

REPORTABLE (4)

(1) EDWIN MUSHORIWA (2) FIRINNE TRUST OPERATING AS
VERITAS (3) BRIAN CROZIER (4) VALERIE INGRAM- THORPE

V

(1) PARLIAMENT OF ZIMBABWE (2) THE PRESIDENT OF THE
REPUBLIC OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE

**GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO
JCC, PATEL JCC, UCHENA AJCC
HARARE: 2 MARCH 2022 & 28 APRIL 2023**

T. Biti, for the applicants

T. Zhuwarara, for the first respondent

T. Magwaliba with

G. Madzoka, for the second respondent

D. Sanhanga, as *amicus curiae*

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

1

GARWE JCC:

[1] In this application the applicants seek an order declaring that the Parliament of Zimbabwe (“Parliament”) and the President of the Republic of Zimbabwe (“the President of Zimbabwe” or simply “the President”) have failed to fulfil certain constitutional obligations delineated in s 328 of the Zimbabwe Constitution in passing Constitution of Zimbabwe Amendment (No.2) Act, 2021 (“the Constitution Amendment Act”). More specifically, the applicants allege that the Bill that was eventually passed by Parliament on 7 May 2021 contained a number

of major and material amendments to the original Bill. Maintaining that the Bill that is passed by Parliament must be the same Bill as that originally gazetted, they seek, as consequential relief, an order setting aside the entire Constitution Amendment Act, alternatively, an order striking down the particular sections of the Constitution Amendment Act which they consider to have been irregularly enacted.

[2] Various objections were taken *in limine* by the respondents, both in their opposing papers and heads of argument. The applicants also raised a number of preliminary points arising from the opposing papers filed by the respondents. The court, of its own motion, invited Ms Sanhanga to appear as *amicus curiae* and, consequent to that invitation, she filed heads of argument dealing with the various contentions raised by the parties.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

2

[3] Having considered the facts of this matter in their totality and the submissions by the parties as well as *amicus curiae*, I reach the conclusion that the Constitution Amendment Act was properly passed. The application must therefore fail. On the question of costs, I observe, with some disquiet, that the applicants deliberately employed language that is invective and not in accordance with the decorum of the court. That language has no place in a court of law. For that reason alone, I am of the view that a costs order against the applicants is warranted in this case.

FACTUAL BACKGROUND

[4] The first applicant, Edwin Mushoriwa (“Mushoriwa”) is a Member of Parliament for the Dzivarasekwa Constituency in Harare, having been so elected in the 2018 harmonised elections. The second applicant, Firinne Trust operating as Veritas

(“Firinne Trust”), is a trust constituted in accordance with the laws of this country. It is a human rights organisation involved in the advocacy of human rights and constitutionalism in Zimbabwe. It further states that part of its mandate is to publicise the work of Parliament and analyse Bills and legislation to ensure adherence to constitutional principles and respect for human rights. The third applicant, Brian Crozier (“Crozier”), is a registered legal practitioner who, for many years, worked as the chief legal draughtsman in the Ministry of Justice, Legal and Parliamentary Affairs. With others he was involved in the drafting of the 2013 Constitution. He states that he has devoted much of his life in defending the rule of law and human rights.

[5] The first respondent, the Parliament of Zimbabwe (“Parliament”) is the organ of State that is charged with the responsibility of initiating, preparing, considering and rejecting legislation. Its legislative authority is exercised through the enactment of Acts of Parliament. The Legislature of Zimbabwe consists of Parliament which passes Bills and the second respondent, the President of Zimbabwe, who assents to and signs Bills presented to him by Parliament to enable Bills to become Acts of Parliament.

[6] The Constitution of Zimbabwe Amendment (No.2) Bill (“the Constitution Amendment Bill”) was gazetted as Bill HB 23/2019 on 31 December 2019 through General Notice 216/2019. It was eventually passed by Parliament on 7 May 2021. It is common cause that during its second reading, the Minister of Justice, Legal and Parliamentary Affairs, in response to points made during the debate, gave notice that he would be moving amendments to the Bill at the Committee Stage scheduled for the following day. The suggested amendments

were published in the order paper for the following day. In addition to the amendments proposed by the Minister, other amendments were proposed from the floor. These amendments were accepted and adopted during the Committee Stage. It is these amendments and their constitutionality that the applicants take issue with.

APPLICANTS' CASE BEFORE THIS COURT

[7] In his founding affidavit, Mushoriwa states that the Bill that was eventually passed by Parliament on 7 May 2021 contained major and material amendments that were incorporated into the original Bill. He states that it is unlawful for Parliament to pass a Constitutional Bill which is not in express terms the same as that which was originally gazetted in terms of s 328 (3) of the Constitution. In other words, so he averred, the Bill that is passed by Parliament must be the same Bill as that originally gazetted. ^{Judgment No. CCZ 04/23} Because the Bill that was eventually passed ^{Constitutional Application No. CCZ 18/21} contained major amendments, it became materially different from the original Bill and was, consequently, invalid. He avers that where, as in this case, there are major and material amendments to a Constitutional Bill that has been gazetted in terms of s 328 (3) of the Constitution of Zimbabwe, then such amendments should be gazetted for a further period of ninety (90) days in terms of the same section and subjected to further debate by members of the public in public meetings and through written submissions as provided for in subsection (4) of s 328 of the Constitution. In failing to ensure that s 328 of the Constitution was complied with, both Parliament and the President failed to fulfil the constitutional obligation to pass a Bill that complied with s 328 of the Constitution. The Bill was passed by both the National Assembly and the Senate in May 2021 and was

signed and gazetted into law by the President on 7 May 2021 as Constitution of Zimbabwe Amendment (No.2), Act No.2 of 2021.

[8] The applicants itemise the amendments they say were material that were introduced at the Committee Stage of Parliament as being the following:-

- the *proviso* that was added to s 124 of the Constitution relating to a proposal by Priscilla Mushonga for political parties to ensure that ten of the sixty women members would be persons under the age of thirty five; that women with disabilities are represented on party lists and young women with disabilities are represented on their party lists in terms of an Act of Parliament.
- the amendment to s 180 of the Constitution which now made provision that an appointment of a Judge could be made by the President whenever it becomes necessary to do so rather than whenever a vacancy arose. Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21
- the amendment to s 186 of the Constitution increasing the retirement age of Judges from 70 to 75 years subject to an election by the Judge to continue and approval by the President. It further provided that, notwithstanding the provisions of s 328 (7), the amendment would apply to the continuation in office of the Chief Justice, Deputy Chief Justice, Judges of the Constitutional Court and Supreme Court.
- the amendment to s 199 providing that 10% of persons to be employed in the public service would be persons with disabilities.

- the amendment to s 268 providing that members of a provincial council should include ten women elected by a system of proportional representation.
- the amendment to s 327 excluding from Parliamentary scrutiny loans and agreements referred to in s 300 (3) and (4) of the Constitution.

PARLIAMENT'S NOTICE OF OPPOSITION

[9] The notice of opposition was deposed to by the Speaker of Parliament, Jacob Mudenda. In his opposing affidavit, he disputed that Parliament was required to re-gazette the amendments that were incorporated into the original Bill or that there was an obligation on the part of Parliament to invite members of the public, once again, to express their views in respect of the same. He stated that there is no provision in the Constitution which requires amendments to be re-gazetted or subjected to further public meetings. Judgment No. CCZ 04/23 Constitutional Application No. CCZ 18/21 He further contended that, had the intention been that a gazetted Bill should be passed without amendments, the section in question would have stated accordingly. In any event, so he argued, there would be no purpose in having parliamentary debates if Parliament is not allowed, at the end of the day, to make amendments where it deems fit. Such an interpretation of s 328 of the Constitution would lead to an absurdity.

[10] He further averred that Parliament did, in fact comply with the provisions of s 328 (3) of the Constitution. The Speaker duly gazetted the Bill as required by s 328 (3) of the Constitution. Thereafter, pursuant to subsection (4), Parliament duly invited members of the public to express their views on the Bill both in public meetings and through written submissions. He further stated that the

amendments came about as a result of parliamentary debate and that the amendments did not, in any event, change the complexion of the Bill. Endorsing the Bill with obvious shortcomings would have constituted a failure on the part of Parliament to perform its constitutional obligation. He further stated that since there is no provision which prohibits Parliament from making amendments to a Constitutional Bill, the matter does not therefore fall within the ambit of s 167 (2) (d) of the Constitution.

THE PRESIDENT'S NOTICE OF OPPOSITION

[11] The opposing affidavit of the President was deposed to by the Attorney-General who has averred that he has been authorised by the President to depose to the affidavit. The Attorney-General has taken a number of preliminary points. First, that the application is fatally defective, having been brought in terms of s 16 (2) (d) of the Constitution, which is a non-existent provision. ^{Judgment No. CCZ 04/23} ~~Second, that not having~~ ^{Constitutional Application No. CCZ 18/21} alleged a contravention of their fundamental rights espoused in Chapter 4 of the Constitution, the applicants have no legal standing to challenge the validity of the Constitution Amendment Act. Third, that the same matter is pending before this court in the application filed by the second applicant jointly with *Eric Matinenga and Ors* in CCZ 14/21. The matter is therefore already pending before this court and the present application ought therefore to be dismissed with costs. Fourth, that Brian Carston Brown has no authority to bring these proceedings on behalf of Firinne Trust. The resolution attached to the founding affidavit gives general authority to the director of the Trust, one Dr Ingram Thorpe, to institute court proceedings, which she did in case number CCZ 14/21. Brian Carston Brown was given alternative authority to depose to an affidavit only in situations where Dr Thorpe would have failed to do so. Fifth, that Firinne Trust, being a trust, has not

established that it has been given legal capacity in terms of its constitution to institute proceedings in its own name as opposed to the names of its trustees. The assertion that it has power to sue and be sued remains a bald one.

[12] On the merits, the Attorney-General states that he does not accept that there were material differences between the Bill that was gazetted and the Bill that was eventually passed. Further that, in any event, there is nothing in the Constitution which prevents Parliament from effecting amendments to a Bill that is passed as a law. He also submits that no attempt has been made to identify the specific constitutional obligation that is alleged to have been breached by Parliament or the President.

[13] He has further stated that the Bill in question was subjected to all the necessary requirements in terms of s 328 of the Constitution of Zimbabwe. There is no constitutional requirement for any amendments effected to a Bill to be gazetted for the second time. The averments made by the applicants in their founding affidavits show that there was publication of the Bill and interested persons were given the opportunity to make contributions in respect of the contents of the Bill. He argues that the applicants are therefore introducing an additional constitutional requirement where none exists. He states that, taken to its logical conclusion, the proposition by the applicants is that amendments that are proposed after gazetting must themselves constitute a separate Constitutional Bill and become subject to further gazetting and the ninety-day notice in the Gazette.

[14] On the amendments introduced during the Committee Stage, he submits that there is nothing in the Constitution that precludes Parliament from incorporating into

the Bill suggestions made by members of Parliament during the Committee Stage. The intention of having debates in Parliament is to ensure that the Bills are fine-tuned, adjusted and amended to suit the needs of society.

APPLICANTS' ANSWERING AFFIDAVITS

[15] In their answering affidavits, the applicants state that the President has duties that are defined in Part 2 of Chapter 5 of the Constitution. S 90 (1) of the Constitution makes it clear that he must uphold, defend, obey, and respect the Constitution. To the contrary, they allege that he and Parliament are responsible for its mutilation.

[16] The applicants also take issue with the affidavit deposed to by the Speaker on behalf of Parliament. Accepting that the Speaker is the head of Parliament, they state, however, that he is not Parliament, which consists of two chambers. The two houses should have separately resolved to defend this matter and given him specific authority to defend this application.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

9

[17] They further argue that the effect of introducing material amendments at the Committee Stage of Parliament is to deny the *imperator* prescribed in subss (2), (3) and (4) of s 328 of the Constitution. A holistic and contextual construction of s 328 is imperative. It must be one that seeks to protect the Constitution and not destroy it.

[18] The applicants accept that Parliament has the right to debate a Bill and to reject some of its provisions. But they do not accept that Parliament, at the instance of the executive or anyone else, can introduce material amendments that were not part of the original Bill when gazetted. Where there is a counter proposal in the

ensuing debate in Parliament, the executive must go back to the drawing board and re-gazette a fresh amendment arising out of those consultations. In other words, the Bill presented and gazetted in terms of s 328 (1), (2) and (3) cannot have amendments that by-pass the obligation for public participation as well as the obligation for the Speaker to give at least ninety days' notice of such Bill in the Gazette specifying the precise terms of the Bill.

[19] The applicants also take the point that it is not competent for the Attorney-General to depose to an affidavit on behalf of the President who is his client. On the point taken by the President that the applicants cannot approach this court in terms of s 16 (2) (d) of the Constitution, the applicants say that this is an “*ipse dixit*... raised by hired guns, acting on behalf of the 2nd respondent, who has no morality, no conscience, no decency other than their bottom line”. They further state that the objection is “nothing but sophistry, pedantism, and typical of those who do not respect the Constitution and who do not respect the rule of law in this country”.

[20] On the suggestion that the present application was the result of cutting and pasting of the *Eric Matinenga* application, the applicants deny that the respective causes of action are similar, regard being had to the fact that, in the *Eric Matinenga* case, the application is based on the doctrine of basic structures, which is not the position in the present matter. They submit that conflating the two applications would have been undesirable.

[21] The applicants state further that the Firinne Trust has the legal capacity to sue and be sued. They aver however that even if it does not have such capacity, the first

and third applicants, who are natural persons, are before the court. They state that there is no point “raising an objection that does not advance any cause other than irritation”. Brian Carston Brown avers that the Deed of Trust of the second applicant authorises the Trust to bring and defend proceedings. He does not, however, attach a copy of the trust deed.

[22] The applicants further stress that no material amendments can be passed at the Committee Stage of Parliament and neither can amendments which would not have been subjected to a process of participatory democracy in terms of s 328 of the Constitution. They argue that if this were to be allowed, it would mean the Executive would ambush the public by introducing major material and far-reaching amendments on an unsuspecting public.

APPLICANTS’ HEADS OF ARGUMENT Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

11

[23] In their heads of argument, the applicants submit that both Parliament and the President failed to fulfil their constitutional obligations in respect of the passage of the Constitution Amendment Act and more specifically, in enacting “ungazetted and unconsulted amendments”. In summary, they submit that it is unconstitutional for Parliament to pass amendments that are not expressed in the terms originally gazetted in terms of s 328 (3) of the Constitution, that have not been gazetted for ninety (90) days as required by s 328 (3) and that have not been subjected to a process of public inquiry as mandated by s 328 (4) of the Constitution. They further submit that the executive must justify its actions and show that it correctly fulfilled its constitutional obligations.

[24] The applicants further argue that the executive cannot, through the back door, allow such extensive amendments without them having been gazetted and debated. They further submit that, in interpreting s 328 of the Constitution, this court should not rely on the literal meaning of the words used but must read all the provisions of the Constitution holistically and in a generous and purposive manner. If that approach is adopted, the conclusion would be reached that it was wrong and unconstitutional to introduce extensive amendments not previously gazetted or subjected to public scrutiny at the Committee Stage of Parliament. They argue that nowhere in the Fifth Schedule to the Constitution is there provision for amendments to be made at the Committee Stage as stated in the Standing Orders. The procedure for amendments at the Committee Stage applies to normal bills but not Constitutional Bills. Section 328 (4) implicitly excludes amendments that have neither been gazetted nor scrutinised by the public as there can never be amendments in respect of which members of the public are not invited to express their views on the proposed Bill.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21 12

[25] On the remedy, the applicants submit that this is not a proper case for the court to employ a blue pencil test and excise the impugned provisions from the Constitution Amendment Act No.2. Instead the Court should set aside the Act in its entirety.

[26] At the hearing of the matter before this court, Mr *Biti*, for the applicants, abandoned the preliminary point previously taken that the Attorney-General cannot properly swear to an affidavit on behalf of the President. Having abandoned that preliminary point, he nevertheless suggested that the judgment of this court should, *obiter*, express its views on the propriety of the Attorney-

General representing the President. He further submitted that, in the event that this court agrees with the applicants and holds that the amendment was unconstitutional, such decision should not have retrospective effect. It was also his further submission that the Standing Orders of Parliament must be consistent with the Constitution which provides that all existing laws must be read in conformity with the Constitution. Asked during the hearing in what way the President failed to fulfil his constitutional obligations, he told the court that the President has the obligation to scrutinise all bills before assenting to them.

FIRST RESPONDENT'S SUBMISSIONS

[27] In heads of argument filed on its behalf, Parliament took two preliminary points. The first was that the application ought to fail, the applicants having purported to approach this court in terms of s 16 (2) (d) of the Constitution. The second was that there has been a fatal non-joinder of both the Attorney-General and the Minister of Justice, Legal and Parliamentary Affairs, who is the Minister assigned the administration of the Act and who has a direct and substantial interest in the matter.

[28] On the merits, Parliament has submitted as follows. It followed the required procedure in amending the Constitution. The Bill was gazetted before it was tabled in Parliament. The requisite ninety days period of notice of the precise terms of the Bill was given. Section 117 (2) of the Constitution confers on Parliament the legislative authority to amend the Constitution in accordance with s 328. Subsection (2) of s 328 provides that an Act of Parliament that amends the Constitution must do so in express terms. The interpretation placed on s 328 of the Constitution by the applicants cannot be correct. The section requires the

Speaker to give notice in the Gazette of the precise terms of the Bill before presenting it in Parliament. In other words the terms in the Gazette from the time of gazetting and presentation in Parliament cannot be changed. Thereafter Parliament must invite members of the public to express their views on the Bill. Such invitation must be done before the Bill is presented in the house and, once it is presented, it cannot be re-gazetted or referred back to the public. The Bill must also be passed at its last reading by an affirmative vote of at least two-thirds of the membership of each house.

[29] It was Parliament's further submission that, regard being had to s 131 (4) and the Fifth Schedule of the Constitution, it has the power to amend a Bill that has been transmitted to either house of Parliament. Para 5 (3) of the Fifth Schedule, in particular, provides that a Bill which, having been transmitted to a house of Parliament, is passed by that house with amendments, must be returned to the originating house 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. Subparagraph (3) also provides that where a Bill is returned to the originating house with amendments, and such amendments are rejected, or amended by the originating house, the other house may, by resolution, withdraw the amendments or agree to it being amended. Bearing in mind the definition of "amend" in s 332 of the Constitution, it is clear that during debate, the houses may amend, vary, alter, modify, add to, delete or adapt the gazetted Bill.

[30] It was Parliament's contention that the Constitution does not provide for any amendments effected to a gazetted Constitutional Bill to be re-gazetted or subjected to further public meetings and consultations. Had the intention been

that the gazetted Bill should not be passed with amendments or that such amendments be further published and subjected to public scrutiny, then Parliament would have said so. Parliament further re-states that there would be little purpose in having debate in Parliament, from the first to the third reading, if Parliament were not to be allowed to make amendments where it deems fit.

[31] In oral submissions, Mr *Zhuwarara*, for Parliament, abandoned the preliminary point that the application was invalid, having been filed in terms of a non-existent s 16 (2) (d) of the Constitution. He however persisted with the preliminary point taken on the fatal non-joinder of the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General.

[32] Mr *Zhuwarara* made the following further submissions. The Constitution provides, in para 12 of Part 4 of the Sixth Schedule, that the Standing Orders that were in force before the effective date continue in force until replaced or amended in terms of the Constitution. Therefore it is not permissible for the applicants to challenge conduct that is allowed by a law without challenging the law that allows it. The Standing Orders provide for amendments at the Committee Stage. Therefore it is impermissible to impugn a process which is part and parcel of the Constitution. He further submitted that the Speaker, being the presiding officer of the activities of Parliament, can quite properly attest to an opposing affidavit on behalf of Parliament.

[33] He also argued that the constitutional obligation on Parliament is to solicit the views of the public in public meetings and to give the public ninety (90) days' notice of the precise terms of the Bill. That requirement was complied with in this

case. The argument whether an amendment is major or material does not arise from any of the provisions of the Constitution. Whether an amendment is major cannot be determined by this court and would require the court to delve into the actual processes of Parliament in order to make such a determination. The argument by the applicants that a Constitutional Bill cannot be amended, as happened in this case, fails to appreciate that members of Parliament are the representatives of the masses. They make the final decisions on what to bring up during debate. He further submitted that they have no legal obligation to take up the views expressed by the public during public meetings and in written submissions. It was quite proper for proposals to be made during the debate in plenary and for amendments to be made to the Bill consequent thereto. Section 328 does not state what Parliament must do with the views expressed by the public. The process was intended to inform members of Parliament of the views expressed by members of the public they represent in Parliament.

Judgment No. CCZ 04/23

Constitutional Application No. CCZ 18/21

16

SUBMISSIONS BY THE PRESIDENT OF ZIMBABWE

[34] In heads of argument filed on his behalf, the President has submitted that s 328 (3) of the Constitution does not impose any obligations on him as the President of Zimbabwe. It merely imposes obligations on the Speaker of Parliament to publish, on ninety days' notice in the Gazette, the precise terms of a Constitutional Bill to be submitted to Parliament. The Speaker's omission, if any, cannot be subjected to the jurisdiction of this court under s 167 (2) (d) of the Constitution. Subsection (4) imposes an obligation on Parliament to invite members of the public to express their views in public meetings and through written submissions.

[35] The President has also raised two preliminary points. First, that in purporting to approach this court under s 16 (2) (d) of the Constitution, which section bears no relationship to the relief sought, the application is invalid and must be dismissed on that basis alone. Secondly, that the relief sought in the application in the *Eric Matinenga* case is identical to that sought in this matter. The matter is accordingly *lis pendens*.

[36] On the merits he has submitted as follows. Section 328 (3) of the Constitution imposes a disability as opposed to an obligation in that it limits the right of Parliament to receive a Constitutional Bill to only those bills that would have been published by the Speaker in the manner set out in that provision. Therefore a breach of s 328 (3) does not constitute a failure to fulfil a constitutional obligation as such an obligation must be a positive duty imposed by that section. He has further submitted that the public functionary upon whom the Constitution imposes a positive obligation is the Speaker of Parliament who must give at least ninety days' notice in the Gazette of the precise terms of the Bill. Neither Parliament nor the President had an obligation to gazette the Bill in terms of s 328 (3). The Speaker, in compliance with s 328 (3), published the terms of the Bill in the Gazette and the Bill was presented to Parliament more than ninety days after such gazetting. The Bill that was presented to Parliament was the same Bill that had been published in the Gazette by the Speaker. He submitted that whilst s 328 (4) imposes an obligation on Parliament to ensure public participation, it imposes no obligation on him as President. For that reason, if the Court finds that Parliament breached that provision, such breach cannot be imputed to him as President.

[37] He further submitted that immediately after gazetting the precise terms of the Bill, as was done in this matter, Parliament was required to do three things. Firstly, it was supposed to invite members of the public to express their views on the Bill. Secondly, it was required to convene meetings and provide facilities to enable the public to air their views. Thirdly, it was required to hold public hearings and receive written submissions. He submitted that, in respect of all three requirements, there was compliance by Parliament. The Bill was gazetted on 17 January 2020. The first invitation for the public to air its views was made on 22 January 2020, five days after the gazetting. Such invitation was therefore immediate. Parliament further convened public meetings during which members of the public aired their views on the Bill. There were also radio programmes and zoom meetings.

[38] In oral submissions, counsel for the President abandoned two preliminary points previously raised. These are whether the application is invalid for citing s 16 (2) (d) of the Constitution and whether there is a pending matter involving the same parties and in which the same relief is sought. He however submitted that the applicants have employed insulting and abusive language in their answering affidavit and, for that reason, should bear the costs of the application. On the competence of the Attorney-General to represent the President, he submitted that, since the applicants had abandoned this point, the court should not determine the matter as urged by the applicants as there is a lot of material that is not before the court, in particular, details on the *sui generis* position of the Attorney-General. On the substance, he submitted that s 328 does not impose any obligation on the President and further that there is no obligation on the President to supervise proceedings in Parliament. In terms of s 131 of the Constitution the President is

required to assent to Bills or refuse to do so. In the context of this matter, that is his only obligation. He cannot be accused of breaching the Constitution where Parliament has committed a breach of its rules.

SUBMISSIONS BY *AMICUS CURIAE*

[39] Ms *Sanhanga*, as *amicus curiae*, submitted that it was common cause that the original Bill was duly gazetted for the minimum period of ninety days and that the public had an opportunity to comment on it before it was debated in Parliament. It was also common cause that the Bill which was originally gazetted was the same Bill which was presented to the National Assembly. It was also common cause that the Bill was amended at the Committee Stage by the National Assembly and that the Bill, as amended, was not again gazetted after the amendments and that no further consultation of members of the public took place. The Bill was then passed in both houses with the requisite two-thirds majority and was assented to by the President and gazetted on 7 May 2021. S 328 (2) of the Constitution provides that an Act of Parliament that amends the Constitution must do so in express terms. The section refers to an Act and not a bill. The amendments made by the Act are in express terms. Therefore s 328(2) was complied with.

[40] She further submitted that whilst Parliament has the general power to amend the Constitution, pursuant to s 117 (2) (a) as read with s 328 of the Constitution, there is no express provision in the Constitution for the amendment of Bills. However para 5 of the Fifth Schedule to the Constitution provides for the amendment of Bills in general, which would also include a Constitutional Bill. It was also her submission that, contrary to the assertions made by the respondents, s 5 of the

Fifth Schedule provides for amendments to be made to Bills in the house of Parliament to which the Bill has been transmitted and not the originating house. In other words the section does not provide for amendments to be made by the originating house, unlike in this case where the amendments were made in the National Assembly. Section 139 provides for Standing Orders which govern the passing of Bills and, in s 154 of the Standing Orders, provision is made for the amendment of Bills in the National Assembly as the originating house. Based on those provisions, the originating house of Parliament is therefore entitled to amend Bills, including Constitutional Bills.

[41] It was her further submission that s 328 (4) merely provides for consultation through public meetings and written submissions. In other words the public simply gives its opinion on the proposed amendment and, although the legislative authorities are expected to listen to those views, they are not obliged to act on them. It is Parliament through the two houses which would then take into account those views and craft a Bill which accords with the views of the public and constituencies as represented by each member of Parliament. In her view, in such a situation, there is no requirement for gazetting the amendments as the stage for consultation would have been passed. In any event the applicants have not stated what the views of the public were. Accordingly, there has been no violation of s 328 (3) (4) of the Constitution and the suggestion that this court should infer requirements which are not expressly stated as being mandatory would impermissibly undermine the legislature which is itself a representative of the people. This, she further submitted, would not only result in arbitrariness in the law but would have, as a consequence, the judiciary amending the Constitution.

ISSUES ARISING FOR DETERMINATION

[42] From the foregoing, it is apparent that a number of preliminary issues arise and that they require to be determined *in limine*. In the event that the preliminary issues are not dispositive of the dispute between the parties, the sole issue that would arise for determination is whether the amendments effected to the Bill should have followed the procedure provided in subss (3) and (4) of s 328 of the Constitution.

[43] The first preliminary issue raised by Parliament was whether the wrong citation of s 167 (2) (d) of the Constitution - reflected in the application as s 16 (2) (d) - was so irregular as to render the application a nullity. Although not raised by the President in his opposing papers, the same point was raised for the first time in his heads of argument. At the hearing of this matter, however, counsel for both Parliament and the President abandoned this preliminary point. That being the case, it becomes unnecessary for this court to make a determination on that issue.

[44] The President also raised the preliminary point that the applicants had no *locus standi* to institute the present application on account of their failure to ground their cause of action on s 85 of the Constitution. He also raised the preliminary point that the present application raises the same issues as those raised in the *Eric Matinenga* case and that, consequently, the matter should not be heard on account of the *lis alibi pendens* principle. These two preliminary objections were, however, abandoned at the hearing of this matter. No submissions were made on two further objections taken by the President - namely, that the once-and-for-all rule was applicable in this matter and that Brian Brown had no authority to bring proceedings on behalf of the Firinne Trust. Further, no submissions were made

either in the heads of argument or during oral address on the point taken that the trust had no legal capacity to litigate. All three issues are accordingly taken as abandoned.

[45] The applicants also abandoned the point taken in their opposing papers that the Attorney-General could not properly swear to an affidavit on behalf of the President. Having so abandoned that point, Mr *Biti*, for the applicants, nevertheless urged this court to express, in *obiter*, its views on the propriety of the Attorney-General deposing to an affidavit on behalf of the President in a matter in which the President is represented by the office of the Attorney-General. This suggestion was opposed by Mr *Magwaliba*, for the President, on the basis that, having been abandoned in heads of argument, a lot of material facts that would have assisted the court in coming to a decision had not been canvassed.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

22

[46] I am inclined to agree with Mr *Magwaliba* that there is no proper basis upon which this court can still proceed to determine the challenge to the authority of the Attorney-General to act on behalf of the President. In the first instance, the challenge was not made *in limine* but in the course of responding to averments in the opposing affidavit. Secondly, no relief was sought in respect of it. Thirdly, it was not even mentioned in the applicant's heads of argument. Before this court the applicants have indicated they are no longer persisting with the objection. In the circumstances, and in the absence of full argument from all the parties to this matter, I am inclined to agree with Mr *Magwaliba* that it would, indeed, be inappropriate for this court to make a pronouncement on this issue, even as *obiter*.

[47] In the result, only two preliminary issues remain for determination by this court. The first is whether the Speaker of Parliament, in the absence of a resolution by both houses, has authority to represent Parliament in opposing this application. The second is whether the failure to join both the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General as respondents is a fatal irregularity. I deal with these two issues in turn.

WHETHER THE SPEAKER OF PARLIAMENT REQUIRES THE AUTHORITY OF BOTH HOUSES OF PARLIAMENT TO ACT ON ITS BEHALF

[48] It was the applicants' submission that the Speaker of Parliament requires the specific authority of the two houses of Parliament to represent it and that, in the absence of such authority, the notice of opposition filed by the Speaker is fatally defective. They argued that because ^{Judgment No. CCZ 04/23} the Speaker is not a member of Parliament, ^{Constitutional Application No. CCZ 18/21} any act he performs is not one that binds Parliament. *Per contra*, Mr Zhuwarara, for the President, argued that the Speaker is, in terms of s 135 of the Constitution, the head of Parliament and also the presiding officer in terms of s 126 (1) of the Constitution.

[49] In *Temba Mliswa v Parliament of the Republic of Zimbabwe* CCZ 2/21 this court determined that there are instances where the juristic acts of Parliament are performed through the agency of the Speaker and that there are others that are performed by the Speaker in his official capacity as Speaker but which do not bind Parliament. The court found that the exercise of power by the Speaker in punishing members of Parliament should be regarded as conduct by the Speaker in his official capacity. In short this court found that certain acts of the Speaker

cannot be divorced from acts of Parliament itself whilst other acts are those of the Speaker performed in his official capacity.

[50] There can be no doubt that the actions of the Speaker in some cases are inextricably linked to the processes of Parliament itself. It is the Speaker who presides over the processes of Parliament and it is also on him that the responsibility of certain functions has been imposed by both the Constitution and the Standing Orders. Section 135 (1) of the Constitution is clear that the Speaker is the head of Parliament and that his exercise of functions is subject to Parliament's Standing Orders. Section 154 of the Constitution is also clear that the Clerk of Parliament is responsible for the day-to-day administration of Parliament but such exercise of power is subject to the control and supervision of the Speaker. Perusal of the Standing Orders also reveals clearly defined roles of the Speaker and Clerk of Parliament as well as members of the house and other select committees.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21 24

[51] In the context of the present dispute, I have no hesitation in holding that when the Speaker gives notice of the precise terms of the Bill pursuant to s 328 (3) of the Constitution, he does so in his official capacity as Speaker and when he and the Clerk of Parliament invite members of the public to express their views in public meetings, they do so on behalf of Parliament. The suggestion by the applicants that he needs the specific authority of both houses before he can represent Parliament in litigation would result in a patent absurdity. It would mean, in virtually every activity of Parliament save those specifically entrusted to him, the prior specific authorisation of both houses would need to be obtained. Clearly this would stymie the various processes that Parliament is involved in. The Speaker,

in his official capacity, is an interested party for purposes of both subss (3) and (4) of s 328 of the Constitution as he is the functionary upon whom the Constitution has entrusted the duty to give ninety days' notice in the Gazette of the precise terms of a Bill. It is the Speaker who, as head of Parliament, is duty-bound to ensure that the requirements delineated in s 328 (4) of the Constitution are complied with by Parliament. The suggestion that, in opposing the present application, he requires authority from both houses of Parliament, is, in these circumstances, outlandish and without substance and must, as a consequence, fail.

WHETHER THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS WERE NECESSARY RESPONDENTS

[52] It was Parliament's submission, taken for the first time in heads of argument, that there has been fatal non-joinder of both the Attorney-General and the Minister of Justice, Legal and Parliamentary Affairs. Parliament has argued that both have a direct and substantial interest in this matter and particularly so in the case of the Minister, who introduced the Bill in question in the first instance.

[53] By taking the point that there has been a fatal non-joinder of the Attorney-General and the Minister only for the first time in heads of argument, Parliament has taken away the opportunity for the applicants to respond to this submission, conduct which does not accord with the tenets of a fair trial - see *President of the Senate and 2 ORS v Gonese and 3 Ors* CCZ 1/21. Ordinarily, as happened in the *President of the Senate* matter (*supra*), such a preliminary objection may be dismissed on that basis alone. However the question of fatal non-joinder is also a question of law and our jurisprudence is clear that, subject to considerations of

fairness and prejudice, such a question can be taken at any time, even for the first time on appeal. This position is so well established in this jurisdiction that it is unnecessary to cite any authorities in support thereof.

[54] In *Tour Operators Business Association of Zimbabwe v Motor Insurance Pool and Ors CCZ 5/15*, this court held that the non-joinder of all parties who have a direct interest in a matter does not, in all cases, render the proceedings a nullity. This court delineated four factors that would render the non-joinder fatal to the proceedings. These are (1) whether relief is sought directly against the Minister (2) whether the relief impugns the Minister's authority (3) whether the relief sought has a direct bearing on the Minister's powers or exercise of discretion and (4) whether the Minister's interest is not purely peripheral.

[55] In the present matter no detail has been provided by the applicants on how, if at all, the order sought would affect the interests of the Attorney-General and the Minister. There is a further consideration. In the *Temba Mliswa* case, (*supra*), this court expressed the view that the jurisdiction of this court cannot be invoked over all persons and over all constitutional matters. This court made it clear that the special jurisdiction of this court to inquire into the conduct of Parliament and the President cannot be invoked to inquire into the conduct of other state agencies who are not Parliament or the President and that it is not permissible to join another party as a respondent in a s 167 (2) (d) application. As a general proposition, this position may be correct.

[56] It seems to me, however, that the above proposition may require qualification. In an application in which it is alleged that Parliament or the President failed to fulfil

a constitutional obligation, the relief sought must be directed at either Parliament or the President. As the s 167 (2) (d) cause of action is directed at either Parliament or the President, the application cannot seek relief against other functionaries who are not the President or Parliament. So far as this may relate to the relief sought, the position, in my view, is correct. It seems to me, however, that there must be a rider.

[57] There will be situations in which the conduct of either the President or Parliament will implicate the conduct of other functionaries or even outsiders. As an example, if it is alleged that a Minister facilitated the conduct of Parliament or the President that resulted in a failure to fulfil a constitutional obligation, then such a Minister, though no relief is sought against him directly, must be cited. Such citation would enable the Minister to respond and place facts before the court so that the court is enabled to make a correct finding on whether or not such involvement facilitated the failure to fulfil a constitutional obligation and indeed whether there was such failure. In such a situation, it seems to me that it would be desirable, if not mandatory, for the functionary against whom an allegation is made to be cited. Such citation is necessary so that any dispute on the facts can be resolved, because it is on the basis of the proved facts that a declaration is made that either Parliament or the President failed to fulfil a constitutional obligation. Without citing such person, adverse findings of fact could be made without such person being aware - an outcome that would be averse to natural justice considerations. He would, in these circumstances, have a direct and substantial interest in the issues raised before the court as his rights may be affected by the judgment of the court - *Maceys Supermarket & Bottle Store (Greencroft) Ltd v*

Edwards 1964 RLR 13(SR); Federation of Non-Governmental Organisation Trust & Anor v Sybeth Msengezi & Ors HH 645/22.

[58] I stress here that these remarks are made *obiter* and that the issue may require to be revisited with the benefit of full argument in an appropriate case in the future. Everything considered, however, this preliminary point must fail.

[59] The only issue that remains for determination is whether there was compliance, on the part of Parliament and the Speaker, with the provisions of s 328 (2), (3) and (4) of the Constitution. Before doing so however I consider it appropriate to deal with the role of *amicus curiae* in court proceedings. The issue arises from submissions by Mr *Biti* during his oral address that Ms *Sanhanga* had ceased to be impartial and, consequently, that she should no longer be regarded as *amicus curiae*.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

28

THE ROLE OF AMICUS CURIAE IN COURT PROCEEDINGS

[60] It was Mr *Biti*'s contention that, whilst it is entirely proper for a court to invite a person with expertise to be a friend of the court, such person ceases to be a friend of the court once he or she adopts the argument put forward by any of the parties. It is apparent from this submission that the role of *amicus curiae* may not be fully appreciated by Mr *Biti* and, perhaps, other legal practitioners in this jurisdiction. It seems to me that this may be an appropriate opportunity for this court to briefly clarify what *amicus curiae* is and the role of such *amicus* during court proceedings.

[61] The term *amicus curiae* derives from Latin and means “friend of the court”. The concept of *amicus curiae* is well established in law and throughout the centuries *amicus curiae* has provided information in areas of the law that the court considered complex and, in some instances, beyond its expertise. Rule 10 of the Rules of this court provides that any person with particular expertise which is relevant to the determination of any matter may be invited by the court to appear before it as *amicus curiae* and file heads of argument within the time frame stipulated by the court. The court may also, on application by a person with relevant expertise, appoint such person as *amicus curiae*. Under the common law *amicus* may also be appointed by the court to represent an unrepresented party or interest. *Amicus curiae* appearing upon invitation from the court has a special responsibility that is distinct from that of *amicus curiae* appearing with the leave of the Court or at the request of the court to represent an unrepresented party or interest.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

29

[62] The role of *amicus curiae* invited by the court is to provide assistance in developing answers to difficult, and usually unsettled, questions of law. He or she is there to provide cogent and helpful submissions that assist the court. *Amicus curiae* can raise new contentions which he or she considers to be useful to the court and which contentions would otherwise not be drawn to the attention of the court. However he or she cannot introduce new contentions that are not based on the record and which require fresh evidence. In making submissions *amicus* can choose a side it wishes to join unless requested by the court to urge a particular position. In other words, whilst the primary obligation of *amicus curiae* is to contribute new contentions to the court, there would be nothing amiss in *amicus* reiterating a party’s submissions, so long as this is done colourlessly and

objectively, without the impression of bias being given in favour of a particular party. In this regard attention may be drawn to the South African Constitutional Court decisions in *Hoffman v South African Airways* 2001 (1) SA 1 CC, 2000 (11) BCLR 1211 (CC) at para 63; *In Re: Certain amicus curiae applications; Minister of Health and Others v Treatment Action Campaign and Others* (CC78/02) (2002) ZACC 13 95 July 2002).

[63] I have gone through the heads of argument filed by *amicus curiae* in this case. She dealt with the preliminary issues raised by the parties - including the crucial question whether the failure to cite the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General constituted a fatal non-joinder - and submitted that none could be upheld. She then proceeded to deal with the nub of the present matter, namely, whether it was mandatory, once amendments had been made to the Bill, for Parliament and the Speaker to again go through the processes provided for in subss (2), (3) and (4) of s 328 of the Constitution. In respect of the latter issue she submitted that Parliament does indeed have the power to amend a Constitutional Bill and that, when that happens, there is no obligation on its part to again give notice in the Gazette or to consult members of the public on those amendments through written submissions and in public meetings. Whilst she may have arrived at the same legal position as did the respondents in this case, she did not simply repeat those submissions but carefully explained why she was of a similar view.

[64] It cannot, in all fairness, be suggested that, merely on account of the fact that her submissions appear to accord with those of one or more of the parties, she therefore ceased being impartial as would be expected of *amicus curiae*. Her

language was measured and submissions were predicated on case law. In these circumstances, I am unable to find any merit in the complaint raised by Mr *Biti* that *amicus* appeared partial and that she had ceased to be *amicus curiae*. That attack is without merit and must therefore be disregarded.

WAS THERE COMPLIANCE WITH S 328 OF THE CONSTITUTION

[65] This is the nub of the dispute between parties. The facts giving rise to the proceedings, which are largely common cause, are worth regurgitating. On 31 December 2019 the Speaker of Parliament gazetted the Constitutional Amendment Bill HB 23/19. It consisted of twenty seven clauses that dealt with an extensive list of constitutional issues. These dealt with various issues, chief among which were the removal of the running mate clause for Vice-Presidents, increasing the number of non-constituency Ministers who could be appointed, increasing the tenure of office of female proportional representative members of Parliament, the appointment of Judges as well as their tenure, the appointment of the Prosecutor-General and the removal of members of Parliament from the membership of Provincial Councils. In accordance with subs (4) of s 328 of the Constitution, Parliament duly invited members of the public to express their views on the Bill in public meetings and through written submissions. In accordance with its processes, Parliament proceeded with the first and second reading of the Bill. In concluding and winding up debate on the Bill, the Minister of Justice, Legal and Parliamentary Affairs responded to points made during the debate and gave notice that he would be moving amendments during the Committee Stage that was scheduled for the following day. The amendments were duly published in the order paper for the following day, that is, 15 April 2021. On 15 April 2021 the Minister proposed a number of amendments whilst

others were proposed from the floor by the Minister himself and Priscilla Mushonga, a member of Parliament. It is these amendments which were then accepted and adopted during the Committee Stage that the applicants seek to impugn.

[66] The process leading up to the debate in Parliament is not impugned and no issues arise before this court in that regard. It is the applicants' contention that Parliament cannot make "major" or "material" amendments to a Constitutional Bill and that, if such amendments are made, the amendments would constitute a new Constitutional Bill and the processes provided in subss (3) and (4) of s 328 of the Constitution must again be complied with. Mr *Biti*, for the applicants, submitted that there is no stage known in our Constitution as the Committee Stage in Parliament and that the Standing Orders that allow amendments at the Committee Stage are not consistent with s 328 of the Constitution, as there cannot be a procedure for a Committee Stage in respect of a Constitutional Bill.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21 32

[67] In light of this submission, there is need therefore to take a closer look at the provision in question in order to determine whether, on a holistic, contextual and purposive interpretation of s 328, which he urges this court to adopt, it means what the applicants contend it does, namely, that where there are major or material amendments effected to a Constitutional Bill, then the process provided for in subss (3) and (4) of s 328 must once again be resorted to. In short should s 328 of the Constitution be interpreted to include such an obligation?

CONSTITUTIONAL INTERPRETATION

[68] In urging this court to adopt a holistic, contextual and purposive approach to the interpretation of s 328, the applicants say nothing about the ordinary meaning of the words used in the section. The position is now firmly established that a Constitution is not simply a statute which mechanically defines the structures of government and the relations between the government and its citizens. Expressed differently, a Constitution is not an ordinary legal document and, in interpreting it in any given case, it behoves a court to go beyond the literal meaning of the words used and to adopt a contextual, holistic and purposive approach in order to give full effect to the provisions of the Constitution.

[69] The interpretation accorded must be a generous rather than a legalistic one, aimed at securing the full benefit of the Constitution. However one must pay due regard to the language which has been used and to the traditions and usages which have given meaning to that language. Where the words employed in the Constitution are clear and unambiguous and allow of no absurdity or repugnance with the rest of the provisions in the Constitution, or with the context, then such a literal interpretation should be adopted - *Stanley Nhari v Robert Gabriel Mugabe and Ors* SC 161/20.

[70] As a general rule, the principles governing the interpretation of a Constitution are basically the same as those governing the interpretation of other statutes. One must look to the words actually used and deduce what they mean within the context in which they appear. If the words used are precise and unambiguous and accord with the context, then no more is necessary than to expound them in their natural and ordinary sense. One does not depart from the literal and grammatical meaning unless this leads to such an absurdity that could not have been

contemplated by the legislature - *Stanley Nhari v Robert Gabriel Mugabe and Ors supra*, at para 22. Put another way, the provisions of the Constitution ought to be given their ordinary grammatical meaning if such meaning is compatible with their complete context. *Anna Colleta Chihava (2) Boas Mapuya (3) Zishe Chizani v The Provincial Magistrate Francis Mapfumo N.O. (2) The Prosecutor General 2015 (2) ZLR 31 (5), 36 A-B; Mupungu v Minister of Justice, Legal and Parliamentary Affairs and Others CCZ 7/21*, at P 47 of the judgment.

WHETHER PARLIAMENT CAN AMEND A BILL

[71] The applicants appear to accept that Parliament does have the power to amend a Constitutional Bill but state that such an amendment should not be “major” or “material”. A consideration of the Constitution shows that, in terms of s 117, Parliament does have the power to make law and to amend the Constitution in accordance with s 328. Section 131 (4) of the Constitution, in turn, provides that the procedure to be followed by the National Assembly and the Senate with regards to Bills is as set out in the Fifth Schedule. The Fifth Schedule, in Part 2, provides for the amendment of Bills by a house to which a Bill has been transmitted by the other house. It is apparent, from the foregoing, that there is no specific power given to Parliament to amend a Bill in terms of the Constitution.

[72] S 139 of the Constitution, however, provides for rules known as Standing Orders made by either house individually or jointly on the recommendation of the Committee on Standing Rules and Orders. Paragraph 12 of Part 4 of the Sixth Schedule provides that the Standing Orders that were in force immediately before the effective date continue in force as Standing orders of the Senate and National Assembly until they are replaced or amended in accordance with the Constitution.

That provision is very clear that any Standing Orders in force before the effective date continue to have effect until replaced or amended.

[73] It was Mr *Biti*'s argument that the Standing Orders are now inconsistent with the Constitution. He argued further that, as Standing Orders relate to ordinary Bills and not to Constitutional Bills, there is a *lacuna* in the law as there is no provision in the Constitution for an amendment during the Committee Stage. I am unable to agree with Mr *Biti*'s contention in this regard. The Constitution states in no uncertain terms that the procedure for "Bills" is as set out in the Fifth Schedule. The Fifth Schedule does not distinguish the procedure to be followed by Parliament with regards to ordinary Bills, on the one hand, and Constitutional Bills, on the other. What this means is that, for purposes of the Constitution, an ordinary Bill is as much a Bill as a Constitutional Bill. It is also clear that Standing Orders 141 and 142 treat a Constitutional Bill as any other Bill, the only significant difference between the two being that, in introducing a Constitutional Bill in Parliament, the procedure provided for in s 328 of the Constitution must be strictly and religiously followed.

[74] As noted elsewhere in this judgment the Constitution provides for the Standing Orders that were in force to remain effective notwithstanding the coming into effect of the 2013 Constitution. The Constitution therefore deliberately avoided the possibility of a *lacuna* in the procedures of Parliament by providing, in unambiguous terms, that the Standing Orders that were in existence on the effective date would remain operative until they are replaced or amended. S 139 (2) of the Constitution is pertinent. It states that Standing Orders may provide for the manner in which a Bill may be passed. Standing Order 143 of the *National*

Assembly Standing Orders (Public Business), (Ninth Edition, 2020) provides for referral of Bills to an appropriate portfolio committee. It further provides that the Committee shall have fourteen days in the case of an ordinary Bill and ninety days in the case of a Constitutional Bill for presentation of its report at the second reading stage.

[75] The portfolio committee is then required to table its report containing its deliberations and recommendations on a Bill at the second reading stage. Once a bill has been read a second time, it is then committed to the Committee of the Whole House which, in terms of Standing Order 154, can make amendments to the Bill. Standing Order 154 provides as follows:

“Amendments in Committee

154 (1) The committee of the whole House when considering a Bill has the power to make any amendments to the Bill under consideration by amending a clause or inserting new clauses at the appropriate places in the Bill;

(2)... (not relevant).”

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

36

[76] Standing Order 154 remains extant. By command of the Constitution itself, it remains effective. It allows for the amendment of clauses in a Bill or the insertion of new clauses at appropriate places in a Bill. The only qualification in the Standing Order to such amendments or new clauses is that any amendments must be:

“(a) relevant to the subject matter of the Bill; or

(b) made pursuant to any instruction, and are otherwise in conformity with these Standing Orders”.

[77] I am, therefore, unable to agree with Mr *Biti* that Standing Order 154 is no longer consistent with the current Constitution or that it is irrelevant in this case. The

Constitution itself says it remains effective until repealed or amended. In any event, the position is settled in this jurisdiction that it is improper for the applicants to impugn, on a constitutional basis, things done in terms of the provisions of the Standing Orders, without simultaneously impugning the validity of the Standing Orders themselves. In this regard, attention may be drawn to the remarks of this court in *Berry (Nee Ncube) and Anor v Chief Immigration Officer and Anor 2016(1) ZLR 38 (cc), 48 C-D* in which it was emphasised that:-

“... one cannot impugn, on a constitutional basis, conduct that constitutes a proper, lawful application of the law, without challenging the constitutional validity of the same law, or actions premised on a misinterpretation of it”.

[78] There is a further reason why Parliament must have authority to amend a Bill presented before it. Section 328 (4) of the Constitution requires that after notice of a Constitutional Bill is given in the Gazette, Parliament must invite members of the public to express their views on the proposed Bill in public meetings and written submissions and that Parliament must convene meetings and provide facilities to enable the public to do so. It is common cause in this case that such invitation was extended to the public and that meetings did take place. It is not in dispute that the public did express some views on the Bill although the specific contributions or submissions made by the public have not been disclosed in this case. S 328 of the Constitution merely provides for public consultation on a Constitutional Bill. It does not oblige Parliament to act on those suggestions. It is also not in dispute that there was debate amongst members of Parliament during the Committee Stage of Parliament and that, following that debate, amendments were then proposed and passed by the Committee of the Whole House.

[79] Members of Parliament are elected by the people and are accountable to the voters who elect them. One must assume that, in debating the Bill during the Committee Stage, they would take into account the views expressed by the public during the public meetings or in written submissions as well as their own experiences. They necessarily must have the power to suggest amendments to clauses in the Bill. As counsel for Parliament correctly submitted, it would serve no practical purpose if, after all the debate in Parliament, Parliament were unable to amend a Bill so that it accommodates the views of members of the public and the views expressed during the parliamentary debates.

[80] When all is said and done, therefore, the inference is irresistible that, in terms of current law, Parliament may effect amendments to a Bill, including a Constitutional Bill, following a debate in Parliament. The only qualification in terms of the Standing Orders is that such amendments must be relevant to the subject matter of the Bill.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

38

WHETHER S 328 REQUIRES THAT MAJOR AMENDMENTS BE RE-GAZETTED AND SUBJECTED TO FURTHER PUBLIC CONSULTATION

[81] S 328 of the Constitution makes provision for the procedures to be followed in the amendment of the Constitution. Whilst the applicants seem to accept that amendments can be affected to a Constitutional Bill, they argue that once the amendments reach the threshold of being “major” or “material”, then the amendments must be re-gazetted and subjected to further public consultation. It is not in dispute that s 328 of the Constitution makes no provision for “major” amendments made to a Constitutional Bill to be subjected to the processes

provided for in subs (3) and (4) of s 328 of the Constitution. The applicants urge this court to interpret that section to mean that such a requirement is implied.

[82] A holistic, generous, purposive and contextual interpretation of the Constitution is what the applicants urge this court to adopt in order to come to the conclusion that the processes in subs (3) and (4) of s 328 must be repeated whenever there are major amendments to a Constitutional Bill. Although the terms holistic, generous, purposive and contextual might appear at first sight to be very strange and frightening, they are not so alarming as they appear. In a purposive approach, a court endeavours to ascertain the design or purpose behind the constitutional provision. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. A holistic interpretation, on the other hand, takes into account all relevant provisions that have a bearing on the constitutional text. A contextual approach takes into account the historical and political setting of the Constitution as well as the textual setting of the provisions in the Constitution. A generous interpretation is one that is in favour of rights and against their restriction-*The Bill of Rights Handbook* by Iain Currie and Johan De Waal, Sixth Edition, pp 135-143.

[83] A requirement that Parliament should repeat the process delineated in s 328 (3) and (4) would be a very deliberate and significant one, one that Parliament would not consign to conjecture or inference. Had Parliament intended to create an obligation on the part of Parliament or the Speaker to repeat the process in subs (3) and (4) following amendments to a Constitutional Bill, it no doubt would have said so. But it did not. Moreover there is nothing either in the context of the Constitution as a whole that suggests that such a requirement was in the

contemplation of the Legislature when s 328 was drafted or that, without reading in such a requirement, the section would be rendered nugatory or that some absurdity would eventuate.

[84] This court cannot read in such a requirement as such an interpretation would not be consistent with the ordinary grammatical meaning of S 328 of the Constitution. Nor can this court find that such a requirement is implied as it is patently inconsistent with the words expressly used in the provision. As Maxwell, *Interpretation of Statutes*, 12th ed, states at pp 1-2:-

“If there is one rule of construction for statutes and other documents it is that you must not imply anything in them which is inconsistent with the words expressly used...if the language is clear and explicit...the court must give effect to it for in that case the words of the statute speak the intention of the legislature.”

[85] Moreover what constitutes a “major” or “material” amendment is neither provided for nor defined in s 328. Bearing in mind that the Standing Orders permit Parliament to amend a Bill, including a Constitutional Bill, any attempt by this court to determine what is a “major” or “minor” amendment would indubitably require this court to unjustifiably delve into the very core of the processes of Parliament. This court has no mandate to do so, bearing in mind that Parliament, as one of three organs of the State, has specific jurisdiction over its own processes. As a court we should always pay attention to the vital limits of our judicial authority and the deliberate design to leave other matters to other branches of the State. As pertinently stated by the Constitutional Court of South Africa in *Economic Freedom Fighters v Speaker of the National Assembly and Ors* CCT 143/15 and CCT 171/15:-

“Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for the court to

*prescribe to Parliament what **structures or measures** to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. **Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved.** At the same time, and mindful of the vital strictures of their powers, **they must be on high alert against impermissible encroachment on the powers of the other arms of government.***” (italics are for emphasis)

[86] Earlier, in the case of *Doctors For Life International v The Speaker of the National Assembly & Ors* CCT 12/05, urging some caution, the Court remarked:

*“The constitutional principle of separation of powers requires that other branches of government refrain from **interfering in parliamentary proceedings...** Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that **the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.**”* (italics are for emphasis)

[87] In all the circumstances, therefore, I am not persuaded that there is any basis for finding that s 328 of the Constitution imposes an obligation on the Speaker and Parliament to re-open the processes provided for in subs (3) and (4) once amendments are effected to a Constitutional Bill. Nor is there any basis for the suggestion that the amendments that are proposed following debate in Parliament must themselves constitute a separate Constitutional Bill.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

41

IN ANY EVENT, THE AMENDMENTS WERE A NECESSARY CONSEQUENCE

[88] As the respondents correctly observe, Parliament has no obligation to incorporate into the Bill the views expressed by the public. Members of Parliament are elected by the people and consequently must bear in mind the views of the public in debating the various provisions of a Bill. They must, during the debate, make contributions on what is in the best interests of the country and, at the end of the

debate, Parliament, as an institution, must come up with a Bill that seeks to improve the socio-economic-political situation of the country. This may necessarily involve the amendment of provisions of the Bill. Amendments may be effected as a result of other considerations, such as the need to ensure consistency with the other existing provisions of the Constitution. A perusal of just two of the amendments impugned by the applicants is telling.

[89] The first is s 11 of the Constitutional Amendment Act which amended the original Bill by the addition of a *proviso* which stipulated that political parties must ensure that ten of the sixty women members are under the age of thirty five and that women with disabilities are represented on their party lists. In my view there is nothing major or material about that proviso. Before that amendment, s 124 of the Constitution provided that, for the life of the first two Parliaments, an additional sixty women members, six from each of the provinces into which Zimbabwe is divided, elected under a party list system of proportional representation based on the votes cast, would be members of the National Assembly. The amendment increased the period during which the sixty women members would be members of Parliament from two to four Parliamentary terms. It also sought to ensure, pursuant to s 20 of the Constitution (which directs the State to take all reasonable measures to ensure that persons aged between fifteen and thirty five years have opportunities to associate and participate in the political, social, economic and other spheres of life) that ten of the sixty women would be persons below the age of thirty five. The proviso also sought to ensure, pursuant to s 22 of the Constitution, that political parties included both young women and women with disabilities on their party lists as provided by an Act of Parliament.

[90] In my view that amendment was necessary to ensure consistency with the other provisions of the Constitution. Had it not been effected, the relevant provisions that oblige the State to include, firstly, young women below the age of thirty-five years and, secondly, young women and women with disabilities in the political, social, economic and other spheres of life would have been rendered nugatory.

[91] The second observation relates to s 180 of the Constitution. The original Bill had sought to amend s 180 of the Constitution by the deletion of “*whenever it is necessary to appoint a Judge other than the Chief Justice, Deputy Chief Justice or Judge President of the High Court*” and substituting in its place the words “whenever it is necessary to appoint the Chief Justice, Deputy Chief Justice, Judge President of the High Court or a sitting judge of the Supreme Court and High Court”. The ultimate amendment then included judges of the Labour Court and Administrative Court. It also amended the original Bill which had provided for an appointment as a judge of a higher court **whenever a vacancy arose** by substituting that phrase with **whenever it is necessary to do so**.

[92] Judges of the Labour Court and Administrative Court enjoy the same conditions of service as do Judges of the High Court. They have the same qualifications and enjoy the same conditions of service – see para 18 (6) of Part 4 of the Sixth Schedule to the Constitution. The amendment simply extended the provision in the Bill by the addition of Judges of the Labour Court and Administrative Court. The final Bill also amended the provision in the original Bill that stated that the President may appoint a sitting judge to be a judge of a higher court **whenever a**

vacancy arises in such court by substituting that phrase with the words **whenever it is necessary to do so**. Section 180 (2) of the 2013 Constitution made provision for interviews for judges **whenever it was necessary to appoint a judge**. The Bill had sought to amend that provision by providing that an appointment could be made by the President **whenever a vacancy arose**. Unlike in the Constitutional Court, there is no prescribed complement or establishment of judges in the Supreme Court, High Court, Labour Court and Administrative Court. Judges are appointed whenever the need to do so arises. The reference in the Bill to the appointment of a judge “whenever a vacancy arises” was factually and legally incorrect. The amendment was effected to capture the correct position, namely, that appointments in these courts are made whenever it is necessary to do so.

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21

[93] The two amendments I have referred to above - selected at random - in my view do not support the suggestion made that they were major or that they were otherwise unrelated to the provisions in the original Bill.

44

WHETHER PARLIAMENT AND THE PRESIDENT FAILED TO FULFIL A CONSTITUTIONAL OBLIGATION

[94] We have said so before and we say so again. In this jurisdiction the position is settled that an alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament and that an obligation shared with other organs of the State will not meet the s 167 (2) test. This court has further enunciated that in an application, such as the present, an applicant must identify the functionary and the impugned conduct with

reasonable precision. See *Mujuru v The President of Zimbabwe & Others* 2018 (1) ZLR 93 (CC), at para 25 and *Mliswa v Parliament of the Republic of Zimbabwe, supra*.

[95] For the reasons already given, subs (3) and (4) of s 328 do not impose any obligation for the processes itemised in those subsections to be recommenced once amendments are made to a Constitutional Bill. S 328 does not impose any obligation on the President to do anything. The suggestion by the applicants that the President has the obligation to scrutinise Bills forwarded to him by Parliament and to supervise Parliament in order to ensure that there is procedural compliance with s 328 of the Constitution is untenable for the simple reason that no such obligation has been imposed on the President by the Constitution. To the contrary, this court has made it clear in the *Mujuru* case, (*supra*), that in the absence of a specific provision to the contrary, the President has no legal obligation to ascertain the validity of an existing law. The President had no obligation in terms of s 328 to ensure that Parliament passed a Bill that complied with that section.

[96] Undoubtedly, s 328 (3) imposes an obligation on the Speaker of Parliament to give at least ninety days' notice in the Gazette of the precise terms of the Bill. Ss 3 states that a Bill may not be presented in the Senate or National Assembly unless the Speaker has given ninety days' notice. As submitted by Mr *Magwaliba*, for the President, a distinction should be drawn between legal limitations that arise from procedural prerequisites and other limitations of legislative power with those that derive from the imposition of duties. In *King*

and Others v Attorneys Fidelity Fund Board of Control and Another 2006(1) SA 474 (SCA), the South African Supreme Court of appeal held that in the former scenario:

“... any such purported legislation shall be void. It imposes not legal duties but legal disabilities. “Limits” here implies not the presence of duty but the absence of legal power.”

[97] It is unnecessary, in the context of the current dispute, to determine whether or not s 328 (3) imposes a mere legal disability as opposed to a legal obligation. I say so because it is common cause that the Speaker complied with subs (3) of 328 in respect of the Constitutional Bill. He gave at least ninety (90) days’ notice of the precise terms of the Bill in the Gazette. That much is not in dispute. The applicants allege that there was a failure on the part of Parliament, firstly, to give at least ninety days’ notice of the precise terms of the amendments effected to the Bill following the debate in Parliament and, secondly, to convene public meetings as mandated by subs (4). I have already found that no such obligation arises from the wording of s 328. In any event, whatever obligation the Constitution imposes on the Speaker to comply with subs (3) would not be an obligation on Parliament for purposes of s 167 (2) of the Constitution. Consequently the applicants have not shown that there was any constitutional obligation that was not fulfilled by Parliament so as to give rise to a suggestion that there was such a failure.

COSTS

[98] It is now the settled position in this jurisdiction that, in general, no costs are awarded in constitutional litigation unless the conduct of a party or legal practitioner is so improper as to warrant an order to the contrary. See R 55 of the

Rules of this court. However the rule that no costs are awarded in constitutional matters is not an inflexible rule and, where a party is guilty of improper conduct, a costs order may well be appropriate.

[99] As noted earlier in this judgment, invective language has been employed by the applicants in responding to the opposing papers filed by the respondents. In *Liberal Democrats & Ors v President of the Republic of Zimbabwe & Ors* CCZ 7/18 this court restated the position that:

“... conduct in the proceedings is a factor to take into account in deciding whether to award costs against an unsuccessful litigant... awards of costs against unsuccessful litigants, in appropriate constitutional litigation cases, are a necessary means for the protection of the integrity of the judicial processes and maintenance of public confidence in it.”

[100] In response to the Attorney-General’s preliminary point in his notice of opposition that the application, having purportedly been instituted in terms of s 16 (2) (d) of the Constitution (which is non-existent) was invalid, the applicants in response stated:-

“This is the kind of *ipse dixit* that can only be raised by hired guns, acting on behalf of the 2nd Respondent who has no morality, no conscience, no decency other than their bottom line.”

They further went on to describe the preliminary objection as:

“... nothing but sophistry pedantism and typical of those who do not respect the Constitution and who do not respect the rule of law in this country.”

[101] This kind of language has no place in a court of law. The Attorney-General was entitled to take the preliminary point that the application, having purportedly been

brought in terms of s 16 (2) (d) of the Constitution, was invalid. Perusal of the Constitution shows that s 16 (2) provides for culture as a national objective. There is no paragraph (d) in s 16 (2) and, in these circumstances, the objection taken by the applicants was unwarranted. The suggestion that the President has no morality, conscience or decency is completely uncalled for. Parties appearing before the court are expected, indeed obligated, to put across their differing positions in appropriate language and to treat the opposite party and the court with respect. If this were not the case, unscrupulous parties would use the courts as a platform to denigrate or besmirch the opposition and even the court itself, in order to achieve other ulterior purposes. This can neither be accepted nor condoned as it would result in loss of confidence in the courts and the entire judicial process.

[102] I am in no doubt that the use of the kind of language such as was employed in this case warrants an order of costs, to act as a reminder that this institution is a venerable one and that inappropriate conduct in proceedings before the court will not be accepted.

[103] I note with some disquiet that Mr *Biti* has previously been warned in cases such as *Chivinge v Mushayakarara* 1998 (2) ZLR 500 (S), 507 A-E and, very recently, *Innocent Gonesse v President of the Senate & Two Ors* CCZ 2/23 against the use of disparaging and insulting language in affidavits drawn on behalf of litigants. Notwithstanding further enunciation by this court in cases such as *Liberal Democrats & Ors v President of the Republic of Zimbabwe E.D Mnangagwa, supra* and *Joshua John Chirambwe v The President of the Republic of Zimbabwe & 4 Ors* CCZ 4/21 on the need for litigants to refrain from unwarranted attacks

on other litigants, witnesses or judicial officials, the same polemic - vitriolic diatribe if you like - continues to rear its ugly head in proceedings before this court. As I understand the position, founding and answering affidavits are drafted by a legal practitioner after consultation with a client. Although the affidavit is deposed to by the client, the legal practitioner plays a central role in the crafting of its contents and, more pertinently, the language employed in dealing with the various issues requiring determination by the court. As stated in *Chivinge's* case, *supra*, it is unbecoming conduct for a legal practitioner to put invective language into the mouth of a litigant. Given these circumstances, it seems to me that in a future and appropriate case, an award of costs *de bonis propriis* may well be found not to be unwarranted.

DISPOSITION

- [104] I am satisfied that on a correct interpretation of s 328 of the Constitution, there is no obligation on either Parliament or the Speaker to again initiate the processes in subs (3) and (4) of that section in the event that there are amendments to a Constitutional Bill following a debate in Parliament. There is also no obligation on the President to scrutinize a Constitutional Bill brought to him for assent in order to ascertain whether Parliament has complied with all the procedural prerequisites for the passing of the Bill.
- [105] The application must therefore fail. Owing to the use of insolent and invective language in response to the opposing papers filed on behalf of the President, it is appropriate, contrary to the normal practice of this court, that the applicants meet the costs of this application.

[106] In the result, the following order is made:

“The application be and is hereby dismissed with costs.”

GWAUNZA DCJ	:	I agree
MAKARAU JCC	:	I agree
GOWORA JCC	:	I agree
HLATSHWAYO JCC	:	I agree
PATEL JCC	:	I agree
UCHENA JCC	:	I agree

Tendai Biti Law, applicants’ legal practitioners

Chihambakwe, Mutizwa & Partners, first respondent’s legal practitioners

Civil Division of the Attorney-General’s Office, second respondent’s legal practitioners

Judgment No. CCZ 04/23
Constitutional Application No. CCZ 18/21