

**REPORTABLE** (3)

(1) LIVISON CHIKUTU (2) PHENEAS CHITSANGE (3) ALBERT DHUMELA

V

(1) MINISTER OF LANDS, AGRICULTURE, CLIMATE AND RURAL SETTLEMENT & ORS (2) MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS (3) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE (4) ATTORNEY GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE  
MALABA CJ, GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC,  
HLATSHWAYO JCC, AND PATEL JCC  
HARARE: JUNE 22, 2022 & APRIL 27, 2023

*T. Biti*, for the appellants

*O. Zvedi* for the respondents

**Judgment No. CCZ 03/23**  
**Constitutional Application No. CCZ 02/22**

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**GOWORA JCC:**

[1] This is an appeal against the entire judgment of the High Court, sitting at Harare, in which it dismissed a constitutional application placed before it. The appellants approached the court *a quo* seeking an order that s 4 and s 6 (1) (b) of the Communal Land Act [Chapter 20:04] (hereinafter the “Communal Land Act”) be declared *ultra vires* the Constitution of Zimbabwe, 2013 (“the Constitution”). The application was prompted by a series of legal instruments passed by the Government which gave notice of the setting aside of 12 940 hectares in the administrative district of Chiredzi, initially for ‘lucerne production.’ A

subsequent statutory instrument altered the purpose of the reservation of the area to an “irrigation scheme.”

[2] The court *a quo* did not find merit in the application. It held that there was nothing unconstitutional with the provisions of ss 4 and 6 of the Communal Land Act. It accordingly dismissed the application. Irked by that decision, the appellants appealed to this Court in terms of s 175 (4) of the Constitution.

### *FACTUAL BACKGROUND*

[3] The appellants in this matter are members of the Hlengwe Shangani ethnic group. They are peasant farmers who occupy tracts of land in the Chilonga area in Chiredzi. They practise mixed farming. The community occupies the south-eastern Lowveld of Zimbabwe, particularly areas bordering or falling within Chikombedzi, Chiredzi, Gonarezhou, Hippo Valley, Malilangwe, Mwenezi, and Triangle. The land in question falls along the Save, Runde, and Limpopo Rivers. The same ethnic group also occupies parts of Mozambique and South Africa. It claims occupation of the land in question well before the advent of colonialism in the 1890s.

[4] The first and second respondents are Cabinet Ministers responsible for the administration of the Ministry of Lands, Agriculture, Water, Climate, and Rural Settlement and the Ministry of Local Government and Public Works, respectively.

[5] The third respondent is the President of the Republic of Zimbabwe (hereinafter referred to as the “President”), with the fourth respondent being the State’s principal legal advisor.

[6] On 26<sup>th</sup> February 2021, a statutory instrument, S.I. 50/21, was published by the Minister of Local Government, Urban, and Rural Development, giving notice that, acting in terms of s 10 of the Communal Land Act, he had set aside 12, 940 hectares in the district of Chiredzi for lucerne production. On the same date, the President, acting under s 6 of the Communal Land Act, published S.I. 51/21, giving notice that a piece of land in extent of 12 940 hectares had been set aside from the district of Chiredzi. It is common cause that the two legal instruments contained errors. The first, S.I. 50/21, cited the wrong Minister as the administrative authority. This was corrected by the publication of S.I. 63A/21 on 9 March 2021 which cited the Minister of Local Government and Public Works. **Judgment No. CCZ 03/23**  
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In addition, the purpose for the setting aside of the 12 940 hectares was altered from that of lucerne production to an irrigation scheme. On the same day, the President published S.I. 72A/21. The Statutory Instrument repealed S.I. 51/21 and gave notice that, the President, acting in terms of s 10 of the Communal Land Act, had set aside a piece of land in extent of 12 940 hectares in the district of Chiredzi for the setting up of an irrigation scheme.

[7] Feeling threatened by the imminent reservation of land within their area of habitat, the appellants applied to the High Court (“the court *a quo*”), impugning the constitutional validity of section 4 and section 6 (1) (b) of the Communal Land Act. The first appellant averred that the land that had been set aside, in

extent 12 940 hectares, formed a significant part of their ancestral lands. He averred that the land was part of their ancestral heritage and that the Hlengwe-Shaangani communities had inhabited the area for over half a millennium. He averred that, given the length of time the community had been in occupation of the same, they could not be dispossessed of the land at the mere whim of the respondents and that, as a result, the reservation of the identified piece of land impacted on their fundamental human rights.

[8] The first appellant listed the fundamental rights contained in ss 51, 48, 71, 63, and s 56 (1) of the Constitution of Zimbabwe as being violated by the respondents' actions. He asserted that ss 4 and 6(1) (b) of the Communal Land Act were the offending sections that enabled the violation of their fundamental rights.

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[9] Section 4 of the Communal Land Act was criticized as unconstitutional and labelled a relic from the colonial era that reinforced the notion that Africans could not own or vindicate property rights. The first appellant challenged the *status quo*, which he alleged prevented “indigenous peoples” from owning property rights to their ancestral homes in communal areas. Section 4 of the Communal Land Act was further impugned as being discriminatory due to the absence of private individual ownership rights for inhabitants of communal lands.

[10] He averred that s 6 (1) (b) of the Communal Land Act enabled the excision of portions of communal land by the third respondent and that this provision breached the property rights enshrined in s 71 of the Constitution. He tied this breach to the right to life as protected by s 48 of the Constitution. Furthermore, he

asserted that the prospective loss of their ancestral land would negatively impact on their right to dignity, which he tied to their ancestral land.

[11] The first appellant averred that their right to practise their culture under s 63 of the Constitution would be affected by their forced relocation from their ancestral lands. He posited that this also violated their dignity. He stated that the impugned provisions violated their community's fundamental human rights as enshrined in the Constitution.

[12] The appellants categorized the application before the court *a quo* as an attempt to reverse two hundred years of colonialism. The first appellant alleged that there existed inconsistencies in the system of land tenure in that the law had permitted the expropriation of commercial farmland from white farmers through the Land Reform Programme and yet, in contrast, the communal land ownership system remained intact. He asserted that s 6 (1) (b) of the impugned Act enabled the expropriation of communal land without any due process and compensation.

[13] He submitted that the evolution of the Communal Land Act from the purported racist Land Apportionment Act and the Tribal Trust Land Act are regarded as incontrovertible evidence of its unconstitutionality. He reiterated that the impugned sections were discriminatory as they breached the appellants' right to equal protection of the law enshrined in s 56 (1) of the Constitution.

[14] He stated that the land was a source not only of their food but their medicine as well. He averred that the proposed irrigation scheme was dubious, and he felt it

was just an excuse to scout for mineral deposits in the area. The first appellant also insisted that the true purpose of their displacement was to pave the way for lucerne production in favour of a company named DenDairy (Pvt) Ltd.

[15] In addition, the first appellant averred that there was no prior consultation with the local people by the third respondent before the exercise of the prerogative under s 6 (1) (b) of the Communal Land Act. This was said to be a breach of the Administrative Justice Act [*Chapter 10:28*] and, consequently, s 68 of the Constitution. He, therefore, sought a retrospective order nullifying the notices published by the respondents earlier in the year.

[16] The first appellant embarked on a rendition of the background of his community's occupation of the land. He submitted that the community's existence in the territory had long been established before the Mfecane upheaval in the 19<sup>th</sup> century. To that end, he attached a case study by J.H. Bannerman that provided an exposition of the history of the Hlengwe community. He recounted clashes with the imperial white community that attempted to establish irrigation systems in areas that contained the graves of their ancestors. The first appellant stated that these graveyards were now part of the land sought to be annexed by the third respondent. He asserted that the prospective dispossession would strip them of their cultural heritage.

[17] The first appellant made extensive reference to international law in support of the application. He indicated that the universal principle of free prior informed consent (hereinafter "fpic") was not observed due to the outdated provisions of

the Communal Land Act, which did not mandate their inclusion in the decision-making process. In addition, the first appellant cited article 17 of the Universal Declaration of Human Rights to support his assertion that the impugned Act was arbitrary in depriving them of their ancestral property. Further allusion was made to the International Covenant for Civil and Political Rights and the African Charter on Human and People’s Rights in support of the application.

[18] Concerning the issue of *locus standi*, the first appellant averred that the application was anchored on s 85 (1) (d) of the Constitution. He asserted that it was a matter of public interest as his community had a direct interest in the matter. He conflated public interest with his community’s interests. Part of his reasoning was that the land question was the essence of the struggle for liberation in Zimbabwe.

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[19] The second and third appellants also deposed to affidavits supporting the constitutional application in the court *a quo*. They reiterated the same concerns regarding the negative implications of the reservation of the land on their human dignity and other related cultural rights. Accordingly, the appellants sought an order declaring ss 4 and 6 (1) (b) of the Communal Land Act *ultra vires* the Constitution.

[20] The respondents opposed the application before the High Court. The fourth respondent deposed to an opposing affidavit on behalf of all the respondents. He raised a preliminary objection alleging the misjoinder of the second and third

respondents. He asserted that he was also a victim of misjoinder in the proceedings as he had no legal interest in the matter.

[21] As to the merits, he refuted the appellants' claim to ownership of the reserved piece of land stating that their community was a mere beneficiary of the communal land whose title was vested in the President. He also refuted the appellants' claim that the project's true intent was not an irrigation project. Lastly, he highlighted that, contrary to the appellants' averments, s 12 of the Communal Land Act provided for compensation in instances of displacement from communal areas.

[22] He further asserted that the State had engaged the Chilonga community regarding the establishment of an irrigation project and that the proposed project was not aimed at displacing the appellants' community. In addition, he highlighted that a relatively large portion of the target area was uninhabited. He added that various similar developmental schemes had been established in other communal areas. The proposed project was, therefore, not out of the ordinary.

[23] The respondents contended that the application was both frivolous and vexatious and lacked a solid basis as the impugned provisions did not militate against the fundamental rights of the appellants as enshrined in the Constitution. He disputed the contention that the Communal Land Act was a colonial construct and, in support of the legislation in question, stated that it served a practical purpose: to regulate the universal national development of communal land. He stressed the

existence of a compensation clause under s 12 of the impugned Act, which was available and accessible to any potentially affected parties.

[24] The appellants replicated and filed answering affidavits. The first appellant objected to the failure on the part of the respondents to attach a notice of opposition to their opposing affidavit. He also took issue with the fourth respondent deposing to an affidavit on behalf of the first to third respondents.

[25] Regarding the substance of the respondents' opposition, the appellants averred that the fourth respondent lacked the capacity to make assertions on matters of government policy. The first appellant reiterated his apprehension that valuable minerals had been discovered in the area and that this discovery constituted the primary reason for the drive to set aside the targeted portion of their ancestral communal land. The appellants refuted the contention by the respondents that there was prior consultation with the community before the impugned actions were taken. They alleged that the community was not allowed to make any meaningful submissions when the government delegation advised them of the plan to annex the disputed territory. Further, meetings with government officials were characterized as hostile and futile.

[26] Following the hearing of the matter, the court *a quo* dismissed the application. The appellants' argument regarding the unconstitutionality of the impugned provisions was rejected. The court was of the view that it was not sufficiently qualified to provide a holistic solution to their predicament. The court *a quo* opined that the executive and legislature were better placed to provide an

effective remedy. Dissatisfied with the disposition *a quo*, the appellants filed the instant appeal before the Court on the following grounds:

*GROUND OF APPEAL*

[27] The court *a quo* grossly erred and misdirected itself in failing to hold that s 4 and s 6 (1) (b) of the Communal Land Act [*Chapter 20:04*] are *ultra vires* the provisions of s 48, s 51, s 72, s 63, s 56 (1) and s 68 of the Constitution of Zimbabwe.

[28] More fully, the court *a quo* grossly erred in failing to hold that the legal position codified in the Communal Land Act [*Chapter 20:04*] denying indigenous aboriginal black Zimbabweans the right to own their land was unconstitutional.

[29] On a very technical level, the court *a quo* erred in implicitly holding that the provisions sought to be impugned were reasonable and justified in a democratic society and in making such a finding without expressly holding that section 4 and 6 of the Communal Land Act [*Chapter 20:04*] violated the applicant's rights.

[30] The court *a quo* further erred in failing to appreciate that it could have granted an order, declaring s 4 and s 6 of the Communal Land Act [*Chapter 20:04*] unconstitutional and then suspending such declaration in terms of s 175(6) of the Constitution, allowing the executive and indeed Parliament time to consult or set up a Land Commission on a new system of land tenure consistent with the Constitution.

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[31] More fully, the court *a quo* thus erred in failing to appreciate that what was before it was a legal issue for the declaration of the appellants' rights as opposed to the policy issue of a new tenure system for communal land."

#### *APPELLANTS' SUBMISSIONS ON APPEAL*

[32] Mr. *Biti*, counsel for the appellants, made the following submissions. He argued that the court *a quo*'s determination was wrong in failing to find that ss 4 and 6 (1) (b) of the Communal Land Act were unconstitutional. He submitted that the court *a quo*'s judgment contained three contradictory views. The first was that the court *a quo* made positive findings as to the racist import of the impugned provisions. Secondly, the court *a quo* held the matter to be one of policy, notwithstanding the mandate of courts to interpret laws. He vehemently objected to such an approach regard being had to s 175 (6) of the Constitution, which imbues the courts with authority to grant a 'just and equitable remedy.' The third facet allegedly contained in the judgment related to the determination that there was nothing objectionable with vesting of land in the President as a consequence of s 4 of the aforesaid Act. Mr. *Biti* submitted that this was in contrast with the court *a quo*'s earlier findings of racial connotations in the impugned provisions. In addition, he contended that it was a condescending view that land barons would overrun communal lands should "natives" be granted title to their land.

[33] To bolster his stance on the alleged racial connotations of the impugned provisions, counsel embarked on a rendition of the historical background giving rise to the present-day Communal Land Act. To this end, Mr. *Biti* advanced that racist undertones were prevalent in the expropriation of communal lands from the

native people of Zimbabwe. He implored the Court to consider judicial pronouncements in Latin America that dealt with the land previously excised from the indigenous people in that region during the colonial era. He argued that the appellants' dignity was tied to their ancestral land. He thus proposed that the course adopted in the Inter-American cases on similar circumstances be followed and given effect to.

[34] As regards the remedy, Mr. *Biti* submitted that the order of unconstitutionality, in this case, ought to be suspended to enable the legislature to make the relevant consultations in formulating a comprehensive land tenure system.

[35] The Court noted that the appellants had not sought to impugn s 10 of the Communal Land Act and whether there existed a cause of action in the matter due to the failure to attack the particular statutory instrument that set aside the appellants' land. Mr *Biti* submitted that despite the first respondent's use of section 10 of the Communal Lands Act in setting aside land for an irrigation scheme there was a cause of action before the Court. He argued that at the relevant time of filing in the court *a quo*, there were three statutory instruments in terms of which the first respondent had acted when he set aside the land in contention. Mr. *Biti* advanced that there thus was a sufficient basis for challenging the constitutionality of sections 4 and 6 of the impugned Act.

#### *RESPONDENTS' SUBMISSIONS ON APPEAL*

[36] *Per contra*, Ms. *Zvedi* submitted that the court's decision *a quo* could not be faulted. She submitted that this was a polycentric matter which was the sole

preserve of the executive and legislature and that the impugned sections did not infringe the appellants' property rights. In addition, Ms. *Zvedi* contended that the vesting of communal lands in the President was aimed at managing development in the country.

[37] She further submitted that the irrigation scheme development project would not compel the relocation of the Hlengwe Community from their ancestral lands as the land earmarked for the project is currently unoccupied. As a result, they would not be forcibly relocated; hence the issue of violation of rights could not be sustained.

[38] She posited that in the event that the community was relocated, s 12 of the Communal Land Act provides for appropriate compensation to be paid to persons affected by any such relocation. She further submitted that in terms of the Constitution, a person might be compulsorily deprived of their property in terms of a law of general application and that the Communal Land Act is such a law.

[39] She argued that the Constitution sanctioned the purpose of the reservation of the land in question and that it was in the public interest and further for the benefit of the local community as it paved the way for an irrigation scheme to be set up. Ms. *Zvedi* averred that a notice for the reservation of the land was provided and the Hlengwe people had also participated in the deliberations and hence they had been able to approach the Court for recourse.

[40] She argued further that communal land is vested in the President, who has the authority to permit land usage within the confines of the Communal Land Act. As a consequence, she submitted that all the procedures were followed.

[41] She contended that the appellants' failure to impugn s 10 of the Communal Lands Act left them bereft of a cause of action. Ms. Zvedi insisted that the intended development would not affect the appellants. She further argued that the Communal Land Act provided adequate remedies in the unlikely event that they were dislodged from their homes.

[42] In conclusion, she submitted that the matter was not yet ripe for determination and that the court *a quo* had not erred at all by finding that the matter is one of policy and a political issue. That the law currently vests all communal land in the President, who may set aside part of such land under the provisions of the Communal Land Act, was beyond dispute. She argued that whether or not that land should no longer remain vested in the President and title given to communal land occupants is a matter for the executive and parliament.

[43] She accordingly moved for the dismissal of the appeal.

#### *ISSUES FOR DETERMINATION*

[44] The appellants have raised five grounds of appeal. However, from those grounds, only three arise issues for determination. The first is whether or not the court *a quo* erred in failing to find that sections 4 and 6 of the Communal Land Act were unconstitutional, as contended by the appellants. Aligned to this is whether the

appellants' claim to a right to property under s 71 is well founded. The second is whether or not the court *a quo* correctly found that the matter was one of policy and entirely in the hands of the executive and the legislature. The third and last issue is whether or not the court erred in concluding that the provisions were reasonable and justifiable in a democratic society and, thus, did not violate the appellants' constitutional rights as alleged.

#### *THE LAW ON CONSTITUTIONAL CONSTRUCTION*

[45] The Constitution is a statute. As such, it is subject to the established canons of interpretation. Accordingly, a court must construe the provisions of the Constitution literally to give effect to its ordinary meaning unless doing so would result in an absurdity. Where, however, this is not possible, a court is enjoined to construe the provisions in a manner that gives effect to the rights being protected.

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[46] As submitted by Mr. *Biti*, the Constitution is a product of negotiation between various stakeholders and thus embodies the values and aspirations of the people of Zimbabwe. It marks a departure from a colonial past. It has a bill of rights that is justiciable that is binding on all arms of the State and the citizenry at large.

[47] With these principles in mind, the Court must then examine the constitutional provision to determine its meaning and interpret the challenged legislation to decide if the alleged violations have been established. This accords with canons of interpretation and has been emphasized time and time by the courts in this jurisdiction in a long line of authorities. The approach by the court was settled by

GUBBAY CJ in *In Re Munhumeso & Ors* 1994(1) ZLR 49(S), at 59B-E, where the learned former Chief Justice said the following:

“Two general interpretational principles are to be applied. The first was lucidly expressed by Georges CJ in *Zimbabwe Township Developers (Pvt) Ltd v Lou’s Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382B-D; 1984 (2) SA 778 (ZS) at 783A-D, to this effect:

‘Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution.’

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See also *Minister of Home Affairs v Bickle & Ors* 1983 (2) ZLR 431 (S) at 441E–H, 1984 (2) SA 39 (ZS) at 448F–G; *S v A Juvenile* 1989 (2) ZLR 61 (S) at 89C, 1990 (4) SA 151 (ZS) at 167G–H.”

[48] The above authority has been followed and given effect by our courts in enforcing fundamental rights even before the incidence of the current Constitution. On several occasions, this court has pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. One of the leading authorities in this regard is *Rattigan & ORS v Chief Immigration Officer & ORS* 1994 (2) ZLR 54 (S) where this court said the following on pp57-58:

“THE RULE OF CONSTITUTIONAL CONSTRUCTION

This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental

rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed. See *Min of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 243G-244A, 1982 (4) SA 301 (ZS) at 306E-H; *Bull v Min of Home Affairs* 1986 (1) ZLR 202 (S) at 210E-211C; 1986 (3) SA 870 (ZS) at 880J-881D; *Nkomo & Anor v A-G, Zimbabwe & Ors* 1993 (2) ZLR 422 (S); 1994 (1) SACR 302 (ZS) at 309E-F. A recent reminder that courts cannot allow a Constitution to be “a lifeless museum piece” but must continue to breathe life into it from time to time when opportune to do so, was graphically expressed by Aguda JA in *Dow v A-G* [1992] LRC (Const) 623 (Botswana Court of Appeal) at 668f-h:

‘—... the over-riding principle must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture which the framers could have painted had they been faced with circumstances of today. The motto which would be to stultify the Constitution is not acceptable. It seems to me that a stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the Constitution. I conceive it that the primary duty of the Judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity’.

See, too, *Hunter et al v Southam Inc* (1984) 9 CRR 355 (SC Canada) at 364; *Govt of the Republic of Namibia & Anor v Cultura 2000 & Anor* 1994 (1) SA 407 (NmS) at 418F-G.”

[49] The appellants have alleged a violation of several provisions of the Constitution. In considering the impugned legislative provisions, the task of the Court is to interpret the Constitution to safeguard and guarantee the protection and enforcement of enshrined fundamental rights under Chapter 4. Accordingly, the

Court must adopt an approach that results in an expansive and broad interpretation of the provisions that protect human rights. It is often said that the Constitution is a living document, and that the courts must strive to breathe life into its provisions. In this endeavour the court must have reference to language in the provision, and, the historical origins of the concept thus enshrined. The provision has be construed in a manner that must give meaning and purpose to any other rights associated with any particular provisions. Thus, it is construed to reflect the citizens' values and aspirations. See in this regard *S v Zuma* 1995(2) SA 642, (CC); *R v Big Mart Ltd* (1985) 18 DLR (4<sup>th</sup>) 321.

[50] It follows, therefore, that the Court must eschew a narrow and restrictive approach. Consequently, the Court must consider and interpret all relevant provisions to give effect to the objects of the Constitution, and best serve its interest and purpose. Following up on the test established in *Munhumeso (supra)*, a guiding tool for the Court was found in the case of *Kawenda v Minister of Justice, Legal & Parliamentary Affairs \$ Ors* CCZ 2/22. In that case MAKARAU JCC stated the following:

“There is an expansive body of jurisprudence from this jurisdiction and beyond on the approach that a court must take when determining whether a statute or other law is in conflict with the Constitution. One begins with an interpretation of the relevant provisions of the Constitution. The purpose of interpreting the Constitution first is to set the framework, the backdrop, or the yardstick against which the impugned law will then be examined or measured. One starts with a discernment of the law. (See *Zimbabwe Township Developers (Pvt) Ltd v Lous’ Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 383 F; and *Democratic Assembly for Restoration and Empowerment & Ors v Suanyama* CCZ 9/18).

In interpreting the constitutional provisions, the ordinary rules of interpretation of statutes apply. The Constitution is but a statute. It is

however settled that in interpreting constitutional provisions, the preferred construction “is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose”. (See *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S)). In particular, when interpreting provisions that guarantee fundamental rights, the widest possible interpretation is adopted to give each right its fullest measure or scope.

After interpreting the appropriate provisions of the Constitution, one then presumes that the impugned law is constitutionally valid. The presumption of constitutional validity serves firstly to place the onus on whoever is alleging invalidity to prove such invalidity and, secondly and, equally important, to guide the court in interpreting the impugned law in favour of validity where the piece of legislation is capable of two meanings. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other falling outside the provisions of the Constitution, the court must perforce uphold the one that falls within.

The presumption in favour of constitutionality is entrenched in our law.

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As the next and final logical step, the Court must then examine the effect of the impugned law on the fundamental right or freedom in question. If the effect of the impugned law is to abridge a fundamental right or freedom or is inconsistent with the provisions of the Constitution providing for the right or freedom, the object or subject matter of the impugned law will be less important or irrelevant. (See *In re Mhunhumeso* 1994 (1) ZLR 49 (S)).

If the court finds the impugned law to infringe upon a fundamental right or freedom or to be inconsistent with the provisions of the Constitution on a fundamental right or freedom, the court must proceed to determine whether the infringement or inconsistency is permissible in terms of s 86 (2) of the Constitution.”

[51] The remarks of MAKARAU JCC are apposite. The steps to be followed have been settled and it will not add value to the above remarks to make any further comment. I will therefore proceed accordingly. I commence with the claimed rights of ownership.

*RIGHT TO OWNERSHIP UNDER SECTIONS 71 AND 72*

[52] It seems to me that the fundamental rights upon which the appellants base their claim for breach of the Constitution have their genesis in an alleged right to ownership over the piece of communal land which the appellants occupy that has been set aside under the Communal Land Act. The right is claimed under s 71 of the Constitution. The appellants link the rights to dignity and life premised on the right under s 71.

[53] An applicant who alleges a violation of a fundamental right must establish the existence of the right, that the provision under which the right is claimed applies to the applicant and that the respondent has violated the right. The appellants have alleged that they own the land they occupy in their affidavits. They allege that their right to ownership of this land is guaranteed under s 71 (2) of the Constitution and they contend that this right has been violated by the setting aside of 12 940 hectares of the land they occupy. They aver that the vesting of the land in the President has violated this right to ownership. Furthermore, they claim the right to ownership due to continued occupation for several hundred years before the incidence of colonialism.

[54] As a consequence, it seems to me that s 71 is the premise upon which all the other claimed rights must flow from. It is the provision that must inform the Court of the existence of the other alleged rights. It is only logical that the inquiry into the dispute commence with an examination of s 71 and what rights it provides for and protects. That section provides, in relevant part, as follows:

## **“71 Property rights**

(1) (not relevant)

(2) Subject to section 72, every person has the right, in any part of Zimbabwe, **“to acquire, hold, occupy, use, transfer, hypothecate, lease, or dispose of all forms of property, either individually or in association with others.”** (my emphasis)

[55] Since the rights enshrined under s 71(2) are subject to s 72, before the Court can determine whether or not the appellants can claim a right under s 71(2), the Court inevitably must construe the provisions of s 72. *In casu*, the Constitution has made s 72 the dominant provision, and the two sections must be construed together. This is in tandem with the canons of interpretation that a court must construe all the relevant provisions of the Constitution to arrive at an interpretation that best serves the objects and interests of the Constitution. Accordingly, the right to ownership of the land claimed by the appellants under s 71(2) must be construed in light of the provisions of s 72.

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[56] The section provides as follows:

## **“72 Rights to agricultural land**

(1) In this section— “agricultural land” means land used or suitable for agriculture, that is to say, for horticulture, viticulture, forestry, or aquaculture or for any purpose of husbandry, including—

- (a) the keeping or breeding of livestock, game, poultry, animals, or bees; or
- (b) the grazing of livestock or game; **but does not include Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey;**” (my emphasis)

[57] The appellants seek to assert rights under the Bill of Rights in respect of ancestral land located within the country's rural areas. The appellants claim that they survive on the land for all aspects of their livelihood. This is not in dispute; their land use is in keeping and in accord with the law. As such, it is land that serves many purposes for the community that occupies it. It is where their residences are located. It is also land upon which the community farms and is thus a source of livelihood. They aver that some of the inhabitants do contract farming for Delta Beverages Corporation and some are cotton producers. Finally, when regard is had to the meaning ascribed to “agricultural land usage” their land constitutes farmland in that it is land used for agriculture, including the keeping of animals, whether domestic or wild, poultry, and all other facets that go with agricultural land.

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[58] Section 72 of the Constitution provides that land located in a communal land or within the boundaries of an urban local authority or a township is expressly excluded from the definition of what constitutes agricultural land. It seems to me that s 72 has not provided for the right to occupy or use agricultural land. What it has done in subsection (1) is to delineate what constitutes agricultural land. Most importantly for this dispute, section 72 of the Constitution has stated explicitly that rights to agricultural land in communal areas are to be governed by the Communal Land Act.

[59] The appellants have not, either before this Court or even the court *a quo*, made any attempt to establish the alleged violation of the right sought to be relied on under s 71. They have also not linked their alleged right of ownership to the

provisions of section 72. All that they contend is that the impugned provisions of the Communal Land Act continue to serve a colonial construct denying local indigenous people proprietary rights to land, which they allege are enshrined under section 71.

[60] Given that the land in issue is communal land, it is governed by the Communal Land Act and the right they assert is specifically to be found in that Act. I am persuaded that the Constitution itself has excluded in specific terms a right to own land under s 71 for communal land dwellers except for the specific rights of occupation and ownership spelt out in the Communal Land Act itself. In turn, despite s 71 being subject to s 72, section 72 has not spelt out any provisions related to communal land rights. This means that to assert a right under s 71 as read with s 72 of the Constitution, regard must be had to the Communal Land Act itself.

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[61] Therefore, this Court must construe all provisions relating to the occupation, use, and deprivation of land provided in the Act. In my view, sections 4, 6, 8, 9, 10, and 12 of the Act are relevant and pertinent in establishing the rights of dwellers in communal land. These sections in my view, confirm or lay to rest the allegations by the appellants of the violations of their fundamental rights on the implementation or exercise of statutory power by the President and the second respondent, respectively.

[62] I therefore proceed to consider the law relating to their right to occupy land in communal areas.

RIGHTS OF OCCUPATION UNDER THE COMMUNAL LAND ACT

[63] I start the inquiry by examining s 8 of the Communal Land Act. That section reads as follows:

**“8 Occupation and use of Communal Land for agricultural or residential purposes**

(1) Subject to this Act and the Regional, Town, and Country Planning Act [*Chapter 29:12*] and any order issued in terms thereof, **a person may occupy and use Communal Land for agricultural or residential purposes with the consent of the rural district council** established for the area concerned.

(2) Subject to subsection (3) and the Regional, Town, and Country Planning Act [*Chapter 29:12*] and any order issued in terms thereof, when granting consent in terms of subsection (1), a rural district council shall—

(a) where appropriate, **have regard to customary law relating to the allocation, occupation, and use of land in the area concerned; and**

(a1) consult and co-operate with the chief appointed to preside over the community concerned in terms of the Traditional Leaders Act [*Chapter 29:17*]; and

(b) **grant consent only to persons who, according to the customary law of the community that has traditionally and continuously occupied and used land in the area concerned, are regarded as forming part of such community or who, according to such customary law, may be permitted to occupy and use such land:**

Provided that, if no community has traditionally and continuously occupied and used land in the area concerned, the district council shall grant consent only to such class of persons as the Minister, by notice in writing to the district council, may specify.

(3)..... n/a

(4).....n/a

(5).....n/a

(6) Where a rural district council is established for any area of Communal Land or any area of Communal Land is incorporated within the area of a rural district council, **any person lawfully occupying or using land in such area for agricultural or residential purposes on the date of such establishment or incorporation, as the case may be, shall be deemed to have obtained the consent of such rural district council for the purposes of subsection (1).”** (*my emphasis*)

[64] Thus, s 8 of the Communal Land Act gives rights of occupation to community members that have occupied the land traditionally and continuously for extended periods. My reading of the section leads me to conclude that a community

member in occupation of such land only has to prove that he or she is a member of a community that has traditionally and continuously been in occupation of such land. That established an entitlement to occupation. All that is required is that the person is part of a community that has continuously and traditionally occupied the land.

[65] However, a community must have services through schools, churches, hospitals, and other amenities. The law provides the grant of permits for occupation by persons or parties who are not part of the traditional dwellers. The provision that permits such rights is found in s 9 of the Act. It provides:

**“9 Permits to occupy and use Communal Land**

(1) A rural district council may, with the approval of the Minister, issue a permit authorizing any person or class of persons to occupy and use, subject to the Regional, Town, and Country Planning Act [Chapter 29:12] and any order issued in terms thereof, any portion of Communal Land within the area of such rural district council, where such occupation or use is for any of the following purposes—

- (a) administrative purposes of the State or a local or like authority;
- (b) religious or educational purposes in the interests of inhabitants of the area concerned;
- (c) hospitals, clinics, or other such establishments for the benefit of inhabitants of the area concerned;
- (d) hotels, shops, or other business premises;
- (e) any other purpose whatsoever which, in the opinion of the rural district council, is in the interests of inhabitants of the area concerned;”

[66] Although the word “permit” has not been defined in the Act, s 2 defines **use** as:

**“use, in relation to Communal Land, includes the erection of any building or enclosure, ploughing, hoeing, the cutting of vegetation, the depasturing of animals or the taking of sand, stone or other materials therefrom.”**

[67] This definition accords with the purposes or definition of agricultural land in s 72 of the Constitution. The appellants occupy land that they utilise both for agricultural and residential purposes. Their right to occupy as a community can only be in accordance with s 8 of the Act. A perusal of the section reveals that the law recognizes the right of a community to occupy communal land that such a community has occupied continuously. It does not define the amount or length of time for such occupation. When regard is had to section 71 (1) of the Constitution, it becomes clear that the provisions of s 8(1) of the Act are not only consistent with but give effect to the right to property being claimed by the appellants. That right is not restricted to ownership. It is broader than ownership. It is the right to **acquire, hold, occupy, use, transfer, hypothecate, lease, or dispose** of all forms of property. The suggestion by the appellants that the right in s 71 is strictly that of individual private ownership of land wherever situated is not borne out by the text of the constitutional provision being relied on. The appellants do not challenge the right accorded under the governing Act. They do not suggest that this right is not in accordance with that enshrined under s 71(2) or that they are not permitted to **acquire, hold, use, transfer, hypothecate, lease, or dispose** of land within the boundaries of communal land.

[68] It is apparent from the above that the occupation of communal land is entirely consistent with the occupation of agricultural land under s 72 of the Constitution. An occupier requires permission or consent from an authority duly empowered by an Act of Parliament. Thus, there is no discernible difference between an occupier of communal land and an occupier of agricultural land. This is because both classifications of land are vested in the State.

[69] The further contention by the appellants that the right in s 71 relates to individual ownership of property is incorrect. Individuals or persons can exercise the right in association with others. In terms of s 8 (2) (b) of the Act, the right of a community that has traditionally and continuously occupied land located in communal lands is guaranteed by the denial of permits of occupation to persons who have not continuously and traditionally been in occupation thereof.

[70] In addition, it is clear that s 8 (2) (a) and (b) accord preference to the customs of the community that has been in occupation. The special provision ensures that a rural district council, in granting consent to dwellers, must have regard to customary law. Therefore, the customs of a community take precedence when the local authority is making decisions affecting the community itself. In addition, where a community has been in continuous occupation of communal land, a district council shall deem that such community has the appropriate consent to occupy the same.

[71] It, therefore, stands to reason that the same meaning should be ascribed to the word permit in s 8 of the Communal Land Act. Consequently, contrary to the position adopted by the appellants, the rights they claim are fully protected under sections 8 and 9 of the Communal Land Act. The Act is not inconsistent with the Constitution, as suggested by the appellants. A careful reading of s 8 (2) (b) of the Act, taken as a whole, establishes that the law has been crafted to protect the community's rights to occupy communal land.

[72] It is the case for the appellants that the beneficiaries of the Land Reform Programme have better conditions and rights in relation to the agricultural land allocated to them under the aegis of s 72 of the Constitution. The right to occupation of agricultural land is not found in s 72. It is provided for in the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. It provides as follows in relevant part:

**“3 Occupation of Gazetted land without lawful authority**

(1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.”

[73] This provision must be read together with sub-sections (4) and (6) of s 72 of the Constitution in so far as these subsections set out the status of agricultural land within the country. Subsections (4) and (6) provide as follows:

“(4) All agricultural land which—

(a) was itemised in Schedule 7 to the former Constitution, or  
(b) before the effective date, was identified in terms of section 16B(2)(a)(ii) or (iii) of the former Constitution;  
continues to be vested in the State, and no compensation is payable in respect of its acquisition except for improvements effected on it before its acquisition.

(5)..... (not relevant)

(6) An Act of Parliament may make it an offence for any person, without lawful authority, to possess or occupy agricultural land referred to in this section or other State land.”

[74] The above provisions dispel the contention by the appellants that beneficiaries under the Land Reform Programme have rights of private and individual ownership over the land they have been allocated. All acquired agricultural land is vested in the State. Beneficiaries can only occupy land in terms of a document granting such beneficiaries lawful authority for such occupation. What constitutes lawful authority has been decided by this Court in several authorities. The meaning to be ascribed to lawful authority was set out in the seminal judgment by

this Court in *Taylor-Freeme v The Senior Magistrate Chinhoyi & Anor* CCZ 10/2014, wherein CHIDYAUSIKU CJ remarked as follows:

“I finally turn to deal with the issue of what constitutes ‘lawful authority’ and whether the applicant had “lawful authority” to occupy the farm.

.....

The clear and unambiguous meaning of s 2(1) of the Act is that ‘lawful authority’ means an offer letter, a permit and a land settlement lease. Nothing more, nothing less. A letter from the late Vice President, the Presidium or any other member of the Executive does not constitute “lawful authority” in terms of the Act.

In the case of *Commercial Farmers Union and Ors v The Minister of Lands and Rural Resettlement and Ors (supra)*, this Court had this to say at p 19 of the cyclostyled judgment:

‘The Legislature in enacting the above provision clearly intended to confer on the acquiring authority the power to issue to individuals offer letters which would entitle the individuals to occupy and use the land described in those offer letters. The draftsman could have used better language to convey the legislative intent, but there can be no doubt that s 2 of the Act confers on the acquiring authority the power to allocate land using the medium of an offer letter. This provision is not in any way inconsistent with ss 16A and 16B of the Constitution. If anything, it fits in well with the overall scheme envisaged in ss 16A and 16B of the Constitution, which is that the acquiring authority acquires land and reallocates the land so acquired. The acquisition of land and its redistribution lies at the heart of the land reform programme. I have no doubt that the Minister as the acquiring authority can redistribute land he has acquired in terms of s 16B of the Constitution by means of the following documents -(a) an offer letter; (b) a permit; and (c) a land settlement lease. The Minister is entitled to issue a land settlement lease in terms of s 8 of the Land Settlement Act [Cap 20:01]. However, if the Minister allocates land by way of a land settlement lease in terms of s 8 of the Land Settlement Act he is enjoined to comply with the other provisions of that Act, such as s 9 which requires him to consult the Land Settlement Board which obviously has to be in existence. I do not accept the contention by the applicants that the Minister can only allocate acquired land by way of a land settlement lease which he presently cannot do because there is no Land Settlement Board in existence.

The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate

the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to use. I am not persuaded by the argument that because the offer letter is not specifically provided for in the Constitution it cannot be used as a means of allocating land to individuals.

I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual.

Having concluded that the Minister has the legal power or authority to issue an offer letter, a permit or a land settlement lease, it follows that the holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease.'

'Lawful authority' means an offer letter, a permit and a land settlement lease. The documents attached to the defence outline are not offer letters, permits or land settlement leases issued by the acquiring authority. They do not constitute 'lawful authority' providing a defence to the charge the applicant is facing."

[75] It is trite that in any jurisdiction with a justiciable bill of rights, the Constitution is the supreme law in that jurisdiction. However, over and above that, a constitution encompasses the citizens' values, aspirations, and expectations. It embodies the sense of entitlement to the realization of citizens' rights. As such, it constitutes a compass for the judiciary in adjudicating disputes where rights are enforced before the courts. Therefore, it stands to reason that in construing the Constitution, the Court must uphold the community values that the Constitution and the judiciary individually and jointly serve. The Constitution must therefore be construed with due regard to its content and the context under which it came into being.

[76] Both s 72 of the Constitution and the Communal Land Act have delineated land use, in the case of former agricultural land and communal land respectively. Both

classifications are specific to land located within the rural areas and where the communities utilise the land for agriculture: that is to say;

*“for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including—*

*(a) the keeping or breeding of livestock, game, poultry, animals, or bees; or*

*(b) the grazing of livestock or game;.”*

[77] This definition of what constitutes “agriculture” accords with that found in the Constitution in relation to agricultural land. On the other hand, the Act in s 8 (1), provides that a rural district council may grant consent to **any person to occupy and use Communal Land for agricultural or residential purposes.**

[78] It seems to me that the appellants, in contending that their right to occupy land in the communal areas is lesser than that of beneficiaries under the Land Reform Programme, have completely misconstrued the constitutional provisions that apply to the two regimes. The primary purpose of land use in communal land is agricultural as well as residential. Agricultural land has been codified, and its occupation and use are determined by the definition accorded to it under the governing legislation.

[79] On a proper construction, the law on the occupation of State land, which includes communal land and agricultural land under s 72 of the Constitution, makes it clear that occupation of land utilised for agricultural purposes must be in terms of lawful authority under s 72 of the Constitution or the consent of a rural council under ss 8 and 9 of the Communal Land Act. Thus, occupation is at the pleasure of the State. It is apparent from the above that the occupation of communal land is

entirely consistent with the occupation of agricultural land under s 72 of the Constitution. An occupier in both instances requires permission or consent from an authority duly empowered by an Act of Parliament.

[80] As the law currently provides, occupiers of agricultural land under the Land Reform Programme and those occupying pieces of land situate in a communal area both occupy State land. They are given authority or permission to occupy by statute. None of the occupants own the land in their own right. Therefore, there is no apparent difference between occupiers of land found in communal lands and those in occupation of agricultural land as defined in s 72. Thus, there is no discernible difference between an occupier of communal land and an occupier of agricultural land. This is because, as earlier explained, both classifications of land are ultimately vested in the State.

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[81] In addition, authority to occupy communal land by persons who are not part of the community is not easily granted or is only granted under special circumstances. It becomes evident that the provisions of the Act are not inconsistent with the Constitution. There has been no breach of s 71 established on the papers.

#### *APPLICATION OF INTERNATIONAL LAW*

[82] The appellants have, in their quest, made reference to international law and pronouncements from foreign jurisdictions regarding the right to property, especially regarding land associated with indigenous communities.

[83] A constitution is comprised of laws that protect human rights. The law on human rights is universal in substance as well as application. In keeping with the generally accepted principle in constitutional law, the Constitution provides that a court or tribunal seized with a matter where the Bill of Rights is an issue for determination, that court or tribunal must consider international law. Accordingly, it may also have regard to foreign law. S 46 is relevant in this regard and provides as follows:

*APPLICATION AND INTERPRETATION OF CHAPTER 4*

**46 Interpretation of Chapter 4**

(1) When interpreting this Chapter, a court, tribunal, forum, or body—  
(a) must give full effect to the rights and freedoms enshrined in this Chapter;  
(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality, and freedom, and in particular, the values and principles set out in section 3;  
(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;  
(d) must pay due regard to all the provisions of this Constitution, in particular, the principles and objectives set out in Chapter 2; and  
(e) may consider relevant foreign law;  
in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.  
(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.”

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[84] In considering the appellants' rights under the Communal Land Act, the Court has paid due regard to the principles set out in the foreign judgments that the appellants referred to and more specifically to the following decisions which have spelt out such rights are pertinent; viz- the case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, the case of the *Xákmok Kásek v. Paraguay*,

the *Indigenous Community of Yakye Axa v. Paraguay*, the *Endorois Community v Kenya*, Comm'n No 276/2003, *African Commission on Human & Peoples Rights (2006)* and *Malawi African Association v Mauritania* Comm Nos 54/91, 61/91, 164/97. It is these cases that Mr *Biti*, for the appellants, suggested should be followed by this court.

[85] Having considered the authorities in question, the Court finds that they do not advance the case for the appellants as contended. The Court notes that the petitioners or claimants in the cases referred to were indigenous peoples in the different jurisdictions where the disputes emanated from. The facts from the cases establish that the respective governments had, variously, restricted the petitioners' access to land, basic essential services, means of livelihood, property rights to ancestral land, and in one case, had caused the relocation of a community subsequent to the conversion of their land to a game reserve. The common relief sought was the resumption of rights to the land or the affording of essential services by governments while awaiting the determination of disputes. The common thread running through the authorities is that the governments in question had either removed the communities from their ancestral lands or deprived them of their use and enjoyment. In *casu*, there is a discernible difference.

[86] The converse is the case in the present dispute. In terms of s 8 of the Act, the community's right to occupy is guaranteed. The provisions of the Act are on all fours with the law applied in the authorities relied upon. The suggestion that the cases recommended individual ownership of ancestral lands as sought by the

appellants in *casu* is not borne out by the facts in the judgments or the conclusions by the respective tribunals. The appellants, just like the petitioners in the foreign decisions referred to above, occupy communal land. These areas are reserved for communities that have been in occupation since time immemorial. Occupation is not based on individual rights but on collective rights. Their rights of occupation were established when their ancestors moved onto the lands in question and set up the communities. This is why s 8 recognizes the right of people who have traditionally and continuously occupied land in communal areas. Such rights are distinct and utterly disparate from the rights of holders of property in urban areas. While rights of occupation and use under the Communal Land Act are community-based, the rights to own and occupy urban areas are primarily based on individual rights. The latter comprises a whole spectrum of categories, which are provided for in s 71 (2) of the Constitution and those rights are not the premise upon which the appellants approach the Court for relief and it is not germane to discuss them for the purpose of this dispute. Their cause of action is primarily based on the community's right to occupy or own land.

[87] The rider is that the mode of occupation under the Act permits the appellants to live in harmony with nature and use the land according to their culture and heritage. They can also embark on all kinds of business and agricultural enterprises. Those living in places like Borrowdale are restricted to residential use. The stands are restricted, and land use is strictly regulated. There are massive differences between the two. By living in communal areas, the appellants have elected to be bound by the strictures of occupation and use as set out in the Communal Land Act.

*WHETHER THE APPELLANTS' RESPECTIVE RIGHTS HAVE BEEN VIOLATED*

[88] Turning to the grounds of appeal, the case for the appellants is that s 4 of the Act is a colonial construct that reinforces the notion that people of African descent or indigenous people cannot own land in their own right. As such, the provision has no room in post-independent Zimbabwe because white people can own land, while Africans are denied this right through the impugned provision. Thus, it offends the dignity of the people and their humanity. Furthermore, the appellants allege that the provision confirms the stereotype that Africans are a lower form of human being than other races.

[89] In addition, it is suggested that s 4 offends against s 71 of the Constitution. It is contended that the provision denies the appellants their right to own property. By the same token, it offends against their dignity as a people. Without their land, they lose their essence as a people. It also militates against their right to culture under s 63. The intended reservation of part of their land may result in their displacement to various parts of the country. They will, as a result, be unable to exercise their cultural beliefs as the Hlengwe-Shangaan people.

[90] As regards s 6, the contention is that its net effect is to expropriate communal land from its owners without compensation. Both statutory provisions are said to infringe the rights to life, dignity, equal protection of and benefit of the law, the right to property, the right to culture and language, and the right to be heard. Cumulatively, the provisions are said to be in breach of ss 48, 51, 56 (1), 63, 71, and 68 of the Constitution of Zimbabwe. However, the appellants only motivate

the violation of four fundamental rights: ss 71 on property rights, 51 on the right to human dignity, 48 on the right to life, and 56 on equality and non-discrimination. Despite the citation of those they have not addressed in detail the other alleged infringements. As a consequence, the Court will only consider the matter relative to the arguments presented before it.

[91] The occupation of the land issue by the community is not in dispute. What is in dispute and is of paramount importance is whether or not that occupation has been interfered with by the measures undertaken by the government to set aside part of the land for developmental purposes. Implicit in their contention is that the control of communal land should not be the preserve of the government, specifically the President, but that ownership thereof should vest in the community. On that basis, they claim that the community has a right to property under the Constitution, which is enforceable under s 71 as read with s 72 of the Constitution. It is this right upon which the appellants hinge all the other rights in respect of which they seek enforcement by the Court. The approach to the Court has been predicated on a right that the appellants contend allows them **“in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of property”** and that this is provided for in s 71.

[92] The appellants contend that the concept of dignity is enshrined in the Constitution through s 51, which stipulates that every person has inherent dignity in his or her private and public life and that he or she has the right to have that dignity respected and protected. They argue that the removal of their community from their ancestral land without compensation impairs their constitutional right to

dignity and harms their self-worth, renders them homeless, landless, and destitute, and jeopardizes their ability to meet the bare necessities of life, including food, nutrition, clothing, shelter, and water. The allegations surrounding the alleged violation of the right to life under s 48 are tied to the issue of human dignity by the appellants. They submitted that the right to dignity is recognized as the founding source of all other fundamental rights. This is substantiated by s 46 of the Constitution.

[93] In the case of *The State v Willard Chokuramba* CCZ 10/19, this court considered the content of the right to human dignity. MALABA DCJ (as he then was) posited the following:

“Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value when interpreting any provision of the Constitution which protects fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in Chapter 4 of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). The preambles state in express terms that human rights ‘derive from the inherent dignity of the human person’. They all refer to ‘... the inherent dignity ... of all members of the human family as the foundation of freedom, justice and peace in the world’. The rights and duties enshrined in Chapter 4 of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law.”

[94] It seems to me that the provisions of s 8 of the Communal Land Act above ensure that the communities occupying communal lands are afforded the right to practice

their culture and to utilise the land to best advantage. The law does not curtail in any manner such usage. Therefore, the claim that somehow the actions of the government have compromised their dignity and right to benefit from the land for socio-economic reasons is not sustainable. The right accorded to them under s 8 of the Communal Land Act includes the erection of any building or enclosure, ploughing, hoeing, the cutting of vegetation, the depasturing of animals or the taking of sand, stone or other materials therefrom.

[95] Despite extensive research, I have not been able to find any authority in which dignity has been defined as a concept. The general view is that it is impossible to ascribe any meaning to human *dignitas* and that it can only be measured in terms of an alleged infringement of a specific right or injury.

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[96] The communities in the communal areas are at large in how they live and use the land. All the benefits that the appellants aver they obtain from the land are covered when the use that they can put to the land is adverted to. There is no limitation on the manner of living or economic enterprise for which such land can be utilized. Their dignity is fully recognized. Consequently, I do not see any inconsistencies with s 51 of the Constitution. I am fortified in this view by the comments by the learned authors *I Currie and J De Waal, The Bill of Rights Handbook*, 6 ed (2013), in which, citing an extract from Chaskalson, they posit the following on the import of the right to dignity:

“As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It, too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the

social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance? But social and economic policies are pre-eminently policy matters that are the concern of government. In formulating such policies, the government has to consider not only the rights of individuals to live with dignity, but also the general interests of the community concerning the application of resources. Individualised justice may have to give way here to the general interests of the community.”

[97] *In casu*, the appellants’ allegation of the infringement of the right to life is said to arise from the alleged limitation of the socio-economic rights of the Hlengwe Shaangani community. The appellants cite s 77 of the Constitution to support their claim to the right to food and water. However, the justiciability of s 77 is qualified by the provision that the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right. As such, the Court is unable to fault the reasoning by the court *a quo* that the bundle of positive rights flowing from the right to dignity was a matter of policy.

[98] It appears, however, that the main bone of contention of the appellants is not concerned with occupation. Instead, their grievance is that the law, as it relates to rights under communal land, does not permit the inhabitants to own the land in their personal right. The appellants contend that there is no reason why community dwellers in their particular situation should not be granted rights to own pieces of land, as is the case in people who reside in urban areas. Thus, it is contended that the law is discriminatory against them and violates s 56 (1) of the Constitution. Section 56 provides:

**“56 Equality and non-discrimination**

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.

(2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.”

[99] The appellants have not specified the subsection they rely on, but from a general consideration of their argument, it is clear that they are invoking s 56 (1) as the premise upon which their claim for relief is based. The ambit of s 56 (1) was in this jurisdiction, in *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* CCZ 6/16. ZIYAMBI JCC stated:

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“It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.”

[100] The meaning to be ascribed to s 56(1) was reaffirmed in the case of *Mupungu v Minister of Justice, Legal, and Parliamentary Affairs & Ors* CCZ 07/21. Commenting on the nature of the right enshrined in s 56 (1), PATEL JCC posited the following:

“As regards s 56 (1), the court *a quo* opined that this section is wider in its scope than the equivalent s 18 in the former Constitution. This, so it reasoned, is because it qualifies the protection and benefit of the law by the use of the word “equal”. Again, with the greatest of respect, this reasoning is fatally flawed. The use of the word “equal” does indeed qualify the protection and benefit of the law, but it does so by restricting rather than broadening the scope of s 56 (1). What this provision means is that all persons in a similar position must be afforded equality before the law and the same protection and benefit of the law... In essence, s 56 (1) is a non-discrimination clause that guarantees equality under the law. The applicant *a quo* (the third respondent *in casu*) did not make any allegation of unequal treatment or differentiation. He did not demonstrate that he was denied the protection of the law, while others similarly positioned were afforded such protection. He failed to show that the enactment or amendment of s 186 of the Constitution operated to discriminate against him in favour of others in the same or similar position. He thereby failed to establish that he had been denied equal protection and benefit of the law. In the event, he entirely failed to establish any infringement of the rights guaranteed by s 56 (1).”

[101] *In casu*, the appellants compare their position to that of the indigenous population who are afforded ownership rights in areas such as Borrowdale. They had perforce to demonstrate that the law treats dwellers in communal areas differently from those in urban areas. However, in my view, the critical distinction is that urban areas do not constitute agricultural land. As such, the allegation of unequal treatment of persons in a similar position cannot be sustained inasmuch as a comparison of ownership in Borrowdale or urban areas is concerned.

[102] That the rights to occupy the land they claim are guaranteed under the Communal Land Act is apparent from the language in s 8 of the Act. What needs clarity is whether or not our law has no provision for individual ownership of communal land. It is suggested that the vestiture of the land in the President militates against several rights. I now consider how the President is empowered to deal with the land the law has vested in him.

[103] I turn to consider s 6 of the Communal Land Act, one of the sections the appellants identified as repugnant. It reads as follows:

**“6 Additions to and subtractions from Communal Land**

(1) Subject to this Act, the Forest Act [*Chapter 19:05*] and the Parks and Wild Life Act [*Chapter 20:14*], the President may, by statutory instrument—

(a) declare that any State Land shall form part of Communal Land;

(b) after consultation with any rural district council established for the area concerned, **declare that any land within Communal Land shall cease to form part of Communal land**

(2) Whenever the President has published a declaration in terms of subsection (1), the Minister shall, by statutory instrument, amend the instrument published in terms of subsection (1) or (3) of section *five*, as the case may be, to reflect such declaration.

(3) Whenever any land ceases to form part of Communal Land in terms of a declaration published in terms of subsection (1), **such land shall thereupon become State land until it is granted, sold or otherwise disposed of in terms of this Act or any other law.**” (the emphasis is mine)

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[104] Tenure and security, especially for communities residing on communal land governed by customary law principles, has been a contentious issue during and after the colonial era. Customary land tenure is regarded as the most insecure land tenure system currently applicable, given the advancement and recognition of private land tenure as the best and superior mode of land tenure. A perusal of s 6 (3) of the Communal Land Act puts paid to the contention by the appellants that, as a community occupying communal land, the law discriminates against them by not giving them the right to ownership of land as individuals. The provision empowers the President to excise land from within the boundaries of a communal area. Once a declaration to that effect has been made, the land becomes State land which may then be granted, sold, or disposed of in any other manner under the Communal Land Act or any other law within the country. This provision gives

the President the authority to pave the way for the ownership of such land in any of the methods described above. The law enables any person who so wishes to acquire as owner land that is no longer part of communal land. It is not unconstitutional, as contended by the appellants. It serves a purpose for the majority of rural dwellers within the length and breadth of the country. In this endeavour, it is difficult to discern how s 6, which permits individual ownership of previously communal land, can be found unconstitutional as alleged.

[105] In contending that the law governing communal land was inimical to rights of individual ownership, the appellants ought to have invited the Court to construe this provision against the law that they contend permits private ownership to pieces of land in urban areas. They have not established that their rights as dwellers of communal land are discriminatory against them as opposed to those of urban dwellers. This would have necessitated a comparison of the relevant laws and an analysis showing discrimination within the law against communal land dwellers as opposed to urban dwellers. The appellants do not even advert to the law governing ownership in areas other than communal land. In this regard, the Court finds that the appellants have not established the allegation that s 6 of the Communal Land Act violates s 56 (1) of the Constitution.

#### *THE LAND TENURE REGIME*

[106] It is appropriate at this juncture to examine the contention that s 4 of the Communal Land Act bestows rights of ownership over that land on the President. The Regional Town and Country Planning Act [*Chapter 29:12*] defines what ownership as it pertains to property means. An owner means:

“(a) in the case of land which is vested in the President—  
 (i) if it is not Communal Land, the Minister responsible for the administration of the land concerned; or  
 (ii) if it is Communal Land, the Minister responsible for the administration of the Communal Land Act [*Chapter 20:04*];  
 (b) in the case of land which is not vested in the President—  
 (i) the person who is registered in the Deeds Registry as the owner of the property; or  
 (ii) a local authority or a statutory body to which the ownership of the property has been transferred or vested by any enactment; or  
 (iii) the person lawfully holding the property in accordance with any enactment or agreement with the State or a local authority or a statutory body which entitles that person to obtain title thereof on the fulfilment by him of the conditions fixed by or in terms of such enactment or agreement; and includes—  
 A. the legal representative of a person referred to in subparagraph (i) or (iii) of paragraph (b) who has died, has become insolvent, is a minor, is of unsound mind or is otherwise under disability; or  
 B. the liquidator of a company which is a person referred to in subparagraph (i) or (iii) of paragraph (b)”

[107] Land is a national resource and its use and occupation must be regulated. It is, therefore, only logical that a central authority be vested with the power and the obligation to ensure that use and domain are held for the good and benefit of the country's inhabitants. Ownership and control are, as a result, therefore vested in a responsible party or authority in a nominal capacity. As is evident from the above, the President merely holds the land in communal areas as a trustee. In *casu*, the law has vested ownership of communal land in the Minister responsible for administering the Act, currently, the Minister of Local Government and Public Works who is cited herein as the second respondent in this suit. It seems to me that the contention that s 4 is unconstitutional, given the governing law on vestiture, is ill-conceived.

The preamble to the Communal Land Act reads:

**“AN ACT to provide for the classification of land in Zimbabwe as Communal Land and for the alteration of such classification; to alter and regulate the occupation and use of Communal Land; and**

**to provide for matters incidental to or connected with the foregoing.”**

[108] In turn, s 4, which is the provision at the centre of this litigation, reads:

**“4 Vesting of Communal Land**

Communal Land shall be vested in the President, who shall permit it to be occupied and used in accordance with this Act.”

[109] In defining agricultural land, s 72 of the Constitution makes a positive pronouncement that excludes communal land and land within the boundaries of an urban local authority or a township. Therefore, I consider the relevant provisions of the Urban Councils Act [*Chapter 29:15*]. Perusal of s 4 of the Act reveals that land, unless excised to a council, is vested in the President. Accordingly, the pertinent provisions of s 4 sections are set out hereunder and read as follows:

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**“4 Provisions relating to establishment, alteration or abolition of municipalities, towns, councils and council areas**

(1) Whenever the President considers it desirable he may, subject to this Act, by proclamation in the *Gazette*, after any local authority concerned has been consulted, establish a municipality or town and—

(a) shall establish a municipal council or a town council, as the case may be, therefor; and

(b) shall fix the area of the municipality or town; and

(c) shall assign a name to the municipality or town; and

(d) may, after consultation with the Commission, divide the council area into any number of wards.

(2) At any time after the establishment of a council the President may, subject to this Act, by proclamation in the *Gazette* and after consultation with the council and (in relation to the division or redivision of the council area into wards) the Commission—

(a) alter the name of the municipality or town;

(b) divide or redivide the council area into any number of wards, create one or more additional wards, alter or abolish one or more wards or abolish the division of the council area into wards;

(c) alter the boundaries of the council area by adding thereto and additionally, or alternatively, subtracting therefrom any area, determine any question arising therefrom and redefine the council area;

(d) abolish the municipality, town or council.

(3) Where a municipality or town is abolished or the whole or any part of the area of a local authority is included in a council area or a separate council is established for that area, the President shall—

(a) make such transfer, disposal or apportionment of property, assets, rights and liabilities; and

(b) .....n/a

(4).....n/a

(5)..... n/a

(6) Where the President has—

(a) in terms of subsection (3) transferred or apportioned any property or assets to a municipality or town, the ownership of such property or assets shall vest in that council with effect from such date as may be specified by the President and, in the case of immovable property, a Registrar of Deeds shall, at the request of that council, cause, free of charge, the name of that municipality or town to be substituted as the owner of the property concerned in the appropriate register in the Deeds Registry and on the deeds relating to that property;

(b) given any direction in terms of subsection (3), the President shall, if that direction has been given, cause the Registrar of Deeds to register that direction.”

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[110] Under the sections referred to above, the President is empowered to transfer land and alter boundaries within municipal areas. Once he has done so, the property transferred vests in the local authority concerned. Where it involves immovable property, the municipality then owns the land, with ownership thereof being registered in the Deeds Registry. This is in accord with the description of owner that is found in the Regional, Town, Country, and Planning Act.

[111] If regard is had to the provisions of s 4 of the Communal Land Act and the definition of “owner” that appears in the Regional, Town, and Country Planning Act, it stands to reason that the claim by the appellants that they are owners in

their own right of the land they occupy is not justified under the law. It goes without saying that all land that is not privately owned is State land and is vested in the President. It becomes evident that all State land is controlled by and the manner of dealing with it is the preserve of the Executive. The appellants have not shown that their land is not part of State land. Their claim to its ownership is, therefore, devoid of merit. It is not consistent with the general law, nor is it consistent with the Constitution and, in particular, ss 71 and 72. The Constitution has made all land acquired under the Land Reform Programme State land. This is evident from a perusal of s 72 (4) of the Constitution, which I have referred to above.

[112] The appellants suggest that the provisions of the Communal Land Act are disparate and distinct from those of urban land in that whereas communities in communal areas are not permitted by law to private individual ownership over land. In contrast, there is provision for private ownership of land in urban areas such as Borrowdale. The same right is not accorded to communal land occupiers. While a fair bit of criticism has been levelled at the legislation, little or no effort has been made to discuss the alleged infringement. An examination of the law pertaining to urban land becomes inevitable. The powers exercised by the President under the Communal Land Act are also found in the Regional, Town, Country, and Planning Act. That Act provides:

**“45 Powers of acquisition**

- (1) Subject to this Act, land within the area of a local planning authority may be acquired—
  - (a) for the implementation of any proposal, including development, redevelopment or improvement, contained in an operative master plan or local plan or an approved scheme; or
  - (b) in terms of section *forty-seven* or *forty-eight*.
- (2) An acquisition of land in terms of this Act may be by way of—

- (a) purchase, exchange, donation or other agreement with the owner of the land; or
- (b) expropriation in accordance with section *forty-six*; or
- (c) the imposition in a permit of a condition referred to in section *forty-one*.
- (3) n/a
- (4) n/
- (5) Any land acquired in terms of this Part by a local planning authority which—
  - (a) is a local authority shall vest in such local authority;
  - (b) **is not a local authority shall vest in the President.**
- (6) n/a

[113] Mr. *Biti* conceded during an exchange with the Court that the law permitted rights of ownership of land located in communal lands even though he said this was a rare occurrence. The provision in 6 (3) of the Act permitting the grant of State land, therefore, allows the transfer of such land to any person depending on the reason for transfer. Consequently, it seems that when regard is had to the provisions of s 6 (3) of the Communal Land Act, the President may declare any part of communal land as State land and that thereafter such land remains State land until granted or disposed of in terms of any law.

[114] The designation of land as communal land is not adverse to ownership of such land once the designation is altered. The law permits the alteration and changes in boundaries of land classified as communal land. The designation is not cast in stone. The law governing security of tenure, whether it is urban or rural land, is consistent. The contention that s 56 has been violated under the law on tenure relating to rural communities has not been justified in this dispute. Consequently, the premise upon which the appellants approached the court *a quo* is without legal or factual basis.

[115] The contention by the appellants that the vestiture of communal land in the President as provided for in s 4 of the Communal Land Act is unconstitutional is therefore not justified in law. Where land is vested in the President, it is vested in him as a trustee. Accordingly, it is transferred, excised, or disposed of, as the case may be, in accordance with the legislative provisions pertaining to the particular land designation that the law provides.

[116] In sum, therefore, in terms of s 72 (4) of the Constitution, all agricultural land acquired under the Land Reform Programme remains State land. In terms of s 43 of the Regional, Town and Country Act, any land acquired under that section by a planning authority that is not a local authority shall vest in the President. In turn, s 4 of the Communal Land Act vests such land in the President. Despite the provisions that vest land in the President or local authority under the Regional Town and Country Planning Act, the owner of the land in question for purposes of the law is the Minister assigned with the administration of the land in terms of an Act of Parliament. In all other cases, the owner is either the person holding title deeds or the local authority. Many other specified species of ownership are not pertinent for discussion.

[117] The inescapable conclusion is that s 4 of the Communal Land Act is not unconstitutional. It is consistent with other statutory provisions relating to land tenure and dovetails with s 72 (4) of the Constitution. When read with s 71 (2) of the Constitution, I find the Communal Land Act is replete with guarantees of occupation and use for the communities *ad infinitum*. The rights of the communities are unfettered. The appellants have sought to impugn sections 4 and

6 of that Act on the premise that they are a relic from the past. The law on land tenure does not reflect the racial connotation they allege.

[118] As the alleged infractions by the respondents were based upon a non-existent right to land under s 71, it follows that all the other alleged rights cannot be vindicated. In the case of *Mutasa and Anor v The Speaker of the National Assembly and Ors* CCZ 9/15, it was held at page 14 that:

“It would be absurd to come to a conclusion that an act done in terms of the provisions of the Constitution can violate someone’s rights under the same Constitution. In other words, the applicants could not have been successful in challenging an act that was sanctioned by the supreme law of the land.

The Constitution is one document that contains provisions that are consistent with each other. One provision of the Constitution cannot be used to defeat another provision in the Constitution. Different provisions of the Constitution must be interpreted with a view to ensuring that they operate harmoniously to achieve the objectives of the Constitution.”

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[119] A constitution is an ultimate law in any jurisdiction. It can be amended where its amendment is provided for. However, it binds all that is subject to it. It cannot be challenged or impugned, and it cannot be criticized. It represents the will of its subjects. In this case, the Constitution has found it appropriate to set out the rights to occupy and own land in communal land within the parameters and the four corners of the statute governing occupation of that land. The same conditions of occupation of that land are replicated in the provisions of s 72 of the Constitution. The Court cannot, in the circumstances, hold that the provisions of the Communal Land Act are inconsistent with the Constitution. The Constitution itself has given the Act validity.

*DISPOSITION*

[120] The appellants have always occupied communal land. Unless the classification of such land is altered, they cannot be heard to allege that the law is unconstitutional. After all, they are not the only community inhabiting communal land. Given the provisions of ss 71 and 72 of the Constitution, wherein the property rights relating to communal land are subject to the Communal Land Act, the rights of the appellants to rural land are to be found in the Act. As all the alleged violations stemmed from a perceived right under s 71, it stands to reason that the whole case has no merit and must be dismissed.

[121] Accordingly, it is ordered as follows:

The appeal is dismissed with no order as to costs.

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<b>MALABA CJ:</b>	I agree
<b>GWAUNZA DCJ:</b>	I agree
<b>GARWE JCC:</b>	I agree
<b>MAKARAU JCC:</b>	I agree
<b>HLATSHWAYO JCC:</b>	I agree
<b>PATEL JCC:</b>	I agree

*Tendai Biti Law* legal practitioners for the appellants

*Civil Division of the Attorney General's Office* legal practitioners for the respondents