixed up as different rules apply to these two categories of appeals. Rule 31 deals with appeals in terms of section 175(3) while Part V of the CCZ Rules is committed to appeals from courts of ‘subordinate court (sic) on a constitutional matter only’.⁴⁷

4.2.6 Where the liberty of an individual is at stake

This instance of exclusive jurisdiction of the CCZ does not appear to have express parent provisions in the Constitution. It is regulated by rule 21(1)(f). The elevation of the right to personal liberty to the status of a matter of exclusive jurisdiction seems to have no other grounds but the importance of liberty in the wider constitutional scheme. In terms of the rules, no specific rule is dedicated to proceedings before the CCZ that seek to redeem the right to liberty. Accordingly, proceedings are initiated and finalized in terms of rules regulating general applications before the CCZ.⁴⁸ We take the view that this seems to be a rather limiting provision not within the contemplation of the Constitution, taking into account the general competence of even lower courts such as the Magistrates’ Court to preside over proceedings that challenge the taking away of

⁴⁷ There appears to be a typographical error in that the phrase ‘subordinate court’ was used instead of ‘subordinate jurisdiction’.

⁴⁸ See Part III of the CCZ Rules.

liberty. It then begs the question as to the rationale behind the inclusion of challenges on the right to liberty in the domain of exclusive jurisdiction of the CCZ. Even the system in practice does not recognize this competence. Any person seeking to bring a challenge on violation of the right to liberty seems to be required to seek leave to access the CCZ directly. Once granted, an application could then be filed and stands to be determined by the CCZ on good evidence.

4.2.7 Challenges to the validity of a declaration of a State of Public Emergency or an extension of a State of Public Emergency

The competence to make or publish a declaration of a state of public emergency (DSPE) is a prerogative of the President in terms of section 113 of the Constitution as read together with section 87 and the Second Schedule to the same Constitution. The same provision (section 113) also provides for constitutional principles applicable to a DSPE. In terms thereof, the President is empowered to make a DSPE and where circumstances permit, extent the period of the declaration. It is in respect of these two competences that section 113(7) vests in the CCZ the competence to determine applications challenging the validity of a DSPE.

Rule 28 of the CCZ Rules is dedicated to provisions regulating proceedings of this nature. Again, the principle is that the highest court in the land deals with contestations regarding a DSPE, which is a manifestation of exercise of state or public power by the head of the executive. Further, the extent to which rights and freedoms in the DOR are limited once the President publishes a DSPE justifies the involvement of the CCZ as the specialized court in constitutional matters. In terms of section 87(1) of the Constitution,

(1) In addition to the limitations permitted by section 86, the fundamental rights and freedoms set out in this Chapter may be further limited by a written law providing for measures to deal with situations arising during a period of public emergency, but only to the extent permitted by this section and the Second Schedule.

It is the further restriction of rights already limited under section 86 (general limitation clause) that makes a DSPE a drastic measure and therefore, its validity or extension becomes an issue of extreme public interest. By determining challenges against the validity or extension of a DSPE, the CCZ would be exercising judicial review over exercise of state power.

4.3 Other ways of accessing the Constitutional Court

Section 167(5) of the Constitution requires that CCZ Rules should provide for the possibility of accessing that Court with or without leave provided it is in the interest of justice to do so. Other

than the specific instances provided for under Rule 21(1), one would require leave of the CCZ in order to access it directly. Leave to access the court directly is granted upon filing an application for that specific purpose in terms of Rule 21(2). Applications for direct access are usually in respect of disputes over which the CCZ shares jurisdiction with other courts. Therefore, Rule 21(2) facilitates direct access with leave of the CCZ.

4.3.1 Applications for direct access to CCZ

Rule 21(2) contemplates ‘an application for direct access’. This denotes a situation where a litigant files with the CCZ an application for an order allowing them to access that Court directly for determination of a constitutional issue. It is an application that precedes the actual application in respect of which access is sought. It is a pre-requisite for the substantive application. It then follows that the grounds upon which the two applications are based have to be different. Application for leave focuses on persuading the CCZ to allow the main application to be filed, which application could have otherwise been filed in another court. If allowed, the main application would then focus on the constitutional issue to be determined by the court.

It is emphasised here that applications for direct access are required in respect of all constitutional issues other than those listed in section 167(2) of the Constitution as read with Rule 21(1). Such applications take the general form of an application as contemplated by Rule 14. An affidavit, to which a draft of the substantive application in respect of which leave is being sought, must accompany the application for direct access in order to set out:

- (i) The grounds on which it is contended that **it is in the interests of justice** that an order for direct access be granted; and
- (ii) The **nature of the relief sought** and the grounds upon which such relief is based; and
- (iii) Whether the **matter can be dealt with by the Court without the hearing of oral evidence** or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.

At the heart of determining an application for direct access is the principle of ‘interests of justice’. The applicant has to convince the court that it is in the interest of justice that access is granted. In terms of Rule 21(8), a number of factors must be taken into account when determining interest of

justice. First is the consideration of prospects of success if direct access is granted. It is not in the interest of justice that applications with low prospects of success should be granted direct access. However, this factor is not decisive. Success should be understood as the possibility that the CCZ would grant the relief being sought in the substantive application hence the requirements that a draft application be attached to the affidavit.

Second, the CCZ would make an inquiry into whether the applicant has any other remedy available. This requirement brings to fore the fact that issues in respect of which direct access is sought are matters of concurrent jurisdiction. The procedure screens those applications where remedies could be available elsewhere, perhaps within the context of common law litigation. Once it is established that a remedy exists elsewhere, it would not be in the interests of justice to allow such applications that already have a remedy.⁴⁹

Third, the CCZ enquires as to whether there are disputes of fact in the matter. Disputes of fact makes it undesirable and in some cases impossible to settle disputes on papers even if the court takes a robust approach to the proceedings. Where it is clear from the draft substantive application that dispute of facts of a material nature exists, the interests of justice do not allow that direct access to the CCZ to be granted since it is generally not a court of first instance. Generally, this Court does not hear evidence to resolve and determine disputes of facts.⁵⁰

Once direct access is granted, the litigant then proceeds in terms of the relevant rule that applies to those proceedings being instituted in the substantive application.⁵¹

4.3.2 Appeals to the Constitutional Court

The CCZ is largely a court of appeal in respect of constitutional issues except in those matters over which it enjoys exclusive preserve as discussed above. The founding provisions of all appeals to the CCZ are contained in section 167(5)(b), which provides that ‘Rules of the Constitutional Court must allow a person, when it is in the interest of justice and with or without leave of the Constitutional Court ... to appeal directly to the Constitutional Court from any other court’.

⁴⁹ *Livera Trading (Pvt) Ltd & 2 Ors v Tornbridge Assets* CCZ13/16 page 6, para 12 -16

⁵⁰ See the Muzanenhano case CC 3/13

⁵¹ See Rule 21(12) of the CCZ Rules.

Part V of the CCZ Rules, in particular, is dedicated to the regulation of the exercise of this right of appeal to the CCZ from subordinate courts. Of note regarding appeals from the SCZ is that, although appeals from this Court lie automatically in the CCZ as direct appeals, Rule 32(2) of the CCZ Rules provides for the right of appeal to any ‘litigant who is aggrieved by a decision of a court of subordinate jurisdiction’ to appeal to the CCZ only on a constitutional matter within 15 days of the decision being appealed against. This Rule, in conformity to section 167(5) of the Constitution, requires the aggrieved litigant to ‘file with the Registrar an application for leave to appeal’. In other words, even in cases where appeals can only lie in the CCZ, nevertheless, litigants are required by the Rules to seek leave in the CCZ to appeal to that Court. This is the case notwithstanding a clear position of the law that such appeals, when noted, become an exclusive preserve of the CCZ. It appears that this is rather a screening exercise to ensure that only deserving cases reach the apex court.

In *Nyamande & Anor v Zuva Petroleum*⁵², the applicants who had not raised a constitutional issue before the SCZ sought leave to appeal against its decision, purportedly (and erroneously) in terms of s 167(5) of the Constitution. The application was dismissed with the Court holding as follows:

Section 167(5) relates to rules of procedure regulating the manner of approach to this Court on appeal from lower courts. It does not confer a right to appeal to the Constitutional Court on a litigant who has no right of appeal...A right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter.

It is clear that the appeal was misconceived on a further ground that the appellant sought to raise a constitutional issue for the first time on appeal contrary to established jurisprudence precluding such an approach⁵³. However, the import of the above sentiments by the Court was to demonstrate that the right of appeal created by the provision is regulated by rules of procedure, but only extendable to a litigant who has the right to appeal. For instance, the right of appeal arises where a litigant is aggrieved by the decision of the court. Further, the right of appeal is created where it is in the interest of justice to do so.

⁵² *Nyamande & Anor v Zuva Petroleum* (CCZ 8\15) pages 5 -6, para 11 -12

⁵³ See also *Chiite & Others v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17.

4.4 The Amicus procedure

Amicus curiae is described as a friend of the court who voluntarily joins judicial proceedings to assist the court by furnishing information or argument regarding questions of law or fact⁵⁴. That litigant is not a party to litigation but joins in the proceedings to assist the court because of expertise or general interest in the matter. The *amicus* may choose the side they wish to join unless required by the court to urge a particular position.

Section 85(3)(d) of the Constitution allows a person with particular expertise to appear, with the leave of the court, as a friend of the court in cases specifically relating to the enforcement of the DOR. Similarly, section 167 (5)(c) as read together with Rule 10 (1) and (2) of the CCZ Rules also permits a person with particular expertise which is relevant to the determination of any matter before the CCZ to appear as a friend of the court with or without leave of that court and when it is in the interests of justice to do so. The person with specific expertise may be invited by the court or may apply to appear as *amicus curiae*.⁵⁵

From the wording of section 85(3)(d), it appears our constitutional design follows both the party-driven and court driven approach to expert opinion evidence. The phrase ‘with leave of the court’ implies that a party could apply to the court to allow an expert to make submissions subject to authorisation by the court. Similarly, the court itself could invite an expert to assist the court on matters that relate to that friend’s discipline of expertise. Nonetheless, the practice and procedure in this jurisdiction has always been that courts have inherent competence to outsource expertise on novel and complex matters. With the current constitutional dispensation taking root in our legal system, it is hoped that our courts will pursue a fairly relaxed approach to *amicus curiae* proceedings and give life to the new constitutional order.

The CCZ Rules lay out the requirements and procedure in respect of *amici curiae* applications⁵⁶. The threshold for a successful application is quite high. The Applicant must meet the following requirements⁵⁷;

⁵⁴ See *Hoffman v South Africa Airways* 2001(1) SA CC [63].

⁵⁵ See Rule 10(1) & (2) of the CCZ Rules

⁵⁶ See Rule 10(2) to (6)

⁵⁷ See Rule 10(3)

- (a) Describe the particular expertise they possess;
- (b) Describe their interests in the proceedings;
- (c) Briefly identify the position they will adopt in the proceedings; and
- (d) Set out the submissions to be advanced, their relevance to the proceedings and the applicant's reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

In addition to the above, the court will grant the application if it considers it to be in the interest of justice to do so and upon terms and conditions which it may determine. In the case of ***European Centre for Constitutional and Human Rights***,⁵⁸ for its admission as *amicus curiae* in a pending matter relating to an application for a declarator, the HCZ dismissed the application on the basis, *inter alia*, that the matter seemed to be a simple matter involving domestic law. One can thus infer that, the matter in which an applicant seeks to be joined as *amicus curiae*, should be a complex one, requiring particular expertise.

In the above-mentioned case, the court also took into consideration the fact that there was an alleged reasonable apprehension of collusion between the applicant (*amicus*) and one of the parties in the pending main matter. It thus follows that the applicant must not have any real or substantial interest in the main matter and should be able to act in a non- partisan and neutral manner. It was further stated that section 167(5)(c) of the Constitution does not give jurisdiction to the HCZ to allow a person to appear as a friend of the court without leave of the Constitutional Court. Respectfully, this may not be a correct interpretation of that provision. It may be observed that s167(5)(c) specifically applies to the CCZ. It appears that other courts with constitutional jurisdiction do not require leave of the CCZ before an application for admission as *amicus curiae* is lodged with them. Courts are masters of their jurisdiction unless same is expressly limited by statute.

Ordinarily, the courts do not make awards of costs against or in favour of an *amicus curiae* save for exceptional cases.⁵⁹ In ***In Re Prosecutor-General of Zimbabwe on His Constitutional***

⁵⁸ HH314/16

⁵⁹ See Rule 10(7) of the CCZ Rules.

*Independence and Protection from Direction and Control*⁶⁰ the court awarded costs to *amici curiae* because of the manner in which the applicant had conducted himself leaving the two *amici* with no option but to intervene and join in the proceedings so as to safeguard their interests. The applicant had ‘stubbornly, unreasonably, inexplicably and unlawfully’ refused to comply with both the law as well as extant court orders of the HCZ and the SCZ requiring the issuance of certificates *nolle prosequi*.

4.5 Accessing the High Court with constitutional matters

As discussed above under jurisdiction of courts in constitutional matters, in terms of section 171(1)(c) of the Constitution, the HCZ ‘may decide constitutional matters except those that only the Constitutional Court may decide’. It was further discussed that such constitutional matters of concurrent jurisdiction between the HCZ and CCZ maybe be brought before the HCZ directly. The form of such proceedings is governed by the HCZ Rules that regulate civil proceedings. There is no procedure reserved for regulating applications of a constitutional nature, whether they are urgent chamber proceedings or those instituted under the normal application or action proceedings.

4.6 Conclusion

This Chapter focused on how a litigant could access the CCZ. In summary, there are two avenues to approach the CCZ with a constitutional issue. One way is through direct access. This occurs where a litigant wishes to lodge a constitutional issue that falls within the jurisdictional preserve of the CCZ (exclusive jurisdiction). The key legal provisions on this method of access are section 167(2) of the Constitution and Rule 21 of the CCZ Rules. Therefore, no formalities are required when accessing the CCZ directly except filing pleadings relying on the correct rules and Forms.

The other way is through indirect access. A litigant wishes to lodge a constitutional issue with the CCZ, which issue could be as well filed in the HCZ. Accordingly, such an issue is not one of exclusive jurisdiction hence the CCZ must authorize its filing before it for the court to act as one of first instance. An application for direct access must be filed. It ought to be in the interest of

⁶⁰ CCZ 3/17. See also *Zuma v. National Director of Public Prosecutions* 2009 (1) BCLR 62 where costs were sought against *amicus*

justice that the CCZ should allow direct access. Once direct access is allowed the litigant may proceed to file their main application in respect of which direct access is sought.

Other forms of access to CCZ include appeals from lower courts, primarily following the cardinal hierarchy of court. Part V of the CCZ Rules deals with such. Having discussed the methods of approaching the CCZ, the next Chapter 5 focuses on the remedial jurisdiction of courts when dealing with constitutional issues. The Chapter is an essential piece in the litigation puzzle.

CHAPTER 5: REMEDIES IN CONSTITUTIONAL ADJUDICATION

85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely—

.....
.....

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

.....

175 Powers of courts in constitutional matters

(6) When deciding a constitutional matter within its jurisdiction a court may—

(a)

(b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.

5.1 Introduction

Chapter 4 elaborated on the methods of accessing the CCZ with a constitutional matter. It elaborated on different strands of constitutional issues that may be brought before this court. In particular, the Chapter made a clear distinction between instances where litigants may directly approach the CCZ (direct access) and those matters which may only be brought to the CCZ after another court has handled them (indirect access). The Chapter also summarized the manner in which constitutional issues may be brought before other courts such as the High Court of Zimbabwe (HCZ).

Assuming that a matter is now pending before the CCZ or HCZ or any other court with constitutional jurisdiction, this Chapter 5 takes the process further by delving into the nature, scope and types of remedies such a court could award in the course of constitutional adjudication. These remedies are briefly discussed to give guidelines to practitioners with emphasis on the constitutional principles behind constitutional remedies as opposed to detail on the types of remedies. There is also a discussion on the judicial philosophy or approach to constitutional remedies in Zimbabwe and other relevant jurisdictions.

5.2 Conceptualizing a remedy

The word remedy attracts several meanings in legal scholarship and practice. Peter Birks has identified at least five different denotations in English law: They range from ‘a cause of action’,

to ‘a right born of a wrong’, to ‘a right born from a court order’.⁶¹ Such varied uses of the term ‘remedy’ likewise abound in Zimbabwean case law. The courts have referred to the following as a ‘remedy’: a statutory right;⁶² a common-law right;⁶³ an order of summary judgment;⁶⁴ a right of appeal;⁶⁵ and the court’s order.⁶⁶ A ‘remedy’ has a very different meaning when used by a court involved with a common-law action where the only possible order it can grant is one of damages than it does when a court considers a constitutional case where it has virtually unlimited discretion to grant whatever order it deems fit.⁶⁷ Birks notes that;

that which is referred to as a remedy is represented as a cure for something nasty. To remedy is to cure or make better. The only precondition to the use of the word is a state of affairs which needs making better”.⁶⁸

Birk has further noted that the term “remedy” refers to an order of the court in the plaintiff’s [Applicant’s] favour on the ground that his initial entitlement has been infringed, appropriated, withheld or taken advantage of in a manner disallowed by the court.⁶⁹ Kate Hofmeyr has come up with a simple definition of a remedy as ‘that which is provided by a court in response to the

⁶¹ P Birks ‘Rights, Wrongs and Remedies’ (2000) 20 Oxford Journal of Legal Studies 1, 9–17 (The two meanings not mentioned in the text are a right born of an injustice or grievance, and right born of a court’s order issued on a discretionary basis.) See also R Zakraewski Remedies Reclassified (2005) (Offers a fascinating discussion of how to understand remedies and their relationship to substantive rights in the context of English law.)

⁶² See, for example, *Fedsure Life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 2 (‘The 1956 Act . . . created a statutory remedy for the commission of what was referred to as an “unfair labour practice” which was soon interpreted by the Courts to include the unfair dismissal of an employee’.)

⁶³ See, for example, *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811, 821A (A) where the court stated that (‘Its remedy, if any, was to sue Oeanate by way of a *condictio*.’)

⁶⁴ See, for example, *First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at para 8 (‘Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy.’)

⁶⁵ See, for example, *S v Dzukuda & Others, S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 48 (‘If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity.’)

⁶⁶ See, for example, *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 21 (‘The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case.’)

⁶⁷ Woolman & Michael Bishop “Constitutional Law of South Africa” 2nd Edition (2013) Juta.

⁶⁸ Birks’s *Supra*

⁶⁹ Peter Birks “Rights, Wrongs and Remedies” (2000) 20 Oxford Journal of Legal Studies 1

claimant's success in showing that his or her right has been violated or threatened.'⁷⁰ Section 85(1) as read with Section 175(6) of the 2013 Constitution provides for the remedial competence of courts in constitutional matters. These remedies ought to be read together with other remedies incidental to each court's jurisdiction as stipulated by the Constitution and implementing legislation.

5.3 Purpose of constitutional remedies

A student of constitutional litigation must be conversant with the purpose of constitutional remedies. The area of remedies is one clear pointer to the stark difference between constitutional and common law remedies. It has already been mentioned that, wherever awarded, remedies must, as far as possible, seek to reverse all the adverse consequences of the violation in question and to guarantee non-recurrence. The violation of an individual's rights goes beyond their personal circumstances or harm. The society is deemed to have also felt the harm in the sense that violations defeat the constitutional objective of creating a just and democratic society. In *Fose v Minister of Safety & Security*,⁷¹ the CCSA held that a remedy is meant to redeem the Constitution and guarantee non-recurrence of violations. In general, therefore, constitutional remedies are *forward-looking, community-oriented and structural* rather than *backward-looking, individualistic and corrective or retributive*.⁷²

As opposed to private laws that are retrospect in nature, constitutional remedies look into the future.⁷³ Violations undermine the Constitution and public confidence in the same way if left unaddressed, hence the primary objective of courts to strike and dismantle the source of the constitutional violation thereby entrenching the rule of law among other things.

This nature of constitutional remedies is best depicted by the public interest species of standing when enforcing the DOR. The objective and purpose of a remedy should not only be to look beyond the immediate circumstances of the victim, but to consider similarly placed persons. This means that remedies target to dismantle the root cause of the violation as opposed to dealing with

⁷⁰ K Hofmeyr 'Understanding Constitutional Remedial Power' unpublished Mphil Thesis (Oxford University, 2006, on file with the author) 11.

⁷¹ 1997 (3) SA 786 (CC) at page 96.

⁷² See Currie and Waal (n2)

⁷³ *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC) at page 80.

its manifestation. By targeting the root cause a remedy would effectively guarantee non-recurrence by uprooting the cause imbedded either in legislation or established practice. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference”. It suggests that certain harms, if not addressed, diminish our faith in the Constitution.⁷⁴ The judiciary therefore bears the burden of striking effectively at the source of the infringement.⁷⁵

According to Currie & de Waal, the harm caused by violating constitutional rights is not merely harm to an individual applicant, but a harm to society as a whole: the violation impedes the realisation of the constitutional ethos of creating a just and democratic society.⁷⁶ The object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement.

5.4 Concept of appropriate relief

The ability to choose a remedy that best suits a client’s circumstances is one of the indicators of a competent legal practitioner. Appropriate relief implies that the remedial competence of courts is unfettered. The law leaves it to the imagination of courts in choosing a remedy where a constitutional infraction has been established. In *Majome v ZBC & Ors*,⁷⁷ the CCZ held that ‘appropriate relief’ should be given a broad meaning which includes the approach that a court may award a remedy which a party did not ask for. This is a dramatic departure from the focus of common law remedies that do not look beyond the prayer of the applicant.

Courts would be within their powers to provide any form of remedy to the extent that it is presented as ‘appropriate’. This phrase ‘appropriate relief’ speaks to the flexibility approach to remedies as held in the *Sanderson v Attorney-General, Eastern Cape*.⁷⁸ Appropriate also implies relevance of the remedy to the violation. There ought to be consistence between the violation and the remedy that is awarded. The question then becomes: to what extent has the remedy reversed the negative

⁷⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CCSA).

⁷⁵ *Ibid* para 96

⁷⁶ *Ibid*

⁷⁷ CCZ 14/16.

⁷⁸ 1998 (2) SA (CC) at page 38.

consequences of a violation? The absence of proof of reversal is evidence of the inappropriateness of the remedy so awarded.

Appropriateness also speaks to the typology of violation, namely, completed, ongoing and potential as contemplated by section 85(1) of the Constitution. Such a typology of violations makes redundant any attempt to enumerate potential remedies a court may award upon finding in favour of the applicant. For instance, it would be inappropriate for a court to award compensation in respect of a potential violation while that remedy perfectly suits a completed violation because the victim has already suffered harm.

Over the years, courts have identified factors that are relevant in determining the ‘appropriateness of remedies’, which include:

- (i) The purpose of remedies as discussed above (redeeming the Constitution and entrenching a just and democratic institution).⁷⁹
- (ii) Effectiveness of remedies achieved by carefully examining the nature of constitutional infringement and dismantling its source.⁸⁰
- (iii) Good government – by preventing creating lacuna in the legislative framework.⁸¹
- (iv) Separation of powers or constitutional deference of decisions either to the legislature or executive.
- (v) The identity of the violator. Private and public bodies or parties are not similarly placed in terms of the nature of remedies a court could award.⁸²
- (vi) The nature of the violation with isolated violations deserving remedies different from systematic, massive and widespread violations.
- (vii) Consequences of the violation on the victim.
- (viii) The court considers fault and causation aspects in the infliction of the infringement.

⁷⁹ See the *Senderson* case.

⁸⁰ *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

⁸¹ *Geldenhuys v National Director of Public Prosecutions* 2009 (2) 310 (CC) at page 42.

⁸² See the *Fose* case.

- (ix) The nature and extent of applicant's responsibility in the infringement of his own rights.⁸³
- (x) Feasibility of successful implementation of the constitutional remedy. Accordingly, remedial orders must not be imprecise. Time to comply with a court order must be taken into account as well as possibility of resistance, avoidance or even contempt.

5.5 Sample remedy - Declaration of invalidity of legislation

Section 2(1) of the Constitution is the supremacy clause. It provides that the Constitution is the supreme law of the land and takes precedence over any other law or conduct in Zimbabwe. Any law, practice, custom or conduct inconsistent with the Constitution is invalid to the extent of the inconsistency. Any such law or conduct must therefore be aligned with the Constitution. Zimbabwean courts are obliged to apply the supremacy clause whenever they find a provision that is not in tandem with the Constitution and invalidate such.⁸⁴ According to Currie & de Waal,⁸⁵ the default remedy following a finding that a law or a provision of a law is inconsistent with the Constitution is to declare the law or the provision invalid to the extent of the inconsistency. The same applies to practice, custom and conduct of a person or an institution bound by the Constitution.⁸⁶

In a Constitutional state, the supremacy of the Constitution means that laws or conduct inconsistent with the Constitution are invalid and that a court must declare them to be so.⁸⁷ This means that the law will be regarded as having never existed (invalid law should not survive its enactment or that of the Constitution).

⁸³ *Sanderson* case. See Zimbabwean cases on trial within a reasonable time where the issue of applicant's contribution to the delay is an important factor when the court determines whether there has been delay guaranteeing the order for permanent stay of proceedings.

⁸⁴ See section 2 (1) of the Constitution of Zimbabwe.

⁸⁵ Iain Currie and Johan de Waal "The Bill of Rights Handbook" 6th Ed (2013) p184.

⁸⁶ See section 2 (1) of the Constitution of Zimbabwe.

⁸⁷ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) [81]–[87] where the Constitutional Court re-emphasised the importance of legality, which requires, in the context of administrative law, that invalid administrative action be declared unlawful. The court held that the factual circumstances; the kind of challenge presented (direct or collateral); the interest involved; and the extent and materiality of the breach of the constitutional right, may indicate some 'amelioration of legality'. See in respect of legislation, *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) [71] (s 172 contains 'express duty to declare law inconsistent with Constitution invalid').

As a matter of jurisdiction, superior courts may declare any legislation and/or conduct invalid.⁸⁸ However, in terms of section 175 (1), an order of declaration of invalidity of an Act of Parliament or conduct of the President has no force and effect unless issued or confirmed by the CCZ. Pending confirmation by the apex Court, the lower court may grant temporary relief.⁸⁹ Even though its order may not have final effect, a thorough canvassing of the remedial possibilities is required in the court of first instance.⁹⁰ This must be done even if the attack on the validity of the law has not been opposed by the state.⁹¹

There are several ways of achieving consistency between the law and the Constitution. The court's role should be confined to eliminating unconstitutional options rather than prescribing to the legislature, another arm of state, what it regards to be constitutional. The principle of SOP requires that the judiciary should exercise caution when dealing with conduct of another arm of state (legislature). For this reason, the courts should prefer the narrow approach to rulings in constitutional cases. Broad rulings, coupled with remedies that a court considers to be 'demanded' by the Constitution may considerably restrict the legislature's ability to reform the law⁹² and violate the principle of SOP.

Courts in many jurisdictions have, however, in trying to mitigate the impact of the remedy of invalidity opted for other remedies such as severance, reading-in, controlling the retrospective effect of orders of invalidity and suspension of order of invalidity. Rather than declaring the law completely invalid, the substantive impact of the declaration should, if possible, be limited by altering the law through severance, reading-in or notional severance to cure the constitutional defect.⁹³

⁸⁸ See section 167, 171 and 175 (6) (a) of the Constitution of Zimbabwe.

⁸⁹ See section 175 (2) of the Constitution of Zimbabwe.

⁹⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [87]–[88] ('it is indeed essential that the court of first instance receive evidence in this regard and adjudicate on it, and not the court of appeal or confirmation'). The Constitutional Court may vary the High Court order. It is not restricted to confirming or rejecting it.

⁹¹ *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 (3) SA 345 (CC) [8]–[12]; *MEC for Local Government, Western Cape v Paarl Poultry Enterprises* CC2002 (3) SA 1 (CC) [47]

⁹² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)

⁹³ See *Van Rooyen v The State* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 88 ('Legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with [the Constitution]. If held to be

5.5.1 Severance

When courts find a provision of law inconsistent with the Constitution the appropriate remedy may be to sever the inconsistent provision from the rest of the legislation.⁹⁴ Severance involves precisely what it describes: an invalid section of a statute is ‘severed’ or ‘cut off’ from the rest of the statute. Severance is appropriate when only part of a piece of legislation is unconstitutional.⁹⁵ It seems to be in conformity to the separation of powers principle as it invalidates less, rather than more of a statute. However, severance is not always the most suitable remedy in some circumstances. Sometimes the law may be structured in such a way that it is impossible or unwise to sever only the unconstitutional parts without affecting the rest of the legislation.⁹⁶ Kriegler J laid down the framework for the application of severance, in *Coetzee v Government of the Republic of South Africa*. He laid down the following two-part test for severance:

If the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?⁹⁷

The first requirement has been rephrased as the need to ‘ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values’.⁹⁸ This objective may be achieved in one of two ways: actual severance and notional severance. Actual severance entails the removal of words and phrases from a legislative provision while notional severance entails leaving the language of the provisions intact, but

unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made.’)

⁹⁴ J Klaaren ‘Judicial Remedies’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999)

⁹⁵ Stu Woolman & Michael Bishop “*Constitutional Law of South Africa*” 2nd Edition (2013) Juta.

⁹⁶ *Ibid.*

⁹⁷ *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

⁹⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517.

subjecting it to a condition for proper application. Notional severance is often resorted to when a statute is overbroad and its application has to be restricted in the course of interpretation.

5.5.2 Reading-in

Reading-in is the opposite of severance. Instead of removing words from legislation, when a court reads-in it adds words to the statute to cure the constitutional defect.⁹⁹ Differentiating reading-in from reading down and notional severance is also important. With both reading down and notional severance, the text of the legislation remains untouched; it is simply given a meaning that conforms to the Constitution. When reading-in, courts change the text.¹⁰⁰

The reading-in of missing words from a statutory provision must be distinguished from interpreting a statute in conformity with the Constitution, which is often referred to as ‘reading-down’. The purpose is to avoid inconsistency between the law and Constitution and the technique is limited to what the text is reasonably capable of meaning.¹⁰¹ Reading-in is a constitutional remedy that is granted by a court after it has concluded that a statute is constitutionally invalid.¹⁰² The court considers reading-in to be a corollary to the remedy of severance.¹⁰³ Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading-in is predominantly used when the inconsistency is caused by an *omission*, and it is necessary to add words to the statutory provision to the unconstitutionality.¹⁰⁴

Reading-in has been the object of some suspicion. The actual act of ‘writing’ and ‘editing’ legislation, some charge, constitutes a judicial usurpation of legislative prerogatives and, therefore, a violation of SOP.¹⁰⁵ Granted, judicial encroachment into the legislative domain is clearly a matter of degree. In any event the principle of SOP has not been proffered as an absolute one, but an

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517

¹⁰² Ex parte Minister of Safety and Security: in re S v Walters 2002 (4) SA 613 (CC).

¹⁰³ Ibid.

¹⁰⁴ Stu Woolman & Michael Bishop “Constitutional Law of South Africa” 2nd Edition p187

¹⁰⁵ See also S Seedorf & S Sibanda ‘Separation of Powers’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, June 2008) Chapter 12.

imperfect constitutional code that manifests itself in different forms depending on the political context, provided the infused checks and balances are efficient to arrest governmental excesses whatever model a country chooses to adopt.

5.5.3 Managing the retrospective impact of orders of invalidity

As briefly discussed above, an order of invalidity of legislation has an immediate impact on the law itself as well as the society it regulates. The first consequence of the impact is that, as a matter of law, the order renders the piece of legislation as having not been enacted at all. This legal outcome fulfils the principle that parliament is presumed not to enact unconstitutional legislation.

Once an order has been made, the second consequence is that every decision made based on the invalid law is also automatically invalidated. This is what is referred to as the disruptive effects of an order of invalidity. It is incumbent upon the court, especially the CCZ to put in place measures to control the impact of the order it makes. For instance, invalidating a criminal provision on the basis of which millions of people have been arrested, prosecuted, convicted and sentenced to diverse punishments would mean such convictions are set aside and of no consequence. Such a scenario would open up the state to various claims that could cripple its operations. Therefore, the court could pick and choose consequences it allows reversal such as expunging of criminal records but foreclosing claims for damages for unlawful arrest and prosecution against the state.

Having anticipated this possibility, the framers of the Constitution incorporated section 175(6) that empowers courts to make any order that is ‘just and equitable’ in the course of dealing with an order of invalidity. Such powers include the competence to make an order and then suspend its operation until such a time that the relevant ‘competent authority’ (parliament) would correct the defect. The other competence is to leave in the discretion of the courts the decision as to whether the order of invalidity is ‘prospective’ or ‘retrospective’.

In the *Mudzuru* case, the CCZ held as follows regarding the disruptive effects of an order of constitutional invalidity of legislation:

The duty of the Court is to declare legislation which is inconsistent with the Constitution to be invalid. Section 175(6)(b) of the Constitution gives the Court a discretion to make an order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity. In the exercise of its discretion, the Court is cognisant of the immense disruption that a retrospective declaration of invalidity may

cause on the persons who conducted themselves on the basis that the legislation was valid. The Court has found it in the public interest to make the order granted to have effect from the date of issue.

In final analysis, the CCZ made a prospective order, with the effective date of the Court's declaration (20 June 2016). This left the massive consequences of the invalid law to remain from the date of enactment of the law until the 20th of June 2016. The CCZ justified this approach as one in 'public interest'. This was a clear example of a court managing or controlling the effects of a retrospective order following a declaration of invalidity of a law.

Turning to comparative jurisprudence on the issue, the South African position regarding the principle underlying retrospective effect of a declaration of invalidity was summed up by Ackermann J in *Ferreira* case,¹⁰⁶

The Court's order does not invalidate the law; it merely declares it to be invalid. . . A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect.

The fact that the CCZ has the power in terms of section 175(6) (b) to postpone the operation of invalidity and, to regulate the consequences of the invalidity, does move away from the conclusion that the test for invalidity is an objective one and that the beginning of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. In the *Fose case*, the CCSA confirmed that in respect of laws, the court 'finds' them inconsistent with the Constitution, whereas it 'declares' executive or administrative conduct to be unconstitutional. In both cases, the declaration is merely descriptive of a pre-existing state of affairs.¹⁰⁷

When courts give relief, they attempt to synchronize the real world with the ideal construct of a constitutional world created in the image of the Constitution. It merely restates the familiar principle that rights and remedies are complementary.¹⁰⁸ In principle, therefore, the declaration invalidates the legislation and any actions taken under the legislation from the moment the legislation or the Constitution came into effect, whichever is the later date, and not from the

¹⁰⁶ *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC) at para 27-28

¹⁰⁷ *Fose v Minister of Safety and Security* 1997 (3) SA 786

¹⁰⁸ *Ibid* at para 94.

moment of the court's order. Put differently, the Constitution screens out unconstitutional law and conduct, preventing them from surviving its commencement.¹⁰⁹

Obviously, the retrospective invalidation of actions taken in good faith under the authority of ostensibly valid legislation could have disruptive results. For example, when a court invalidates an unconstitutional reverse-onus presumption in a criminal procedure statute, all convictions that have previously been granted on the basis of the presumption become invalid.¹¹⁰ Therefore, section 175 (6) (b) permits a court, in the interests of justice and equity, to depart from the principle and to limit the retrospective effects of a declaration of invalidity.

Courts have taken several factors into account when determining whether to limit the retrospective effects of an order of invalidity.¹¹¹ In general, the court balances the disruptive effects of an order of retrospective invalidity against the need to give effective relief to the applicant and similarly-situated people.¹¹² As far as disruption is concerned, a court will be hesitant to disturb the results of cases finalized before its order of invalidity,¹¹³ and even under ostensibly-valid legislative authority to possible delictual or criminal liability.¹¹⁴ As far as the need to give effective relief is concerned, the CCSA has recognised the importance of affording successful litigants the relief

¹⁰⁹ The point is nicely illustrated by *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC).

¹¹⁰ So, if the invalidation of the dagga-dealing presumption in *S v Bhulwana* (note 70 above) had been retrospective it would have required the retrial of all persons convicted on the basis of the presumption since the commencement of the interim Constitution.

¹¹¹ Most of the considerations are listed by Kriegler J in *S v Ntsele* 1998 (11) BCLR 1543 (CC) [14].

¹¹² See for example: *S v Zuma* 1995 (2) SA 642 (CC) [43] (the 'interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new' and the interest of avoiding 'the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the] statute').

¹¹³ *S v Bhulwana* (note 70 above) [32] ('As a general principle... an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity'); *President of the Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC) [19]; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 20 above) [89]; *First National Bank v Land and Agricultural Bank* (note 56 above) [18].

¹¹⁴ See *De Lange v Smuts NO* (note 49 above) [105]; *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) [34]; *National Coalition for Gay and Lesbian Equality v Minister of Justice* (supra) [102]; *S v Ntsele* (supra) (the financial consequences for third parties of a retrospective order will be considered); *Ex parte Minister of Safety and Security: In re S v Walters* (supra) [74]–[75] (unfair to create criminal and civil liability after the event); *Masiya v Director of Public Prosecutions, Pretoria* 2007 (5) SA 30 (CC) [51] (definition of rape cannot be extended retrospectively, to include non-consensual anal penetration of a female, as this would offend the constitutional principle of legality. Prospective extension was accordingly ordered).

they require, but has also held that the litigants before a court should not be singled out for relief but that all people who are in the same situation should be afforded relief.¹¹⁵ Full retrospectivity has been ordered to avoid ‘patent injustice’.¹¹⁶

The usual practice followed when a court decides to vary the retrospective effect of its declaration of invalidity in the interests of avoiding disruption to the justice system is to make a *prospective* order invalidating a statute, or reading-in correcting words. This means that the invalid provision may no longer be applied from the date of the order in unresolved matters, or that the corrected version must be applied henceforth. At the same time the order is declared to operate *retrospectively* in the limited sense that, where appeal or review is still pending or the time for the noting has not yet expired, the unconstitutionality of the statute may be raised in such appeal or review.¹¹⁷

5.6 Structural Interdicts

A ‘structural interdict’ directs the violator to rectify the breach of fundamental rights under court supervision. The structural interdict typically consists of five elements which are as follows:

- (a) The court declares the respects in which government conduct falls short of its constitutional obligations;
- (b) The court orders the government to comply with the obligations;

¹¹⁵ *S v Bhulwana* (supra) (‘Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants.’); *Mistry* (supra) (court will not selectively reach back into the past to come to the aid of one successful litigant without affording the relief to others in the same situation). In *National Coalition for Gay and Lesbian Equality v Minister of Justice* (supra) the Constitutional Court held that the interests of good government, explicitly mentioned in s 98(6) of the interim Constitution, would continue to be a factor to consider. The 1996 Constitution, however, by requiring an order that is ‘just and equitable’ entrenches a broader and more flexible test.

¹¹⁶ *Hassam v Jacobs* NO 2009 (5) SA 572 (CC) at para 55.

¹¹⁷ The order in *S v Bhulwana* (note 70 above) is a representative example. See, however, *Centre for Child Law* where the court added instances where an application for condonation for the late filing of an application for leave to appeal (or the late noting of an appeal) is granted. This makes the order nearly fully retrospective.

(c) The court orders the government to produce (usually under oath) a report within a specified period of time¹¹⁸ setting out what steps it has taken, and what future steps will be taken;

(d) The applicant is afforded an opportunity to respond to the report; and

(e) The matter is enrolled for a hearing and, if the court is satisfied, the report is made an order of court. A failure to comply with obligations as set out in the court order will then amount to contempt of court.¹¹⁹

In the South African jurisdiction, from an early stage of the development of constitutional jurisprudence, the High Courts have granted structural interdicts as a form of relief mostly in cases dealing with socio-economic rights and rights entailing similar forms of positive obligations on the state.¹²⁰ The CCSA initially granted only limited forms of structural interdicts,¹²¹ but this has changed dramatically over the last number of years. Especially in eviction matters, the Court has resorted to ‘supervision and engagement’ orders in order to protect the negative component of the right to housing.¹²² The court has ordered the parties in these matters to ‘engage meaningfully’ regarding a timetable for eviction and relocation and to report back to the court on any agreement reached so that it can be made an order of court, if appropriate.¹²³ The court has set standards for temporary accommodation and, on occasion, even ordered that a specific percentage of new low-cost housing be allocated to the evictees.¹²⁴

The period may be extended, on application, if it is in the interest of justice to do so. See *Sibiya v DPP*, Jhb 2005 (5) SA 315 (CC) [7]–[9].

¹¹⁹ Stu Woolman & Michael Bishop “Constitutional Law of South Africa” (2013) 2nd Edition, Juta

¹²⁰ See *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W); *City of Cape Town v Rudolph* 2004 (5) SA 39 (C); *Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T); *EN v Government of RSA* 2007 (1) SA BCLR 84 (D)

¹²¹ *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) and *August v Electoral Commission* 1999 (3) SA 1 (CC) (‘directing steps to be taken to allow prisoners to register and vote in elections’)

¹²² Regarding engagement, see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) [14]. This order was also employed in a spoliation application in order to supervise the return of residents to homes which had been declared unsafe. See *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC).

¹²³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC)

¹²⁴ *Ibid.*

The structural interdict is arguably the only really *effective* remedy in such matters. Furthermore, as remarked by Plasket J, in a decision aimed at correcting systemic difficulties that made it difficult to implement a sentence of committing a juvenile to reform school, ‘the structural interdict is particularly suited to a society committed, as ours is, to the values of “accountability, responsiveness and openness” in a system of democratic governance’.¹²⁵ By granting the structural interdict along the lines suggested above, a court will at least ensure a government ‘response’ in the form of the ‘report’ to the court and thereby an ‘account’ for a failure to comply with a positive obligation imposed by the Bill of Rights.¹²⁶

In cases involving violations of socio-economic rights, structural remedies can prove to be the most successful in producing the most desired outcome. Plasket J in, *S v Z and 23 others*,¹²⁷ noted that such a remedy is most suited in societies where the issue of accountability is not a problem. Such a remedy ensures that the government responds to the dictates of the court. However, structural interdicts as a remedy has the likely potential of violating the principles of separation of powers and therefore flexibility in crafting such a remedy is required so as not to encroach into the domain of the other arms of the government.¹²⁸

This is a form of remedy our courts in Zimbabwe are still to embrace, especially recommended for socio-economic rights due to their technical nature, and need for exclusive expertise that may reside in people other than those appearing before the court. Some semblance of a structural order was issued by the HCZ in respect of *habeus corpus* proceedings where state and non-state actors were constituted to oversee the implementation of the order and report on progress to the court.¹²⁹ In the same vein as the South African experience, structural interdicts would go a long way in dealing with politically contested orders such as eviction from farms or other forms of settlements

¹²⁵ *S v Z and 23 similar cases* 2004 (4) BCLR 410.

¹²⁶ See also *Sibiya* (note 141 above) (court ordering mandamus with supervisory jurisdiction in respect of conversion of death sentences imposed under previous dispensation to appropriate sentences).

¹²⁷ 2004 (4) BCLR 410 (E).

¹²⁸ See Stu Woolman & Michael Bishop “Constitutional Law of South Africa” (2013) 2nd Edition, Juta

¹²⁹ The Court ordered the security agents (Police) to report to it regularly on the progress made in locating Itai Dzamara, an adult person who went missing in 2015. Section 50(7) empowers the HCZ to exclusively preside over *harbeous corpus* proceedings where a missing person is believed to be detained in an unknown place. The proceedings impose an obligation on the state to investigate the whereabouts of the missing person within its territory in order to produce a body, dead or alive. The intention is to re-establish the connection between the person and protection of the law.

where it is almost impossible for the courts to be availed with accurate factual background to enable it to consider all ‘relevant circumstances’ as required by section 74 of the Constitution. A panel of experts in different issues raised by the proceedings would go a long way to establish such facts and fulfil the objectives and purpose of the provision.

5.7 Constitutional damages

A proper reading of section 85 (1) and 175 (6) (b) of the Constitution allows the conclusion that the Constitution vests in courts the constitutional jurisdiction to grant the remedy of damages when it sees fit. In light of the argument proffered by Currie and Waal, constitutional remedies should be forward-looking, community-orientated and structural. An award of damages is not, however, a forward-looking remedy. Rather, it requires a court to look back to the past in order to determine how to compensate the victim or even to punish the violator.¹³⁰ There is a further difficulty, referred to by the CCSA in *Steenkamp NO*, which is that the breach of a constitutional or statutory duty is not wrongful in the delictual sense for that reason alone.¹³¹

However, even though there are challenges regarding the use of damages as a remedy to constitutional violations, courts, with the powers they derive from section 176 of the Constitution, have the space to develop this remedy. Currie and Waal have stated that there are at least two reasons why such a remedy is necessary which include the following. First, there are certain situations where a declaration of invalidity or an interdict makes little sense and an award of damages is then the only form of relief that will ‘vindicate the fundamental right and deter future infringements’. The authors use a number of examples to illustrate the point. For instance, a farmer may force workers to work on Election Day and, as a result, prevent them from voting. Or, politicians may instruct the police to break up a lawful demonstration when it is about to begin and, as a result, the demonstration does not take place. Or, a devout Christian may be prevented from attending a church service on Christmas Day.¹³² In these types of situations, where the victim has missed a unique opportunity to exercise a fundamental right, a bare declaration of rights is too

¹³⁰ Currie and de Waal p200.

¹³¹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) [37]–[40].

¹³² Currie and Waal, *supra*.

weak and an award of damages is the only effective remedy.¹³³ Secondly, the possibility of a substantial award of damages may encourage victims to come forward and litigate, which may in itself serve to vindicate the Constitution and to deter further infringements.

With regards to constitutional damages there are two leading cases, that is the case of *Fose v Minister of Safety and Security* which ushered the general approach to constitutional damages and then the case of *Carmichele v Minister of Safety and Security*¹³⁴ which brought in new claims of damages through indirect application of the Bill of rights. Having noted this, it is important to briefly have an appreciation of the general principles on constitutional remedies, including Zimbabwean experience.

5.7.1 General principles regarding constitutional damages

In *Fose* case, the plaintiff sued the Minister for damages suffered as a result of alleged assault and torture at the hands of the police. The plaintiff claimed under the usual delictual heads of damage: pain and suffering, loss of amenities of life and shock, *contumelia* and past and future medical expenses. However, in addition to these damages, the plaintiff sought ‘constitutional damages’ for the infringement of his constitutional right to dignity and the right not to be tortured. To back up the claim for constitutional damages, the plaintiff alleged that there were widespread and persistent infringements of fundamental rights by members of the police station. The plaintiff argued that, under the common law, damages were intended to provide compensation for harm caused to one private party by the wrongful action of another. The public law action for constitutional damages, on the other hand, had the following objectives in addition to the objective of compensation of the victim:

1. The vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights.
2. The deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government.

¹³³ See also Sanderson (note 4 above) [39], where the court mentions the possibility of damages after acquittal as a possibility when a delay in prosecution results in prejudice to the accused.

¹³⁴ 2001 (4) SA 938 (CC).

3. The punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion.¹³⁵

The CCSA held that, in this case, an award of constitutional damages in addition to delictual damages would not be appropriate. Delictual damages were considered by the court to be an adequate vindication of the plaintiff's constitutional rights.¹³⁶ On the issue of punitive damages, it held that it was not persuaded that such damages would effectively deter the police from torturing suspects.¹³⁷ In a country where there is a great demand on scarce public resources, it was inappropriate to use them to pay punitive damages to plaintiffs who were already compensated by delictual damages for the injuries caused to them.¹³⁸ The funds could be better employed in structural and systemic ways to eliminate or substantially reduce the root causes of infringements.¹³⁹

In the *Movement for Democratic Change* case, Zimbabwean courts had the liberty to comment on punitive damages and held that, assuming that the Supreme Court was empowered under s 24(4) of the Constitution [referring to the Lancaster House Constitution] to make an award of compensatory damages for breaches of fundamental rights and freedoms, that punitive damages ran counter to our tradition, which favours compensatory damages that can be carefully calculated; that punitive damages provide an unjustifiable windfall for the plaintiff; and that where they are awarded it is the public at large that ultimately bears the cost. The prayer for punitive damages was accordingly dismissed.¹⁴⁰ Therefore, from both cases it can be noted that courts are disinclined to award damages on the basis that they put a strain on public resources and the taxpayer's money.

¹³⁵ See Fose judgment.

¹³⁶ Ibid.

¹³⁷ Kriegler J stated that where there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief compensating a particular plaintiff may not be adequate as a means of vindicating the Constitution and deterring future violations of it. In *Fose*, however, the policemen implicated would not be deterred by a payment of damages from the public coffers which does not affect their own finances. See also Didcott J. The payment is also made to the plaintiff alone and not to those who suffered as a result of the widespread violations. Didcott J added that when punitive damages are awarded against a private defendant, the deterrent effect will be greater.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ *Movement for Democratic Change and Others v Commissioner of Police and Others* 2001 (1) ZLR 8 (S)

5.8 Conclusion

Chapter 5 was dedicated to constitutional remedies and made a few conclusions which can be summarised as follows:

- a. Courts have unlimited competence to order any form of remedy as long as it is appropriate or just and equitable.
- b. The major distinction between constitutional and common law remedies is that the former are forward-looking; community oriented and structural in nature, while the latter are just the opposite. In all this, remedies should as far as possible, reverse the negative consequences of violation of rights and guarantee non-recurrence.
- c. An order of constitutional validity of legislation renders the impugned law invalid from the time of its existence or the constitutional standard against which it is measured.
- d. Courts are empowered to control the impact of declarations of invalidity by issuing orders that are just and equitable including making the orders of invalidity prospective rather than retrospective.
- e. The courts in Zimbabwe should embrace structural interdicts especially in the area of socio-economic rights that require meticulous expertise and oversight in terms of implementation of court orders.
- f. Courts do not easily grant constitutional damages that seek to extend a windfall to the applicant. They rather focus on directing the resources to dealing with the root cause of the violation for the benefit of the public in general.

The final section of the chapter discussed a few examples of remedies, constituting the conclusions of the Chapter.

In view of the discussion on the remedial jurisdictions of court, the next Chapter 6 focuses on an expose of costs in constitutional litigation. While costs are part of remedies that the courts may award, it is pertinent that they be discussed on their own on account of the constitutional importance of costs orders in the Zimbabwean constitutional design. Such discussion inevitably brings to finality the selected discussions on constitutional litigation in this series of the *Handbook on Constitutional and Electoral Litigation*.

CHAPTER 6: COSTS IN CONSTITUTIONAL ADJUDICATION

Costs

55. (1) Generally no costs are awarded in a constitutional matter:

Provided that, in an appropriate case, the Court or the Judge, as the case may be, may make such order of costs as it or he or she deems fit.

(2) If the Court or the Judge considers that the conduct of a party has been such as to warrant such an order, the Court or a Judge may make any one or more of the following orders-

(a) depriving a successful party of all or part of his or her costs in the appeal or application;

(b) ordering a successful party to pay all or part of the costs of the other party;

(c) ordering a party to pay costs on a legal practitioner-and client scale or any other appropriate scale.

(3) If the Court or a Judge considers that the conduct of a legal practitioner representing a party has been such as to warrant order in terms of sub rule (2), the Court or Judge may make any one or more of the following orders--

(a) that the legal practitioner personally pays all or part of the costs on such scale as the Court or Judge determines;

(b) that the legal practitioner refunds to the client all or any of the fees the client had paid him or her in respect of the matter;

(c) that the legal practitioner shall not charge his or her client any fee in respect of all or part of the work done by him or her in respect of the matter.

(4) Before making an order in terms of sub rule (2) or (3), the Court or the Judge shall give the party or legal practitioner concerned an opportunity to make representations as to whether or not the order should be made.

(5) This rule shall not derogate from the power of the Court or a Judge to make any other order to or give any direction, whether as to costs or otherwise, arising out of the conduct of a party or legal practitioner.

6.1 Introduction

This Chapter focuses on the issue of costs in constitutional litigation. It highlights and illustrates the approach courts should take with regards to this issue. To fulfil its objectives, this Chapter contains an analysis of the rules and principles that govern the general

approach on costs and those that govern costs in constitutional matters. To set the scene, the Chapter begins by providing the general approach to costs and later analyses the specific approach to costs in constitutional matters.

6.2 General approach to costs in litigation

The purpose of costs is to indemnify, fully or partially, the successful party for the expenses incurred in hiring counsel to defend or enforce their legal rights. The often cited statement of the law with respect to costs was that penned by Baron Bramwell in *Harold v. Smith*:

Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out, the extent to which costs ought to be allowed is also ascertained.

The South African courts have also highlighted that the purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he was put through having been unjustly compelled to initiate or defend litigation, as the case maybe. Owing to the operation of taxation, however, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.

It should be noted that a costs order is not intended to be compensation for a risk to which a litigant has been exposed, but a reimbursement of expenses necessarily incurred for the purpose of the litigation and in the Zimbabwean jurisdiction they are determined by a tariff. However, despite its longevity, indemnity is no longer the exclusive governing principle of the law of costs. Three other justifications have been introduced, namely, the encouragement of settlement; the prevention of frivolous or vexatious litigation; and the discouragement of unnecessary steps in proceedings.

6.3 General rules governing costs

The two principles which have governed costs orders in Zimbabwean law since the earliest time are, firstly, that the court of first instance has a judicial discretion to award costs and secondly, that costs follow the event in that the successful party is usually awarded costs.

Cilliers refers to these principles as the "basic rule" and "general rule" respectively. These principles exist in a "curious" relationship. Lying at the heart of this curious relationship is

the paradox that a judicial officer of first instance has the discretion to make a costs award whilst at the same time apparently prescribing how that discretion should be exercised. The tension has been managed in two ways. Firstly, there is an extensive body of precedent in support of the rule that the second principle yields to the first. As a result, the nature of the judicial discretion in the court a quo has been described as ‘very wide’ or ‘overriding’. However, it is not surprising to find judicial officers then maintaining that the discretion is wide and unfettered although there is also a large body of case law maintaining that the discretion is not unfettered.

The second approach towards reconciling the two principles was put forward in *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* where Murray CJ proposed that the first principle must be exercised ‘upon grounds which a reasonable man could have come to the conclusion arrived at’, the second principle should not be departed from ‘without the existence of good grounds for doing so’. The judge did not put forward any other criteria by which to evaluate ‘good grounds’, although his statement is authority for the proposition that a departure from the second principle must be justified. The question of who is the successful party in a case, is therefore primarily relevant for determining if there has been a departure from the second principle. Apart from the ‘good grounds’ there are other decisions in which it was held that a judge may depart from the second principle only if ‘special circumstances’ are present.

Further, given that the larger body of authority sits behind the rule that the second principle yields to the first, the proposition that ultimately emerges is that costs are in the judicial discretion of the court of first instance. The courts’ present approach to costs in constitutional and/or public interest matters is acknowledged as a new third principle of the same status as the second principle. It would not trump the first principle but would rather have to yield to it, if the current understanding of the relationship between the first and second principle is retained.

6.4 Costs in constitutional litigation

The key provision on costs in constitutional litigation in Zimbabwe is Rule 55 of the CCZ Rules. It provides that ‘generally no costs are awarded in a constitutional matter’. The provision has a proviso the effect of which is to confirm the discretion of a judge, in an

appropriate case, to make a costs order as is deemed fit. The principle of discretion is also confirmed in Rule 55(2), which allows a judge to take into account ‘the conduct of a party’ in determining an appropriate costs order. Such conduct could have the result of depriving the successful party of costs; imposition of a costs order on the successful party to pay all or part of the other party’s costs; or requiring a party to pay costs on legal practitioner – client scale of costs (higher scale).

The Court, while still exercising its discretion, is empowered by Rule 55(3) to make an order of costs *de bonis* if the conduct of the legal practitioner appearing before it so warrants. The effect of such costs order is either to require the legal practitioner to pay all or part of the costs on a scale determined by the Court; the legal practitioner refunds the client all or part of fees already paid; or that the legal practitioner shall not charge any fee in respect of all or part of the work they have done in that matter. However, Rule 55(4) requires the Court in both instances to allow a party or legal practitioner to make representations ‘as to whether or not’ the punitive order of costs should be made.

The CCSA had an occasion in *Ferreira v Levin NO & Others* to consider the application of the traditional principles relating to the award of costs in constitutional litigation. Ackermann J stated:

The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.

...the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation”.

Although the rules specifically lay out a principle that the conduct of a party may warrant an order of costs against it or him if the court deems so, it should be noted that the courts' discretionary power on orders of costs is not limited to this principle only. It can be observed from a reading of various case law authorities from our jurisdiction and similar jurisdiction that there are other guiding principles on awards of costs in constitutional litigation.

It is now an established general principle that private parties who are unsuccessful in constitutional litigation against the State should not be mulcted in costs. It thus follows that where a private party seeks to assert a constitutional right against the government and fails, each party would bear its own costs. In *Motsepe v Commissioner for Inland Affairs* Ackermann J stated as follows;

one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category.

However, this established general rule has exceptions and this was aptly summarized in *Affordable Medicines Trust v Minister of Health* as follows

The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their rights. But this is not an inflexible rule. There may be circumstances that justify a departure from this rule such as where the litigation is frivolous and vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do what is just having regard to the facts and circumstances of the case.

In the case of *Majome v Zimbabwe Broadcasting Corporation* costs were awarded against the applicant because,

the conduct of the applicant in seeking to use court process to provide justification for criminal conduct in a case in which the constitutionality of the provisions of the law creating the offence is not impugned deserves censure by an order of costs.¹⁴¹

¹⁴¹ Judgment No. CCZ 14/2016 p14.

Conversely, where a private party is successful in constitutional litigation against the State, costs follow the result and this is compelling for a court to award costs against the State in favour of a private litigant who achieved substantial success in proceedings brought against it.

The award of costs against the State was also regarded as a measure to encourage ‘servants of the State’ to adopt a more cautious attitude and probing approach where what is at stake is the deprivation of the subject’s liberty and to also ensure that unnecessary and unreasonable opposition is not mounted by the State.

The primary consideration in constitutional litigation is whether a costs order would hinder or promote the advancement of constitutional justice, hence regard is to be paid to the nature of the issues before the court. From this standpoint, the importance of the constitutional issue raised can be a paramount consideration in awarding costs. In certain exceptional circumstances, the court may order state institutions to pay the costs of unsuccessful parties on the basis that the unsuccessful parties raised important constitutional issues. In the *Mudzuru case*, the applicants were successful in their challenge of the constitutionality of the Customary Marriages Act [Chapter 5:07], in that it did not provide for a minimum age limit of 18 years. However, as a general principle they were not awarded costs because the court was of the view that the application raised questions of national importance, the answers to which were not so obvious and the litigation concerned the ending of the problem of child marriage and thus each party bore its own costs.

A contrary approach to the *Mudzuru case* is observed in the case of *Gory v Kolver* wherein the court stated that it was the State that was responsible for the statutory provision still remaining on the statute books in its unconstitutional form. It held,

... despite dicta of the Court to the effect that comprehensive legislation accommodating same-sex life partnerships in a constitutionally acceptable manner was necessary no such legislation had been forthcoming. Instead, members of the gay and lesbian community had been compelled to approach the Court and, in that way, to achieve piecemeal reform of the law. Justice and equity required that the Minister be ordered to pay the costs of both the applicant and first respondent in both Courts.¹⁴²

¹⁴² 2007 (4) SA 97 (CC) para 65.

An inference may be made from the above dictum that a determination on an award of costs can be made on the basis of the principle of justice and equity as well as the importance of the constitutional issue to the public in general. Therefore, the Zimbabwean position is summed up as follows: generally, the CCZ does not award costs in constitutional adjudication. This is to ensure that 'spirited' individuals are not mulcted with costs and therefore discouraged from enforcing the Constitution in the public interest. However, a costs order could be given against a party or the legal representative, taking into account factors such as the conduct of that party or the conduct of counsel in the legal proceedings.. In terms of section 55 of the CCZ Rules, the discretion of the court in making costs orders is reinforced and protected while the general rule that costs follow the successful party remains generally stated and applicable.

6.5 Conclusion

In this chapter, which marks the end of the general discussion on constitutional adjudication, it was observed that there is a unique judicial approach to costs when dealing with constitutional adjudication. The principle contained in Rule 55 of the CCZ Rules is that the CCZ would generally not order costs in constitutional matters. This reinforces the constitutional principle that costs should not be used to deter or scare away spirited individuals who seek to hold government and other duty bearers accountable by enforcing the Constitution and redeeming its infringement. This is significant departure from the rule that costs are designed to indemnify a litigant for costs incurred in prosecuting or defending a lawsuit. However, notwithstanding Rule 55, the courts' discretion in making costs orders remains intact and in fact reinforced. A court may make a costs order not necessarily to give effect to the traditional purpose of costs orders, but taking into account the conduct of the parties and or counsel in the course of the proceedings. However, such costs orders would be exceptions rather than norms.

. Admittedly, the Chapter did not cover all aspects of constitutional litigation such as constitutional interpretation; principles of subsidiarity, ripeness and mootness as well as constitutional avoidance. Such topics would be dealt with in detail in the supplementary publications to follow this inaugural one. On this note, the following Chapter 7 commences Part II of the *Handbook* by looking at Electoral Litigation, which arguably, is part and parcel of constitutional adjudication.

CHAPTER 7: ELECTORAL DISPUTE RESOLUTION

7.1 Introduction

This part begins the segment on specialized constitutional litigation. Specialized constitutional litigation is technically defined here to refer to legal proceedings involving specific procedures for the determination of constitutional issues. Where invoked, the procedure is specific to those proceedings only without the possibility of engaging alternative procedure. Examples include constitutional referrals in terms of section 175(4) of the Constitution; confirmation proceedings in terms of section 175(3) of the Constitution; electoral petitions in terms of section 93 of the Constitution and subsidiary legislation. While some of these procedures have been discussed above, albeit briefly, this part focuses on adjudication of electoral disputes.

EDR transcends between pre and post-election or polling day. This means there are electoral contestations that arise in the run up to polling while others arise as a result of what transpires on the polling day. While both faces of EDR are equally important to a practitioner, the focus of this *Handbook* is on post-election litigation. This is widely referred to as electoral petition procedure, which is the process where an aggrieved person institute legal proceedings to challenge the result (undue return) of an election on account of irregularities or any other reason whatsoever. The focus has been necessitated by the technical nature of election petition proceedings in Zimbabwe. The discussions save to highlight some of the ‘blind spots’ that waylay litigants and their lawyers. Similarly, the expose would also be helpful to courts of law for them to better understand the criticisms levelled against them in respect of the manner in which they have handled election petitions in Zimbabwe.

7.2 General principles behind EDR

EDR is no isolated procedure. It seeks to enforce constitutional principles that find residence in electoral law. Put differently, the procedure is backed up by constitutional principles which constitute the foundation upon which this discipline of the law is established. Some of these principles, like other constitutional principles, are drawn from the provisions of the express

provisions of the Constitution, while others draw their parentage from constitutionalism, which informs determination of constitutional disputes.

7.2.1 Political rights

Election-related rights are encompassed by section 67 of the Constitution. The heading used for convenience purposes only says ‘political rights’. An immediate insinuation is that the provision provides for multiple rights with affinity to elections or the electoral process. In fact, this should be the correct interpretation of section 67. Being a primary provision in this discussion, the provision is hereby quoted verbatim:

67 Political rights

- (1) Every Zimbabwean citizen has the right—
 - (a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and
 - (b) to make political choices freely.
- (2) Subject to this Constitution, every Zimbabwean citizen has the right—
 - (a) to form, to join and to participate in the activities of a political party or organisation of their choice;
 - (b) to campaign freely and peacefully for a political party or cause; (c) to participate in peaceful political activity; and (d) to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause.
- (3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right—
 - (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and (b) to stand for election for public office and, if elected, to hold such office.
 - (4) For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.

It has been said that EDR is almost exclusively centred on giving effect to section 67 of the Constitution. Being a part of the DOR, the provision should be interpreted in the context of section 46 of the Constitution, which is the interpretation clause of the DOR. Among other things, courts, when interpreting the DOR, must seek to give ‘full effect to the rights and freedoms’ in the

Chapter;¹⁴³ must promote the values and principles that underlie a democratic society;¹⁴⁴ must take into account international law; and may consider foreign law, among other aides to interpretation.

Putting these aides of interpretation together, it is imperative to dissect section 67 in order to reveal the different rights it protects, and further expose the umbilical code between this provision and electoral dispute resolution mechanisms. It must be noted at this juncture that there is no EDR process that falls outside of the provisions of section 67 of the Constitution. All pre and post-election contestations seek to enforce one or more rights encompassed by section 67. Accordingly, section 67 could be split into distinct rights and freedoms such as the following:

- i. Right to a free election;
- ii. Right to a fair election;
- iii. Right to a regular election
- iv. Right to make political choices freely;
- v. Right to form a political party or organisation of choice;
- vi. Right to join a political party or organisation of choice;
- vii. Right to participate in the activities of a political party or organisation of choice;
- viii. Right to campaign freely and peacefully for a political cause;
- ix. Right to participate in peaceful political activity;
- x. Right to participate individually in peaceful activities to influence, challenge or support the policies of Government or any political or whatever cause.
- xi. Right to participate collectively in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of Government or any political or whatever cause.
- xii. Right to vote in all elections and referendums to which the Constitution or any other law applies.
- xiii. Right to vote in secret in all elections and referendums to which the Constitution or any other law applies.
- xiv. Right to stand for public office;
- xv. Right to hold public office if elected.

¹⁴³ See section 46(1)(a) of the Constitution.

¹⁴⁴ Section 46(1)(b) of the Constitution.

Therefore, this is the catalogue of rights and freedoms embodied in section 67 of the Constitution, and we make a bold assertion that it is not possible for any electoral challenge, be it in the pre-election or post-election phase, to be located outside of the parameters of section 67 of the Constitution in terms of the *ratio decidendi*. Section 67 is the ‘complete code’ of electoral litigation in terms of the subject matter of the dispute. Whatever provisions are contained in the electoral law seek to give full effect to the one or more of the rights contained in section 67. Therefore, section 67 of the Constitution is the grundnorm of electoral adjudication in Zimbabwe.

7.2.2 Right to a fair hearing

Section 69(2) of the Constitution provides that:

In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

EDR has been globally criticized for its lack of sensitivity in terms of time lines within which petitions must be lodged and determined. This has been the case in Zimbabwe until the adoption of the 2013 Constitution that sought, among other things, to deal decisively with the practice of open time frames that has resulted in the failure by courts to hear and determine a presidential petition filed in the aftermath of the 2002 general elections. Further, courts have been observed to operate under immense political pressure when dealing with electoral petitions, to the extent that their independence is threatened and in some cases compromised. However, in Zimbabwe, the above provision is the formal mechanism to constitutionally guarantee the independence of our courts in all disputes including electoral petitions.

Further, in terms of section 155 of the Constitution (principles of electoral systems), the state is required to take all appropriate measures including ‘timely resolution of electoral disputes’ as a means of giving effect to the principles of elections that are peaceful, free and fair; conducted by secret ballot; based on universal suffrage and equality of votes; and free from violence and other electoral malpractices’.¹⁴⁵ Section 157 further buttresses this point by requiring that an act of parliament ‘must provide for conduct of election’ and among other things, it must regulate ‘challenges to elections results’ (election petitions).

¹⁴⁵ See section 155(1) of the Constitution.

It is for these valid reasons summarizing the complexity of electoral litigation that section 69 of the Constitution applies. The provision enforces timeous resolution of electoral disputes and also speaks to the need for our courts to remain independent, impartial and competent even in the perilous times of resolving election petitions. That is the import of their constitutional obligations.

7.2.3 Right to access to courts

Section 69(3) of the Constitution provides for the right of every person to ‘access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute’. It would appear the Constitution is in the business of providing for what is obvious; which is that any person should be able to approach courts of law for resolution of disputes. However, implementing legislation (especially rules of courts) has brought in conditionalities to this access such that EDR is one of those legal procedures with restrictive approach to legal standing notwithstanding the huge public interest inherent in the proceedings. These and related matters shall be interrogated further in the course of analysing the EDR framework in Zimbabwe.

7.2.4 Public interest inherent in EDR

An election is one process that makes little sense if exercised individually. It is a communal process where the electorate and those individuals that make themselves available for election commune. Some voters vote for the winning candidate while others lose with the candidate of choice. Those that get elected assume public functions to run constitutional errands on behalf of the electorate. This is called representative democracy. The only means available to voters to withdraw mandate is through another election or impeachment proceedings.

These are the intricacies that run through the cobweb of the relationship between voters and candidates. It is from this milieu that when an election result is challenged, the process does not only attempt to untangle the interests of the different actors, but must take into account the interest of each and every stakeholder. To this end, we submit here that EDR arouses a great deal of public interest in the proper resolution of the dispute to enforce the principles of elections adumbrated in section 155(1) of the Constitution.

7.3 The legal framework regulating elections in Zimbabwe

Electoral dispute resolution in Zimbabwe (EDR) is regulated by various pieces of legislation ranging from the Constitution, Acts of Parliament and different forms of subsidiary legislation

(statutory instruments). As mentioned earlier on, the Constitution refers to EDR in section 155 of the Constitution on *Principles of Electoral Systems* thereof which requires the State to ‘ensure the timely resolution of electoral disputes’ as a constitutional principle.

Even though Zimbabwean electoral law establishes a harmonized electoral process, it then distinguishes between electoral disputes in relation to the election to the office of President or Vice President on the one hand, and on the other, elections to the office of a Member of Parliament or local authority. Consequently, key legislation dealing with EDR are Parts XVII and XXII – XXIII of the Electoral Act [Chapter 2:13] as amended incorporating the amendments made by the General Laws Amendment Act (No. 3 of 2016) the Electoral Amendment Act (No. 6 of 2014) and the National Prosecuting Authority Act (No. 5 of 2014] as well as amendments previously made by the Electoral Laws Amendment Act, 2007 (No. 17 of 2007), the Local Government Laws Amendment Act, 2008 (No. 1 of 2008) and the Electoral Amendment Act, 2012 (No. 3 of 2012). The Electoral Act provides in the long title partly as follows¹⁴⁶

... procedure for the nomination and election of candidates to and the filling in of vacancies in Parliament; to provide for elections to the office of the President; to provide for local authority elections; to provide for offences and penalties, and for the prevention of electoral malpractices in connection with elections; to establish the Electoral Court and provide for its functions; to make provision for the hearing and determination of election petitions.

Accordingly, the Electoral Act is one of the most detailed pieces of legislation on account of the fact that the electoral law is largely consolidated as opposed to several pieces of legislation scattered around. The consolidated approach works well for practitioners who then find everything ‘under one roof’.

At a procedural level though, it suffices to mention that EDR is rooted on rules of procedure of the different institutions that have electoral jurisdiction. These will be discussed in detail in the following two chapters. However, it should be stated that the following are rules of procedure applicable in EDR:

- i. Constitutional Court Rules (SI 161 of 2016);
- ii. Electoral Court Rules (SI 74A of 1995);

¹⁴⁶ Electoral Act [Chapter 2:13].

iii. High Court Rules.

These rules of procedure complete the code of EDR in Zimbabwe. The CCZ Rules apply to the resolution of presidential petitions. Chapter 8 of this *Handbook* makes reference to this procedure, which is an exclusive domain of the CCZ. The High Court Rules apply to EDR in the event of the existence of a lacuna in the Electoral Court Rules.

It therefore, naturally follows that the leading institutions in EDR are courts of law. The CCZ is one such court with exclusive jurisdiction, as has been discussed in different places in this publication, over disputes concerning an election to the office of President or Vice-President. It may also deal with disputes concerning election to other offices that reach it by way of appeals. The SCZ also has competence to deal with cases that reach it as appeals from the Electoral Court or High Court.

The High Court (and specialised division of the High Court of Zimbabwe called the Electoral Court) is a key player in electoral dispute resolution in that it hosts the electoral division traditionally known as the Electoral Court. Much of pre-election takes place in the High Court as the institution installed by the Electoral Act to enforce the electoral law. Section 161 provides in respect of the Electoral Court as follows:

161 Establishment and jurisdiction of Electoral Court

(1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.

(2) The Electoral Court shall have exclusive jurisdiction—

(a) to hear appeals, applications and petitions in terms of this Act; and

(b) to review any decision of the Commission or any other person made or purporting to have been made under this Act;

and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court: Provided that the Electoral Court shall have no jurisdiction to try any criminal case.

(3) Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court.

On its part, the Zimbabwe Electoral Commission (ZEC), an independent constitutional commission, handles electoral disputes administratively. It makes such decisions in many areas

falling under its prerogative. However, its decisions are subject to review by the Electoral Court, although ZEC is not supposed to take part in post-election litigation as this is a threat to its independence.

7.4 Conclusion

Chapter 7 was meant to introduce EDR section of the *Handbook*. It made a few points in the introductory remarks. It reiterated the constitutional principles behind EDR based on the Constitution and constitutionalism. The Chapter also identified the electoral law code (legislative framework providing for elections in Zimbabwe) before identifying the key institutions in the EDR. However, a full discussion on the manner in which courts handle electoral disputes now follows below.

CHAPTER 8: THE PRESIDENTIAL ELECTION PETITION PROCEDURE

93 Challenge to presidential election

- (1) Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election.
- (2) The election of a Vice-President may be challenged only on the ground that he or she is or was not qualified for election.
- (3) The Constitutional Court must hear and determine a petition or application under subsection (1) within fourteen days after the petition or application was lodged, and the court’s decision is final.
- (4) In determining a petition or application under subsection (1) , the Constitutional Court may—
 - (a) declare a winner;
 - (b) invalidate the election, in which case a fresh election must be held within sixty days after the determination; or
 - (c) make any other order it considers just and appropriate.
- (5) If, in a petition or application under subsection (1)—
 - (a) the Constitutional Court sets aside the election of a President, the election of the President’s two Vice-Presidents is automatically nullified;
 - (b) the Constitutional Court sets aside the election of either or both Vice-Presidents, the President must without delay appoint a qualified person or qualified persons, as the case may be, to be Vice-President or Vice-Presidents.

Section 93 of the 2013 Constitution of Zimbabwe

8.1 Introduction

This Chapter briefly discusses the main issues regarding disputes relating to the office of President and Vice President. It should be noted that in terms of section 14 of the Sixth Schedule to the Constitution, from 2023, general elections to be held in Zimbabwe will require a presidential candidate to nominate two persons to run with him or her as Vice Presidents so that they are also elected into those offices. This explains why the electoral law now refers to challenges to the election of Vice President. This Chapter discusses the legislative and institutional framework for the resolution of such electoral disputes related to the office of the President and the two Vice Presidents

8.2 The legislative and institutional framework in presidential petitions

Section 93 of the Constitution deals with the ‘challenge to presidential election’. It is the primary provision regarding the manner in which the challenge must be processed and prosecuted. In the words of the CCZ in *Tsvangirai v Mugabe*, it is the ‘complete code’ in the adjudication of a presidential petition.¹⁴⁷ Being a constitutional provision, it is implemented by Part XVII of the Electoral Act, which is dedicated to presidential petitions. As to rules regulating the process, the CCZ Rules are applicable to the total exclusion of others. This follows the characterisation of such disputes as exclusively reserved for the CCZ.

The key provision to the resolution of electoral disputes is section 93, which provides as follows:

93 Challenge to presidential election

(1) Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election.

(2) The election of a Vice-President may be challenged only on the ground that he or she is or was not qualified for election.

(3) The Constitutional Court must hear and determine a petition or application under subsection (1) within fourteen days after the petition or application was lodged, and the court’s decision is final.

(4) In determining a petition or application under subsection (1), the Constitutional Court may— (a) declare a winner;

(b) invalidate the election, in which case a fresh election must be held within sixty days after the determination; or

(c) make any other order it considers just and appropriate.

(5) If, in a petition or application under subsection (1)—

(a) the Constitutional Court sets aside the election of a President, the election of the President’s two Vice-Presidents is automatically nullified;

(b) the Constitutional Court sets aside the election of either or both Vice-Presidents, the President must without delay appoint a qualified person or qualified persons, as the case may be, to be Vice-President or Vice-Presidents.

¹⁴⁷ Judgment No. CCZ 20/17.

8.3 *Locus standi* to lodge a presidential petition

As quoted above, the key provision to presidential petitions is section 93 of the Constitution. Section 93(1) establishes the right for an ‘aggrieved candidate to challenge the validity of an election’ by lodging an application or petition with the CCZ within the specified timelines.

These principles on standing are restated in section 111 of the Electoral Act. Section 111(1) provides for standing to lodge a presidential election petition for any person ‘claiming to have had a right to be elected at that election’ or ‘alleging himself or herself to have been a candidate at such election’. While these two instances could be interpreted as ambiguous in relation to the parameters of locus standi allowed by section 93(1), they should be interpreted to mean nothing more than that an aggrieved candidate has the right to challenge a result.

8.4 Procedure for filing a presidential petition

The form and procedure for filing pleadings is governed by Rule 23 of the CCZ Rules. In essence therefore, section 93 of the Constitution must be read together with the relevant parts of the Electoral Act and CCZ Rules in order to get a full picture of the principles and procedure to be followed in dealing with a presidential petition.

In terms of the rules, a presidential election challenge is initiated by ‘lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election’.¹⁴⁸ Rule 23(1) contemplates a presidential petition to be by way of application procedure. That clarifies the confusion in section 93(1), which makes no distinction between a petition and an application. Once a challenge is lodged, the CCZ must ‘hear and determine’ it or otherwise dispose of it within fourteen days after the petition or application was lodged, and the court’s decision is final’.¹⁴⁹ On determining the challenge, the CCZ is vested with wide powers to make an appropriate order. Section 93(4) empowers the CCZ to either declare a winner, nullify the election and trigger a fresh election within sixty days, or ‘make any other order it considers just and appropriate’.

The contemplation in Rule 23 that a petition takes the form of an application (Form CCZ1), suggests a particular manner in which a petition ought to be determined. From the experience of

¹⁴⁸ Section 93(1) of the Constitution.

¹⁴⁹ See Section 93(3) of the Constitution.

the 2013 petition, it appears that the CCZ would determine it on papers filed of record. There is nothing in the Rules to suggest that the application, as is the case with parliamentary election petition, is tried. This is probably the case because the CCZ is ordinarily ill-suited to hear evidence. Parties are therefore, expected to file papers that sufficiently persuade the court in favour of the respective desired outcome.

This procedure in turn raises questions regarding the feasibility of lodging a successful petition taking into account the geographical restrictions in terms of collecting evidence from across the country. In a presidential election, the whole country constitutes the constituency. If witness evidence has to be heard from all corners of the country, it implies that several lawyers are required to pool resources and expertise in order to initiate and finalise a single petition.

8.4.1 Prevailing jurisprudence in presidential petitions

Presidential election petitions are rare in Zimbabwe. The first of its kind was *Tsvangirai v Mugabe & Ors*.¹⁵⁰ This was filed on 12 April 2002 in terms of section 102 of the Electoral Act. The petition was in essence challenging the outcome of the Presidential Election held on 9 to 11 March 2002. The applicant alleged numerous serious allegations against the Registrar General of Elections and the Electoral Supervisory Commission in relation to the manner in which they conducted the said Presidential Elections. The petition remained undetermined to this day thereby casting a dark shadow on the EDR framework in Zimbabwe, especially the ability of courts to resolve such disputes within a reasonable time.¹⁵¹

Another duel between the same political contestants culminated in another electoral petition in the aftermath of the 2013 harmonized elections, in *Tsvangirai v Mugabe*.¹⁵² This was an electoral petition in terms of s 93(1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (hereinafter referred to as “the Constitution”). The petitioner relied on fourteen grounds for challenging the validity of the election, which he alleged, constituted corrupt practices committed by the first respondent through his agents or by third parties with his knowledge. He also alleged

¹⁵⁰ Case No HC 3616/2002.

¹⁵¹ It should be noted that the electoral law at the time only required that a petition be filed with 30 days of the election, but did not specify the maximum time limit within which a court presiding over the petition ought to finalise it and deliver judgment.

¹⁵² Judgment No. CCZ 20/17.

irregularities which he said were committed by the Zimbabwe Electoral Commission and the Chief Elections Officer (second and fourth respondents respectively), who were responsible for conducting the election. Having met some setbacks in accessing voting materials, the petitioner sought to withdraw his petition. Nonetheless, the Chief Justice directed that it be set down and heard. A number of principles, which include the following, came out of these proceedings.

a. Section 93 (1) guarantees the right of access by the **aggrieved candidate** who meets the prescribed requirements to the Court to seek redress of his or her grievances. This is a legal remedy for the protection of the right guaranteed to every citizen under s 67(1) of the Constitution to free, fair and regular elections for any elective public office established in terms of the Constitution or any other law and exercised in accordance with the provisions of the Electoral Law. So the exercise of the right of petition is limited. *Locus standi in judicio* for the exercise of the right is limited to an aggrieved candidate. No other person has a right under s 93(1) of the Constitution to lodge a petition or application with the Court challenging the validity of an election of a President.

b. Investigation by the CCZ when dealing with a petition to establish the truth of what happened in the election and the giving of a final and binding decision on the validity or invalidity of the election, is a protection of the right of every Zimbabwean citizen to a free, fair and credible election of a President. In other words, the process protects every citizen even though only an ‘aggrieved candidate’ has standing to institute proceedings.

Section 93 of the Constitution enacts the principle that an election can only be declared invalid and set aside upon clear proof of facts of commission of prohibited conduct **which materially affect** the validity of an election. The exercise of the right is also restricted as to the subject matter the petition or application can address. It can only be based on grounds which materially affect the validity of the election. It follows that the onus lies with the applicant to establish those facts and demonstrate how they affected the validity of the election in question, otherwise the election result stands as announced.

However, it remains the case that there is need for a presidential petition to be prosecuted to finality so that more and more legal provisions in the electoral law get to be interpreted in the course of determining a petition in order to build jurisprudence in this area of the law.

8.4.2 The form of a presidential petition

Rule 23(1) of the CCZ Rules decisively settles the debate as to the nature of court proceedings to challenge a result in a presidential election. It provides that the ‘application where the election of a President or Vice President is in dispute shall be by way of court application’. A court application takes the form of CCZ1 Form. This form resembles an ordinary court application on notice. Rule 23 does not deal with the form of a ‘petition’ or defines what a petition is.

Once filed, the court application (petition) has to abide by the timelines enjoined by the Constitution, namely, that the petition must be filed within seven days of the election result, any notice to oppose the relief being sought must be filed and served by the respondent (winning presidential candidate) within three days,¹⁵³ within the same period of time the petitioner may file answering affidavit together with heads of argument,¹⁵⁴ again within three days the respondent files own heads of argument, thereafter the matter must be set down for hearing so that it is determined within fourteen days required by the Constitution. Notwithstanding that the petition must be a court application, the Electoral Act anticipates that a presidential election is ‘tried’ as opposed to being heard.¹⁵⁵ A finding that the President was not lawfully elected shall not have a retrospective effect. Anything already done by that person in the capacity of President shall be allowed to stand as if he or she had been lawfully elected.¹⁵⁶

8.4.3 Withdrawing an electoral petition

As discussed above, in the *Tsvangirai v Mugabe* case, the CCZ interpreted section 93(3) of the Constitution as not entitling a petitioner to withdraw the petition once filed with the court. Consequently, the CCZ ruled that once filed, a presidential petition is not withdrawable,, it is immune from such procedure. This means that filing a notice of withdrawal and tendering costs is not acceptable as procedure for withdrawing a presidential petition for any reason whatsoever.

If exercised, the Court reasoned, the right to withdraw the petition or application would have the effect of removing the petition from the exercise by the CCZ of its jurisdiction thereby preventing

¹⁵³ Rule 23(3) of the CCZ Rules.

¹⁵⁴ Rules 23(4) of the CCZ Rules.

¹⁵⁵ Section 111(2) of the Electoral Act.

¹⁵⁶ Section 111(3) of the Electoral Act.

the Court from discharging the obligatory duty imposed by section 93(3) of the Constitution. If that happens, then the Court would be in breach of the Constitution.

However, it remains unclear as to the implications of the adoption of CCZ Rules in the aftermath of the judgment in *Tsvangirai v Mugabe*. A closer look at the Rules reveals that withdrawals of applications from the roll of the CCZ are regulated by Rule 53 of the CCZ which provides that:

Withdrawal

53. (1) Except as otherwise provided in the Constitution, whenever all the parties, at any stage of the proceedings, file with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter the withdrawal, whereupon the Court shall no longer be seized with the matter.

The import of this provision is that in any given case, a case could be withdrawn by agreement between the parties, which agreement is subject to ratification by the CCZ through the Chief Justice (CJ). If the CJ is satisfied with the arrangements made in respect of costs and other related issues, the Registrar shall, at the instance of the CJ, enter the withdrawal. One wonders if this provision also applies to presidential petitions. Be that as it may, the phrase ‘except as otherwise provided in the Constitution’ could be interpreted to mean that since the Constitution does not provide for a right to withdraw a petition, the introduction of the Rules does little to change the position. Otherwise, the CCZ Rules would be *ultra vires* the Constitution if they allowed withdrawal of petitions in the same manner.

8.5 Conclusion

This Chapter focused on matters to do with the filing and determination of a petition challenging the validity of an election to the office of the President or Vice President, which challenge, as noted can only be in respect of lack of qualification.. It was established that, as from 2023, election to the office of vice president will commence. It was further revealed that the key provision to presidential petition is section 93 of the Constitution while the practice and procedure is regulated by Rule 23 of the CCZ. This is a matter of exclusive jurisdiction of the CCZ. Finally, the emerging jurisprudence is that a petitioner in a presidential election does not have the right to withdraw a petition once filed. The reason set out in the *Tsvangirai v Mugabe* case was that the Constitution

does not provide for that right hence it cannot be inferred. The coming chapter focuses on other petitions following the same format of analysing the legislative and institutional framework.

CHAPTER 9: THE PRACTICE AND PROCEDURE OF OTHER ELECTORAL PETITIONS

AN ACT to provide for ... procedure for the nomination and election of candidates to and the filling in of vacancies in Parliament; to provide for elections to the office of the President; to provide for local authority elections; to provide for offences and penalties, and for the prevention of electoral malpractices in connection with elections; *to establish the Electoral Court and provide for its functions; to make provision for the hearing and determination of election petitions.*

Long Title – Electoral Act [Chapter 2:13]

9.1 Introduction

As discussed in Chapter 8 above, the electoral law makes a distinction between presidential petitions on one side and parliamentary and local authority petitions on the other. The latter are referred to as ‘other petitions’. Part XXIII of the Electoral Act exclusively deals with the ‘other election petitions’ category. This Chapter goes further to discuss in detail the practice and procedure for the adjudication of these other petitions. We reiterate here that the complete code of this category of petitions includes the Constitution, the Electoral Act and all its regulations including the 1995 Electoral Court Rules read together with the High Court (Civil) Rules. Regular reference will be made to prevailing jurisprudence on any of the aspects inherent in this process.

9.2 *Locus standi* to file a petition/the parties to an election petition

As briefly discussed in the beginning, an election petition is a dispute that arises in the context of the exercise of the right to vote, whether before or after the actual polling day. Ironically the Electoral Act does not define an ‘election petition’. We have already mentioned in Chapter 8 above that section 93(1) of the Constitution entitles the ‘aggrieved party’ the right to lodge a presidential petition. Section 111(1) of the Electoral Act defines such a party as a person who claims the ‘right to have been elected’ or one who alleges ‘to have been a candidate’ in the election. However, the state of affairs dramatically changes when it comes to other petitions.

Section 167 of the Electoral Act identifies all persons with standing to file a petition as follows:

A petition **complaining of an undue return or an undue election of a member of Parliament** by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever **may be presented to the Electoral Court by any candidate at such election.**

The provision is important in that it distinguishes between pre-polling electoral proceedings and those ‘complaining of an undue return or undue election’. The latter is what the electoral law commonly refers to as an electoral petition. These proceedings are post-polling day complaining of conduct on or before polling day provided the allegation is that the declared winner was not duly elected as a result of ‘any cause whatsoever’. Therefore, standing is limited exclusively to ‘any candidate at such election’.

It is important to state that such candidate contemplated by the provision is one that has participated in the parliamentary election the result of which is being challenged. It is not an open invitation to any other candidates, for instance, those who contested in a presidential election, to challenge such result. Eligibility is limited to those who were candidates in that election. In proof thereof, nomination papers from the Nomination Court should be decisive in terms of determining who was or was not a candidate in a particular election.

9.3 Proper respondents in a petition

The only definition of a party in Part XXIII of the Electoral Act dealing with electoral petitions is that of a ‘respondent’. A respondent is defined as the President, a Member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition. There is no definition of a ‘petitioner’. However, a petitioner is isolated from the crowd by legal provisions that provide for standing of a person to lodge a petition – understood to mean the **losing candidate(s)**.

The import of the definition is to list persons who may carry the title of ‘respondent’ during the adjudication of an election petition. To that end the definition accords with section 155 of the Constitution to the extent that both provisions envisage three tiers of election in Zimbabwe, namely, presidential, parliamentary and local government elections, hence reference to president, member of parliament and councillor.

In practice however, this provision has caused much suffering in litigating election petitions challenging the result of an election. In the several petitions filed to challenge parliamentary results after the 2013 general elections, many of the petitioners had to withdraw citation of ZEC based on

the definition of a respondent in the Electoral Act. This was notwithstanding the clear fact that certain relief and allegations made in the petitions, especially those to do with prejudicial management of elections, which fall within exclusive responsibility of ZEC, would have required ZEC to appear and respond to same.

This was a case of oversight of the law by legal practitioners involved in those cases. Had it been not for the urgency under which petitions are filed, such negligent oversight was so costly on petitioners so as to deserve costs *de bonis*.¹⁵⁷ The issue of ZEC as a respondent to election petitions seems to have been resolved with finality in *Muzenda v Kombayi & Anor*.¹⁵⁸ This has been the position since the *Pio* case. There is a constitutional principle to be enforced by this restriction. The reasoning being that ZEC is an independent institution whose independence is not only required, but is enforced and guaranteed by the Constitution. Therefore, ZEC should not be drawn into partisan squabbles between the petitioner and respondent. If involved, ZEC would naturally take a side with one of the parties thereby compromising its independence. Even if not cited in the court order, ZEC has no luxury to refuse to hold another election once an undue return is established. This obligation is triggered by operation of the law whether or not ZEC has directly participated in the proceedings.

However, ZEC could be properly cited as a respondent in respect of pre-polling electoral proceedings especially in respect of actions only ZEC may execute. Part XXIII only applies to petitions challenging election results. The Act provides that:

‘petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever ...’¹⁵⁹

9.4 Formalities when filing a petition

The key provisions regarding the form of ‘other petitions’ are set out in the Electoral Act and Electoral Court Rules. The Act does not specify the form of a petition. The best it does is to require it to be ‘signed by the petitioner or all of the petitioners if more than one’.¹⁶⁰ Further still, the Act

¹⁵⁷ The Electoral Court has since ordered costs *de bonis* in election disputes in the case of

¹⁵⁸ (EP 119/08) [2008] ZWHHC 47 (09 June 2008);

¹⁵⁹ See section 167 of the Electoral Act.

¹⁶⁰ Section 168(1)(b) of the Electoral Act.

does not specify where the petitioner must sign the petition. Rule 21 of the Electoral Court Rules provides that ‘an election petition shall be generally in the form of a court application’. This prescription seems to resonate with Rule 23(1) of the CCZ Rules, which also envisages a court application as the form in which a presidential petition must take.

Accordingly, Rule 21 of the Electoral Court Rules requires that the affidavit or petition cover shows the following information:

- a) petitioner’s right to file in terms of s167 (that s/he participated in the election);
- b) polling date;
- c) date of announcement of result;
- d) constituency;
- e) grounds upon which challenge is based (fraud, malpractice, rigging, intimidation, vote buying and so on);
- f) if based on corrupt or illegal practice, full names and address. Such people must be served to accord them the right to be heard.
- g) Exact relief sought by the petitioner – that respondent was unduly elected!

Section 168 further provides for proof as to when a petition is said to have been lodged. First, it must be presented to the Registrar of the Electoral Court within 14 days ‘after the end of the period to which the election applies’. Second, it must be signed by the petitioner. Simple as it may appear, the practice has always been to file petitions as court applications, which means that once the petitioner signs the founding affidavit, the requirement is fulfilled.

However, the bone of contention has been the interpretation of this provision as to mean that the ‘petitioner signs the petition’. This is not a simple problem as the majority of petitions filed in the aftermath of the 2013 parliamentary elections were dismissed by the Electoral Court citing the reason that the petitioner did not sign the petition.

Neither the Electoral Act nor the Rules stipulate with precision the part of the petition where the signature must be appended. Unlike the CCZ Rules, both these instruments do not provide for a list of prescribed forms, which petitioners must use as a template. This aspect alone speaks to the outdatedness of Electoral Court Rules thereby making them absolutely unsuitable to regulate important processes such as election petitions. Court rules in Zimbabwe always have schedules

which provide for a list of prescribed forms so that there should be no doubt as to the form a particular pleading must take, thereby making penalization for non-compliance justified.

However, what we see in Zimbabwean electoral jurisprudence is judicial tendency to lean in favour of strict-compliance approach when dealing with election petitions. There is no basis in law or fact that a petitioner, as the Electoral Court dealt with post 2013 election petitions, must sign on the front page of the petition. There is no provision requiring such conduct. In any event, all the dismissed petitions had valid affidavits appended to them, which affidavits, by practice, were sworn to and signed by each petitioner. Therefore, if the mischief section 168(1)(b) of the Electoral Act seeks to prevent people other than the petitioner from filing petitions without the knowledge of the actual losing candidate, then such fears are decisively allayed once the petitioner swears to an affidavit appended to the petition. Not in a single occasion was the authenticity of the affidavits; and therefore the petition itself, ever challenged. In the final analysis, dismissal of petitions based on non-compliance with section 168(1)(b) is and remains bad law that undermines the exercise of political rights in terms of section 67 and the right to losing candidates to be heard in terms of section 69 of the Constitution.

9.4.1 Other requirements

Over and above the requirement to sign the petition, Rule 21 of the Electoral Court Rules requires, again without stating with precision as to where in the court application this must be located, that the petitioner must assert their right to lodge an application in terms of section 167 of the Act.¹⁶¹ The dates on which polling took place and the result was announced in the election concerned, including the constituency, must be indicated. This detail is clearly critical to assist, the respondent in opposing the petition and the court in determining whether or not the petition was filed within the prescribed time. Further, Rule 21(e) specifically demands that the ‘grounds’ upon which the petitioner relies to ‘sustain the petition’ must be given. These grounds are provided for in Part XVIII (intimidatory practices), XIX (corrupt practices), XX (illegal practices), and XI (further provisions on illegal and corrupt practices) of the Electoral Act. Such grounds must be clearly stated as they have a bearing on the nature of evidence required to prosecute the petition.

¹⁶¹ However, the Rules still make reference to the repealed section 125 of the Electoral Act. This again shows the extent to which these Rules, which are extensively used during election time, have remained outdated while the principal act has gone through several amendments.

With similar force, the petitioner must state the ‘exact relief’ they are seeking.¹⁶² Invariably though, the essence of an election petition challenging the result of an election logically prays for a declaration that the malpractice concerned had the effect of inducing a wrong result and therefore the ‘winner’ must be declared unduly elected. Depending on circumstances, the petitioner may pray to court that they instead be declared the winner, or that a re-election be ordered to give effect to the true expression of the electorate.

Again the issue of where grounds for the petition and relief being sought must be located in a petition suffers in obscurity. One would expect that, the petition being an application, the relief being sought must be incorporated into the draft order. In the same vein, it would appear acceptable that grounds for the petition be stated and elaborated in the founding affidavit of the petitioner since this is a matter of facts that must be presented under oath.

Finally, Rule 21(f) of the Electoral Court Rules requires that in instances where a petition is based on grounds of corrupt or illegal practices (Parts XIX and XX of the Electoral Act), the ‘full name and address, if known, of every person whom the petitioner alleges was guilty of such practice’, must be provided and stated in the petition. This does not mean that they be joined as parties, but that they be notified and given a chance to defend themselves. The rationale of this requirement was stated by the court in the *Mutinhiri* case as follows:

that the *audi alteram partem* rule, that is to say, the need to be heard before anyone can be condemned is paramount and the bedrock upon which our justice system is founded. Thus, in enacting r 21 (f) Parliament intended that such people like and ... would not be condemned of threatening to throw people into ... dam and of stabbing others without being given a chance to be heard. It would therefore be anomalous and unjust for the petitioners to assert their right to be heard while actively denying others the same right by omission.¹⁶³

While the mischief to be eliminated by the identification requirement is clear and plausible, the problem is that it appears the courts expect in all cases and take for granted that petitioners may not genuinely be aware of the full names and addresses of the perpetrators. This requirement is further complicated where several persons are implicated in corrupt or illegal practices. Surely the legislature would not have intended to saddle petitioners with such onerous onus to provide

¹⁶² See Rule 21(g) of the Electoral Court Rules.

¹⁶³ *Mutinhiri* judgment, p7.

addresses of such multitudes. We submit here that provision of names and addresses is conditional to the petitioner having knowledge of such detail and also taking into account the restrictive timelines within which petitions have to be filed once an election result has been announced.

9.4.2 Service of petitions

This is another aspect that has drawn controversy in prosecuting petitions. Service of a presidential petition attracts few difficulties due to the fact that there is only a single person to be elected to this office at any given election. Accordingly, their whereabouts or place of residence or business is common knowledge. However, the problem arises when dealing with parliamentary and/ or local government election petitions.

Section 159 of the Electoral Act provides that:

Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, **be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.** (Own emphasis)

Two issues have dominated service of a petition. The first issue is whether or not the ten-day service period maybe extended in exceptional circumstances, and second, is the question as to which places fall into the category of ‘usual or last known dwelling or place of business’. Notwithstanding the onerous timelines within which petitions have to be immaculately prepared and filed in compliance with statutory provisions discussed above, the courts have insisted that the service period may not be extended in any circumstances. In fact, the courts have declared that departure from statutory requirements is not possible.

The *locus classicus* in terms of compliance with statutory provisions in electoral disputes is the *Pio* case. It dealt with the issue of whether a petitioner who files notice of petition out of time becomes non-suited. The court reviewed numerous case law from several jurisdictions including England and South Africa with comparable statutory provisions. In final analysis, the court departed from the traditional approach of interpreting peremptory provisions as such, and adopted the substantial compliance approach even in electoral law.¹⁶⁴ In the words of the court,

¹⁶⁴ *Pio* Judgment, p156. See also *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) and *Zantsi and Others v Odendaal and Others; Mtoba and Others v Sebe and Others* 1974 (4) SA 173 (E) on this proposition.

The part of s 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its own, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; in other words defects in the notice would not invalidate it.¹⁶⁵

In that case the petitioner had served the petition outside of the 10-day period, among other forms of non-compliance with several provisions of the then Electoral Act. This case law triggered a series of similar pronouncements confirming and restating the various findings of the *Pio* judgment especially with the proliferation of election petitions since 2000. Probably the most telling judgment to review and revive the ground breaking findings of the *Pio* judgment is that of *Chabvamuperu & Ors v Jacob & Ors*.¹⁶⁶

The *Chabvamuperu* judgment was a consolidation of five petitions for administrative convenience on account of the cases dealing with more or less similar issues. These were the effect of service of notice of petition outside of the 10-day period as well as serving such notice at respondent's political party headquarters. Among other things the judgment restated the proper approach to interpretation as held in the *Pio* judgment – the substantial compliance approach.¹⁶⁷

This judgment is important in that it added a level to statutory interpretation in electoral cases. The court incorporated the four stage approach to interpreting peremptory statutes guided by the Supreme Court decision in *MDC and Another v Mudede and Others*.¹⁶⁸ The test essentially requires the court sitting to determine whether a provision requires strict compliance or substantial compliance would suffice. The court held:

that the approach necessitates that I first establish what had to be done in terms of section 169 and secondly, the object of the section. In the third step, I have to establish what was actually done and finally, assess whether what was actually done can stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that I find substantial compliance, I then have to consider whether there was any prejudice as a result of the non-compliance.

¹⁶⁵ *Pio* Judgment, p165.

¹⁶⁶ Electoral Petition No. 78/2008.

¹⁶⁷ *Chabvamuperu* Judgment, p6. Per Makarau J citing with approval *Quinell v Minister of Lands, Agriculture and Rural Resettlement* SC 47/04; *MDC and Another v Mudede and Others* (supra). *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S); *Kutama v Town Clerk Kwekwe* 1993 (2) ZLR 137 (S); *Chitungo v Munyoro and Another* 1990 1 (ZLR) 52 (HC).

¹⁶⁸ 2000 (2) ZLR 152 (SC).

With due respect to the court in the *Chabvamuperu* case, it appears that the test was better articulated by Kudya J in *Muzenda v Kombayi & Another*.¹⁶⁹ The court gleaned the test from the *Pio* and *Mudede* judgments and articulated it as follows:

Step 1: The relevant legislation

Step 2: What actually happened

Step 3: Whether the provisions of the relevant legislation were substantially complied with

Step 4: Whether there was any prejudice as a result of non-compliance.¹⁷⁰

Needless to add that in *Gore v Chimanikire*, the court found non-compliance with service of notice of petition 11 days after the due date, and that service at respondent's political party headquarters was in violation of section 169 of the Electoral Act mainly because non-compliance in both instances resulted in significant prejudice on the respondent in that he was prevented from promptly preparing his defence in view of the speedy resolution of the petition as required by public interest. The Court held as follows:

The electoral law sets out in specific and clear language the proper manner of serving election petitions. Service has to be personal or at the residence or place of business of the first respondent. In the view of this court, service of the petition at the party headquarters of the first respondent, does not constitute service at any of the places contemplated by s 169 of the Act. **This court sitting as an Electoral Court has no powers to condone any breach of the requirements as to time frames or as to manner of service that are stipulated in the Act.**¹⁷¹ (Emphasis added)

The emphasised portion of the quote from the judgment goes to reflect the inclination of courts towards treating EDR as a *sui generis* procedure that divests the court of any competence to condone non and/or substantial compliance with provisions of the Electoral Act.

9.4.3 Service of notice and proof of costs

The same provision, section 169 of the Electoral Act, requires that the 'Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition...' must be served on the respondent within 10 days of presentation or

¹⁶⁹ As above.

¹⁷⁰ Muzenda Judgment, p4.

¹⁷¹ Later in *Gore v Chimanikire* HH 47/2008. See also *Nath v Singh and Ors [1954] SCR 892; Kunju v Unni 1984 (3) SCR 162; Robinson v Minister of Lands and Anor 1994 (2) ZLR 171 at 175 A-C; Barrows and Anor v Chimphonda 1999 (1) ZLR 58 (S) at 62G-63A; and Mthinkhulu v Nkiwane and Anor S-136-01 at 3.*

filing of the petition. The issue as to whether the notice and list of names and addresses of sureties must be peremptorily served together in terms of the provision found itself standing for determination by the Electoral Court. The court expressed a view on this in the *Pio* and *Chabvamuperu* judgments.

In the former judgment, the court interpreted the provision in such a way that it split the two aspects (service of notice and service of names and addresses of sureties) as peremptory and directory, respectively.¹⁷² In essence the finding was service of notice of presentation of petition was peremptory admitting no derogation while names and addresses of sureties could be done after the 10 day period. The *Chabvamuperu* court held as follows:

It appears to me that the petitioners have erroneously interpreted section 169 to intrinsically link the furnishing of security with the presentation of the petition such that one cannot exist without the other. It is clear that the presentation of the petition, a thing in the exclusive domain of the petitioner has no direct link to the furnishing of security for the costs of the respondent, the fixing of which is under the control of persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked one to the other that service of one could not be effected in the absence of the other.

The reasoning of the court was **that service of details of sureties could be done later**. It admits of substantial compliance where it is served as soon as it becomes available. The other grounds were that such knowledge is not critical to the preparation of defence such that no prejudice is suffered by the respondent. Therefore, litigants must not fret if they are unable to serve notice and proof of security.

9.4.4 Withdrawing an electoral petition

The modalities of withdrawing a petition challenging the result of a presidential election have been dealt with in Chapter 8 above. As already mentioned, the procedure is different when dealing with other petitions. The key provision for other petitions is s178 of the Electoral Act. In essence a petitioner or petitioners have the right to withdraw a petition ‘at any time’ during the adjudication of the petition. However, as to procedure, s178(3) contemplates the making of an application, oral or written, to be made to the Electoral Court. This is a clear departure from common law litigation where the filing of a notice of withdrawal in which costs are tendered could suffice for that purpose.

¹⁷² *Pio* Judgment.

9.5 Strict versus substantial compliance in electoral petitions

From the analysis of judgments cited above it appears that the proper position is that substantial compliance is part of our electoral jurisprudence. It is no longer part of our law that electoral proceedings are *sui generis* to the extent that courts' hands are tied and may not condone any departure from all conduct required by statute. This undisputed clarity of the law then revives the debate on the approach of the Electoral Court in respect of electoral petitions predominantly filed in the aftermath of the 2013 parliamentary elections.

As indicated above, nearly all of the petitions were declared non-suited on account of the fact that petitioners did not sign the petitions while others suffered from different defects which the court also regarded as fatal and therefore incurable. Only a single petition made its way to trial. What is discouraging is that those dismissed petitions were never given a reasoned analysis of the new approach to statutory interpretation in Zimbabwe – the four stage interpretation enunciated in the *Pio* judgment and reiterated in the *Chabvamuperu* and other judgments decided during that time.

9.6 The determination of a petition

An electoral petition is tried by the Electoral Court in open court.¹⁷³ Section 171 of the Electoral Act provides for a number of issues that may arise during the trial of a petition, including the remedial competences of the Court when determining a petition. The Court may determine that:

- (a) the respondent was duly elected. The consequence will be that such election shall be and remain as valid as if no petition had been presented against his or her election;
- i. (b) the respondent was not duly elected but that some other person was or is entitled to be declared duly elected, in which case the respondent shall forthwith be deemed to have vacated the seat. If that is the case the Electoral Court shall forthwith certify its determination to ZEC, and to the President of the Senate or the Speaker of the National Assembly, as the case may be, and the Commission shall thereupon, by notice published in the *Gazette*, declare such other person duly elected with effect from the day of the determination of the Electoral Court.
- ii. (c) the respondent was not duly elected and that no other person was or is entitled to be declared duly elected, in which case,

¹⁷³ See section 171(1) of the Electoral Act.

(i). the seat of the respondent shall forthwith become vacant; and

(ii) the Electoral Court shall forthwith certify its determination and put parliament on notice for the Speaker to notify the President of the existence of a vacancy and the cause thereof so he or she may proclaim a day for the by-election after making the necessary consultations.

9.7 Appeals against decisions of the Electoral Court

Section 172 of the Electoral Act provides that appeals from the Electoral Court on a point of law only lie in the SCZ. This provision has just been amended by the Electoral Amendment Act, No. 6 of 2018. The Amendment brought in the repeal of s172(3), which provided for the determination of an appeal ‘within six months’ from date of lodging. The new s182 now consolidates timelines of filing, determination of petitions and appeals. In terms of s182(1), ‘every election petitions shall be determined within six months of presentation’. Now an appeal is determined within three months – a decrease from six months prior to amendment.¹⁷⁴ This effectively shortens the period for the determination of a petition to 9 months down from 12 months. The provision vests in the Chief Justice and/ or Judge President the power to give directions as to the manner on determining the pending petition or appeal in order to ensure that petitions are resolved within the timeframe. Taken conjunctively, the amendments were brought to eliminate the possibility of indefinite determination of appeals in conformity with s158 of the Constitution – timely resolution of electoral petitions.

9.8 Practical steps or points to note on adjudication of petitions

The following are summarized points to reflect the steps that litigants, lawyers and judicial officers should take account of when dealing in any way with electoral petitions. They are drawn from practical experience of lawyers, litigants and judicial officers who shared their experience in this field of law. They shall be updated as new experiences are amassed in the forthcoming elections.

Practical steps and points to note in the adjudication of electoral petitions

¹⁷⁴ Section 182(2) of the Electoral Act.

- The law presumes every result as a valid result in that election. The onus lies on the petitioner to convince the court that the election was not valid.
- Electoral proceedings are special procedures (*sui generis*) that are highly technical – the language and procedure is different.
- Lawyers should be aware that condonation proceedings are almost non-existent in electoral litigation.
- Practitioners must be meticulous with pleadings – it is important to see the opinion of colleagues before filing papers.
- Candidates are advised to go into an election expecting to win but declared loser through a manipulated election – this approach prompts the whole election team to start collecting evidence in preparation to lodge a case.
- Lawyers should interview witnesses and ensure they are loyal to the petitioner’s cause and will attend court.
- Lawyers should follow changes of law through amendments and familiarize themselves with latest developments in this area.
- Lawyers must pay attention to detail – follow demands of the law regarding form and procedure.
- ICTs are increasingly becoming integrated into electoral law. Lawyers should stay abreast with such developments.
- Post-election litigation is cumbersome – everything is done on urgent basis – even the Rules say so – Rule 31 of This exposes especially the petitioner to a host of fatal blind spots.
- Compliance with rules and provisions is mandatory – no room for substantial compliance – pay attention to detail – have a check list of requirements.
- Lawyers should understand that petitioners are nervous and agitated individuals who need to be handled with necessary sensitivity but also with firmness.
- Petitioners must provide the evidence the lawyer needs within agreed timelines.

- Post-election litigation is a politically charged process and environment – players must exercise due care.
- Lawyers must work in teams when prosecuting a petition. One lawyer is not enough for a single petition.
- Instructions to file petitions usually come so late that it is prudent in some cases to decline instructions rather than filing for the sake of it.

9.9 Conclusion

One conclusion that was apparent in the discussion is that electoral adjudication is highly technical. It is infested with several blind spots that waylay litigants and their lawyers. The task is made heavy on account of the fact that our law presumes an election result as valid on the face of it. The onus is on the petitioner to convince the court otherwise. One of the weaknesses of our electoral law is that statutes should be read together with rules of procedure in order for a litigant to account for all the substantive and procedural requirements of a valid petition. Reform of the law should result in procedural requirements being codified in the rules of procedure while substantive statutes focus on principles. Nevertheless, on a positive note, the task is manageable with a mastery of the complete code in adjudication of other petitions (Constitution, Electoral Act and regulations including Electoral Court and High Court Rules).

CHAPTER 10: ANNEXES

- Constitutional Court of Zimbabwe Rules (S.I. 161 of 2016)
- Electoral Court Rules (S.I. 74A of 1995)