

IN THE CONSTITUTIONAL COURT OF ZIMBABWE CASE NO. CCZ 14 /21
HELD AT HARARE

In the matter between:-

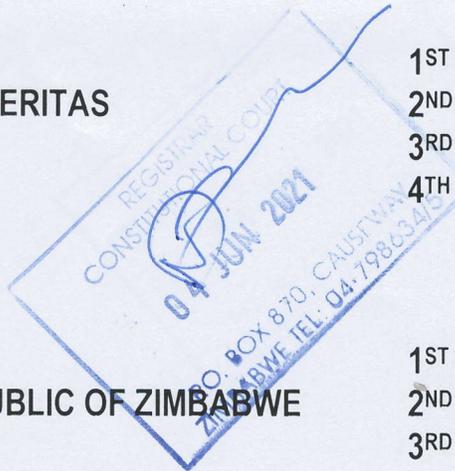
ERIC TAURAI MATINENGA
FIRINNE TRUST operating as VERITAS
VALERIE INGHAM-THORPE
BEATRICE MTETWA

1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT

AND

LUKE MALABA N.O.
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
PARLIAMENT OF ZIMBABWE

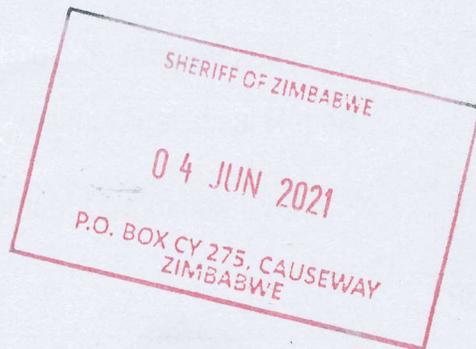
1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT



CONSTITUTIONAL COURT APPLICATION FOR A DECLARATOR IN TERMS OF
SECTION 167(2)(D) OF THE CONSTITUTION



Prepared by: **TENDAI BITI LAW**
Applicant's Legal Practitioners
HMB CHAMBERS
28 Rowland Square
Milton Park
HARARE [TB/rnc/V14]



In the matter between:-

**ERIC TAURAI MATINENGA
FIRINNE TRUST operating as VERITAS
VALERIE INGHAM-THORPE
BEATRICE MTETWA**

**1ST APPLICANT
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3RD APPLICANT
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AND

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THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
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**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

**CONSTITUTIONAL COURT APPLICATION FOR A DECLARATOR IN TERMS OF SECTION
167(2)(D) OF THE CONSTITUTION**

TAKE notice that the Applicants intend to apply to the Constitutional Court for the Order in terms of the Draft Order annexed to this notice and that the accompanying affidavits and documents will be used in support of the application.

If you intend to oppose this application you will have to file a Notice of Opposition in **Form CCZ 2**, together with one or more opposing affidavits with the Registrar of the Constitutional Court at **Harare** within 20 (twenty) days after the date on which this notice was served upon you. You will also have to serve a copy of the Notice of Opposition and affidavit/s on the applicant at the address for service specified below. Your affidavits may have annexed to the documents verifying the facts set out in the affidavits.

Leave to apply is not necessary.

DATED AT HARARE ON THIS DAY OF JUNE 2021.

TENDAI BITI LAW
Applicants' Legal Practitioners
HMB CHAMBERS
28 Rowland Square,
Milton Park **HARARE**
[TB/rnc/V14]

To: **The Registrar**
Constitutional Court of Zimbabwe
HARARE

And

To: **LUKE MALABA N.O**

1st Respondent
High Court of Zimbabwe
HARARE

And

To: THE PRESIDENT OF ZIMBABWE
2nd Respondent's Legal Practitioners
Munhumutapa Building
Cnr Samora Machel/ Sam Nujoma
HARARE

And

To: PARLIAMENT OF ZIMBABWE
3rd Respondent
Parliament Building
Nelson Mandela Avenue
HARARE

**IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. CCZ /21

In the matter between:-

**ERIC TAURAI MATINENGA
FIRINNE TRUST operating as VERITAS
VALERIE INGHAM-THORPE
BEATRICE MTETWA**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT**

AND

FIRST APPLICANT'S FOUNDING AFFIDAVIT

I, **ERIC TAURAI MATINENGA** do hereby make oath and state that:-

1. I am the 1st Applicant in this matter and the facts I depose hereto are within my personal knowledge and to the best of my belief true and correct.

THE PARTIES

2. I am an Advocate of this Honourable Court and of the other Superior Courts of Zimbabwe. I have been practising law for a period in excess of 35 years. My address of service is care of my undersigned legal practitioners of record.
3. I am an officer of this Honourable Court. I took an oath to defend justice, the rule of law and constitutionalism in Zimbabwe.
4. Between 2009 and 2013 I was privileged to be the Minister of Constitutional and Parliamentary Affairs in Zimbabwe. In that capacity I oversaw the lengthy and protracted process that gave birth to the new Zimbabwean Constitution that came into force in 2013, being Constitutional (Amendment No 20) of 2013.
5. I take particular pride in the production of this document as my ministry and myself were core to its drafting and production.
6. However more than personal pride, as a citizen and more as an officer of this Honourable Court, I am duty bound to protect the same. This application is about protecting the Zimbabwean Constitution.
7. For the sake of completion, I place it on record that I have also in the past served as a President or Judge of the Administrative Court.
8. Between 2008 and 2013 I served as a Member of Parliament representing the Constituency of Buhera West. Both capacities required me to take an oath to the Constitution and to Zimbabwe.
9. These tasks are the oaths I am fulfilling in this present application.

10. The 2nd Applicant is Firinne Trust, operating under the moniker of Veritas being a Trust duly incorporated according to the laws of Zimbabwe, with capacity to sue and be sued.
11. This Trust can sue in its own name in terms of Rule 8 of Order 2(a) of the High Court Rules.
12. Veritas is a human rights trust with responsibilities in monitoring parliamentary activity recording the same and offering critical evaluations of developments in Parliament and human rights matters.
13. 3rd Applicant is Valerie Ingham-Thorpe, a Zimbabwean human rights activist who was involved as an activist during the war of liberation and has since been involved in human rights and the defence of the Constitution since the eighties up to now. Over the years she has been involved in various cases and fights to protect human rights and the rule of law in Zimbabwe.
14. The 4th Applicant Beatrice Mtetwa, like myself is a legal practitioner of this Honourable Court. She is renowned human rights defender whose record speaks for itself. As a human rights defender, she has represented many victims of constitutional abuse over the years and campaigned for the defence and protection of the Constitution. She has received many international awards in recognition of her work. Her address of service is care of her undersigned legal practitioners of record.
15. 1st Respondent is Luke Malaba N.O. He is cited as such in his official capacity as the Chief Justice who was in office at the time the Constitutional Court handed down judgement in case number CCZ4/2020. There is no personal relief that is being claimed against him. He is being cited, as the head of the court that delivered a judgement which I seek to impeach being Judgment No CCZ-4-20 whose details are outlined below.
16. The 2nd Respondent is the President of the Republic of Zimbabwe, His office is set up in terms Section 89 of the Constitution of Zimbabwe. His duties among other things include the protection of the Constitution and the protection of fundamental human rights freedoms and the rule of law. His address of service is care of Munhumutapa Building, Harare.
17. 3rd Respondent is the Parliament of Zimbabwe duly set up in terms of Section 118 of the Constitution of Zimbabwe. It is the sole legislative body in Zimbabwe as defined by Section 116. It derives its authority from the people of Zimbabwe and its duty among other things is to make laws for the peace order and good governance of Zimbabwe. Its address of service is care of Parliament Building Kwame Nkrumah Avenue, Harare.

CAUSE OF ACTION

18. This is a constitutional application. It is directed against Constitutional Amendment No 1 of 2017 which was passed by Parliament, on the 6th of April 2021 and Constitutional Amendment No 2 which was passed by Parliament on the 4th of May 2021 and gazetted on the 7th of May 2021 as the Constitution of Zimbabwe Amendment No 2 Act being Act No 2 of 2021.
19. I contend that both Constitutional Amendment Act No 1 of 2017 which was gazetted on the 7th of September 2017 and Constitutional Amendment Act No 2 of 2021 are unconstitutional amendments in that, they are inconsistent with the provisions of Section 117(2)(b) which requires that Parliament make laws for the peace order and good governance of Zimbabwe.
20. I aver and contend that the changes made in Constitutional Amendments No 1 and 2 which allow the President to now solely appoint the Chief Justice and the deputy Chief Justice, as well as extending the term of office of Constitutional Court Judges beyond the age of 70 as well as allowing current sitting judges of the Supreme Court and the Constitutional Court to benefit from the extension of the term of retirement from 70 to 75 is bad law which is against the principle of good governance of Zimbabwe espoused in the Constitution of Zimbabwe.
21. I further contend that the two Constitutional amendment Acts are unconstitutional amendments in that in that they seek to alter the basic structure of the Constitution and indeed the founding values and principles of the Constitution of Zimbabwe.
22. The Constitution is the supreme law of the country. Its basic structure must be protected. The basic structure of the Constitution of Zimbabwe is predicated on the principle of separation of powers, and independence of the judiciary. These are founding principles codified in Section 3 of the Constitution of Zimbabwe. I maintain that any Constitutional Bill or Act affecting the basic structure of the Constitution is against the peace, order and good governance of Zimbabwe and is therefore unconstitutional.
23. To the extent that the two laws now allow the 2nd Respondent to appoint judges and to temper with their offices, this is a fundamental redrafting of the Constitution and a fundamental defacement of the basic structure and values of the Constitution.
24. It is my contention as well that provisions to Constitutional Amendment No 2 Act relating to (i) the Prosecutor General, (ii) Parliament's oversight on loans and (iii) the reconstruction of the provisions relating to devolution, are an affront to the basic structures of the Constitution. Those amendments are in any event in breach of section 117(2)(b) of the Constitution of Zimbabwe.
25. The deletion of the running mates provision in the Constitution, when account is taken of the foundational issue that the Constitution wished to address, namely the uncertain succession issue relating to the late President Mugabe, at the level of the State President are a further breach of Section 117(2) (b) of the Constitution.

26. Such Acts are not permitted at law and therefore the two Acts should be set aside.
27. The separate grounds upon which I challenge Constitutional Amendment Bill No 1, are simple. They are that;
 - (a) Constitutional Amendment Bill No 1 of 2017, was passed by Parliament, in breach of Section 147 of the Constitution of Zimbabwe;
 - (b) The portion of the judgement of the Constitutional Court in the matter of **Innocent Gonese and Jessie Majome v Speaker of Parliament & Others CCZ4/20** directing that the Senate passes Constitutional Amendment Bill No 1, within 180 days from the declaration of invalidity was a nullity and a breach of Section 147 of the Constitution of Zimbabwe.
28. This is the essence of the instant application.

BACKGROUND

29. It is not in dispute that for a long time after the independence of Zimbabwe in 1980, across the length and breadth of Zimbabwe and across all political divide, there was huge dissatisfaction with the country's then Constitution, the Lancaster House Constitution that was negotiated by parties present at Lancaster House in London in 1979.
30. There were those that felt that the Constitution did not deal sufficiently with the question of land. Others felt that the Constitution did not sufficiently protect citizens. Others felt that the Constitution was a ceasefire document intended to stop the war of liberation that had arrested the country from the late fifties to 1979.
31. With the advance of nationhood new challenges and new wounds emerged, which questioned the adequacy of the Constitution.
32. Like any other country in transition, Zimbabwe went through its own vicious challenges and contestations. This vicious past made Constitutional reform inevitable.
33. This viciously contested past included violence centred around issues such as Gukurahundi, thereby posing into the fore the issue of transitional justice, disputed elections and the need to establish a more sustainable electoral framework. The issue of poverty, uneven and unequal development of regions in Zimbabwe, made it inevitable that the debate around devolution and decentralisation of State power, and socio economic rights would take place.
34. The issue of a Constitution that was incapable of protecting itself given the numerous amendments to the same was another important issue. Between 1980 and 2004, a period of merely 24 years, the Zimbabwean Constitution had been amended sixteen

times and many of those amendments, were taking away rights and vested interests set out in the 1979 Lancaster House Constitution.

35. It therefore became inevitable that across the length and breadth of Zimbabwe the quest for a new Constitution and a new social contract to govern relations between citizens and the State became inevitable.
36. A turning point in the pursuit of Constitutional reform in Zimbabwe came in January 1998 when Zimbabweans gathered at the University of Zimbabwe and formed an organisation known as the National Constitutional Assembly which brought together churches, the trade union movement, students and progressive intellectuals to push for constitutional reform.
37. The effort by the National Constitutional Assembly (NCA) forced the then President Robert Mugabe to set up a Constitutional Commission through proclamation No 6 of 1999 which was contained in SI 138A of 1999.
38. The Constitutional Review Commission, CRC so appointed was chaired by then Judge President of the High Court and later to be Chief Justice, the late Chief Justice Godfrey Chidyausiku.
39. The CRC did considerable work in gathering evidence from all corners of Zimbabwe. Such evidence was eventually collated in the form of a Constitution.
40. The Constitution was then subjected to a referendum on the 10th of February 2000. The Constitution was rejected by a majority of the people of Zimbabwe at a national referendum.
41. Before the Constitution was subjected to a referendum the NCA, which had not been part of the CRC felt that the Constitution that was being presented to Zimbabweans was not reflective of the views of Zimbabweans.
42. An attempt to stop that referendum was dismissed by the High Court of Zimbabwe in the case of **Mushayakarara and Another v Chidyausiku NO and Others 2000 (1) ZLR 227 (H)**.
43. Following the 11th March 2001 Presidential election, which again was fiercely contested and whose election challenge still remains outstanding to date, constitutional negotiations under the direction of President Mbeki, President Obasanjo and to some extent Prime Minister Howard of Australia in the form of a Commonwealth Troika commenced in private between the two major political parties in Zimbabwe, the MDC and Zanu PF.
44. In these constitutional negotiations held between 2002 and 2004, professor Welshman Ncube representing the MDC and Honourable Patrick Chinamasa representing Zanu PF produced a constitutional draft that is little known in this country.

45. After this, the Southern African Development Corporation (SADC), pursuant to an extra ordinary Summit in Dar Salaam, held on 29 March 2007 appointed President Mbeki to oversee negotiations in Zimbabwe that would, among other things, create a new Constitution and create conditions for free and fair elections. That process resulted in yet another negotiated Constitution which was signed in Kariba on the 30th of September 2007 and is commonly referred to as the **Kariba Draft Constitution**.
46. Although the Kariba Constitution was only signed by the parties on the 30th September 2007, on the 20th of September 2007, Parliament approved constitutional amendments which were extracted from the Kariba Draft Constitution. These amendments were published as Constitutional Amendment No 18.
47. It was the anticipation of the political parties involved that the Kariba Constitution would be adopted before the 2008 election. Evidence of this is born by the second reading speeches in Parliament on the 20th of September 2007 pursuant to the passage of Constitutional Amendment No 18 of 2007.
48. Regrettably the 2008 election was not held on the basis of the Kariba Draft Constitution as parties anticipated.
49. The 2008 election was held on the 28th March 2008 and produced an uncertain outcome on the Presidential election. It also produced a hung parliament in respect of which the MDC led by Dr Morgan Tsvangirai won 100 seats, Zanu PF won 98 seats and the MDC led by Professor Welshman Ncube won 10 seats.
50. A Presidential runoff election was held on the 28th of June 2008 which was rejected by both regional and international bodies including the Southern African Development Community and the African Union.
51. Pressure was then put on political parties in Zimbabwe to continue with political negotiations aimed at reforms reflective of the aspirations of the people of Zimbabwe.
52. These political negotiations resulted in the execution of an agreement known as the Global Political Agreement (GPA) in respect of which they agreed in Article 6 thereof to embark on a constitutional making process.
53. **Article 6** of the Global Political Agreement, which dealt with the issue of the Constitution making read as follows:-

“Article 6 Constitution

Acknowledging that it is the fundamental right and duty of the Zimbabwean people to make a constitution by themselves and for themselves; Aware that the process of making this constitution must be owned and driven by the people and must be inclusive and democratic; Recognising that the current Constitution of

Zimbabwe made at the Lancaster House of Conference, London (1979) was primarily to transfer power from the colonial authority to the people of Zimbabwe; Acknowledging the draft Constitution that the Parties signed and agreed to in Kariba on the 30th of September 2007, ...; Determined to create conditions for our people to write a constitution for themselves; and Mindful of the need to ensure that the new Constitution deepens our democratic values and principles and the protection of the equality of all citizens, particularly the enhancement of full citizenship and equality of women.

6.1 *The Parties hereby agree:*

(a) *that they shall set up a Select Committee of Parliament composed of representatives of the Parties whose terms of reference shall be as follows:-*

(i) *To set up such subcommittees chaired by a Member of Parliament and composed of members of Parliament and representatives of Civil Society as may be necessary to assist the Select Committee in performing its mandate herein;*

(ii) *To hold such public hearings and such consultations as it may deem necessary in the process of public consultation over the making of a new Constitution for Zimbabwe;*

(i) *To convene an All Stakeholders Conference to consult stakeholders on their representation in the sub-committees referred to above and such related matters as may assist the committee in its work;*

(ii) *To table its draft Constitution to a 2nd All Stakeholders Conference; and*

(iii) *To report to Parliament on its recommendations over the content of a New Constitution for Zimbabwe.*

(b) *That the draft Constitution recommended by the Select Committee shall be submitted to a referendum;*

- (c) *that, in implementing the above, the following time frames shall apply:*
- (i) *The select Committee shall set up within two months of inception of a new government;*
 - (ii) *The convening of the first All Stakeholders Conference shall be within 3 months of the date of the appointment of the Select Committee;*
 - (iii) *The public consultation process shall be completed no later than 4 months of the date of the first All Stakeholders Conference;*
 - (iv) *The draft Constitution shall be tabled within 3 months of completion of the public consultation process to a second All Stakeholders Conference;*
 - (v) *The draft Constitution and the accompanying Report shall be tabled before Parliament within 1 month of the second All Stakeholders Conference;*
 - (vi) *The draft Constitution and the accompanying Report shall be debated in Parliament and the debate concluded within one month;*
 - (vii) *The draft Constitution emerging from Parliament shall be gazetted before the holding of a referendum;*
 - (viii) *A referendum on the new draft Constitution shall be held within 3 months of the conclusion of the debate;*
 - (ix) *In the event of the draft Constitution being approved in the referendum it shall be gazetted within 1 month of the date of the referendum; and*
 - (x) *The draft Constitution shall be introduced in Parliament no later than 1 month after*

the expiration of the period of 30 days from the date of its gazetting”.

54. Pursuant to the above, Parliament, in 2009, set up a select committee on constitution making, otherwise known as COPAC it will be referred to in these proceedings by the said acronym.
55. COPAC, consisted of three Co-Chairpersons appointed from each of the political parties. They included Honourable Munyaradzi Paul Mangwana from ZANU PF, Honourable Comrade Douglas Togarasei Mwonzora from the MDC led by Dr. Morgan Richard Tsvangirai and Honourable Edward Tshothso Moyo Mukhosi from the MDC then led by Professor Arthur Mutambara. The Deputy Co-Chairpersons were Honourable Monica Mutsvangwa from ZANU PF, Honourable Comrade Fungai Jessy Majome from the MDC led by Dr. Morgan Richard Tsvangirai and Honourable Believe Gaule from the MDC led by Professor Mutambara. Other members of COPAC were Honourable Flora Bhuka, Honourable Chief Fortune Dzefanaya Charumbira, Honourable Amos Chibaya, Honourable Kufakunesu Chidhakwa, Honourable Gift Chimanihire, the late Honourable Edward Takaruza Chindori-Chininga, Honourable David Coltart, Honourable Lazarus Dangwa Kambarami Dokora, the late Honourable Gladys Gombani Dube, Honourable Innocent Gonese, Honourable Dr. Jorum McDonald Gumbo, Honourable James Ian Kay, Honourable Martin Khumalo, Honourable Cephass Makuyana, Honourable Editor Elimencia Matamisa, Honourable Thokozile Angela Matutu, Honourable Tambudzani Budakgai, Honourable Dr. Olivia Nyembesi Muchena, Honourable Rolana Muchiwa, Honourable Jabulani Ndlovu and Honourable B. Tshuma.
56. Working with COPAC was a committee known as the Management Committee which consisted of the parties' representatives to the negotiating process that had resulted in the drafting of the Global Political Agreement. This Management Committee consisted of Professor Welshmen Ncube & Mrs Priscilla Mushonga, representing the political party known as the MDC then led by Professor Arthur Mutambara. The other party represented was the MDC led by Dr. Morgan Richard Tsvangirai whose representatives to the management committee were Elton Mangoma and Tendai Biti. ZANU PF was represented by Nicholas Goche and Patrick Chinamasa.
57. On the 13th and 14th of July 2009, COPAC and its Management Committee organised the first All Stakeholders Conference as was defined in **Article 6** of the Global Political Agreement. This first All Stakeholders Conference was held at the Harare International Conference Centre and was, respectfully opened by the Principals to the Global Political Agreement that included the President of the Republic of Zimbabwe Comrade R.G Mugabe, the then Prime Minister of the Republic of Zimbabwe Dr. Richard Morgan Tsvangirai and the then Deputy Prime Minister of the Republic of Zimbabwe, Professor Arthur Mutambara.
58. The First All Stakeholders Conference, despite being mired in great controversy on its first day on the 13th of July 2009, achieved a lot. It authorised COPAC to do the following:-

- (i) Conduct an outreach programme to gather the views of the people;
- (ii) Analyse the data so gathered; (iii) Produce a Draft Constitution.

59. In addition, it agreed on 17 thematic areas in respect of which views would be sought. These were the following:-

- **Founding Principles of the Constitution; • Separation of powers of the State • Systems of Government**
- Executive organs of the State, Public Service Commission, Police and Defence
- Elections, transitional mechanisms and independent commissions
- Citizenship and Bill of Rights
- Land and Natural Resources
- **Public Finance and Management**
- Media
- Traditional Institutions and customs
- Labour
- Youth
- Disabled
- War Veterans/Freedom Fighters
- Local Languages, Arts and Culture
- Women & Gender
- Religion

60. I need to emphasize that as Minister of Constitutional Affairs, it was my responsibility to convene the all Stake Holders Conference. This I did.
61. My work became a link between the work that COPAC was doing and the Executive.
62. As a result of which, I would produce constant reports to my principals, the President Robert Mugabe and the Prime Minister Morgan Tsvangirai as well as reports to Parliament.
63. I was also involved in the process of all attempts to break deadlocks in respect of meetings of the management committee that constituted of the main parties negotiators who were Patrick Chinamasa and Nicholas Goche on the part of Zanu PF, Professor Welshman Ncube and Priscilla Mushonga on the part of the MDC

(Green), Tendai Biti and Elton Mangoma on the part of the MDC led by Dr Morgan Tsvangirai.

64. These meetings were many and extensive.
65. Pursuant to this, COPAC then facilitated the training of outreach team members between December 2009 and early January 2010. Over 700 delegates were trained during this period.
66. Over and above this, in April 2010 COPAC also trained 210 rapporteurs to record evidence that was going to emanate from the outreach programmes. Those rapporteurs were trained at the ZESA Training Centre.
67. Once this had been done, COPAC then organised the meeting points and dates thereof of the same and on the 16th of June 2010, the outreach programme was officially launched by the three principals referred to above.
68. On the 21st of June 2010 COPAC embarked on its outreach programmes countrywide. Seventy (70) teams were dispatched to different provinces of the country with each of the outreach teams comprising of the following members:-

- 3 co-chairpersons from the three different political parties
- 3 rapporteurs from the three political parties
- 1 technician
- Drivers
- Ordinary team members

69. The outreach programme, was conducted over 95 days during which **4 943** meetings were successfully completed. The following is a table of the meetings that were held.

Province	No. Of Meetings	Total No. Of participants	No. Of Males	No. Of Females	No. Of youths	No. Of Special needs	Average attendance
Mash East	567	181 756	60 158	69 733	50 400	1 465	321
Mash West	509	121 647	55 034	44 148	22 119	346	239
Manicaland	677	152 130	57 828	67 760	24 911	1 631	225
Mat South	477	48 211	19 248	21 602	7 142	219	101
Mash Central	652	214 023	71 965	77 284	63 482	1 292	328
Mat North	614	53 077	20 905	20 605	11 246	321	86
Masvingo	622	184 208	64 960	76 267	41 053	1 928	298
Midlands	672	102 453	43 842	42 690	15 515	406	152
Harare	96	49 699	17 541	17 192	14 761	215	518
Bulawayo	57	11 556	4 791	3 957	2 611	197	203
Totals	4 943	1 118 760	416 272	441 238	253 240	8 020	226

70. During this outreach programme, it was evident that one of the most popular issues across the provinces was the need to reign in the power of the President and the power of any party or individual to amend a Constitution.
71. There were many citizens across the length and breadth of the country who felt that too much power resided in the office of the President. Many felt that the conflation in 1987 of the old powers of the Prime Minister and the President upon the repeal of the provisions pertaining to the Prime Minister, created a President who was omnipotent and imperial. He could appoint Judges, Ministers, declare war, declare a State of emergency. Therefore the issue of addressing the imperial powers of the President became a major issue.
72. Another issue that was also of concern was the uncertain succession provisions in the Constitution. This issue was subjective and was raised in connection with the long period that President Mugabe had stayed in office. It was felt that a country with an uncertain succession policy would remain unstable. Peace and stability was compromised.
73. A further issue that was also of concern was the issue of land. Across the length and breadth of the provinces, Zimbabwean citizens in the main wanted to protect the legacy of the fast track land reform programme. It was regarded as a key foundational issue.
74. Another issue that was so fundamental and popular was the issue of devolution and decentralisation of the State power. According to the outreach national report, which was subsequently prepared by COPAC out of the total 1950 wards, the following results showed the popularity of devolution.
- 1 386 wards that is to say 71% wanted a unitary system of the government.
 - 1 138 wards (58%) wanted a devolved system of government within a unitary State.
 - 1 614 wards (82%) wanted provincial governance
 - 379 wards (19.4%) did not want provincial governance
 - On the type of governance 277 wards (14.2%) wanted the position of provincial councils in a unitary council
 - 59 wards (3%) wanted provincial councils
 - 58 wards (2.97%) wanted provincial councils that were elected.
75. Thus it became clear that there were founding values and principles that were so dear to Zimbabweans. These values included separation of powers, supremacy of the Constitution, the unity of Zimbabweans, protecting people's rights and the issue

of protecting the land reform programme as a gain of our independence and our right to selfdetermination.

76. Those issues were self-evidently the mischief that those who were making the Constitution sought to address. They became the foundation of that Constitution and would later be reproduced in the preamble and Sections 2 and 3 of the Zimbabwe Constitution.
77. After the outreach programme, COPAC itself prepared a draft summary of all the Constitutional issues. In the process of preparing the data, COPAC engaged two processes which were;
- (i) The extraction of Constitutional issues, all of them, as derived from the outreach. These were then collated in a document that was headed Constitutional Issues;
 - (ii) The extraction from the list of Constitutional Issues, the list of Agreed Constitutional Issues that would actually go into the Constitution.
78. Thereinafter, COPAC then developed 26 Constitutional Principles from the National Statistic Report to guide the drafting progress. These 26 Constitutional Principles were the following:-
- (i) *Supremacy of the Constitution*
 - (ii) *Recognition of Zimbabwe's Liberation, democracy, sovereignty of the State and its people*
 - (iii) *Recognition of the Principle of separation of powers*
 - (iv) *Recognition of land and natural resources as belonging to all Zimbabweans.*
 - (v) *Constitution should maintain mechanism of redressing colonial imbalances in the distribution of natural resources including land.*
 - (vi) *The new Constitution must ensure the maintenance of unity, in diversity, peace, stability, security and prosperity for all the people of Zimbabwe,*
 - (vii) *Recognition of the rule of law, good governance and democracy*
 - (viii) *Recognition that power to rule and govern must be derived from the authority of the people.*
 - (ix) *The recognition of fundamental human rights.*
 - (x) *All organs of the State to respect, protect, promote and fulfil the rights and freedoms spelt out in the Bill of Rights*
 - (xi) *Recognition of the principle of decentralisation*
 - (xii) *Recognition of the principle of devolution of power.*
 - (xiii) *Recognition of gender equality and gender mainstreaming in all spheres of governance.*
 - (xiv) *The recognition of the rights of children, youth, disabled, women, workers and vulnerable groups.*

- (xv) *The recognition of universal adult suffrage.*
- (xvi) *The recognition of the importance of an electoral system that guarantees regular free fair and effective elections that ensures adequate representation of the electorate*
- (xvii) *Recognition of the importance of the Bill of Rights by entrenching it in the Constitution and its justiciability*
- (xviii) *Recognition of the principle of checks and balances among the levels of government and the Arms of the State.*
- (xix) *Recognition of the need for equitable resource sharing mechanism*
- (xx) *Recognition of the rights of ratio, ethnic, culture, linguistic, religious and political minorities*
- (xxi) *That the management of public finances should be informed by transparency, responsiveness, accountability, responsibility, integrity and equity*
- (xxii) *All arms of state to uphold the principles of democracy and good governance*
- (xxiii) *Recognition of the principle of Constitutional transition and orderly transfer of power.*
- (xxiv) *All Arms of State must uphold the Constitution, respect human rights, be non-partisan and professional*
- (xxv) *The Constitution must recognise the diversity of languages, customary practices and traditions and must seek to protect and promote these*
- (xxvi) *The institution, status and role of traditional leadership, according to indigenous law, shall be spelt out and recognised in the Constitution*

79. Thus, devolution of power was a founding principle and value of the Constitution became clear. These founding principles were derived from the extensive outreach programme that was outlined above which involved 4943 meetings.
80. In January 2012, COPAC then appointed various technical committees in the various thematic areas to begin the process of drafting. One such committee was the committee on Systems of Government. I attach hereto marked **Annexure 'A'**, COPAC's document dated the 12 of January 2012 being instructions to its committee on draft systems of government. That committee consisted of Ms. C. Damiso, Mr. J Tshuma, Hon. J.G. Moyo, Hon. J. Mudenda, Mr. K. Phulu, Hon. S. Mushonga and Mr. M. Ncube.
81. COPAC, together with its Management Committee, eventually agreed, after the meeting of thematic committees, that the work should be referred to professional drafters who were Justice Moses Chinhengo, Mr. Brian Crozier & Mrs Priscilla Madzonga. Drafting this Constitution commenced on the 5th of December 2011 and the drafters were given a contract which spelt out their terms of reference and the need for confidentiality among other things. Various preliminary drafts were prepared by the drafters and the major one was produced in April of 2012. At that stage, the parked issues that were in contention which included the following:-

- (i) *Dual or mono-citizenship*
- (ii) *Issue of the death penalty*
- (iii) *Systems of government that is to say the question of devolution, the manner of appointment of governance and the manner of constituting the provincial authorities*
- (iv) *Whether to have a national prosecuting authority, independent or attorney general*
- (v) *The number of vice presidents*
- (vi) *The threshold of victory of a president (50% + 1 or simple majority)*

82. For the sake of the completeness, I attach hereto marked **Annexure 'B'** the foreword by COPAC in its National Statistical Report Volume 1 dated October 2012 and **Annexure 'C'** a report prepared by a Management Committee for the benefit of the Principals on the 15th of September 2012. These documents are important historical documents that capture the issues and proceedings of the heavily contested but also heavily involved constitutional making process making.
83. The parties could not make progress on the parked issues until the Principals of Government ordered the Management Committee to go and resolve the issues amongst themselves. Thus, in the first two weeks of July of 2012 the Management Committee and the Co-Chairs were literally locked up in a secret location at The Inn on the Rugarara in Nyanga.
84. It was then agreed that the document will be taken to various political parties for their comments and input before the holding of the second All Stakeholders Conference.
85. Eventually, a second All Stakeholders Conference was convened in October of 2012 and once again there was no agreement on the question of devolution. It took a meeting that was called by the Principals on Thursday the 18th of January 2013 for the parties to eventually agree on the question of devolution which is then reflected in the New Constitution of Zimbabwe.
86. When COPAC completed its work, it produced a national report. I beg leave to incorporate herein as if specifically traversed, a copy of the national report produced by COPAC.
87. COPAC also produced a national statistical report version 1 and version 2 which were prepared for the October 2012 All Stakeholders Conference. The first version of the National Statistical Report summarises the results of the national outreach meetings at national level on issues to do with the founding values and principles and the preamble, arms of the State, systems of the government, Executive organs of the State, independent public officials, independent commissions, languages, arts and culture, traditional institutions, transitional mechanism, youth, women and gender, public finance, war veterans, land, natural resources, empowerment, environment, media, bill of rights, citizenship, religion, disabled, electoral systems, labour.

88. The report also summarises special submissions by selected constituencies including children, institutions, Parliament and the diaspora.
89. Version 2 of that report is detailed and reports on the views of children, the diaspora, Parliament as well as submissions that had been made to the COPAC website www.copac.org.zw.
90. I beg leave to incorporate herein as if specifically traversed copies of the National Statistical Reports. It was clear during the entire constitutional making exercise the elaborate and exhaustive processes that were engaged by COPAC which oversaw an outreach programme conducted over 90 days during which 4943 meetings were held in 1950 wards across the country. (See COPAC's final national report)
91. Furthermore despite consultations, there were extensive negotiations on key issues between the COPAC leadership itself consisting mainly of Edward Mkhosi, Douglas Mwonzora and Munyaradzi Paul Mangwana representing MDC Green, MDC-Tsvangirai and Zanu PF respectively.

The New Constitution as a Break from the Past

92. Thus as the national report of COPAC will show, the constitutional making process resulting in the current constitution was a difficult negotiated process with many ups and downs.
93. It is common cause that literally every provision was heavily contested. The Constitution itself, and the negotiations, were typical of a society in transition battling between the old rallies of the past characterised by violence, disunity, intolerance and disrespect and the quest to establish an even, equal free and democratic society.
94. The Constitution so agreed and put to the referendum sought to address the mischief of power concentrated in an individual; an imperial president; the mischief of regular constitutional amendments; the mischief of supremacy of individuals as opposed to the supremacy of the Constitution. The mischief of impunity and reckless indifference.
95. The new Constitution offered a major fundamental and defining break from the past. For instance in Chapter 1 it had what it described as founding provisions of the Constitution. These founding provisions include;
 - (a) The supremacy of the Constitution
 - (b) The rule of law
 - (c) Fundamental human rights and freedoms
 - (d) Separation of powers
 - (e) The nation's diverse cultural religion and traditional values

- (f) Recognition of the inherent dignity and worth of human beings
 - (g) The concept of free and fair elections
 - (h) The orderly transfer of power following elections
 - (i) Good governance
 - (j) The contemplation of the promotion and public awareness of the Constitution.
96. Apart from **Founding Provisions**, the Constitution also has a generous provision relating to Citizenship in **Chapter 3**, **Chapter 4** is an extremely comprehensive Declaration of Rights. The Executive is provided for under **Chapter 5** and for the first time in this country, terms of office are placed on the office of the Chief Executive Officer of the country. Legislative authority is bestowed in Parliament and Parliament alone has the right to make legislation. **Chapter 7 of the Constitution** deals with the elections and unlike in the past Constitution, the period in which an election has to be held is defined thus avoiding the debate that arose in the *Mawarire* case *supra*.
97. The **Judiciary** is established in **Chapter 8** and for the first time in the history of this country, a **Constitutional Court** is established. There are new, progressive and innovative ways of appointments of the members of judiciary which incorporate the concept of public interviews which makes the process of appointment of judges transparent and in line with principles of good governance.
98. **Chapter 11** deals with the security services sector and for the first time, term limits are placed on Service Chiefs with an Independent Complaint Mechanism set up in **Section 210 of the Constitution**.
99. Again for the first time in history of this country, an Intelligence Services is established in Part 4 of Chapter 11 of the Constitution, something that never existed.
100. In Chapter 12 of the Constitution, Independent Commissions are set up supporting democracy and these institutions include the Zimbabwe Electoral Commission; Zimbabwe Human Rights Commission; the Zimbabwe Gender Commission; the Zimbabwe Media Commission; and the National Peace and Reconciliation Commission.
101. In **Chapter 14**, a new concept of **devolution** is introduced with the setting up of fresh provincial structures in Zimbabwe. **Chapter 16** is significant in that it codifies and **Constitutionalises** the land reform programme whilst democratising the same to the extent that beneficiaries of the land reform programme are given security of tenure and the right to alienate agricultural land. See **Section 293**.
102. Thus, this Constitution is a major substantive and material break from the Lancaster House Constitution. One of the fundamental breaks it makes is the provisions in **Section 2** that confirms the Constitution of Zimbabwe as the Supreme Law of Zimbabwe and holds that any law practice, custom or conduct inconsistent with the it is invalid to the extent of the inconsistency. Further, it avoids the debate of vertical or horizontal application by holding in **Subsection 2** that the obligations imposed by

the 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 the same.

103. A significant point to note, with regards to the new Constitution, is the preamble of the New Constitution. That preamble captures the aspirations of the framers of the Constitution and the aspirations of the people of Zimbabwe, the mischief that they sought to deal with and the aspirational goals of that Constitution.

104. The preamble of that Constitution reads as follows;

“We the people of Zimbabwe, United in our diversity by our common desire for freedom, justice and equality, and our heroic resistance to colonialism, racism and all forms of domination and oppression, Exalting and extolling the brave men and women who sacrificed their lives during the Chimurenga / Umvukela and national liberation struggles, Honouring our forebears and compatriots who toiled for the progress of our country, Recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law, Reaffirming our commitment to upholding and defending fundamental human rights and freedoms, Acknowledging the richness of our natural resources, Celebrating the vibrancy of our traditions and cultures, Determined to overcome all challenges and obstacles that impede our progress, Cherishing freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny, Acknowledging the supremacy of Almighty God, in whose hands our future lies, Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work, And, imploring the guidance and support of Almighty God, hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land.”

105. There can be no question that the 2013 Constitution was a fundamental break with the past establishing a Constitution that was entrenched, a Constitution with basic structural features, a Constitution that establishes consistency, a Constitution that streamlined power and a constitution with a dream and a vision.

106. That dream and a vision, is perhaps codified in Section 8 of the same which reads as follows;

“Objectives to guide State and all institutions and agencies of government

(1) *The objectives set out in this Chapter guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives.*

(2) *Regard must be had to the objectives set out in this Chapter when interpreting the State's obligations under this Constitution and any other law."*

107. Thus the establishment, enhancement and promotion of a sustainable just, free and democratic society in which people enjoy prosperous happy and fulfilling lives, is the ultimate national objective.
108. The State and institutions, in Section 81(8)(1) of the Constitution, are thus enjoyed at every level to formulate and implement and policy decision that lead to the establishment of this just free and democratic society.
109. I call it the Zimbabwe utopia.
110. The New Constitution that was adopted, was eventually submitted to a referendum on the 15th of March 2015. In this referendum 3.3 million Zimbabweans representing 94.4% of the people who voted approved the Constitution in a referendum.
111. This fact is important.

The Basic Structure of the Constitution

112. I respectively contend that the Zimbabwean Constitution, like any other Constitution, has basic structures, which if altered deface the Constitution completely and it ceases to exist.
113. By basic structure, I refer to those values and principles which form the core of the Constitution.
114. I refer to those key essential features of the Constitution which should they be repealed or dislodged or amended, the Constitution becomes indistinguishable and loses its identity.
115. Put differently I contend that in any Constitution there are issues that are of critical importance and important characteristics of a Constitution which if they are removed the Constitution loses its value.
116. I contend that the basic structures of this Constitution are essentially five. They are contained in Section 2 and 3 of the Constitution of Zimbabwe. They include;
 - (i) The doctrine of supremacy of the Constitution;
 - (ii) The rule of law and the doctrine of legitimacy;
 - (iii) The principle of separation of powers;

- (iv) The principle of good governance defined to include transparency, accountability, free, fair, regular elections and the transfer of power; and
 - (v) Recognition and respect of the liberation struggle.
117. I contend that when one traces the remainder of the Constitution each of the provisions in that Constitution can be classified under these five pillars.
 118. I contend that any attempt to emasculate a provision that has a direct impact on these basic structures and essential features has the net effect of fundamentally altering that Constitution, defacing that Constitution, delegitimizing that Constitution and therefore ultimately becomes unlawful.
 119. I contend that any Constitutional amendment that seeks to alter the basic structure of the Constitution as identified above is on its own unconstitutional.
 120. It fails to meet the test set out in Section 117 (20 (b) of the Constitution.
 121. I contend that any Constitutional Amendment is unconstitutional once it
 - (a) effectively alters the basic essential principles of the Constitution is not permissible.
 - (b) Any amendment that destroys the foundational values of the Constitution is not permissible
 - (c) Any amendment that undermines the basic values of the Constitution is not permissible.
 122. Put in simple terms if certain fundamental foundational principles, values and norms are seriously altered, the life of the Constitution comes to an end and from its ashes, a new monster emerges.
 123. A key important feature of the Constitution and a key important structure of the Constitution is the doctrine of separation of powers.
 124. That doctrine is entrenched in this Constitution.
 125. That doctrine oversees the creation of independent arms of the State namely the Executive, the Judiciary and the Legislature.
 126. The executive is defined in Chapter 5 of the Constitution of Zimbabwe. Its functions are limited to those that are outlined in Section 110.
 127. Another key important pillar of the Constitution is judiciary independence.
 128. Its independence is outlined in Chapter 8 of the Constitution of Zimbabwe.

129. Section 164 of the Constitution says:

“(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.

(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—

(a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;

(b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.

(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.

(4) Nothing in this section is to be construed as preventing an Act of Parliament from vesting functions other than adjudicating functions in a member of the judiciary, provided that the exercise of those functions does not compromise the independence of the judicial officer concerned in the performance of his or her judicial functions and does not compromise the independence of the judiciary in general.”

130. The legislature in turn is provided for in Chapter 6 of the Constitution of Zimbabwe.

131. Section 117 of the Constitution reads as follows:

“(1) The legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature.

(2) The legislative authority confers on the Legislature the power—

(a) to amend this Constitution in accordance with section 328;

(b) to make laws for the peace, order and good governance of Zimbabwe; and

(c) to confer subordinate legislative powers upon another body or authority in accordance with section 134.”

132. What is critical from Section 117 is that the Legislature makes laws for the peace, order and good governance of Zimbabwe.
133. This means that Parliament does not have a blank cheque. It cannot make a law that is against the good governance of Zimbabwe.
134. I contend that any law that alters the basic structure of the Constitution of Zimbabwe, is an infringement of Section 117 (1) (a) of the Constitution of Zimbabwe.
135. I further contend that the judiciary, as the guardian of the principle of the supremacy of the Constitution has a right, a duty and an obligation to determine whether a law passed by Parliament, is consistent with good governance as is spelt out in section 117 (1) (b) of the Constitution of Zimbabwe.
136. I contend that any law, that is against peace order and good governance in Zimbabwe is not a valid law.
137. I contend specifically for the purposes of this application that a law that alters the Constitution and affects the basic structure of the Constitution is against good governance and in breach of Section 117 of the Constitution of Zimbabwe.

Separation of Powers and Judicial Independence

138. In the old Lancaster House Constitution, separation of powers was blurred. Particularly after the conflation of the office of the Prime Minister and the titular President done in 1987 with Constitutional Amendment No 9 to the Zimbabwean Constitution which abolished the institution of the Prime Minister and created the office of an Executive President.
139. Where power is literally monopolised in one office, there is no separation of powers. There are no checks and balances.
140. The new Zimbabwean Constitution of 2013, created a clear regime of separation of powers with consequent checks and balances.
141. Thus, Executive power itself was limited. The Executive does not have a blank cheque.
142. Whilst in Section 110 the Executive has right to make decisions on policy matters and those issues which are the prerogative of the State, checks and balances have been placed on areas which in the past have caused contention.
143. Thus for instance, unlike the old Constitution everything that the Executive does is now subject to constitutional or judicial review unlike the old Constitution which in

Section 32 (k) excluded the courts in inquiring on the legitimacy of some executive actions.

144. The power to declare war, the power to declare state of emergency is now subject to checks and balances.
145. The unfettered power of the President to appoint every office and discipline in the Constitution has been taken away.
146. Whereas the old Constitution had an Attorney General that could be fired, the new Constitution has a National Prosecuting Authority and an independent Prosecutor General who was not appointed by the President.
147. The clearest example of the new Constitution being a departure from the past is the Section dealing with the judiciary and the appointment of judges.
148. The initial Zimbabwean Constitution in Section 84, held that the Chief Justice shall be appointed by the President acting on the advice of the Prime Minister but before tendering his advice the Prime Minister shall consult the Judicial Services Commission and consider any recommendations the commission will make.
149. With regards to other judges of the High Court and the Supreme Court, these were appointed by the President acting on the advice of the Judicial Services Commission. Furthermore section 86 of the Constitution made it clear that the tenure of office of a judge was the age of 65 years which could be extended to 70 upon an election by the judge provided that an election was subject to the submission and acceptance acting on the advice of the Judicial Services Commission.
150. I reproduce here, Section 86 of the old Constitution which now, finds itself being reproduced by the Respondents as the new Section 186, as amended by Constitutional Amendment No 2 of 2021.
151. It is regrettable and sad that the Respondents are taking us to a dark contested past which I dealt with in 2013.
152. Thus Section 86(1) of the Lancaster House Constitution read as follows:

“Subject to the provisions of Section 87, a judge of the High Court shall retire when he attains the age of sixty – five years unless before he attains the age, he has elected to retire on attaining the age of seventy years:

Provided that –

(a) An election under this subsection shall be subject to the submission to, and acceptance by, the President acting on the advice of the Judicial Services

Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office;

(b) The provisions of this subsection shall not apply to an acting judge.”

153. The 2013 Constitution changed that. In terms of Section 181, all judges are appointed by an elaborate process of public interviews conducted by the Judicial Services Commission who then submit names to the President whose role becomes normative.

154. The new Zimbabwean Constitution adopted in 2013, fundamentally changed the provisions of 84 and 86 of the old Lancaster House Constitution. The old Section 84, was replaced with a new Section 180. Section 180 of the 2013 Constitution read as follows:

“180 Appointment of judges

(1) *The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section.*

(2) *Whenever it is necessary to appoint a judge, the Judicial Service Commission must—*

(a) *advertise the position;*

(b) *invite the President and the public to make nominations;*

(c) *conduct public interviews of prospective candidates;*

(d) *prepare a list of three qualified persons as nominees for the office; and*

(e) *submit the list to the President; whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.*

(3) *If the President considers that none of the persons on the list submitted to him in terms of subsection (2)(e) are suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.*

(4) *The President must cause notice of every appointment under this section to be published in the Gazette.”*

155. Section 186 of the 2013 Constitution equally reads as follows;

“186 Tenure of Office of Judges

- (1) *Judges of the Constitutional Court are appointed for a nonrenewable term of not more than fifteen years, but—
 - (a) they must retire earlier if they reach the age of seventy years; and
 - (b) after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment.*
- (2) *Judges of the Supreme Court and the High Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire.*
- (3) *A person may be appointed as a judge of the Supreme Court or the High Court for a fixed term, but if a person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy years even if the term of his or her appointment has not expired;*
- (4) *Even though a judge has resigned or reached the age of seventy years or, in the case of a judge of the Constitutional Court or a judge referred to in subsection (3), reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.*
- (5) *A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission.*
- (6) *The office of a judge must not be abolished during his or her tenure of office.”*

156. This provision thus entailed that the President has no control over the appointment of judges.
157. The mischief that the 2013 Constitution tried to deal with was to create a break with the past in respect of where those appointed on the judiciary became extensions of the Executive or were deemed to be extensions of the judiciary.
158. In 2017 for instance there was legal drama with regards to the appointment of the Chief Justice pursuant to the retirement of the late Chief Justice Chidyausiku.
159. It was perceived at the time that the Executive had its own preference other than Justice Luke Malaba.
160. This subjective process was highlighted in a High Court Judgement in the matter of **Zibani v Juducial Services Commission HH-797-16.**

161. That judgement tried to stop judicial interviews that were being conducted by the Judicial services Commission at the Harare International Conference Centre.
162. Fortunately the Judicial Services Commission appealed against the High Court decision and interviews continued.
163. One or two of the candidates boycotted the public interview process resulting in the eventual successful appointment of Chief Justice Malaba pursuant to an important judgement of this Honourable Court in the **JSC v Zibani** which was argued down on the 13th of January 2018.
164. The Zibani case, had its starting point, amendments to the Constitution that were made in Constitutional Amendment No 1 of 2017.
165. The process outlined in Section 180 of the 2013 Constitution was replaced by a new Section 180 which reads as follows;

"180 Appointment of Judges

- (1) *The Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court and all other judges are appointed by the President in accordance with this section.*
- (2) *The Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court shall be appointed by the President after consultation with the Judicial Service Commission.*
- (3) *If the appointment of a Chief Justice, Deputy Chief Justice or Judge President of the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (2), the President shall cause the Senate to be informed as soon as is practicable: Provided that, for the avoidance of doubt, it is declared that the decision of the President as to .such appointment shall be final.*
- (4) *Whenever it is necessary to appoint a judge other than the Chief Justice, Deputy Chief Justice or Judge President of the High Court, the Judicial Service Commission must-*
 - (a) *advertise the position: and*
 - (b) *invite the President and the public to make recommendations; and*

- (c) *conduct public interviews of prospective candidates; and*
- (d) *prepare a list of three qualified persons as nominees for the office; and*
- (e) *submit the list to the President; whereupon, subject to subsection*

(5) *If the President considers that none of the persons on the list submitted to him or her in terms of subsection (4)(e) are suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.*

(6) *The President must cause notice of every appointment under this section to be published in the Gazette.*

(7) *The offices of senior judge of the Labour Court and senior judge of the Administrative Court must be filled by another judge or an additional or acting judge, as the case may be, of the court concerned, and are appointed by the Chief Justice after consultation with the Judicial Service Commission."*

- 166. It is my respectful contention that the provisions of Constitutional Amendment No 1 of 2017 cited above fundamentally alter the basic structure of the 2013 Constitution.
- 167. By restoring judicial appointments of the Chief Justice and Deputy Chief Justice to the President, who makes a decision on criteria that is unknown without process of public interviews, the doctrine of separation of powers is breached as well as the demonopolisation of powers that had been done in the 2013 Constitution.
- 168. It affects judicial independence.
- 169. Put simply, one can't pass Constitutional Amendment No 1 of 2017 without defacing the 2013 Constitution.
- 170. I contend that Constitutional Amendment No 1 of 2017, is fundamentally in breach of Section 114 of the Constitution of Zimbabwe. It is against the people and the good governance of Zimbabwe. It couldn't have been made.
- 171. The amendments in Constitutional Amendment No 1 of 2017 were later followed by the Amendments in Section 186 of the Constitution in Constitutional Amendment No 2.

172. Whereas, prior to Constitutional Amendment No 1 the 2013 and current Zimbabwean Constitution in Section 186 read as follows:

“(1) Judges of the Constitutional Court are appointed for a nonrenewable term of not more than fifteen years, but—

(a) they must retire earlier if they reach the age of seventy years;

(b) after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment.

(2) Judges of the Supreme Court, the High Court and any other Judges hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire.

(3) A person maybe appointed as a judge of the Supreme Court, the High Court and any other courts for a fixed term, but if a person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy years even if the term of his or her appointment has not expired.

(4) Even though a judge has resigned or reached the age of seventy years or, in the case of a judge of the Constitutional Court or a judge referred to in subsection (3), reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.

(5) A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission.

(6) The office of a judge must not be abolished during his or her tenure of office.”

173. Constitutional Amendment No 2, which was passed by Parliament in May of 2021 and became law on the 7th of May 2021 when it was gazetted as Constitutional Amendment No 2 of 2021 now reads as follows;

“186 Tenure of office of judges

(1) Judges of the Constitutional Court are appointed for a nonrenewable term of not more than fifteen years, but—

(a) they must retire earlier if they reach the age of seventy years, unless they elect to continue in office for a further period of one year at a time not exceeding a continuous period of an additional five years, in which case each such election shall be subject to the submission to, and acceptance by, the President, after consultation with the Judicial Service Commission of Zimbabwe and producing of a medical report

as to the mental and physical fitness of the judge so to continue in office;

(b) after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment.

(2) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must either retire or elect to continue in office for a further period of one year at a time not exceeding a continuous period of an additional five years, in which case each such election shall be subject to the submission to, and acceptance by, the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office.

(3) Judges of the High Court and any other judges hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire.

(4) A person may be appointed as a judge of the Supreme Court, the High Court and any other court for a fixed term, but if a person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy-five years (in the case of a judge of the Supreme Court) or seventy years (in the case of a judge of the High Court or any other court) even if the term of his or her appointment has not expired.

(5) Even though a judge has resigned or reached the age of retirement or, in the case of a judge of the Constitutional Court, reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.

(6) A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission.

(7) The office of a judge must not be abolished during his or her tenure of office.”

174. The new Section 186 is unbelievably crude and in violation of the old section 186 of the 2013 Constitution. It's a fundamental departure from the original section 186 of Constitution.

175. It eliminates and liquidates the former provision and creates a new regime of imperial authoritarian consolidation through the office of an Executive President something which was against the essence of the Old Constitution.
176. The new section extends the tenure of Constitutional and Supreme Court judges to 75.
177. It now makes the appointment of judges to the Constitutional Court after the age of 70 subject to the sole concern of the President.
178. There is no criteria in respect of which the president rejects a judge or accepts the same after the age of 70.
179. This is sad and unacceptable.
180. Furthermore, notwithstanding the provisions of section 328(7) of the Constitution which makes it clear that where there is a change in the Constitution increasing the term of office of an individual, the same shall not benefit the incumbent, Section 186 (4), creates the impression that the incumbents are intended to benefit.
181. Section 186(4) is dangerous. It is an attempt to side step section 328(7), without going to a referendum or without following any of the procedures for amending section 328.
182. Section 186(4) on its own is therefore unconstitutional.
183. Another dangerous provision of Constitutional Amendment No 2 is the new section 180(4) (a) which was introduced by section 12 of Constitutional Amendment No 2 Act.
184. This states that:
- “(4a) Notwithstanding subsection (4) the President, acting on the recommendation of the Judicial Service Commission, may at any time whenever it is necessary to do so appoint a sitting judge of the Supreme Court or High Court, Labour Court or Administrative Court to be a judge of the next higher court.”*
185. This provision is a restoration of the old provisions in the Lancaster House Constitution cited above. It is an unconstitutional amendment to the Constitution.
186. The position that section 186(4) overrides section 328(7), is the understanding by the Respondents. This has become self evident in the fiasco concerning the appointment or reappointment of the 1st Respondent as a Chief Justice pursuant to his turning 70 on the 15th of May 2021.

187. I attach hereto marked Annexure 'A' a self explanatory letter written by the President of the Republic of Zimbabwe on the 11th of May 2021 purportedly appointing Chief Justice Luke Malaba as Chief Justice for a further term of five years ending when he turns 75.
188. There is no question therefore that Constitutional Amendment No 2 of 2021 like Constitutional Amendment No 1 of 2021, fundamentally alters the basic structure of the 2013 Constitution.
189. It destroys the doctrine of separation of powers.
190. It destroys the checks and balances put in the new Constitution. It repersonalises in the office of the President appointments which had now been institutionalised and made transparent and accountable.
191. The appointment of judges is no longer transparent and accountable. It is now subject to a subjective criteria in the mind of the President alone.
192. Moreover, this is clearly in breach of the principles of good governance which is the basic criteria of passage of any law.
193. I therefore contend that both Constitutional Amendment No 1 and Constitutional Amendment no 2 are unconstitutional amendments to the Constitution.
194. They unarguably alter the basic structure of the Constitution.
195. Further they are in breach of the good governance provision in the Constitution.

The Amendments Pertaining to the Prosecutor General

196. I contend that the amendments pertaining to the appointment of the Prosecutor General, like the provisions dealing with judges, undermines the basic structure of the Constitution. They are not consistent with section 117 (2) (b) of the Constitution.
197. The original section 259(3) of the 2013 Constitution made it clear that the Prosecutor General was appointed by the President on the advice of the Judicial Services Commission following the procedure for the appointment of judges.
198. Section 259(7) also made it clear that the provisions relating to the removal of a judge from the office shall apply to the removal of the Prosecutor General.
199. Section 16 of Constitutional Amendment No 1 amends section 259 in such a manner that the procedure following the appointment of a judge that is to say public

interviews, no longer applies. The Prosecutor General is now appointed by the President simply on the advice of the Judicial Services Commission.

200. Furthermore section 259 (7) which made it clear that a Prosecutor General could only be removed on grounds similar to that of a judge, has been replaced by a new section 259 (7) which places the discretion of removing a Prosecutor General entirely at the discretion of the President.
201. In the text of the this application, I have highlighted various areas of the Constitution making process that demonstrates that the Amendments pertaining to the Prosecutor General go to the basic structure of the Constitution and deface the same.

The Amendments pertaining to Parliament's Oversight over the Executive.

202. This is one of the most dangerous and pervasive amendments contained in the Constitutional Amendment No 2. The current
Constitution in section 327 makes it clear that an international treaty which has been concluded or executed by the President or under the President's authority does not bind Zimbabwe until it has been approved by Parliament. It further makes it clear section 327 (3) that an agreement which is not an international treaty but which;
- (a) Has been concluded or executed by the President or under the President's authority with one or more foreign organisations;
- (b) Imposing fiscal obligations of Zimbabwe does not bind Zimbabwe until it has been approved by Parliament.
203. Section 21 of Constitutional Amendment No 2, now excludes from Parliamentary scrutiny and from binding Zimbabwe, loan agreements and guarantees that are referred to in section 300(3) and 300(4) of the Constitution of Zimbabwe.
204. Surely if Parliament cannot oversee loan agreements and guarantees executed by Government, then the doctrine of separation of powers is gone.
205. Parliament becomes pointless.
206. An Executive cannot be given a blank cheque of imposing indebtedness on a country.
207. The amendments made to section 327 fundamentally deface the Constitution. They are regressive.

Amendments Dealing with Devolution Contained in Chapter 14 of the Constitution.

208. As indicated above, the issue of devolution was popular and hotly contested. It was only resolved after a meeting of the negotiators, the management committee and the principles that was held at State house in January of 2013.
209. The provisions in the 2013 Zimbabwean Constitution made executive Mayors of Bulawayo and Harare the two metropolitan cities the chairpersons of the metropolitan councils.
210. The provisions in the 2013 Constitution also provided that Members of Parliament were members of the respective metropolitan councils or provincial councils where they came from.
211. This provision has now been deleted in Constitutional Amendment No 2.
212. I contend that this is a fundamental redrafting of the 2013 Constitution.
213. It's an assault on the basic structure of that Constitution.

Provisions Relating to Running Mates

214. The running mate provisions were inserted in the Constitution for the stability and good order of the country. The mischief pertained subjectively to President Mugabe who had been in office for such a long time. It was therefore felt that the country adopts a presidential system where the running mate would automatically become the president upon the demise of an incumbent.
215. The new provision now creates uncertainty and instability. Like the Lancaster House Constitution it now shifts the burden of succession to a political party. Those political parties are often fractured and divided and advancing limited party interests instead of national interests.
216. Therefore the old uncertainty that gripped the country particularly in the later years of President Mugabe's governance and that directly led to the military coup of November 2017 is now back with us.
217. I contend that the amendments therefore made, are such a fundamental defacement of the 2013 Constitution in its undulated form and are in any event a breach of section 117(2)(b) of the Constitution.

Disposition

218. For the reasons argued above, I contend that the amendments contained in Constitutional Amendments No 1 and 2, are a fundamental departure from the 2013 Constitution. They attack and impugn on the basic structure of the Constitution and in any event they are a breach of section 117(2) (b) of the Constitution.
219. I therefore pray for an order;
- (a) Setting aside Constitutional amendment No 1 in its entirety and
 - (b) Setting aside Constitutional amendment No 2 in its entirety.

Separate Ground for the Setting Aside of the Constitutional Amendment No 1 Of 2017

220. Constitutional Amendment No 1 of 2017 has a separate problem of its own. Constitutional Amendment No 1 of 2017 was passed in Parliament in 2017.
221. However, the Bill was not passed with the requisite two thirds majority in the National Assembly and in the Senate as is required by section 328 of the Constitution of Zimbabwe.
222. In the matter of Innocent **Gonese and Jessie Majome v the Speaker of Parliament and Ors** CCZ57/2017 and CCZ58/2017, the Applicants challenged the Constitutional passage of Constitutional Amendment No 1 of 2017.
223. Although the matter was brought in 2017 and argued in January of 2018, the 1st Respondent only delivered judgement of the Constitutional Court on the 30th of March 2020.
224. The judgement that was handed down on the 30th of March 2020, is judgement Number CCZ4/2020.
225. Notwithstanding that Parliament had been dissolved on the 29th of July 2018 to pave way for the 2018 Harmonised election and notwithstanding the provision of Section 147 of the Constitution of Zimbabwe, the Constitutional Court directed that the Senate conduct a vote within 6 months from the declaration of invalidity, to pass Constitutional Amendment No 1.
226. The relevant disposition in judgment CCZ4/2020 read as follows:

“It is declared that the passing of Constitutional Amendment Bill (No. 1) of 2017 by the Senate on 01 August 2017 was inconsistent with the provisions of s 328(5) of the Constitution, to the extent that the affirmative votes did not reach the minimum threshold of two-thirds of

the membership of the House. Constitutional Amendment Bill (No. 1) of 2017 is declared invalid to the extent of the inconsistency. The declaration of invalidity shall have effect from the date of this order but is suspended for a period of one hundred and eighty days, subject to the provisions of paragraph 1(b).

Accordingly, the following order is made -

- (a) The proceedings in the Senate on 01 August 2017 when Constitutional Amendment Bill (No. 1) of 2017 was passed be and are hereby set aside, for the reason that a two-thirds majority vote was not reached in that House.*
- (b) The Senate is directed to conduct a vote in accordance with the procedure for amending the Constitution prescribed by s 328(5) of the Constitution within one hundred and eighty days of this order, failing which the declaration of invalidity of Constitutional Amendment Bill (No. 1) of 2017 in paragraph (1) shall become final.*
- 2. The applicants' allegation that there was no vote in the National Assembly on 25 July 2017 when Constitutional Amendment Bill (No. 1) of 2017 was passed be and is hereby dismissed for lack of merit.*
- 3. The applicants' allegation that a two-thirds majority was not reached in the National Assembly on 25 July 2017 when Constitutional Amendment Bill (No. 1) of 2017 was passed be and is hereby dismissed for lack of merit.*
- 4. There is no order as to costs."*

227. The Senate failed to comply with this order within the initial 6 months granted resulting in the Constitutional Court further extending that period, in a judgement that was handed down in February 2021 being Judgement No CCZ 2/21.

228. The Constitutional Court, in a bench presided over by Justice Makarau, Justice Patel and Justice Gorowa with Justice Gorowa dissenting, directed and provided the Senate a further six months to pass Constitutional Amendment No 1.

229. Pursuant to this order the Senate eventually passed Constitutional Amendment No 1 of 2017 on the 6th of April 2021.

230. It is our respectful contention that the disposition of the Constitutional

Court in Judgement No CCZ4/2020 extending the time in which the Senate could pass Constitutional Amendment No 1, is a legal nullity in that it breaches and offends Section 147 of the Constitution.

231. I therefore seek a specific order in that respect.
232. Further, to the extent that the Bill was passed in the Senate on the 4th of May 2021 after it had lapsed in 2018 pursuant to the provisions of Section 147 of the Constitution I seek an order declaring that Constitutional Amendment No 1 of 2017 which was gazetted in 2017 be and is hereby set aside for that reason.
233. I therefore seek and pray for an order in terms of the draft.

Jurisdiction of This Honourable Court

234. In terms of Section 167(2)(d) this Honourable Court has jurisdiction to determine whether Parliament or the President has acted in conformity with this Constitution.
235. I contend that Parliament and the President, breached the Constitution of Zimbabwe by:
- (a) Passing laws, that is to say Constitutional Amendment No 1 and Constitutional Amendment No 2, that are;
 - (i) In breach of the provisions of Section 114 of the Constitution of Zimbabwe in that they are against the people and good governance of Zimbabwe.
 - (ii) In passing laws that breach the foundational values and principles of the Constitution codified in Section 2 and 3 of the Constitution of Zimbabwe.
 - (b) In other words the President and Parliament, passed unconstitutional constitutional amendments that are in breach of the basic structure of the Constitution of Zimbabwe
236. Further as against Constitutional Amendment No 1, I contend that the President and Parliament acted unlawfully in passing a law that was in breach 147 of the Constitution of Zimbabwe.

LOCUS STANDI

237. As indicated above, the actions of the Respondents have breached the Constitution of Zimbabwe.
238. I am entitled to a declaration that the Constitution has been breached. 239. The Constitution is a matter of public importance. The Constitution is the most important document in any country.
240. It is a social contract between citizens and those governing the same.
241. As a Zimbabwean and a concerned citizen I have a right to bring the instant application.
242. In the circumstances I pray for an order in terms of the draft.

**THUS SWORN AND SIGNED AT HARARE ON THIS DAY OF JUNE
2021.**

ERIC TAURAI MATINENGA

Before me:-

COMMISSIONER OF OATHS

1ST APPLICANT
2ND APPLICANT

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

In the matter between:-

ERIC TAURAI MATINENGA
FIRINNE TRUST operating as VERITAS
VALERIE INGHAM-THORPE
BEATRICE MTETWA

3RD APPLICANT
4TH APPLICANT

AND

LUKE MALABA N.O.
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
PARLIAMENT OF ZIMBABWE

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

DRAFT ORDER

AT HARARE

Before the Full Bench of the Constitutional Court
Mr Biti for the Applicant
.....for the Respondents

WHEREUPON after reading papers filed of record and hearing Counsel:

It is declared that:-

1. That the 2nd and 3rd Respondents failed to fulfil constitutional obligations in passing Constitutional Amendment No 1 of 2017 and Constitutional Amendment No 2 of 2021 in breach of Section 167(2)(d) of the Constitution.
2. Constitutional Amendment No 1 of 2017 passed by the Senate on the 6th of April 2021 and gazetted as law on the 7th of September 2017. And Constitutional Amendment No 2 of 2021 gazetted into law on the 7th of May 2021 be and are hereby set aside and be declared to be unconstitutional amendments on the basis that;

- (a) They are a fundamental breach of the **Basic Structure and Principles** of the Constitution founding values and principles of the Constitution contained in section 2 and 3 of the Constitution of Zimbabwe, and or;
- (b) They breach the provisions of section 117 (2) (b) of the Constitution of Zimbabwe.
3. That in any event Constitutional amendment No 1 of 2017, Gazetted on the 7th of September 2017 be and is hereby declared a nullity for being in breach of Section 147 of the Constitution of Zimbabwe.
4. That the part of the order in the Judgement of the Constitutional Court in the matter of **Innocent Gonese & Another v The Parliament of Zimbabwe Judgment No CCZ4/2020** extending the time in which the Senate could pass Constitutional Amendment No 1 be and is hereby set aside on the basis that it breaches Section 147 of the Constitution of Zimbabwe.
5. That the 3rd Respondent pays cost of suit.

BY THE JUDGE

REGISTRAR

**IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE**

In the matter between:-

**ERIC TAURAI MATINENGA
FIRINNE TRUST operating as VERITAS
VALERIE INGHAM-THORPE
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**3RD APPLICANT
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**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

1ST APPLICANT
2ND APPLICANT

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DATED AT HARARE ON THIS DAY OF JUNE 2021. _____

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 Applicants’ Legal Practitioners
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 28 Rowland Square, Milton
 Park
HARARE [TB/rnc/V14]

To: **The Registrar**
 Constitutional Court of Zimbabwe
HARARE

**IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE**

In the matter between:-

**ERIC TAURAI MATINENGA
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LUKE MALABA N.O.

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

PARLIAMENT OF ZIMBABWE

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

**CONSTITUTIONAL COURT APPLICATION FOR A DECLARATOR IN TERMS OF SECTION
167(2)(D) OF THE CONSTITUTION**

1ST APPLICANT
2ND APPLICANT



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