REPORTABLE (4)

(1) INNOCENT GONESE

(2) JESSIE MAJOME

v

(1) PARLIAMENT OF ZIMBABWE

(2) THE SPEAKER OF THE NATIONAL ASSEMBLY

(3) THE PRESIDENT OF THE SENATE

(4) EMMERSON MNANGAGWA N.O.

(5) THE PRESIDENT OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA JCC, GARWE JCC,
GOWORA JCC, HLATSHWAYO JCC, PATEL JCC,
GUVAVA JCC, MAVANGIRA JCC & BHUNU JCC
HARARE, JANUARY 31, 2018 & MARCH 31, 2020

T Mpofu, with him *T Biti*, for the applicants

L Uriri, with him *W Mandinde* and *M Nzombe*, for the first, second and third respondents

M Chimombe, for the fourth and fifth respondents

MALABA CJ: The two applicants are Members of Parliament. They brought two separate applications in terms of s 167(2)(d) of the Constitution of Zimbabwe Amendment (No. 20) 2013 ("the Constitution"), as read with r 27 of the Constitutional Court Rules. They alleged failure by Parliament to fulfil the constitutional obligation to act in accordance with the procedure for amending the Constitution prescribed by s 328 of the Constitution. The allegationns in the applications are the same. So are the issues.

The two applications were consolidated and heard as one. The applicants challenged the validity of the proceedings that culminated in the passing of Constitutional Amendment Bill (No. 1) 2017. The relief sought is by way of a declaratory order in the terms that -

1. Parliament failed to fulfil the constitutional obligation provided for in s 328(5) of the Constitution of Zimbabwe, which requires a Constitutional Bill to be passed by two-thirds of the membership of each House sitting separately, when it passed Constitutional Amendment Bill (No. 1) of 2017 on 25 July 2017 and 01 August 2017 in the National Assembly and the Senate respectively.

2. Accordingly, the proceedings in Parliament pertaining to Constitutional Amendment Bill (No. 1) of 2017 on

25 July 2017 and 01 August 2017 be and is hereby set aside.

3. The first respondent pays costs of suit.

The Constitutional Bill was intended to amend s 180 of the Constitution insofar as it related to the procedure for the appointment of the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court. The proposed amendment would also add to s 180 of the Constitution a provision relating to the appointment of the Senior Judges of the Labour Court and the Administrative Court by the Chief Justice.

The application was filed on 06 September 2017. Before it could be heard, the President signed Constitutional Bill (No. 1) 2017 into law. The applicants filed another application under CCZ 58/17. They sought an order setting aside the Constitutional Amendment Act on the basis that Parliament had failed to fulfil a constitutional obligation in the passing of the Constitutional Bill.

There are two distinct challenges to the passing of the Constitutional Bill. The validity of the passing of the Constitutional Bill is challenged by impugning the proceedings in the National Assembly and the Senate. In respect of the proceedings in each House, the contention is that the passage of the Constitutional Bill was in contravention of the amending procedure prescribed by s 328(5) of the Constitution. The

grounds for the claimed violation of s 328(5) of the Constitution are different. In respect of the proceedings in the National Assembly the grounds raise factual questions, whilst the grounds in relation to the proceedings in the Senate raise a question of law.

The Court holds that the applicants have failed to show on a balance of probabilities that there was no voting conducted in the National Assembly. They also failed to show that the "Aye" votes did not reach the required minimum threshold of 180 votes. The Court is of the view that the applicants have not been able to prove failure on the part of the National Assembly to act in accordance with the procedure for the amendment of the Constitution prescribed by s 328(5) of the Constitution.

The constitutional obligation imposed on Parliament by s 328 when exercising the power to amend the Constitution is to ensure that the procedures prescribed are complied with. The Court entertains no doubt that, to amend the Constitution by the method prescribed by s 328, every requirement prescribed by the provision must be observed. The omission to comply with any one of the requirements is fatal to the validity of the proposed amendment. The applicants established that the Constitutional Bill was not passed with the requisite two-thirds majority in the Senate. There was no compliance with the requirements of the procedure prescribed by s 328(5) of the Constitution.

The reasons for the decision now follow.

The Court notes the fact of the conflicting versions of facts and the interpretation of the applicable constitutional provisions. The granting of the relief sought by the applicants depends on one reality. It is discoverable by the finding of the facts on the matters in dispute, the declaration of the true meaning of the applicable constitutional provisions, and the application of the law to the facts.

The proposed amendment to s 180(1) of the Constitution was the cause of the events which culminated in the cause of action pleaded by the applicants for the relief sought. Nothing turned on the substantive value of the proposed amendment of the Constitution.

Before the proposed amendment, s 180 of the Constitution read 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) 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 or her 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. …"

Section 180 of the Constitution would read as follows after the proposed amendment:

"**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 nominations; 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), the President must appoint one of the nominees to the office concerned.

(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."

FACTUAL BACKGROUND

The main contention by the applicants was that there was no proper vote in Parliament.

The allegations of fact on which the applicants' cause of action was based had no support from the evidence produced. That

was the case in respect of what they alleged happened in the National Assembly.

NATIONAL ASSEMBLY

The applicants made the following allegations of fact.

There were 234 Members of the National Assembly present in the House on 25 July 2017 out of a total number of 270. This appears from the Order Paper. There was a debate on the Mid-Term Budget Review and the Economic Outlook Statement presented by the Minister of Finance on 20 July 2017. The fourth respondent moved a motion to adjourn the debate in favour of the presentation of the Constitutional Bill. There was argument between the second respondent and Members of the opposition. Eventually, the second respondent agreed with the fourth respondent. He ruled that the House was to proceed with the third reading of the Constitutional Bill.

The first applicant moved a motion in terms of Standing Order 152(3) that the Constitutional Bill be sent back to the Committee Stage to ensure that it incorporated matters that had not been included in the text. The motion was disallowed by the second respondent. Bells rang so that voting could commence. According to the applicants, the House was not properly divided at this stage. A point of privilege was raised to the effect that there had to be a secret vote.

The raising of the point that the voting be by secret ballot was based on the suspicion that some Members of the ruling party had been intimidated to vote for the Constitutional Bill. The contention was that a secret ballot was necessary in the circumstances. The second respondent ruled that the vote was not going to be by secret ballot. While the point of privilege was being considered, the tellers were counting Members. The Members who were sitting on the Government benches were counted as part of the "Aye" vote. Those who sat on the opposition benches were counted as being part of the "Noe" vote.

The tellers told the second respondent that the "Aye" votes were 187. The first applicant raised an objection and pointed out that the second respondent had the obligation to ascertain whether there were more than 180 Members in the House. He argued that the second respondent was obliged by Standing Order 127, to separate Members who voted in favour of the Constitutional Bill from those who voted against it. The applicants aver that the process was not in accordance with Standing Order 127. They relied on the unrevised *Hansard* and the Order Paper to advance their argument.

According to the unrevised *Hansard*, there was commotion in the House following the communication to the second respondent by the tellers that 187 Members had voted in favour of the Constitutional Bill. Some Members left the House. The second respondent acceded to the request that the counted numbers

should be verified. The Sergeant-at-Arms was ordered by the second respondent to conduct a recount. After the recount, the unrevised *Hansard* records that the second respondent said:

> "After the verifications, the figure given of the results of the count is: Ayes – 182 and the Honourable Members who left are Honourable Matuke, Honourable Chinomona, Honourable Ruvai, Honourable Nyamupinga and Honourable Muchenje.
>
> Those against – 41. The number of affirmative votes recorded is not less than two-thirds of the membership of the House. I, therefore, declare the final votes in the House on the Constitutional Amendment Bill to have been in accordance with the provisions of Section 328(5) of the Constitution."

According to the applicants, the irregularities in the vote were as follows -

1. When the bells were rung, the doors of the Chamber were closed. Before the vote was concluded and before the verification was conducted an Honourable Member walked in.

2. The second respondent breached the Standing Orders by opening the doors before the process of the vote was completed.

3. No vote took place and the verification process became the vote. The counting of the votes was based on an assumption that those on the Government benches supported the motion. This is not permitted by the Standing Orders and the Constitution.

4. The second respondent failed to properly divide the House, as is required by the Rules.

5. The second respondent did not allow the Chief Whips and the Sergeant-at-Arms together with the tellers to move around to make the necessary verifications after the vote.

6. Honourable Pedzisayi was counted twice for the "Aye" votes according to the Order Paper.

The applicants averred that the names of those alleged to have voted with the "Ayes" appear in both the unrevised *Hansard* and the Order Paper. According to both sources, there were 182 "Aye" votes. Those who voted with the "Ayes" included the names of Honourable Beremauro G, Honourable Mukanduri and Honourable B Tshuma. These Members were not in Zimbabwe on 25 July 2017. They were in Uganda on a Parliamentary visit. The allegation was also that Honourable D Marapira and Honourable G Mabuwa, who were recorded as part of the Members who voted in favour of the Constitutional Bill, were absent on official leave. The applicants said that Honourable M Chikukwa, Honourable M Hlongwani, Honourable P Dutiro, Honourable Y Simbanegavi and Honourable D Ndlovu were not present. They were nonetheless recorded as being part of the "Aye" vote. According to the applicants' calculation, there were 171 "Aye" votes against a required threshold of 180 votes in favour of the proposed amendment to the Constitution.

There was a contradiction in the averments. The applicants alleged that voting did not take place in the National Assembly. They also said that the vote was conducted in an irregular manner. They averred that the required minimum threshold of 180 votes in favour of the Constitutional Bill was not reached in the National Assembly.

The applicants alleged that the Constitutional Bill was passed in the Senate by 53 votes. They alleged that the minimum two-thirds threshold for votes in favour of a Constitutional Bill in the Senate is 54 votes.

In opposing the application, the first, the second and the third respondents took the preliminary point to the effect that Parliament is not a legal *persona*. The contention was that Parliament cannot sue or be sued.

On the merits, the first and the third respondents averred that the procedural requirement that there must be an affirmative two-thirds vote for a valid constitutional amendment was complied with.

The second respondent averred that he acted in accordance with Standing Order 127 in the conduct of the vote. The bells were rung, and all Members present moved into the Chamber. He then appointed tellers and divided the House, by directing that the "Ayes" should go to the right and the "Noes" should go to

the left. An objection was raised when the House had already been divided.

The unrevised *Hansard* relied on by the applicants did not capture everything that transpired. The revised *Hansard* and the audio recording show that voting was conducted properly. There were 182 "Aye" votes as recorded in the corrected *Hansard*, unlike the numbers relied on by the applicants which are based on the unrevised *Hansard*.

The first and the second respondents relied on the Journal of the House ("the Journal") and alleged that it was the correct record of the proceedings of the House. They alleged that the unrevised *Hansard* relied upon by the applicants was subsequently corrected after reconciliation with the audio recording. Their position was that, contrary to the allegations made by the applicants, the audio recording captured both the division of the House and the conducting of the vote.

The first and the second respondents contended that the applicants' case was based on the report in the unrevised version of the *Hansard*. The names of those Members who voted were corrected in the Journal in terms of Standing Order 131. They explained that, in terms of the procedure of the Journals Office and the *Hansard Operational Manual*, the corrected version of the *Hansard* and the corrected Votes and Proceedings were filed in the Journal of the House, which is bound at the end of each Session. The Master Copy of the *Hansard* was prepared by the

Hansard Reporters after they had gone through the unrevised version of the *Hansard* while listening to the audio recording. The Order Paper relied on by the applicants contained errors, which were corrected using this method.

The second respondent conceded that, according to the corrected records, Honourable Mukanduri, Honourable Beremauro and Honourable Tshuma were out of the country. However, he maintained his position that Honourable Marapira and Honourable Mabuwa were present during the proceedings in the House relating to the voting on the Constitutional Bill. Their inclusion on the list of Members absent with leave was an error which was corrected.

The second respondent maintained that, whilst the *Hansard* is the official report of the proceedings in Parliament, it does not necessarily constitute an accurate record of what transpired on the day in question. The accurate record is contained in the Journal, which is bound at the end of each Session after it has been proofread and corrected if necessary. The Journal is a security item and is kept by the Clerk of Parliament.

The second respondent stated in the opposing affidavit in part as follows:

> "I conducted the vote in terms of Standing Order 127. The unrevised *Hansard* relied upon by the applicants did not capture that part. The audio record recording at minute 01:58:16-20 (which audio will be played at the

> hearing if required) and the corrected *Hansard* (*vide* 'CC' hereto) clearly show that the voting was done properly. …
>
> It is also important for this Court to note that, unlike the unrevised *Hansard*, the Journal (*vide* Annexure 'BB' hereto) is the correct record of proceedings. See also the alterations of the Master Copy of the *Hansard* (*vide* Annexure 'CC') before submitting it to the printers to produce Annexure 'DD' hereto which forms part of the Journal. …
>
> These allegations are denied. The audio recording clearly shows what transpired ….
>
> The applicant relied on the 'Unofficial Report Unrevised' *Hansard* as shown on its cover and the 'Advance copy - Uncorrected Votes and Proceedings' which the applicant is referring to as the 'Order Paper', which may at times contain errors, as in this case, and such errors in the names of the division list were corrected in the Journal of the House in terms of Standing Order 131 of the Standing Rules and Orders of the National Assembly."

The second respondent took the argument further. He averred that the unrevised *Hansard* left out four Members, Honourable Muchinguri, Honourable Mukupe, Honourable Madzinga and Honourable D Mpofu, who were present and voted with the "Ayes". This was confirmed by the Attendance Register and the corrected copy of Votes and Proceedings. According to this record, the "Aye" votes remained at 182.

It was also the second respondent's contention that the Attendance Register and the corrected copy of the Votes and Proceedings showed those Members who were present and voted for the proposed amendment of the Constitution. According to these records, Honourable Chikukwa, Honourable Hlongwani and Honourable Dutiro were present and voted "Aye". In terms of the Attendance Register compiled by the Sergeant-at-Arms, Honourable

Simbabegavi was marked absent but she came late and participated in the voting and voted with the "Ayes". The second respondent alleged that the Sergeant-at-Arms failed to correct the error. As for Honourable D Ndlovu, the second respondent said there was an error. The intended entry was Honourable A Ndlovu. In regard to the issue that Honourable Pedzisayi was counted twice, he admitted that there was an error, which was corrected in terms of Standing Order 131. The second respondent maintained that the Journal confirmed that 182 Members voted in favour of the Constitutional Bill. He contended that the Constitutional Bill was passed in accordance with the procedure prescribed by s 328(5) of the Constitution.

Finally, the first and the second respondents averred that, at the verification of the votes, the five Members who had voted but subsequently left the House were not included in the 182 "Ayes". They had initially been counted as part of the 187, but were excluded following the verification exercise because they had left before the verification was conducted.

The applicants alleged, in their answering affidavits, that the documents relied on by the first, the second and the third respondents were fabricated, doctored and tampered with. The applicants relied on the unrevised *Hansard*, and the Order Paper. They rejected the corrections made to the documents. The first applicant averred in the answering affidavit as follows:

> "I also wish to state that the recordings of Parliament on the 25th of July 2017 must have been recorded and captured on video. Surely, this Honourable Court has powers, which I do not have, of summoning both the video recording of what happened in Parliament which I notice the respondents do not refer to in their papers."

THE SENATE

The vote in the Senate was conducted on 01 August 2017. The applicants relied on Order Paper 75, titled "ADVANCE COPY - UNCORRECTED", to outline the events that took place in the Senate on the day in question. The applicants' position regarding the proceedings in the Senate was that there was a vote. The contention was that the vote in favour of the proposed amendment to the Constitution did not reach the minimum two-thirds majority required by s 328(5) of the Constitution.

The Order Paper and the unrevised *Hansard* showed that 53 Senators voted in favour of the Constitutional Bill. The composition of the Senate is eighty Members. The applicants contended that the minimum threshold to be reached by votes in favour of a proposed amendment of the Constitution in accordance with the requirements of s 328(5) of the Constitution was fixed by reference to the total number of eighty Senators prescribed by s 120(1) of the Constitution. Two-thirds of 80 is 54 and not 53. The applicants argued that the Constitutional Bill was not passed by the Senate in accordance with the procedure prescribed by s 328(5) of the Constitution.

The third respondent opposed the application insofar as it related to the Senate. Her argument was as follows. The Constitutional Bill was passed with the requisite minimum two-thirds majority. The membership of the Senate was reduced from eighty to seventy-nine after the death of Senator Alfina Juba on 09 July 2017.

In their answering papers, the applicants averred that the membership of the Senate for the purpose of compliance with the requirements of s 328(5) of the Constitution does not fluctuate. It remains at eighty. They contended that there is need to protect the integrity of the Constitution by requiring a two-thirds majority calculated against a complement of eighty Members, notwithstanding the death of a Senator.

WHETHER PARLIAMENT CAN SUE OR BE SUED IN ITS OWN NAME

The purpose of the exercise of jurisdiction conferred on the Court is to ensure that the other organs of the State, such as the Legislature, act in accordance with the rules prescribing the procedures for the exercise of the powers conferred on them by the Constitution.

Mr Uriri persisted with the point *in limine* that Parliament has no legal personality and for that reason cannot sue or be sued in its own name. He argued that s 118 of the Constitution, which provides that Parliament consists of the Senate and the National Assembly, does not create a legal *persona*. He reasoned

that Parliament is created by way of constitutive membership. The contention was that the Speaker is the representative and spokesperson of Parliament in its collective capacity. He pressed the point further by arguing that the Speaker and the President of the Senate are cited nominally only. He contended that relief was being sought against a body with no legal personality.

Mr Biti for the applicants took a contrary view. He argued that Parliament can sue and be sued. For this proposition, he relied on ss 116 and 118 of the Constitution. Section 116 of the Constitution provides that the Legislature consists of Parliament and the President. He argued that the words "body corporate" are not found in the Constitution. The contention was that the fact that Parliament is not described as a body corporate capable of suing and being sued does not rid it of its status as a constitutional body with justiciable obligations.

Mr Biti further relied on s 167(2)(d) of the Constitution for the proposition that, in applications for relief in enforcing obligations imposed on it, Parliament itself has to be before the Court. Section 167(2)(d) provides that the Constitutional Court makes the final decision whether the conduct of Parliament is constitutional.

The Court was of the view that the point *in limine* had no merit. Parliament exists as a body established by the

Constitution out of the joint functions of the two Houses of the National Assembly and the Senate. Whilst the two Houses exist separately for themselves, they exist together for Parliament. Out of the two Houses is constituted Parliament, which is an important body for the purposes of the constitutional order. Together with the President, Parliament is conferred with legislative power. It includes the power to amend the Constitution in accordance with the procedure provided for the purpose under s 328 of the Constitution.

There are provisions of the Constitution which impose obligations on Parliament. The constitutional provisions impose the obligations on Parliament as directly enforceable law.

Section 119 of the Constitution imposes an obligation on Parliament to protect the Constitution and promote democratic governance in Zimbabwe. The obligation imposed on Parliament by s 328(5) of the Constitution is that it must not pass a Constitutional Bill at the last reading in the National Assembly and the Senate except by affirmative votes of two-thirds of the membership of each House.

Section 45(1) of the Constitution provides that the provisions guaranteeing the protection and promotion of fundamental human rights and freedoms enshrined in *Chapter 4* are binding on the State and all executive, legislative and judicial institutions. Fundamental human rights are binding on Parliament

as directly enforceable law. Section 85(1) of the Constitution secures the fundamental rights and freedoms by making courts of law accessible to any person whose rights are violated by State authority. That is the case where jurisdiction over the subject matter in dispute is not specified.

The Court would not be in a position to exercise its jurisdiction to determine whether the conduct of Parliament is constitutional or whether Parliament has failed to fulfil a constitutional obligation if Parliament, as a constitutional body, cannot be held accountable.

The provisions of s 167(2)(d) of the Constitution show that there is an acceptance that Parliament can be held accountable for failure to discharge its constitutional obligations. The effect of the provision is that the question of fulfilment of a constitutional obligation by Parliament is a matter for the exclusive jurisdiction of the Court. When the Court deals with an application for relief in terms of s 167(2)(d) of the Constitution, it essentially looks at Parliament in the conduct of its functions. The constitutional obligation Parliament would be accused of failing to fulfil would have been imposed on it in its capacity as a body established by the Constitution to exercise the legislative power conferred on it by the legislative authority derived from the people.

Mr Uriri relied on Woolman and Bishop, "*Constitutional Law of South Africa*", 2 edn Vol 1, Chapter 17, para 17.2, and *Gauteng Provincial Legislature* v *Killian* 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA) at para [26].

The contention that the case of *Killian and Others supra* is authority for the proposition that Parliament cannot be sued in its own name, because the Speaker is the representative and spokesperson of the Assembly in its collective capacity, must be taken in context. The case raised for determination the question whether the Speaker of the Gauteng Provincial Legislature had the power to give an undertaking with regard to costs relating to the resolution of a dispute on the constitutionality of a Bill by the Constitutional Court in terms of s 98(2)(d) of the Constitution of the Republic of South Africa Act 200 of 1993. The case did not speak to the question whether Parliament could sue or be sued in its own name. The Supreme Court of Appeal interpreted s 98(9) of the Interim Constitution. The section provided that:

> "(9) The Constitutional Court shall exercise jurisdiction in any dispute referred to in subsection (2)(d) only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so." (the underlining is for emphasis)

It is clear that the provision explicitly gave the Speaker of the National Assembly the power to refer a dispute to the Constitutional Court. As such, the case relied upon by the first, the second and the third respondents does not take their case any further.

Paragraph 17.2 in Woolman and Bishop "*Constitutional Law of South Africa*" *supra*, relied upon by the first, the second and the third respondents as authority for the proposition that Parliament cannot sue or be sued in its name, is unhelpful. It reads as follows:

> "The NA [National Assembly] is chaired by the Speaker. The speaker is the representative and spokesperson of the Assembly in its collective capacity. The Speaker may therefore give binding undertakings on behalf of the NA. Such undertakings may even embrace the expenditure of moneys in relation to the legislative process. Though the Speaker may be removed by a resolution of the NA, the Speaker must not bow to political pressure and is 'required by the duties of his office to exercise, and display, the impartiality of a judge'."

It is important to note that in stating the above, the learned authors made extensive reference to the case of *Killian and Others supra*. It was the finding of the Supreme Court of Appeal that the Speaker of the Gauteng Provincial Legislature had the power to give an undertaking to minority political parties that the Legislature would cover the legal costs incurred in referring a pending bill to the Constitutional Court. As such, the case is not authority for the proposition that Parliament cannot sue or be sued in its own name.

Regard must be had to *Commission for the Implementation of the Constitution* v *Parliament of Kenya and Others* [2013] eKLR Petition No. 454 of 2012 where the High Court of Kenya at paras 40-41 said:

> "40. I have been cautioned that the doctrine of separation of powers forbids this court from straying into what is seen as the sphere of Parliament. I have also been warned that 'Parliament of Kenya' as a state organ cannot be sued by its own name. I think the latter issue is effectively answered by the question of jurisdiction I have discussed above. In any case, and on this I agree with Mr. Regeru, counsel representing CIC, that a reading of **Article 261(5)** and **(6)** contemplates Parliament as the Party to any Petition that may be filed therein. The provision reads that, ***'If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.'***
>
> 41. I therefore reject the respondent's contention that Parliament, as a State organ, cannot be sued by its own name at least for purposes of this suit. I think the common law notions regarding capacity to be sued must yield to the Constitution which recognises Parliament as a State organ and imposes on it specific responsibilities. The doctrines of legal personality must be read against the beam of the rich provisions of our Constitution."

A reading of s 167(2)(d), as read with s 119, of the Constitution shows that Parliament may be sued in its name. It is a separate organ of the State which must be independently accountable for failure to act in accordance with the constitutional obligations imposed on it directly. It is the obligations imposed by ss 119(1) and 328(5) of the Constitution, among others, that Parliament must fulfil. It is in respect of those obligations that the Court exercises jurisdiction in terms of s 167(2)(d) of the Constitution.

The Court is the highest institutional expression of the rule of law. Its duty is to enforce respect for and the maintenance of the constitutional order. The constitutional order is characterised by a fundamental system of values in terms of which validity of all legislation and other official acts or conduct must be assessed. Thus, any branch or level of Government, including Parliament, that violates the Constitution or refuses to carry out a constitutional duty can be called to account in a proper proceeding before the Court. It would be in the interests of Parliament to have claims of violation of constitutional provisions imposing obligations on it directly determined by the Court.

PRINCIPLES GUIDING THE AMENDMENT OF THE CONSTITUTION

The interpretation and application of the provisions of s 328 of the Constitution, in the context of the effect of the principles on the amendment of the Constitution, disclose the invalidity of the passing of the Constitutional Bill in the Senate. The process confirms the constitutionality of the conduct of the National Assembly.

A constitution is a special document. It is an embodiment of selected legal rules which establish and regulate or govern the Government of a country. The constitution contains the principles and values of governmental organisation. It is not just a fundamental law of Government. It is a form of Government

established by the people in the exercise of their sovereignty for their own purposes.

The people declared the Constitution to be the supreme law of the land. It imposes obligations that 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. The people made it a limited Government. It is a popular Government. Those who administer it are responsible to the people. The powers conferred, the restrictions which are imposed, and the authorities which are exercised, the organisation and institutions thereof which are provided for under the Constitution, are in each case for the same object – the common benefit and happiness of the governed.

The people provided in the Constitution itself that it may be amended. They prescribed the procedures for the amendment of the Constitution to ensure that the action taken in compliance with these procedures achieves the object of ensuring that the proposed amendment is for the common benefit of the people.

The fact that the Constitution is a fundamental law by which a limited Government and the mode of its operations is established explains the rationale behind the conditions and restrictions imposed on the Houses of Parliament in the exercise of the power to amend the Constitution. The power to amend the Constitution is a limited power. It is conferred on the

Legislature for the purpose of ensuring that it is used to produce good governance and the happiness of the people.

James A. Gardner in an article titled "*What is a State Constitution*", 24 Rutgers L.J. 1025 (1993) at p 1034 expressed his view thus:

> "On this view, state constitutions are not expressions of the distinctive fundamental values or character traits of a set of heterogeneously sovereign peoples. Rather, state constitutions are simply local articulations of national values; they express not our differences, but our fundamental commonality and our mutual commitment to a shared national project."

MAHOMED J in *S* v *Makwanyane and Another* 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 para [262] opined:

> "All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future."

The Constitution represents what a nation holds dearly. It represents the areas of common interest of the whole citizenry. The Constitution is the conscience of the people.

Amendment of the Constitution does not extend to replacement of the Constitution. The process of amending the Constitution includes variation, alteration, modification, addition to, deletion of, or adaptation of existing constitutional provisions.

The Constitution is not an existential order of power. It is founded on the fundamental principles and values listed in s 3. These foundational principles and values are designed to inspire and provide the basis for the rationale for the justification of any legislative action or conduct in the exercise of public authority. They show that the Constitution is value-oriented. It is a fundamentally normative Constitution embracing values, rights and duties.

The power to amend the Constitution is conferred on the Legislature. It is exercisable by the two Houses of Parliament on the same Constitutional Bill whilst they are sitting separately. The principle of amendability of the Constitution underscores the fact that Government pre-supposes the existence of a perpetual mutability in its own operations for the benefit of those who are its subjects. Representative government also pre-supposes the existence of a perpetual flexibility in adapting itself to the wants of the people, their interests, their habits, their occupations and their infirmities.

The principle of amendability of the Constitution is counterbalanced in its application and effect by the principle of rigidity of the Constitution. In the exercise of the power to amend the Constitution conferred expressly and exclusively on it, the Legislature is subjected to a special process. The process is defined by mandatory procedures, compliance with which determines whether the object of amending the Constitution has been accomplished.

The procedure for the exercise of the power to amend the Constitution prescribed by s 328 of the Constitution marks the Constitution as a controlled or rigid Constitution. The obligation imposed by s 328 of the Constitution to comply with the prescribed procedure when exercising the power to amend the Constitution conferred on the Legislature by s 117(2)(a) distinguishes the exercise of the power to amend the Constitution from the exercise of the power to amend ordinary legislation. The distinction gives effect and value to the foundational principle of supremacy of the Constitution.

In *Mike Campbell (Pvt) Ltd and Anor* v *The Minister of National Security Responsible for Land, Land Reform and Resettlement and Anor* 2008 (1) ZLR 17 (S) at 26F-27E, the Court said:

> "Zimbabwe has a controlled Constitution. Its provisions cannot be amended, added to or repealed without compliance with the prescribed special formality. Dicey *supra* at pp 118-119 says that a controlled constitution 'is

> one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws'. …
>
> Zimbabwe, like many other nations with controlled Constitutions, has, in the Constitution, a section which prescribes with meticulous precision the special procedure for the alteration of its fundamental laws."

In *McCawley* v *R* 1920 A.C. 691 LORD BIRKENHEAD classified constitutions as "controlled" and "uncontrolled", depending on the presence or absence of some extraordinary procedure to be adopted for amendment of the constitution. At p 704 he observed:

> "Many different terms have been employed in the text-books to distinguish these two contracted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature. Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British Constitution, constituted by historic development but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter."

James Bryce, in "*Studies in History and Jurisprudence*" Vol 1 p 166, classified constitutions as "rigid" and "flexible". He said:

> "A 'Rigid Constitution' is one which enjoys an authority superior to that of the other laws of the State and can be changed only by a method different from that whereby those other laws are enacted or repealed. 'Flexible Constitutions', on the other hand, are those which stand upon an equal footing with other laws and which can be changed by the same process as other laws."

"Flexible constitutions" are associated with Parliamentary democracies, while "rigid constitutions" are associated with constitutional democracies. In "rigid constitutions", the Judiciary is the guardian of the Constitution. It has the power to determine whether all functions of the State are carried out according to the provisions of the Constitution. The Court also has power to declare a law unconstitutional if it is not enacted in compliance with constitutional provisions.

Implied repeal is not permitted when it comes to the Constitution, because the Constitution is a sacrosanct document which should not be tinkered with at will. The doctrine of implied repeal is ousted by s 328(2) of the Constitution, which provides:

> "(2) An Act of Parliament that amends this Constitution must do so in express terms."

The above provision is another example which reinforces the notion that the amendment of the Constitution is a limited power, the exercise of which is strictly controlled. A constitution is a supreme law, which is intended to guarantee stability to a nation. It is made difficult to change to protect it from being

subject to impulses of majority, temporary excitement, and popular caprice or passion.

In dealing with the importance of rules on constitutional amendment, Albert Richard, in an article titled "*Amending Constitutional Amendment Rules*" (March 9, 2014), International Journal of Constitutional Law 655 (2015); Boston College Law School Legal Studies Research Paper No. 336, said:

> "No part of a constitution is more important than the rules that govern its amendment and its entrenchment against it. In constitutional democracies, formal constitutional amendment rules constrain political actors by entrenching procedures for altering the constitutional text. Amendment rules thereby distinguish constitutional law from ordinary law, the former generally requiring more onerous requirements to change than the latter. Amendment rules also precommit successor political actors, create a popular check on the judicial branch, channel popular will into institutional dialogue, and express constitutional values. Perhaps their most important function, however, is to serve as a corrective device: amendment rules authorise political actors to update the constitutional text as time and experience expose faults in its design and as new challenges emerge in the constitutional community."

Section 328 of the Constitution provides in part:

> "**328 Amendment of Constitution**
>
> (1) In this section —
>
> 'Constitutional Bill' means a Bill that seeks to amend this Constitution;
>
> …
>
> (2) An Act of Parliament that amends this Constitution must do so in express terms.
>
> (3) A Constitutional Bill may not be presented in the Senate or the National Assembly in terms of section 131

unless the Speaker has given at least ninety days' notice in the *Gazette* of the precise terms of the Bill.

(4) Immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection (3), Parliament must invite members of the public to express their views on the proposed Bill in public meetings and through written submissions, and must convene meetings and provide facilities to enable the public to do so.

(5) A Constitutional Bill must be passed, at its last reading in the National Assembly and the Senate, by the affirmative votes of two-thirds of the membership of each House.

(6) Where a Constitutional Bill seeks to amend any provision of Chapter 4 or Chapter 16 —

(*a*) within three months after it has been passed by the National Assembly and the Senate in accordance with subsection (5), it must be submitted to a national referendum; and

(*b*) if it is approved by a majority of the voters voting at the referendum, the Speaker of the National Assembly must cause it to be submitted without delay to the President, who must assent to and sign it forthwith."

The amendment of different constitutional provisions is not done by the same process. An amendment of a provision other than *Chapter 4*, *Chapter 16* and s 328 of the Constitution requires affirmative votes to be not less than two-thirds of the membership of each House of Parliament. An amendment of a provision under *Chapter 4*, *Chapter 16* and s 328 requires a referendum in addition to the special majority referred to in s 328(5) of the Constitution. The Constitution thus follows the tradition whereby certain subjects are too important to be amended by a special majority in Parliament. This means that the issue of constitutional amendment is not an ordinary provision.

It is one which enjoys special protection by the Constitution itself. When interpreting s 328(5) of the Constitution, this underlying principle ought to be borne in mind.

INTERPRETATION OF SECTION 328(5) OF THE CONSTITUTION

The question for determination is whether s 328(5) of the Constitution requires that the amount of the votes in support of the Constitutional Bill must not be less than two-thirds of the total number of persons the Constitution declares that the House consists of. Does the subsection mean that the votes must not be less than two-thirds of the Members of the House who are alive and capable of voting at the time the voting is conducted?

The two Houses of Parliament interpreted the phrase "the membership of each House", as used in s 328(5) of the Constitution, differently. The National Assembly interpreted the words to mean the total number of persons the Constitution has declared the House to consist of as its Members. The Senate interpreted the phrase to mean the number of Members of the House who are alive and capable of voting at the time the vote on the proposed amendment to the Constitution is taken at the third reading.

The interpretation must take into account the language used; the context; the subject-matter; the purpose; and the object; of s 328(5) of the Constitution. The Court must bear in mind that it is the Constitution it is construing.

Section 328(5) of the Constitution is a fundamental law which prescribes the procedural and substantive requirements for a valid amendment of the Constitution. It sets out an objective standard for the determination of the validity of the amendment. The words "the membership of each House", as used in s 328(5) of the Constitution, refer to an element of the prescribed requirements of the objective standard for the measurement of the validity of the amendment of the Constitution which is peculiar to each House.

The requirement that the amount of the vote in favour of the Constitutional Bill must be not less than two-thirds of the membership of the House is applicable to votes by each House. The only factor of the requirement of the objective standard for the measurement of the validity of the proposed amendment which differentiates one House from the other and relates to its membership is the total number of persons the Constitution declares to be what each House consists of.

Section 120(1) of the Constitution provides that the Senate consists of eighty Senators, who become its members by being elected by the electorate in the manner prescribed.

Section 124(1) of the Constitution provides that the National Assembly consists of two hundred and seventy Members, who are elected in the manner prescribed.

It is necessary to consider the meaning and purpose of other provisions of the Constitution that have a bearing on the subject of s 328(5) of the Constitution. No single constitutional provision may be taken out of its context and interpreted by itself. The fundamental principle is that a constitution is a mode of limited government, characterised by the apportionment and distribution of powers. The powers concerned must be exercised for the benefit of the people as a whole in accordance with the constitutionally prescribed procedures.

Section 117(2)(a) of the Constitution expressly provides that the power to amend the Constitution conferred on the Legislature must be exercised in accordance with s 328.

Sections 120(1) and 124(1) of the Constitution are the laws governing the composition of the Houses. The contents of each provision provide the meaning of the words "the membership of each House", as used in s 328(5) of the Constitution.

The subject-matter of s 328(5) of the Constitution is the objective standard for the measurement of the validity of the amendment. As an element of the standard by which the validity of the amendment of the supreme law of the land is to be measured, the membership of each House has to be a constant element enjoying a degree of permanence. Considering the fact that amendment of s 328(5) of the Constitution is rendered more difficult by the requirements of s 328(9) of the Constitution,

the membership of each House in the context of s 328(5) of the Constitution is a constant factor.

Section 138(1) of the Constitution provides that all questions proposed for decision in either House of Parliament are to be decided by a majority of the votes of the Members of that House present and voting. The provision of a special procedure under s 328 of the Constitution for the exercise of the power to amend the Constitution means that the procedure prescribed by s 138(1) of the Constitution is not applicable to the special process of amending the Constitution. The exclusion of the procedure for deciding questions proposed for decision in either House of Parliament prescribed in s 138(1)(a) of the Constitution from the special process of amending the Constitution is evidence of the intention of the makers of the Constitution to protect the Constitution from fluctuating standards for the measurement of the validity of the amendment of the Constitution.

The effect of the contention by the respondents that the words "the membership of each House", as used in s 328(5) of the Constitution, mean the total number of Members of the House who are alive and capable of voting at the time the vote is taken is the importation of the procedure prescribed by s 138(1)(a) of the Constitution into the special process of amending the supreme law of the land.

The interpretation of the words "the membership of each House", as used in s 328(5) of the Constitution, to mean the total number of persons the Constitution declares each House to consist of is consistent with the object of the provision. The purpose and object of the requirements of the procedure for the exercise of the power to amend the Constitution prescribed by s 328(5) of the Constitution is to ensure that the amendment of the Constitution is of common benefit to the people. The procedural and substantive requirements of s 328(5) of the Constitution ensure that there is representation of the people and protection of their interests in the process of the amendment of the Constitution.

In making the Constitution and committing themselves to it as the supreme law of the land, the people imposed on themselves the obligation to accept an amendment of the Constitution effected by a vote in accordance with the standard of validity prescribed by s 328(5).

The meaning of the words "the membership of each House" as the whole number of persons the Constitution has declared the House to consist of receives support from the provisions of s 344 (3) and (4) of the Constitution. The section reads in relevant part as follows:

> "**344 Quorum and effect of vacancies in constitutional bodies**
>
> (1) …;
>
> (2) …;

(3) Any reference in this Constitution to the votes of —

(*a*) half of the membership of a body whose membership is not a multiple of two;

(*b*) two-thirds of the membership of a body whose membership is not a multiple of three; or

(*c*) three-quarters of the membership of a body whose membership is not a multiple of four;

is to be interpreted to mean that the number of votes must be not less than the whole number next above one-half, two-thirds or three-quarters, as the case may be, of the body's membership.

(4) Any reference to the total membership of Parliament is a reference to the total number of persons who for the time being are Members of Parliament."

Mr Mpofu argued that the Constitution maintains a distinction between s 344(4) and s 328(5). He submitted that the Constitution must be interpreted purposively and not in the abstract. He took the point further and argued that s 344 is not a substantive section. It is a definition section. There is a difference in the construction of the two. Any other interpretation would render s 328(5) meaningless. The provision is meant to make constitutional amendment difficult. He finally argued that s 328 of the Constitution grades different provisions based on how important they are.

Mr Uriri took a contrary view. He argued that the first port of call is the definition of "Member of Parliament" in the Constitution. "Membership" is derived from "Member of Parliament". Hence, in order to understand what "membership"

means, regard has to be had to the definition of "Member of Parliament". Membership depends on the construction of "Member of Parliament". He further contended that the law does not allow for a vacuum. The interpretation to be given to the provision must be one which best achieves the intention of the lawmakers.

Mr Uriri urged the Court to find, in respect of the Senate, that the relevant number is 79. He said the reason was that s 328(5) relates to "membership", which is derived from "Member". "Member of Parliament" relates to a person who is alive and is able to carry out Parliamentary business.

Section 344(4) of the Constitution is related to sections such as s 109(1), which relates to a vote of no confidence in Government, s 114(2), which relates to the revocation of a declaration of war, s 113(2), which relates to the approval of a declaration of a state of emergency, s 122(8)(f), which relates to the vacation of office by the President of the Senate, and s 126(8)(f), which relates to the vacation of office by the Speaker.

The provisions, which give substance to s 344(4) of the Constitution, show that its application is determined by the subject-matters to which the specific provisions relate and is confined to those provisions. The provisions of s 344(4) cannot be interpreted as giving meaning to s 328(5) of the Constitution. To the contrary, s 344(4) of the Constitution

sheds light on what s 328(5) of the Constitution does not mean. There is no provision which is similar to s 328(5) in the Constitution.

The contrast can be seen in s 113(6) of the Constitution, which provides:

> "113 (6) If, by a resolution passed by a majority of the members present at a joint sitting of the Senate and the National Assembly, Parliament resolves that a declaration of a state of public emergency — …".

This provision relates to Members "present". The majority that carries the day depends on the Members actually present and voting.

Another example of a similarly worded provision is s 138 of the Constitution, which provides:

> "**138 Voting and right of audience in Parliament**
>
> (1) Except where this Constitution provides otherwise —
>
> (*a*) all questions proposed for decision in either House of Parliament are decided by a majority of the votes of the Members of that House present and voting; …". (the underlining is for emphasis)

The provision under which the Constitution is amended does not relate to the presence of the Members. Its provisions are an exception referred to in s 138(1) of the Constitution. It means that in terms of s 328(5) of the Constitution the controlling concept is the membership of the House, which relates to the total number of persons the House is declared by

the Constitution to consist of. The number does not fluctuate since it is fixed by the Constitution. It is a definite number. When the provisions are contrasted, it becomes apparent that "the membership of each House", as used in s 328(5) of the Constitution, does not mean persons who are at any given time Members of Parliament.

Section 328(5) of the Constitution has two references to membership of the House. The first relates to the exercise of the power to vote. The vote can only be cast by Members of Parliament who are present and voting. The second reference is to the objective standard for the measurement of the votes cast in favour of the proposed amendment to the Constitution. It is the requirement of that objective standard that the votes in favour of the proposed amendment must not be less than two-thirds of the membership of the House concerned.

For the purposes of the objective standard for the measurement of the validity of amendment of the Constitution in terms of s 328(5) of the Constitution, the makers of the Constitution decided to fix the minimum threshold to be reached by the votes in favour of the proposed amendment by reference to the constant constitutive element of each House. They were free, in the exercise of the power of sovereignty, to do so. They were not under delegated authority, as the Legislature is. Section 328(5) of the Constitution is not in conflict with any

other provision of the supreme law. The matters it regulates are exclusive to its provisions.

"The membership of each House" is an essential element of the requirement of the objective standard fixed by the fundamental law. It is therefore binding on all Members of the House, individually and collectively, in the exercise of the power to amend the Constitution.

The people decreed by the supreme law that the validity of the exercise of the power to amend its provisions be determined by application of an objective standard, which takes into account the representation and the protection of their interests.

When searching for the true construction of a constitutional provision, a court must constantly bear in mind that its authors were not executing a delegated authority, limited by other constitutional constraints. They were establishing a fundamental law. To that extent the people, in the exercise of the power of sovereignty, were intent upon establishing such principles as seemed best calculated to produce good government and promote public happiness. They did so at the expense of any and all existing institutions which might stand in their way.

The objective standard for the determination of the validity of the proposed amendment of the Constitution is

applied to the amount of votes in favour of the amendment at the third reading. It is that vote which decides the question whether the Constitutional Bill is passed by the House concerned. Compliance with all the procedural requirements prescribed by s 328 of the Constitution is obligatory.

In enacting the provisions of s 328(5) of the Constitution, the people deliberately chose the formulation of the objective standard for the determination of the validity of an amendment of the Constitution. The objective standard subjects the votes in favour of the proposed amendment to a minimum threshold fixed by reference to the whole number of persons fixed by the Constitution itself as the anchor for the standard. The people settled for the formula prescribed by s 328(5) of the Constitution because they were satisfied that its application would secure the object of protection and promotion of their interests. It is a means of affording indirect popular participation in the process of amending the fundamental law.

Section 344(3) of the Constitution relates to provisions which use the formula for determining the validity of decisions on any questions for decision by the House by requiring the votes in favour of what is proposed to reach a minimum threshold fixed by reference to the membership of the body. The subsection prescribes what should happen when "the membership of a body" is not a multiple of the denominator to the vulgar fraction to express the minimum threshold.

The words "membership of a body", as used in s 344(3) of the Constitution, relate to the whole number of members the body is declared by the Constitution to consist of. It is clear from s 344(3) of the Constitution that reference to the "membership of a body" in any provision of the Constitution is reference to the total number of persons the Constitution has declared the body to consist of.

It is important to note for the purpose of the determination of the question before the Court that s 344(3) of the Constitution refers to "the membership of a body" when used in the Constitution in reference to the votes of a constitutional body. Section 328(5) of the Constitution falls into the category of provisions in which the formula fixing the minimum threshold for votes in favour of the proposed action by reference to the membership of the body concerned is used. The words "the membership of each House" are used in s 328(5) of the Constitution in a constitutive sense to refer to what constitutes each House, as prescribed by the fundamental law. The words refer to what constitutes the full strength of each House.

The correctness of the construction of s 328(5) of the Constitution linking the minimum threshold the votes in favour of the proposed amendment of the Constitution have to reach to the whole number of Members making up each House as fixed by the Constitution itself is supported by the provisions of s 344(4)

of the Constitution. Section 344(4) of the Constitution provides that any reference in the Constitution to "the total membership" of Parliament is reference to the total number of persons who for the time being are Members of Parliament. The definition of the total membership of Parliament is given immediately after the provisions of s 344(3), where reference is made to "the membership of a body". The effect of s 344(4) of the Constitution is that where reference is made in a provision of the Constitution to the "membership of a body", and that body is one of the Houses of Parliament, reference is not being made to the total number of persons who for the time being are Members of Parliament. Section 332 of the Constitution defines "Member of Parliament" to mean a Senator or a Member of the National Assembly.

The people decided that the objective standard for the determination of the validity of an amendment of the Constitution should not include an essential element which would depend on the effects of unpredictable occurrences of such events as death or removal from office of Members of either House. This self-restriction in the Constitution serves to guarantee stability and respect for the established constitutional order.

The amendment of the Constitution must not be an easy process. Section 328 of the Constitution prescribes the procedure for amending the Constitution, reflecting different

degrees of difficulty depending on the provision sought to be amended.

The amendment of the Constitution is a matter on which the public places a lot of importance. A swift and easy method of amending the Constitution would weaken the sense of security which the rigid Constitution gives. There would be too little distinction from the method for amending ordinary legislation. That would erode the special status of the supremacy of constitutional law. The Constitution would not occupy the special place it occupies today in the country's legal system. Changing provisions of the Constitution without following the special procedure provided for in s 328 would expose the Constitution to passing interests. The idea reigns that solidity and security are the most vital attributes of a fundamental law. See Bryce "*The American Commonwealth"* Vol 1*:* p 207.

The effect and substantive value of the foundational principle of supremacy of the Constitution is that, once ordained by the people, the Constitution and its provisions bind the people themselves. The people must respect and obey the dictates of what has been done by Parliament within the ambit of the limited powers they would have conferred on it and in accordance with the procedure they would have prescribed for its conduct.

Democracy is a limited form of government. The principle of supremacy of the Constitution is to the effect that, once the people have given the representatives they would have put in Parliament, the power to make the final decision by the prescribed amount of votes in favour of the amendment of the Constitution in accordance with the prescribed procedure, they would have bound themselves to accept the amendment as being in the common interests of the entire people. Therein lies and governs the principle of the rule of law. It is to the effect that law is the master to be obeyed by the State, every person, and every institution and agency of Government at every level.

When a Member of a House of Parliament casts a vote in favour of the proposed amendment to the Constitution, he or she is discharging a democratic mandate. He or she is not casting the vote for personal interests. The principle of representative democracy guarantees every Member of Parliament not only freedom in the exercise of his or her mandate but also equal status as a representative of the entire people. In principle each House complies with its function as a body of representation in its entirety.

The law does not differentiate votes in favour of the proposed amendment to the Constitution according to the political affiliation of the Members casting the votes. The voter acts as a Member of the House who is required to act in accordance with his or her conscience within the confines of the

duties of the office of membership. The fact that a political party with a majority of Members of Parliament manages to secure the requisite special majority of two-thirds of the membership of the House to amend the Constitution does not change the fact that at law the affirmative votes for the amendment of the Constitution represent the entire citizenry. The reason is that, although cast by an individual, the vote is an exercise of the power belonging to Parliament as a constitutional body established for the purpose of exercising legislative authority for the common good of the entire people. The people established Parliament as a means by which they would exercise through representatives the legislative authority they vested it with for their common interests. The Constitution creates a representative democracy, undergirded by the doctrine of separation of powers.

The interpretation of s 328(5) of the Constitution must seek to give effect to the fundamental values on which a republican form of government is founded. Section 328 of the Constitution does not only prescribe the procedures that those entrusted with the power to amend the fundamental law have to keep in mind and bear the obligation to act according to their requirements in the exercise of the power. The duty-bearers must also appreciate the rationale behind the limitation on the exercise of the power conferred on them in the context of the dynamism of the relationship with the people. They have to

appreciate the legal consequences of failure to act in accordance with the procedures prescribed by s 328 of the Constitution.

ANALYSIS OF THE FACTS

SENATE

The parties disagreed when it came to the interpretation of the provisions of s 120(1) of the Constitution, which provide for the composition of the Senate.

It is not in dispute that at the time the vote was conducted the Senate had only 79 Members. The question is whether, in calculating the minimum two-thirds threshold, the constitutive number, that is eighty, or the functional number of Senators who are able to participate and cast their votes should be used.

It was common cause that s 344(3)(b) of the Constitution refers to the formula used in s 328(5) of the Constitution. In terms of s 120 of the Constitution, the Senate consists of eighty Senators. Section 328(5) of the Constitution requires that the votes in the Senate in favour of an amendment of the Constitution be not less than two-thirds of its membership. Eighty is the only number specified in the Constitution which relates to the membership of the Senate in a constitutive sense. In terms of s 344(3)(b) of the Constitution, eighty is the membership of the Senate. There is no provision in the Constitution which refers

to seventy-nine or any other number other than eighty in relation to the membership of the Senate.

Now that it has been resolved that the relevant figure is eighty, another question arises. The question relates to whether 53 is two-thirds of 80. This is answered by s 344(3)(b) of the Constitution.

Eighty is not a multiple of three. The next multiple of three after 80 is 81. One-third of 81 is 27, and two-thirds of 81 is 54. Two-thirds of 80 is 54 in terms of s 344(3) of the Constitution.

It is not in dispute that the "Aye" votes in the Senate were 53. They were one short. The "Aye" votes in the Senate did not reach the required minimum two-thirds majority to pass the Constitutional Bill.

NATIONAL ASSEMBLY

The parties agreed that the applicable figure with regards the National Assembly is 270. They agreed that two-thirds of that number is 180. The agreement was based on the interpretation of s 124(1) of the Constitution which provides for the composition of the National Assembly.

The question was whether the applicants established, on a balance of probabilities, that there was no vote in Parliament. The cause of action as pleaded was the alleged complete failure

by the Speaker to conduct voting proceedings in the House to enable the Constitutional Bill to be passed. In the same breath, the applicants accepted that the voting did take place. The cause of action on this version of pleadings was that the votes cast in favour of the Constitutional Bill failed to reach the minimum threshold of 180 votes required by the provisions of s 328(5) of the Constitution.

The finding of the facts in issue depended on the finding on the accuracy of the sources of information produced as evidence by the parties. It is necessary to make a finding on the credibility of the evidence adduced by the parties.

Mr Mpofu argued that the unrevised *Hansard* and the Order Paper showed that the votes in favour of the Constitutional Bill did not reach the required minimum threshold of 180. He said the 182 votes relied upon by the respondents to prove compliance with the procedural and substantive requirements of s 328(5) of the Constitution included Members who were in Uganda on official duties and those who were absent for undisclosed reasons. When asked why the records of Parliament were later corrected, *Mr Mpofu* argued that the "correction" was not a correction; it was a "creation" because the error in the original documents had not been identified. He went on to argue that "the so-called correction" went to the substantive business of Parliament. He said it introduced a record that differed materially from the one reflective of the contemporaneous objections made by the

first applicant during the proceedings of 25 July 2017. The contention was that the correction was designed to cover up the irregularities in the proceedings conducted by the Speaker.

Mr Uriri took the view that there was compliance with the Constitution. He argued that the applicants' cause of action was premised on the unrevised *Hansard* and Order Paper, documents subsequently lawfully corrected. He argued that the amended documents of Parliament remain extant until they are set aside. He reasoned that there was a need for an application for a declaration of invalidity of the amended documents because they are an official record of Parliament. The contention was that there was nothing in the applicants' case on which reliance could be placed for rebuttal of the presumption that the contents of the official documents in the revised version represent the truth.

The Court noted that the applicants produced documents, the contents of which supported some of the averments they made. The respondents did not take issue with the authenticity of the documents produced by the applicants to support their case. The second respondent accepted that the documents were authentic. The point of departure was that the second respondent took the view that the documents relied upon by the applicants were inaccurate. They were subsequently lawfully corrected. The applicants, on the other hand, rejected the corrections made to the documents, describing them as "creations".

The evidence showed that the *Hansard* recorders recorded at ten minute intervals. In addition, there was an audio recording of proceedings. There was also a video recording process which was contemporaneous with both the manual and audio recordings. A closer analysis of the scenario suggests that Parliament had realised that it could not rely on the *Hansard* recorders' record only. The fact that there were contemporaneous audio and video recordings of the proceedings was an indication of the fact that there was an acceptance of the fact that a manual recording process is potentially inaccurate. It was difficult to understand why the applicants sought to rely on the manual recording of the *Hansard* recorders, which was the basis of the unrevised *Hansard*. It is the audio and video recordings which are used to correct the unrevised *Hansard* record so that it reflects accurately what transpired in the National Assembly.

The second respondent stated that the unrevised *Hansard* and the Order Paper used by the applicants were corrected in terms of Standing Order 131. The applicants did not deny that those documents could be lawfully corrected in terms of Standing Order 131.

Standing Order 131 provides that:

"… if the numbers have been inaccurately reported or an error occurs in the names of the division lists, the chair, on being informed of such errors, must order the Journal of the House to be corrected".

Standing Order 199 on the Journal of the House provides:

"**199 (1)** The Clerk must produce the Votes and Proceedings of the House which must be printed and distributed to Members from day to day.

(2) The Votes and Proceedings so printed, bound and signed by the Speaker, must constitute the Journal of the House."

Katherine Swinton, in an article titled "*Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege*", Osgoode Hall Law Journal, Vol 14, No. 2 (October 1976) pp 348-349, while writing on parliamentary practice, said:

> "Therefore, the enrolled copy of an Act would appear to be the original copy retained by the Clerk of the Parliaments. This makes no reference to the number of votes recorded nor the number of readings in the passage of the bill, showing only that the House of Commons and Senate passed the bill and royal assent was recorded on stated dates. To learn of the exact number of votes in favour of a bill and the number of readings, it is necessary to refer to the Journals of the respective Houses or to *Hansard*.
>
> The Journals are the official record of the proceedings of the House. They are compiled daily from the 'scroll' of the Clerk. The scroll, in reality foolscap sheets written in longhand by the Clerk, records the events of the House, whether the tabling of documents, the readings of a bill, or the votes on a bill or an amendment. The Journals made up from the scroll are more comprehensive, as they include the text of amendments and the results of recorded divisions, as well as the date of royal assent to bills, the Speaker's rulings on procedure and questions of privilege, and the text of royal recommendations. According to *Beauchesne*, any conflict between the scroll and the Journals would be solved by reliance on the Journals.
>
> The Journals do not serve the same purpose as *Hansard*, although there is some slight degree of overlap in their content. *Hansard* records the verbatim proceedings of the House, that is, the speeches and comments in the Chamber. The Journals are much more cryptic and are similar to minutes of a meeting. Their judicial treatment is also potentially different: the Journals are admissible

> evidence, whereas *Hansard* is normally excluded. In practice, it may be that the Journals can rarely be admitted due to parliamentary privilege, but they are at least potentially open to judicial scrutiny." (the underlining is for emphasis)

When the second respondent produced documents that corrected some of the errors, it was incumbent on the applicants to rebut the respondents' version by tendering evidence which showed that the respondents' version of events could not be possibly true. In para 58.4 of the first applicant's answering affidavit, he averred:

> "This is why even at this late stage, the second respondent has failed to produce affidavits from the two Honourables Mabuwa and Marapira to prove that they were in Parliament. They were not. I do not recall seeing them there and the *Hansard* confirms this."

The second respondent denied the averment and produced documents that proved that the two Members were in the House during the time the voting for the proposed amendment of the Constitution was conducted. It was not for the second respondent to prove the presence of the Members concerned. It was for the applicants to prove their absence.

The applicants obtained an affidavit from the Honourable Brian Tshuma, who said that at the relevant time he was away in Uganda on Parliamentary business. That fact did not take the applicants' case any further. It was confirmed by the corrected record of proceedings.

The applicants did not allege that they had correlated the manual recording and the audio recording in order to verify the accuracy of what the respondents alleged. On the other hand, the second respondent took the trouble to go through the audio recording in order to satisfy himself that the unrevised *Hansard* tallied with it. As a result of the process, the second respondent made corrections to the master copy of the unrevised *Hansard* to create documents that accurately reflected what transpired in the House on 25 July 2017.

The applicants cannot deny the correctness of the audio recording without themselves having correlated their unrevised *Hansard* to the audio recording. One cannot deny the correctness of a superior recording mechanism on the strength of a document prepared using a potentially inaccurate method of recording without first verifying the contents of the more superior method of recording. Before criticising the revised *Hansard*, the applicants needed to correlate the manually prepared *Hansard* with the audio recording.

The version backed by the evidence with more probative value is the one to be preferred. The probative value of evidence is impacted upon, negatively or positively, as the case may be, when regard is had to the manner in which the evidence was compiled. The documents produced by the second respondent are corroborated by the audio recording, the more accurate of the

means of recording. The Court would lean towards the party who took the trouble to revisit the audio recording.

The National Assembly is a creature of the Constitution and it is one of the constituent parts of Parliament. There is a presumption of constitutionality as regards the conduct of business of the House. It has been said that the presumption is in favour of every legislative act, and that the whole burden of proof lies on the party who denies its constitutionality. *Brown* v *Maryland* 25 U.S. 419, 436 (1827); *Lawrence* v *State Tax Commission of Mississippi* 286 U.S. 276, 283 (1932).

Having made the finding that the revised *Hansard* is the true record of what ensued in the National Assembly, regard must be had to the contents of the revised *Hansard* in an effort to establish whether or not a vote did take place in the House. The revised *Hansard* shows that the following happened in the National Assembly:

> "… [HON MEMBERS: *Inaudible interjections*]- No, I have ruled –
>
> [HON MEMBERS: *Inaudible interjections.*] – Order, order, we proceed. Section 328(5) of the Constitution of Zimbabwe provides that, 'A Constitutional Bill must be passed, at its last reading in the National Assembly and in the Senate, by an affirmative vote of two-thirds of the membership of each House.'
>
> In order to comply with the provision of Section 328(5), it is necessary that the number of the affirmative votes cast by Members be recorded. I therefore direct that the bells be now rung after which the votes of – [HON MEMBERS: *Inaudible interjections.*] – Hon. Members will be counted –
>
> [HON. MEMBERS: *Inaudible interjections.*] –

[*Bells rung*].

[*House divided*].

***HON.ADV.CHAMISA:** Hon. Speaker, we are grateful that you have managed to divide the House which is not a problem in itself but realising that this is a Constitutional Bill, it is a Bill – [HON. MEMBERS: *Inaudible interjections.*] –

…

What I am submitting Hon. Speaker, is that let us allow the secrecy of the vote by Members of Parliament – [HON. MEMBERS: *Hear, hear*] – so that we have a secret ballot. There are Members who are intimidated from the other side. They have been complaining to us Hon. Speaker Sir. Voter intimidation cannot be allowed in Parliament. … As individual Members, we feel that let us vote without fear or favour; without intimidation and let us make arrangements for a secret ballot for this vote is an important Bill being a constitutional Bill. Hon. Speaker Sir, I so request.

THE HON. SPEAKER: Order, Order. I hear you Hon. Chamisa … in this case, I say no secret ballot.

HON. TOFFA: Point of order Mr. Speaker Sir.

…

THE HON. SPEAKER: Hon. Toffa, can you take your seat? – [HON. MEMBERS: *Inaudible interjections*] – Order, order! Sit down. Order, the tellers have been counting and we want to hear the numbers – [AN HON. MEMBER: *The correct numbers not just the numbers*]- I will send you outside now and can you be orderly. What numbers do we have from the Ayes?

HON. MUKWANGWARIWA: We have 187.

THE HON. SPEAKER: And this side?

HON. GONESE: Mr Speaker, I think that procedurally – [HON. MEMBERS: *Inaudible interjections.*]-

…

HON. GONESE: I am saying that the position in terms of the constitutional provisions is that the affirmative votes, it does not matter how many votes we have this side. It has to be 180+. So, we have got to verify that first. From our side, those we counted, we came up with 173. We might have made an error and this is why we need a physical count. We need to have a physical count and confirm the names with the people who are here because we do not know each other.

We have to verify firstly how many people are there because when we counted Mr. Speaker, we have come up with a figure which is about 173 which is well short of that number. We have made an error and we need to verify because this is just to fulfil the constitutional position. We have to comply with our Constitution because some people were seated haphazardly and it was not easy to verify.

…

We need to count physically as to how many Members there are.

THE HON. SPEAKER: What is your number?

…

HON GONESE: The numbers on this side Mr. Speaker are not relevant. We need to verify affirmative votes, … The affirmative votes are the ones which count, even if there were two people on this side, it does not really matter, what matters are the affirmative votes. That is what matters. So, for me Mr. Speaker, we need to verify that number because even if there were two people or zero people, it would not matter, because what matters is whether there is one-third or two-thirds which is 180+. So, my view is that we have to confirm the affirmative votes. Are they 180+? If they are not 180+, then that is not correct.

…

THE HON. SPEAKER: And what is your number?

…

HON GONESE: I will give you the number Mr. Speaker. The number which we have is 41 but we still need verification – [HON. MEMBERS: *Inaudible interjections.*] –

THE HON. SPEAKER: Order. … I have consulted with the Leader of Government Business and we will verify the numbers this side – (*Right side of the Chair.*) – and we want Tellers now – [HON. MEMBERS: *Inaudible interjections*] – Order, order. I am going to announce the results and then we verify …

HON. MLISWA: On a point of order Mr. Speaker Sir.

THE HON. SPEAKER: What is your point of order?

…

HON. MLISWA: I cannot speak when they are making noise and standing - …

…

THE VICE PRESIDENT AND MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS (HON. E.D. MNANGAGWA): Mr Speaker Sir, may I request Hon. Members who are standing, if they have places to sit, to sit down. …

Mr. Speaker Sir, the request by the Members of the opposition is that they would want the figures to be verified. My view in democracy is that we must be very transparent. May I ask Hon. Members to become honourable as they are Honourable Members?

…

Mr. Speaker Sir, the point currently in question is the question of verifying the numbers that have been mentioned by appointed counters from both sides, but there is need from the other side - they want us to verify the numbers that you have been given as Mr. Speaker, after the count. I, representing this side, agree that quietly, can we have the Sergeant-at-Arms count our side, he gives you the number and he comes to the other side when everybody is seated, and gives you the number –

…

HON. KHUPE: Thank you very much Mr. Speaker – [HON. MLISWA: *I have not been given the chance and I am just equal to them.*] –

Mr. Speaker Sir, I agree 100 per cent with the Vice President that the votes must be verified – but my point is that, votes must be verified to the satisfaction of both sides and the only way we can be satisfied is that two Chief Whips from MDC count the ZANU PF side and those from ZANU PF count the MDC side together with the Sergeant-at-Arms. That is the only way we can be satisfied that the numbers are correct. Mr. Speaker Sir. We want fairness in this House. If indeed we are not hiding anything, let us do it like that.

THE HON. SPEAKER: Order, order. Hon. Chamisa please, please be quiet. The Sergeant-at-Arms can be accompanied by two Whips – … [HON. MLISWA: *I have to be part of the counting as well because I am an independent Member and the Chief Whips cannot count us.*] -

Mr. Speaker directed the Sergeant-at-Arms to conduct a recount of Hon. Members on the right side.

THE HON. SPEAKER: After the verifications, the figure given of the results of the count is: Ayes – 182 and the Hon. Members who left are Hon. Matuke; Hon. Chinomona, Hon. Ruvai, Hon. Nyamupinga, Hon. Muchenje - …

> Those against – 41. The number of affirmative votes recorded is not less than two-thirds membership of the House. I therefore, declare the final votes in the house on the Constitutional Amendment Bill to have been in accordance with the provisions of section 328(5) of the Constitution.
>
> **AYES:** {Lists the individual names of those voting in favour of the bill}
>
> *Teller: Rungani, A.*
>
> **NOES:** {Lists the individual names of those voting against the bill}
>
> *Teller: Gonese, I.*
>
> Bill read the third time. …".

The record shows that there was a vote. The second respondent called for a vote and the opposition requested for a division of the House. It is not in doubt that the bells were rung and the House was divided. A teller was appointed who then took up his duty and counted the Members in the divisions. In the presence of all the Members, he communicated that there were 187 "Aye" votes. Thereafter, there was heckling in the House as the opposition requested that the votes be verified. At that stage, no complaint was made to the effect that there was no vote count. What was challenged was the accuracy of the count of 187 affirmative votes. The first applicant agreed that the opposition had 41 votes. That admission, reflected in the corrected *Hansard*, is evidence that there was a vote.

Verification connotes a vote. It is the first applicant himself who requested a verification. The verification established 182 "Aye" votes. An explanation was made that

Honourable Matuke, Honourable Chinomona, Honourable Ruvai, Honourable Nyamupinga and Honourable Muchenje left the House after the results of the vote were declared. The five Members attended the voting proceedings on the day in question. The revised papers also show the names of those who were absent. The five Members were not part of the absentees.

The applicants did not deny the fact that they were given an opportunity to verify the votes. They accept that verification took place. One cannot speak of verification without accepting that there was a process that resulted in the request for the verification of the results. By requesting a verification, the applicants accepted that there was a vote. It is a clear contradiction in the applicants' case to suggest that there was no vote and then later accept that there was a verification process which established that an affirmative vote of 182 was reached in the National Assembly.

The unrevised *Hansard* shows Honourable Chamisa interjecting before the count. The applicants rely on that to say that there was no vote. The revised *Hansard* shows that the interjection by Honourable Chamisa came after the result of the vote had been communicated.

A vote is an expression of a will. It can be expressed in a number of ways. Divisions are used for counting those in favour of or against a motion. Once the House is divided, it means a person would have moved over to the side with which he or she

wants to vote. The movement to the side of the House is the voting. In this sense, the allegation that there was no "formal vote" is of no consequence. The law requires that there be a vote and it does not require that it be a "formal vote". The law requires that an individual Member of the National Assembly express his or her will. That was done by moving towards either side of the House when it was divided.

In a paper titled "*Divisions in the House of Commons: House of Commons Background Paper*", Commons Briefing Papers SN 06401, 2 August 2013, Mark Sandford explained:

> "A vote in the House of Commons is known as a 'division'. Members vote by walking through either an Aye (yes) or a No lobby. Their names are recorded as they file past the clerks and are then counted by the Tellers."

Woodall Parker in "*Outlines of the Constitution of the British Government in India*" p 42, opines:

> "The voting is taken by the Speaker asking members to say aye or no to the question; he decides which are in the majority; and if his decision is questioned a division takes place and the members are counted."

The first applicant's founding affidavit was to the effect that when Honourable Chamisa made the interjection, the tellers were already counting Members where they were sitting. The division of the House is the vote itself. Once Members moved to either side of the House, the tellers had to start counting them where they were sitting. The suggestion that there be a secret ballot had lost its relevance. Members had already voted by

reason of the seats they elected to take when the House was divided.

After the vote was conducted, Members in the "Noes" division demanded a verification of the votes. The fourth respondent acceded to the request. This was captured in both the unrevised *Hansard* and the Journal. The applicants would not have asked for a verification of votes if there had been no voting done. The applicants conceded that the fourth respondent acceded to a verification process.

Paragraph 89 of the first applicant's founding affidavit reads:

> "The committee stage was completed on the 27th of June 2017. However, on this day, the fourth respondent did not have the required numbers and he did not seek leave of the House to proceed to the third reading."

The fourth respondent deferred the third reading on 27 June 2017 because he did not have the requisite numbers to secure the votes in favour of the Constitutional Bill and reach the minimum threshold for its passage in the House in accordance with the requirements of s 328(5) of the Constitution. By parity of reasoning, when he requested the third reading on 25 July 2017 he had the requisite numbers. The fourth respondent could not have sought leave to proceed to the third reading of the Constitutional Bill if he did not have at least 180 Members in

attendance who were most likely to vote in favour of the proposed amendment of the Constitution.

It is common cause that after a Constitutional Bill is passed by the National Assembly the Speaker is required to present a certificate which states that the Bill received the affirmative votes of at least two-thirds of the membership of the House.

Section 328(10)(a) of the Constitution provides as follows:

> "(10) When a Constitutional Bill is presented to the President for assent and signature, it must be accompanied by —
>
> (a) a certificate from the Speaker that at its final vote in the National Assembly the Bill received the affirmative votes of at least two-thirds of the membership of the Assembly; …". (the underlining is for emphasis)

The above section makes it clear that the Speaker's certificate speaks to the presumption of the fact that there was an affirmative vote on the day in question and that the vote reached the requisite minimum threshold of two-thirds majority of the membership of the House.

The certificate is an integral part of the legislative process. It is taken as evidence of the facts it contains. It creates a constitutional presumption of regularity. In order to rebut the presumption, the applicants needed to show that the

certificate was not born out of a process that is consistent with the law.

It was a contradictory pleading for the applicants to allege that the vote in favour of the Constitutional Bill did not reach the minimum threshold of two-thirds of the membership of the House when they averred at the same time that no vote was conducted. The question of whether the required threshold was reached could not arise if there was no voting conducted by the Speaker. One cannot allege that the required threshold was not met without accepting that there was a vote. Implicit in the alleged failure to reach the required minimum threshold is an acceptance that a vote was conducted. One cannot make two mutually inconsistent averments in the same pleading. It has the effect of destroying the cause of action because a cause of action cannot be sustained by contradictory averments.

The existence of a vote is in itself an important element of the question whether there was a two-thirds majority. One cannot deny a process of voting and then go on to argue about what was claimed to have been the result of that process. For one to establish the existence of a two-thirds majority, there must be an underlying vote that resulted in a figure which then becomes the subject of a challenge.

The applicants alleged that the results of the vote included Members of the National Assembly who were actually

absent during the vote. The revised *Hansard* showed, upon a physical count, that 239 Members were present in the House on 25 July 2017, excluding those who were allegedly counted yet they were absent. The figure of 239 was different from the 234 Members who were alleged by the applicants to have been in the House. The applicants relied on the figures from the unrevised *Hansard*. The unrevised *Hansard* reflected inaccurate figures.

APPROPRIATE REMEDY

The analysis demonstrates that the applicants failed to show that the Constitutional Bill was not passed in the National Assembly in a manner prescribed by the Constitution. The applicants have been able to show that the Constitutional Bill failed to garner the requisite 54 votes needed for it to be passed in the Senate.

The Constitution is the supreme law of the land. It is binding on every person and every institution of Government. The purpose of the acts to be done and the requirements to be observed before an amendment of the Constitution can be effected is to enforce the supremacy of the Constitution and the principle of the rule of law.

The Court is required by constitutional policy to pronounce against any amendment of the Constitution which is not shown to have been made in accordance with the rules prescribed by the

fundamental law. Power exercised in accordance with procedures prescribed by law is exercised in accordance with the principle of the rule of law. It was a constitutional obligation on Parliament not to pass the Constitutional Bill in the Senate when the votes in favour of the proposed amendment were less than two-thirds of the membership of the House. There was a violation of the Constitution.

Section 175(6) of the Constitution provides as follows:

> "(6) When deciding a constitutional matter within its jurisdiction a court may —
>
> (*a*) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;
>
> (*b*) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect."

The question whether the Constitutional Bill ought to be set aside depends on whether the invalidity of the process in the Senate is severable from the validity of the process in the National Assembly.

Paragraph 5 of the Fifth Schedule to the Constitution provides as follows:

> "PROCEDURE REGARDING BILLS
>
> 5. *Transmission of Bills between Houses*

> (1) A Bill which originated in one House of Parliament and has been passed by that House must be transmitted to the other House without delay, and the date of its transmission must be recorded in the journal of the House from which it is transmitted.
>
> (2) A Bill that has been transmitted to a House of Parliament must be introduced into that House without delay, and the House may reject the Bill or pass it with or without amendment.
>
> (3) A Bill which, having been transmitted to a House of Parliament in accordance with this paragraph, is passed by that House with amendments must be returned to the House where it originated with the amendments duly certified by the Clerk of Parliament, and the House to which it is returned may reject, agree to or amend any of those amendments.
>
> (4) If, after a Bill has been returned to its originating House in terms of subparagraph (3), any amendment made to it by the other House is rejected or amended by the originating House, the other House may, by message to the originating House pursuant to a resolution, withdraw the amendment or agree to its being amended."

Section 328(5) of the Constitution also shows that a Constitutional Bill would be passed by the requisite votes cast in each House in separate proceedings.

The two provisions, read together, show that there are two different but complementary processes, that is, the process in the National Assembly and the process in the Senate. The difference in the processes is underscored by the fact that a Bill that originates in the National Assembly, if it fails to garner the required votes, will not be transmitted to the Senate and vice versa. The Constitutional Bill, after the voting process in the National Assembly, was transmitted to the Senate.

The process in the National Assembly was regular. Only the process in the Senate was irregular.

The invalidity of the proceedings in the Senate does not affect the validity of the proceedings in the National Assembly. The third respondent, together with the second respondent, prepared the certificate in terms of s 328(10)(b) of the Constitution. The third respondent had calculated the minimum threshold from the number seventy-nine and not eighty. The proceedings were conducted on the understanding that fifty-three votes in favour of the proposed amendment of the Constitution would be enough. It was an error of law. As such, the invalidity of the process in the Senate was informed by the misinterpretation of s 328(5) of the Constitution. The Senate ought to be afforded an opportunity to conduct the vote with a full appreciation of what is required for a Constitutional Bill to be passed. The order to that effect would be consistent with the provisions of s 175(6)(b) of the Constitution.

DISPOSITION

1. 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.

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

BHUNU JCC: I agree

Tendai Biti Law, applicants' legal practitioners

Chihambakwe Mutizwa and Partners, first, second and third respondents' legal practitioners

Civil Division of the Attorney General's Office, fourth and fifth respondent's legal practitioners