

REPORTABLE (7)

- (1) LIBERAL DEMOCRATS
(2) REVOLUTIONARY FREEDOM FIGHTERS
(3) VUSUMUZI SIBANDA (4) LINDA MASARIRA
(5) BONGANI NYATHI

v

- (1) PRESIDENT OF THE REPUBLIC OF ZIMBABWE E.D. MNANGAGWA N.O.
(2) VICE PRESIDENT OF THE REPUBLIC OF ZIMBABWE RTD. GENERAL
CONSTANTINO G. CHIWENGA N.O.
(3) THE ZIMBABWE DEFENCE FORCES
(4) SPEAKER OF THE NATIONAL ASSEMBLY N.O.
(5) ROBERT G. MUGABE

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, MAY 24 & JULY 16, 2018

No appearance for the applicants

No appearance for first, second, third and fifth respondents

S J Chihambakwe, with him *A Demo*, for the fourth respondent

Before: MALABA CJ, In Chambers

On 1 March 2018 the applicants filed a chamber application for leave for direct access to the Constitutional Court in terms of r 21(2) of the Constitutional Court Rules SI 61 of 2016 (“the Rules”). The first and second applicants are political parties represented by the third and fourth applicants respectively. The fifth applicant is a political activist. He is not a member of any of

the political parties. It is not explained in the papers why the political parties were joined with him in the making of the application.

From an affidavit of service deposed to by the fourth applicant, service of the application was effected on all the respondents on 2 March 2018. The fourth respondent filed the notice of opposition on 12 March 2018. The hearing of the matter was set down for 24 May 2018 at 11:00 am. The notices of set down of the matter for hearing were sent out on 14 May 2018. On that day the applicants filed what they called a notice of withdrawal of the application. The parties had been directed to file heads of argument by not later than 4 pm on 18 May 2018. The fourth respondent had filed heads of argument on 17 May 2018.

On 17 May 2018 the fourth applicant in no uncertain terms disclaimed the notice of withdrawal which was filed with the registrar on 14 May 2018. Speaking on behalf of all the applicants, through an article published in a local newspaper, she made serious allegations of improper conduct against the registry staff at the Constitutional Court. The allegations were that the officials had colluded with state security agents and caused the papers relating to the case to disappear. The allegations were made despite the fact that the matter was still on the Court's roll pending hearing on 24 May 2018. The Court had not at any time indicated a change in the scheduled hearing of the case.

On 23 May 2018 the registrar received a letter written on behalf of the first applicant confirming that the application had been withdrawn "to allow individuals to pursue their interests independently".

On the day of the hearing of the matter, all the applicants were in default. There was also no appearance for the first, second, third and fifth respondents. Satisfied that all the parties had been served with the notice of set down, the Court proceeded to hear submissions from counsel for the fourth respondent, who asked the Court to look into the merits of the application. After hearing submissions on behalf of the fourth respondent, judgment was reserved.

FACTUAL BACKGROUND

The main application the applicants intended to place before the Court was premised on the interpretation of the circumstances of the termination of the fifth respondent's presidency. The applicants accept that the presidency came to an end as a result of the written notice of resignation from office addressed to the Speaker of the National Assembly by the fifth respondent on 21 November 2017.

According to the applicants, the resignation from office by the former President was a direct result of the military action of 14 November 2017, known as "Operation Restore Legacy". The applicants allege that it was the presence of military vehicles in the streets of Harare between 14 and 21 November 2017 that caused the former President to resign from office. Their contention was that the resignation was not a result of exercise of free will.

The applicants were also of the view that the impeachment proceedings commenced by the joint sitting of the Senate and the National Assembly for removal of the former President from office were not in accordance with the Constitution. They said the impeachment process was intended to aid and abet takeover of power by the military. The contention was that the events connected with the transfer of state power following the resignation of the former

President, including assumption by the first respondent of the office of President, were constitutionally invalid.

The relief sought in the main application would be by an order in the following terms:

“AFTER READING DOCUMENTS FILED OF RECORD

IT IS HEREBY ORDERED THAT:

1. The deployment of the third respondent by the second respondent or any of his subordinates in pursuance of orders issued by the second respondent in the streets of Harare and other places in Zimbabwe including the Zimbabwe Broadcasting Corporation, the fifth respondent’s residence and other key government sites on the 14 and 15 November 2017 was unlawful and is in contravention of the Constitution of the Republic of Zimbabwe.
2. That the forced takeover of the state of Zimbabwe by the third respondent as announced by same through a broadcast on Zimbabwe Broadcasting Corporation on the 15th November 2017 is unlawful and in contravention of the Constitution of the Republic of Zimbabwe.
3. That any further or subsequent actions taken by any of the second and third respondents in pursuance of their objectives here stated or not and the installation of the first respondent as President and all such following actions in forming a government are unconstitutional and not in the spirit of the Constitution of Zimbabwe.
4. That the current government headed by the first respondent cannot preside over the forthcoming elections or continue any other day in office considering the unlawfulness and unconstitutionality of their actions but that such occupation of government by the above mentioned be set aside and the Constitutional Court order the formation of a Transitional Authority by all political players in Zimbabwe with equal participation for a given period of time to lead the country into elections having addressed the pertinent issues of electoral reforms and patronage appointments in strategic institutions of governance which has always been a thorny issue in the country.
5. That such Transitional Authority as appointed should last for an adequate period of time to address the issues above and such period to be between twelve and twenty-four months.
6. That the fourth respondent failed to perform its duties in terms of sec 119 of the Constitution of -

- i. Protecting the Constitution and promoting democratic governance,
 - ii. Ensuring that the provisions of the Constitution are upheld and all institutions and agencies of government at every level act constitutionally and in the national interests – in that it:
 - b. Did not challenge the actions of the army in November 2017 and beyond that
 - c. Participated and allowed the swearing in of the First respondent as President.
 - d. It allowed the swearing in of army personnel into Ministerial positions against army not serving in civilian institutions.
 - e. It allowed without challenging the illegal and unconstitutional change of government by the first respondent, the second respondent and itself the fourth respondent represented by its head.
7. There is no order of costs.”

The question of the lawfulness of the military action of 14 and 15 November 2017 was determined by the High Court. In the case of *Sibanda & Anor v President of the Republic of Zimbabwe N.O. & Ors* HC 1082/17, the High Court on 24 November 2017 made the following order:

“WHEREUPON, after reading documents filed of record, and hearing counsel

IT IS ORDERED BY CONSENT THAT:

1. The actions of the Defence Forces of Zimbabwe in intervening to stop the take-over of the first respondent’s constitutional functions by those around him are constitutionally permissible and lawful in terms of section 212 of the Constitution of Zimbabwe in that:
 - a. They arrest the first respondent’s abdication of constitutional function, and
 - b. They ensure that non-elected individuals do not exercise executive functions which can only be exercised by elected constitutional functionaries.

IT IS CONSEQUENTLY ORDERED THAT:

2. The actions of the Defence Forces being constitutionally valid, the second respondent has the right to take all such measures and undertake all such acts as will bring the desired end to its intervention.”

The applicants cannot seek to have the question of the constitutionality of the military action enquired into by the Court whilst the order of the High Court determining the same issue is extant.

In opposing the application, the fourth respondent took as a point *in limine* the fact that the applicants had failed to comply with the requirements of r 21(3) (a) and (c) of the Rules. The rule requires that an application for direct access should state the grounds on which it is alleged that it is in the interests of justice that an order for direct access be granted. An application for direct access must also indicate whether the matter can be dealt with by the Court without hearing of oral evidence. If the matter cannot be dealt with without hearing oral evidence, the applicant must show how such evidence would be adduced and any conflict of facts resolved. The point on the failure by the applicants to indicate whether the matter could be dealt with without hearing of oral evidence was taken in the light of the applicants’ allegation that the impeachment process was commenced at the behest of the military.

On the merits, the fourth respondent contended that the main application had no prospects of success because it was based on the allegation that the former President’s resignation from office was not voluntary. The fourth respondent said that the applicants did not deny the fact that the contents of the written notice of resignation and the signature of the former President on the document provided incontrovertible evidence of the exercise by him of free will in electing to resign from office. He averred that the resignation from office by the former President was in terms of s 96(1) of the Constitution.

The fourth respondent said the resignation from office by the former President created a vacancy in the office of President. In terms of para 14(4)(b) of the Sixth Schedule to the Constitution, the vacancy in the office of President had to be filled by a nominee of the political party which the former President represented when he stood for election. ZANU-PF is the political party the former President represented when he stood for election. It notified the Speaker of the name of the first respondent as its nominee within ninety days after the vacancy occurred in the office of President. The notification was in terms of para 14(5) of the Sixth Schedule. The fourth respondent said that the filling of the office of President by the first respondent following the resignation from office by the fifth respondent was constitutional. The first respondent assumed office as President after taking the oath of President in terms of s 94 of the Constitution.

The fourth respondent averred that the impeachment process began when the Senate and the National Assembly held a joint sitting to entertain and debate a motion in terms of which charges of serious misconduct, intentional failure to obey, uphold or defend the Constitution, and wilful violation of the Constitution were levelled against the former President. He denied the allegation that the joint sitting of the Senate and the National Assembly was at the behest of the military. He contended that Members of Parliament exercised the power vested in the two Houses by s 97(1) of the Constitution.

At the hearing of the application *Mr Chihambakwe* invited the Court to consider the applicants' conduct in the case. He argued that the application was frivolous and vexatious. The applicants must have realised the futility of founding the relief sought in the main application on the allegation that the former President signed the written notice of resignation from office under

duress. Without supporting evidence from the latter, the applicants must have known that they would not be able to prove the allegation. He said that the applicants “abused court process for political reasons”.

Mr Chihambakwe argued that there was lack of seriousness on the part of the applicants in the making of the application. He said any reasonable person would have appreciated the fact that the application could not produce an order for the establishment of a Transitional Authority if the resignation of the former President was declared unconstitutional. The *status quo ante* the resignation would have had to be restored. He argued that a litigant who abuses court process by pursuing a frivolous and vexatious cause should be punished with an order of costs on a legal practitioner and own client scale. He prayed for the dismissal of the application for an order for direct access to the Court with costs on the punitive scale.

DETERMINATION OF THE ISSUES

WHETHER THE WITHDRAWAL OF THE MATTER WAS VALID

The case of *Meda v Sibanda and Ors* 2016 (2) ZLR 232 (CC) is authority for the principle that a party cannot withdraw at will a matter that has been set down for hearing. The party intending to withdraw the matter must obtain the consent of the other party and the leave of the Court. The purported withdrawal would otherwise have no legal effect.

Rule 53(2) of the Rules gives effect to the principle by providing as follows:

“53. Withdrawal

(2) A person instituting any proceedings may, at any time before the matter has been set down and thereafter, by consent of the parties or leave of the Court, withdraw such proceedings, in either of which event he or she shall deliver a notice of withdrawal and shall embody in such notice an undertaking to pay costs.”

Rule 53(2) is subject to provisions of the Constitution. One such provision is s 93(3), which has been interpreted to mean that once a petition or application challenging the validity of an election of a President or Vice President has been lodged with the Constitutional Court it cannot be withdrawn.

In the *Meda* case *supra* at 234F-235B the Court said:

“While parties may at any time before a matter is set down, withdraw a matter, with a tender of costs, the same does not hold true for a matter that has already been set down for hearing. Once a matter is set down, withdrawal is not there for the taking.

The applicable principles are set out in DE Van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (2nd edn, Juta & Co Ltd, Cape Town, 2015) at p B1-304. A person who has instituted proceedings is entitled to withdraw such proceedings without the other party’s concurrence and without leave of the court at any time before the matter is set down. The proceedings are those in which there is *lis* between the parties, one of whom seeks redress or the enforcement of rights against the other. ...

Once a matter has been set down for hearing it is not competent for a party who has instituted such proceedings to withdraw them without either the consent of all the parties or the leave of the court. In the absence of such consent or leave, a purported notice of withdrawal will be invalid. The court has a discretion whether or not to grant such leave upon application. The question of injustice to the other parties is germane to the exercise of the court’s discretion. It is, however, not ordinarily the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one - see *Abramacos v Abramacos* 1953 (4) SA 474 (SR); *Pearson & Hutton NNO v Hitseroth* 1967 (3) 591 (E) at 593D, 594H; *Protea Assurance Co Ltd v Gamlase* 1971(1) SA 460 (E) at 465G; *Huggins v Ryan* NO 1978 (1) SA 216 (R) at 218D; *Franco Vignazia Enterprises (Pty) Ltd v Berry* 1983 (2) SA 290 (C) at 295H; *Levy v Levy* 1991(3) SA 614 (A) at 620B; Herbstein & Van Winsen ‘*The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*’ (5 ed) p 750.” (my emphasis)

The applicants took the view that the filing of a notice of withdrawal after a matter had been set down for hearing had the effect of terminating the proceedings before the Court. They were wrong. The act of setting the matter down for hearing puts it under the control of the Court.

A party who files a notice of withdrawal without the consent of the other parties or the leave of the Court after the matter has been set down and fails to attend at the hearing runs the risk of being found in default. The Court can, as happened in this case, exercise its discretion and proceed to hear submissions from the party who is before it on the day of the hearing.

WHETHER IT IS IN THE INTERESTS OF JUSTICE THAT THE APPLICATION FOR DIRECT ACCESS BE GRANTED

An application for direct access is regulated by the Rules. An applicant has to satisfy all the requirements of the Rules. The Court found that the applicants failed to comply with the Rules in this regard. There has to be actual compliance with the contents of the provisions of the applicable rule. It is not a question of mere formality. Direct access to the Constitutional Court is an extraordinary procedure granted in deserving cases that meet the requirements prescribed by the relevant rules of the Court.

Rule 21(3) of the Rules prescribes what must be contained in an application of this nature. It provides as follows:

“(3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out —

- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
- (b) the nature of the relief sought and the grounds upon which such relief is based; and
- (c) 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.”

The importance of the requirement that an applicant should show that it is in the interests of justice that the application be granted has been explained by Currie I and de Waal J in “*The Bill of Rights Handbook*” (6th ed, Juta & Co (Pty) Ltd 2013) at p 128. The learned authors said:

“Direct access is an extraordinary procedure that has been granted by the Constitutional Court in only a handful of cases. ... The Constitutional Court is the highest court on all constitutional matters. If constitutional matters could be brought directly to it as a matter of course, the Constitutional Court could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. Moreover, ... it is not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given.”

It is imperative for an applicant for an order for leave for direct access to indicate that it is in the interests of justice that an order for direct access be granted. Where the affidavit does not satisfy the requirement, the application has no basis. Rule 21(3)(a) requires that the founding affidavit should have regard to the matters that show why the interests of justice would be served if an order for direct access is granted. *Mr Chihambakwe* correctly pointed out that the applicants’ founding affidavit was wanting in that regard. The applicants did not provide the factual foundation on which the Court could make its decision whether the application, if granted, would be in the interest of justice. There was therefore no compliance with r 21(3)(a).

Rule 21(8) goes on to provide as follows:

“(8) In determining whether or not it is in the interest of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account —

- (a) the prospects of success if direct access is granted;
- (b) whether the applicant has any other remedy available to him or her;

(c) whether there are disputes of fact in the matter.”

After considering all the circumstances of the case, the Court came to the decision that the application had no prospects of success. Du Plessis M, Penfold G and Brickhill J, “*Constitutional Litigation*” (1 ed, Juta & Co Ltd, Cape Town, 2013) at p 89, explain the requirement that there be prospects of success in an application for direct access. They say:

“Another relevant consideration in deciding on direct-access applications is the prospects of success of a claim. This inquiry inevitably involves a degree of delving into the merits of the case and is in many respects similar to the inquiry that is conducted in relation to an appeal. ... An applicant for direct access must make out at least a *prima facie* case on the merits of the matter. ... Of course, predictably, the court will not be inclined to grant direct access to an applicant who is unlikely to be successful on the substantive issues raised as to do so would waste judicial resources. It should be also borne in mind that reasonable prospects of success are necessary for direct access to be granted but that good prospects are not, in themselves, a sufficient basis to be granted direct access.” (my emphasis)

As indicated earlier, the main application hinges on three issues. The first is whether the former President’s resignation was done under duress. The second is whether the impeachment process against him was instituted at the behest of the military. In particular, the applicants alleged that the impeachment proceedings were a direct result of “Operation Restore Legacy”. The third issue is whether the assumption by the first respondent of the office of President was unconstitutional. The applicants failed to make out a *prima facie* case on the merits of each of the issues.

The applicants made assertions of the facts which the fourth respondent denied. Consistent with the general rule that the person who makes an affirmative assertion of facts which are not self-evident must prove them, the *onus* was on the applicants to prove the facts

they asserted. *Nyahondo v Hokonya and Ors* 1997 (2) ZLR 457 (S) at 459. The Court turns to show that the applicants had no factual basis for the allegations they made on each issue.

WHETHER THE FORMER PRESIDENT’S RESIGNATION WAS DONE UNDER DURESS

The Constitution provides for situations in which a presidency may be brought to an end. Ordinarily, a presidency must last for a period of five years from the time an elected President is sworn in and assumes office to the time he or she is re-elected and sworn in or a new President is elected and sworn in. Under the Constitution, a presidency can, however, be brought to an end before the expiry of the period of five years by death, resignation or removal from office of the President through the impeachment process.

It is common cause that the former President resigned from the office of President at a time when impeachment proceedings for his removal from office were underway. The question raised by the application is whether the resignation was coerced out of the former President against his will.

Section 96(1) of the Constitution provides for a situation where a presidency may be brought to an end by resignation. The Constitution envisages a freely and voluntarily tendered resignation for the termination of the presidency to be valid. In other words, the resignation must be a free expression of the will of the President to bring his or her presidency to an end.

Section 96(1) of the Constitution provides as follows:

“96 Resignation of President or Vice-President

- (1) The President may resign his or her office by written notice to the Speaker, who must give public notice of the resignation as soon as it is possible to do so and in any event within twenty-four hours.” (my emphasis)

In compliance with the Constitution, the former President gave written notice of his resignation from office to the Speaker of the National Assembly, who is also the Head of Parliament. The written notice of resignation reads:

“21 November, 2017

The Honourable Jacob Mudenda,

NOTICE OF RESIGNATION AS PRESIDENT OF THE REPUBLIC OF ZIMBABWE
IN TERMS OF THE PROVISIONS OF SECTION 96(1) OF THE CONSTITUTION OF
ZIMBABWE AMENDMENT (NO. 20) 2013

Following my verbal communication with the Speaker of the National Assembly, Advocate Jacob Mudenda, at 1353 HRS, 21st November 2017, intimating my intention to resign as the President of the Republic of Zimbabwe, *I, Robert Gabriel Mugabe, in terms of Section 96(1) of the Constitution of Zimbabwe, hereby formally tender my resignation as the President of the Republic of Zimbabwe with immediate effect.*

My decision to resign is voluntary on my part, and arises from my concern for the welfare of the People of Zimbabwe, and my desire to ensure a smooth, peaceful and non-violent transfer of power that underpins national security, peace and sustainability. Kindly give public notice of my resignation as soon as possible, as required by Section 96(1) of the Constitution of Zimbabwe.

(signed)

ROBERT GABRIEL MUGABE

President of the Republic of Zimbabwe

The Honourable Jacob Mudenda
Speaker of the National Assembly
Parliament of Zimbabwe” (italics emphasis my own)

The Speaker gave public notice of the resignation through General Notice 652 of 2017 within twenty-four hours of receiving the written notice, as required by s 96(1) of the

Constitution. The General Notice was published in a *Government Gazette Extraordinary* on 22 November 2017. It reads as follows:

“General Notice 652 of 2017.

CONSTITUTION OF ZIMBABWE

Notice of Resignation as President of the Republic of Zimbabwe in terms of the provisions of section 96(1) of the Constitution of Zimbabwe Amendment (No. 20) 2013.

IT is hereby notified that I, Advocate Jacob Francis Mudenda, Speaker of the National Assembly, on Tuesday the 21st of November, 2017, received a written notification from His Excellency the President, Robert Gabriel Mugabe, in terms of section 96(1) of the Constitution, that he has resigned as President of the Republic of Zimbabwe with immediate effect.

22-11-2017
ADVOCATE JACOB FRANCIS MUDENDA,
Speaker of the National Assembly.”

The former President’s written notice of resignation speaks for itself. It sets the context in which it was written. The former President candidly reveals the fact that he had communication with the Speaker at 1353 hours. In the communication, the former President expressed to the Speaker his desire to resign from the office of President. The Speaker must have advised the former President that for the resignation to have the legal effect of bringing his presidency to an end, it had to be communicated to him by means of a written notice. That is a specific requirement of the form a constitutionally valid resignation from office by a President has to take. A written notice of resignation addressed to the Speaker and signed by the President, on the face of it, meets the first requirement of constitutional validity.

The written notice, which was signed by the former President, in which he communicated his resignation from office, was received by the Speaker later that day at 1750 hours. The

sequence of events shows willingness on the part of the former President to ensure that the end of his presidency was in conformity with the Constitution. The contents of the written notice show that the former President was aware of the fact that his resignation from office had to conform with the procedural and substantive requirements of the provisions of s 96(1) of the Constitution to have the desired legal effect. Specific reference is made in the written notice to what is the only provision of the Constitution in terms of which the validity of a resignation by a President from office must be established.

Resignation from office is an expression of a peculiarly personal decision. Absent credible evidence to the contrary, resignation from office is evidence of the exercise of free will. A written notice of resignation addressed to the Speaker and signed by the President raises the presumption that it is a free and voluntary resignation.

One does not ordinarily append one's signature to a document the contents of which do not represent one's interests. The signature is in itself evidence, in the absence of anything of stronger probative value to the contrary, of the fact that the contents of the document express the true intention of the signatory. In the circumstances, the author of the written notice of resignation would carry the evidential burden of proving that he or she signed the written notice under duress.

What the former President said in the written notice of resignation is the best evidence available of the state of his mind at the time. He said he was free to express his will to resign. Not only does the former President declare in the written notice that he made the decision to bring his presidency to an end voluntarily, he gives reasons for doing so in clear and

unambiguous language. He said he was motivated by the desire “to ensure a smooth, peaceful and non-violent transfer of power that underpins national security, peace and sustainability”. There is no doubt that the former President ensured that his resignation from office was in strict compliance with the letter and spirit of the provisions of s 96(1) of the Constitution.

The applicants seek to impugn the constitutionality of the former President’s resignation by alleging, without any evidence, that he resigned under duress. However, the fact that the former President freely and voluntarily chose to act constitutionally in bringing his presidency to an end, thereby ensuring a smooth and peaceful transfer of power, attests to an application of the mind to the consequences of his action.

In the absence of any allegation and evidence by the signatory of having signed the document under duress, a court would not even find it necessary to enquire into the credibility or otherwise of allegations of the document having been signed under duress being made by a third party who was not present at the time the document was signed.

The written notice of resignation was received by the Speaker at 1750 hours. The debate of the motion for the removal of the President was underway. The timing of the service of the written notice is proof of a deliberate decision by the former President to end his presidency by resignation rather than suffer the disgrace of removal from office by impeachment.

The proceedings before the joint sitting of the Senate and the National Assembly would not have influenced the former President to resign if he considered them to be unconstitutional or unlikely to lead to his removal from office. At the time the impeachment process began, the military action had obviously not removed the former President from office. What is clear from

the written notice of resignation is that the former President was free to choose not to resign from office at the time he did. He could have decided to remain in office and await the humiliation of being removed from office by the impeachment process. The state of freedom to choose how the presidency was to end is a right the former President enjoyed under the Constitution.

The relief the applicants intended to seek from the Constitutional Court in the main application shows lack of seriousness in the raising of the allegation of unconstitutionality of the former President's resignation from office. Whilst contending that the resignation had no legal effect because it was done under duress, the applicants did not seek that it be set aside nor that the *status quo ante* be restored. They did not want the former President back in office.

The applicants wanted the Constitutional Court to order that a Transitional Authority comprising all political players, presumably including themselves, be appointed to exercise the powers of government for a minimum period of twelve months. They cannot want to have their cake whilst eating it at the same time. If, upon review, the resignation of the former President was found to have been inconsistent with the requirements of s 96(1) of the Constitution, it would have had to be declared unconstitutional. The legal effect of the declaration of constitutional invalidity would be that the resignation would be taken as having not occurred. The former President would have had to remain in office. No Transitional Authority could be formed on the basis of a resignation in breach of the provisions of s 96(1) of the Constitution. The Constitution has specific provisions on how a vacancy in the office of President created by resignation must be filled.

WHETHER THE IMPEACHMENT PROCEEDINGS WERE AT THE BEHEST OF THE MILITARY

Linked to the former President's resignation are the impeachment proceedings that were convened against him. It is common cause that the fourth respondent notified the former President of the impeachment proceedings. The fourth respondent produced a copy of the *Hansard*, which is the official record of the proceedings that took place on 21 November 2017. It is proof that the impeachment proceedings were conducted in accordance with constitutional requirements.

Section 97 of the Constitution provides for the procedure to be followed when the Senate and the National Assembly resolve to impeach a President. It reads:

“97 Removal of President or Vice-President from office

(1) The Senate and the National Assembly, by a joint resolution passed by at least one-half of their total membership, may resolve that the question whether or not the President or a Vice-President should be removed from office for —

- (a) serious misconduct;
- (b) failure to obey, uphold or defend this Constitution;
- (c) wilful violation of this Constitution; or
- (d) inability to perform the functions of the office because of physical or mental incapacity;

should be investigated in terms of this section.

(2) Upon the passing of a resolution in terms of subsection (1), the Committee on Standing Rules and Orders must appoint a joint committee of the Senate and the National Assembly consisting of nine members reflecting the political composition of Parliament, to investigate the removal from office of the President or Vice-President, as the case may be.

(3) If —

- (a) the joint committee appointed in terms of subsection (2) recommends the removal from office of the President or Vice-President; and

- (b) the Senate and the National Assembly, by a joint resolution passed by at least two-thirds of their total membership, resolve that the President or Vice-President, as the case may be, should be removed from office;

the President or Vice-President thereupon ceases to hold office.”

Under the Constitution, only the two Houses of Parliament, when constituted into a joint sitting, are vested with the power to impeach a President for the purpose of removing him or her from office. Whilst Parliament has the power of impeachment, it is not under a duty to impeach a President. It has a wide leeway to decide whether and when to institute the impeachment process. Impeachment is a dangerous political process, to be embarked on as a last resort and in clear cases. A failed impeachment process may have serious divisive effects. A successful removal of a President from office by impeachment visits the former President and the nation with disgrace.

Impeachment is, however, a democratic weapon against serious misconduct, intentional failure to obey, uphold or defend the Constitution, wilful violation of the Constitution, and inability to perform the functions of the office of President due to physical or mental incapacity. In clear cases, the personal and national disgrace resulting from the removal of a President from office through the impeachment process are a price worth paying.

The *Hansard* indicates that on Tuesday, 21 November 2017, at 1630 hrs, there was a joint sitting of the Senate and the National Assembly at the Harare International Conference Centre. A member from the ruling party moved a motion for the resolution of the question whether or not the removal of the President from office for the reasons specified in s 97(1) of the Constitution should be investigated. The mover of the motion set out details of the acts and omissions the former President was alleged to be guilty of. The motion was supported by two members of the

ruling party. Two members of the opposition rose to support the motion. A proportional representation member also supported the motion. The debate was on-going when at 1750 hrs the impeachment process was interrupted by service on the Speaker of the written notice of resignation from the former President.

Members of Parliament had to decide at this stage of the process whether the acts and omissions with which the former President was being charged in the motion would, if proved at the investigation stage, constitute the grounds for removal of a President from office listed under s 97(1) of the Constitution.

The applicants did not suggest that what happened at the International Conference Centre were not impeachment proceedings. They accepted that a joint sitting of the Senate and the National Assembly was convened and a motion moved charging the former President with acts and omissions which, if proved, would constitute the grounds for removal from office. They did not seek to impugn the accuracy and correctness of the record of proceedings in the nature of the debates by Members across the political divide who supported the motion for a resolution that the question of the removal of the President from office be investigated.

Failure by the applicants to allege any inconsistency between the conduct of the proceedings and the requirements of s 97(1) of the Constitution shows that they had no basis on which the constitutionality of the impeachment proceedings could be impugned. The joint sitting of the Senate and the National Assembly does not only have the power to decide when impeachment proceedings commence, it controls the advancement of the process towards the

realisation of its objective. It does so through compliance with the procedural and substantive requirements of s 97 of the Constitution.

Had the former President not stopped the impeachment process from going through each of the four stages prescribed by s 97 of the Constitution by tendering his resignation from office, he would have been given an opportunity to be heard on the charges levelled against him at the investigation stage. The fact that the former President tendered his resignation at a time when the impeachment process was underway suggests that he carefully considered the chances of surviving the process and concluded that his removal from office was the inevitable outcome.

WAS THE ASSUMPTION BY THE FIRST RESPONDENT OF THE OFFICE OF PRESIDENT UNCONSTITUTIONAL?

The allegation that the assumption by the first respondent of the office of President was unconstitutional could only be made on the assumption that the resignation from office by the former President was invalid. That assumption was wrong. All the evidence shows that the former President's resignation was in conformity with the provisions of the Constitution.

The legal effect of the resignation was the creation of a vacancy in the office of President. Paragraph 14(4)(b) of the Sixth Schedule to the Constitution provides that a vacancy in the office of President created by the resignation of a President who has been elected in a general election must be filled by a nominee of the political party which the President represented when he or she stood for election.

Paragraph 14(5) of the Sixth Schedule provides that the political party which is entitled to nominate a person to fill the vacancy in the office of President must notify the Speaker of the

nominee's name within ninety days after the vacancy occurred in the office of President. The Constitution goes on to provide that the nominee assumes office as President after taking the oath of President in terms of s 94, which oath the nominee must take within forty-eight hours after the Speaker was notified of his or her name.

It is common cause that the assumption by the first respondent of the office of President was in accordance with the procedural and substantive requirements of paras 14(4)(b) and 14(5) of the Sixth Schedule to the Constitution. A vacancy in the office of President occurred as a result of the resignation by the former incumbent.

ZANU (PF), which is the political party the former President represented when he stood for election, nominated the first respondent as the person to assume the office of President. The Speaker was notified of the first respondent's name as the nominee to fill the vacancy in the office of President within the prescribed period of ninety days after the vacancy occurred in the office of President.

The first respondent took the oath of President within the requisite forty-eight hours after the Speaker was notified of his name. As a result of strict compliance with all the procedural and substantive requirements of a constitutionally valid assumption of the office of President left vacant by reason of resignation in terms of s 96(1) of the Constitution, the first respondent assumed office as President. The question of the constitutionality of the assumption by the first respondent of the office of President cannot arise from these self-evident facts.

COSTS

The general principle by which the Court is guided on the question of costs is that generally no costs are awarded in constitutional matters. As is clear from the proviso to r 55(1) of the Rules on costs, the general principle is subject to the overriding principle to the effect that the award of costs is a matter within the discretion of the court to be exercised judicially, taking into account the circumstances of each case.

In the exercise of discretion, courts usually do not order costs against an unsuccessful private party who seeks to vindicate constitutional rights against the State or to protect and enforce the Constitution in the public interest. The rationale for the approach is that orders of costs in such circumstances might have a chilling effect on potential litigants in the same category as the unsuccessful litigant. As the approach is part of the exercise of discretion, a court may, in appropriate circumstances, order that an unsuccessful private party pay costs in a constitutional case.

The circumstances that may influence a court to exercise its discretion and order an unsuccessful private party to pay costs in a constitutional case include institution of frivolous or vexatious proceedings. Conduct in the proceedings is a factor a court is entitled to take into account in deciding whether to award costs against an unsuccessful litigant. The test is that the award of costs should be just when regard is had to the facts and circumstances of the case. It would not be in the interests of the administration of justice to encourage litigants to believe that they are free to institute constitutional proceedings challenging the constitutionality of State action on spurious grounds. Awards of costs against unsuccessful litigants, in appropriate

constitutional litigation cases, are a necessary means for the protection of the integrity of the judicial process and maintenance of public confidence in it.

In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) the Constitutional Court of South Africa at 296H–297E held:

“[138] The award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. 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 constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or 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 that which is just having regard to the facts and circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* [1997 2 SA 898 (CC)], this Court articulated the rule as follows:

‘[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or “chilling” effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.’” (my emphasis)

In *De Lacy and Another v South African Post Office* 2011 (9) BCLR 905 (CC) the principle that an award of costs is a matter within the discretion of a court and that a court may depart from the general principle that an unsuccessful litigant is not ordered to pay costs in constitutional litigation was again stated. It was said:

“An award of costs is a matter which lies in the discretion of a court. The discretion is exercised judicially and with regard to all circumstances relevant to the determination of costs. The standard developed by this Court, to be used in the enquiry, is whether it is just and equitable to make a particular costs order. We have also said that where an unsuccessful litigant had sued a state organ with a view to vindicate a protection afforded by the Constitution, the litigant should not ordinarily be ordered to pay costs. That however is not an inflexible rule.

A court may depart from this general rule if it is just and equitable to do so. This may be the case where the unsuccessful litigant is shown to have acted with improper motive, or has abused court process; has conducted the case in a vexatious manner; has not properly adhered to the rules of court; has made sustained and unwarranted attacks on other litigants or witnesses or judicial officers concerned or has not pursued the claim in good faith. This limited catalogue is not intended to be exhaustive in as much as what may be an appropriate costs order, even in constitutional litigation, and may be conditioned by the circumstances of the case.” (my emphasis)

The above authorities show that costs would be awarded in constitutional litigation in any of the following circumstances -

- i. Where the litigation is conducted in a frivolous or vexatious manner;
- ii. Where the litigation amounts to an abuse of court process;
- iii. Where the litigation is motivated by improper motive;
- iv. Where there is non-compliance with the rules of court;
- v. Where unwarranted attacks are made on other litigants, witnesses or judicial officials; or
- vi. Where the claim is pursued with *mala fides*.

The list is not exhaustive as cost orders must be made on a case by case basis if there is to be justice in constitutional litigation.

The applicants made an application for leave for direct access without compliance with the Rules of Court. They sought relief in respect of an application they intended to place before the Constitutional Court when the relief they sought in that application was groundless. They must have known that the relief they sought could not be granted on the allegations they made. They made a frivolous application.

The litigation amounted to abuse of court process. The applicants made malicious allegations of improper conduct against officials in the registry of the Constitutional Court, accusing them of colluding with state security agents to make documents relating to their application disappear. They knew that the allegations were false. They conducted themselves in this manner to attract publicity for political reasons.

Although the applicants are unsuccessful private parties in a constitutional case, their conduct justifies an award of costs against them.

Mr Chihambakwe argued that costs on a legal practitioner and client scale should be ordered against the applicants. In the opposing affidavit and the heads of argument, the fourth respondent prayed for the dismissal of the application with costs. There was no prayer for an order of costs on the punitive scale.

Rule 55(2) of the Rules provides that if the Court or the Judge considers that the conduct of a party has been such as to warrant an order of costs on a legal practitioner and client scale the Court or the Judge may order the party to pay such costs. Rule 55(4) provides that before making such an order the Court or the Judge shall give the party concerned an opportunity to make representations as to whether or not the order should be made. The applicants were not given the

opportunity to make representations whether or not the order of costs on a legal practitioner and client scale should be made.

DISPOSITION

In the result it is ordered that -

- “1. The application for direct access to the Court be and is hereby dismissed.
2. The applicants are to pay the fourth respondent’s costs jointly and severally the one paying the others to be absolved.”

Chihambakwe Mutizwa & Partners, fourth respondent’s legal practitioners