

REPORTABLE (14)

JEREMIAH MUTONGI BAMU

v

- (1) **DOUGLAS TOGARASEYI MWONZORA**
- (2) **MOVEMENT FOR DEMOCRATIC CHANGE–T**
- (3) **ZIMBABWE ELECTORAL COMMISSION**
- (4) **THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE**
- (5) **THE MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS**

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE: 4 MAY 2023**

Ms A Y Saunyama, for the applicant

T Maanda, for the first and second respondents

T M Kanengoni, for the third respondent

L T Muradzikwa, for the fourth and fifth respondents

Judgment No. CCZ 14/23

Constitutional Application No. CCZ 23/23

1

Before: GOWORA JCC, In Chambers

**AN APPLICATION FOR ADMISSION AS *AMICUS CURIAE* IN TERMS OF RULE
10(2) OF THE CONSTITUTIONAL COURT RULES, 2016**

[1] This is an application brought in terms of r 10(2) of Constitutional Court Rules, 2016 (“the Rules”). The applicant sought leave to be admitted as *amicus curiae* in the matter of *Douglas Togaraseyi Mwonzora and Another v Zimbabwe Electoral Commission and Others*, which application was filed under case number CCZ 20/23 (“the main matter”).

[2] After hearing the parties, I issued a judgment *ex tempore* and admitted the applicant as *amicus curiae* in the main matter. I indicated that the reasons for my decision would follow in due course. What follow hereunder constitute those reasons.

FACTUAL BACKGROUND

[3] It is common cause that during the course of the year 2022, the third respondent undertook a delimitation exercise of the electoral boundaries into which Zimbabwe is to be divided in fulfilment of the provisions of ss 160 and 161 of the Constitution of Zimbabwe (“the Constitution”). On 20 February 2023, following the observance of the prescribed constitutional processes, a final delimitation report was gazetted by the fourth respondent. The report was published as Statutory Instrument 14 of 2023.

[4] The first and second respondents alleged that the final delimitation report was invalid as it fell short of the requirements of s 161 of the Constitution. **Judgment No. CCZ 14/23** **Constitutional Application No. CCZ 23/23** It was their contention that should a finding be made that the delimitation exercise was not done in compliance with the constitutional requirements, then an election held in terms of the boundaries so delimited would be in violation of the right in s 67(1)(a) of the Constitution, which requires elections to be free and fair.

[5] The first and second respondents then filed an application for leave for direct access in this Court under case number CCZ 9/23. In that application, they indicated that should leave for direct access be granted, they would file an application for an order nullifying the gazetting of the final delimitation report and for orders directing the third respondent to redo the delimitation exercise and interdicting the fourth respondent from proclaiming the dates for the holding of general elections until such time as the third respondent would have prepared a delimitation report in compliance with the order that

was sought from this Court. The application for leave for direct access was heard by a three-member panel of this Court and leave was granted on 6 April 2023.

[6] On 13 April 2023, the first and second respondents duly filed an application in this Court under case number CCZ 20/23 headed “COURT APPLICATION FOR A *DECLARATUR* AND CONSEQUENTIAL RELIEF”. Therein the first and second respondents sought the following relief:

“IT BE AND IS HEREBY ORDERED THAT

1. It is hereby declared that the final delimitation report prepared by the first respondent and gazetted by second respondent in the government gazette on 20 February 2023, as statutory instrument 14 of 2023, Proclamation 1 of 2023 is invalid for not being in compliance with s 161 of the Constitution and accordingly is in contravention of applicants’ right to free and fair elections in terms of s 67 (1) (a) of the Constitution of Zimbabwe.
2. The gazetting of the final delimitation report prepared by the first respondent on 20 February 2023, as statutory instrument 14 of 2023, Proclamation 1 of 2023 is hereby declared invalid for not being in full compliance with ss 161 (11) and (12) of the Constitution of Zimbabwe and accordingly is in contravention of applicants’ rights to free and fair elections in terms of s 67 (1) (a) of the Constitution of Zimbabwe.

CONSEQUENTLY

IT BE AND IS HEREBY ORDERED THAT:

3. First respondent be and is hereby ordered to redo the delimitation exercise and prepare a delimitation report that fully complies with the requirements of s 161 of the Constitution of Zimbabwe; and which takes into account the census final report.
4. Second Respondent shall not proclaim the dates of general elections before the first respondent has prepared a delimitation report in compliance with the terms of the order in paragraph 3 above.
5. The respondents shall pay the costs of this application.”

[7] The applicant alleges that he got to know from reports in the press that the first and second respondents had been granted direct access and that the main matter was set down for hearing on 8 May 2023. On 3 May 2023, he filed this application for his admission as *amicus curiae*. He had, at the time of filing the application, accessed the application and opposing papers in the main matter and thus had an adequate

opportunity to consider the case made by the first and second respondents in response to the application. The applicant deposed to a founding affidavit in which he gave details of his expertise, the nature of his interest in the main matter, the position he intended to adopt in the main matter and the submissions he intended to advance.

[8] In the founding affidavit, the applicant explained his understanding of the application in the main matter and the import of the relief sought. He averred that he intended to submit that the holding of general elections in Zimbabwe in 2023 and upon the expiration of the five-year term reckoned from the date of the swearing-in of the President on 26 August 2018 is a constitutional imperative which may not be dispensed with. In other words, he sought to focus on the question of whether the Constitutional Court could be requested to make an order that would effectively amend the Constitution by prolonging the life of local authorities, Parliament, and the Presidency beyond the five-year term envisaged in s 158 of the Constitution. In his view, an order prohibiting the proclamation of election dates as had been sought by the first and second respondents would be constitutionally repugnant. He added that the submissions he sought to make had not been covered by any of the parties in the main matter.

[9] It was common cause that at the time this application for admission as *amicus curiae* was filed, the heads of argument had already been filed in the main matter and that the matter, as has already been observed, had been set down for hearing by this Court on Monday 8 May 2023.

[10] When the application was placed before me, I issued directions for the parties to urgently appear and address me on their positions regarding the application.

SUBMISSIONS BY THE PARTIES

[11] Counsel for the parties duly appeared and made submissions on the application. I proceed to summarise the respective positions of the parties.

[12] Ms *Saunyama*, for the applicant, submitted that the applicant had the onus of proving the considerations set out in r 10 (3) (a) – (d) of the Rules. In this regard, she argued that the applicant was interested in the proceedings, that he was a registered voter, that he was qualified to appear as *amicus* and that he specialises in constitutional law and electoral law. The applicant was credited with fifteen years of continuous legal practice. Ms *Saunyama* also adverted to the applicant's experience and the activities he has undertaken which she submitted as having a bearing on this application.

[13] Counsel submitted that the applicant intended to focus on the question of whether the Constitutional Court can be requested to make an order of **Judgment No. CCZ 14/23** Constitution by prolonging the life of local authorities, of Senate, Parliament and the Presidency. In this regard, she stated that the applicant would focus primarily on the import of section 158 as read with sections 143 and 157 of the Constitution.

[14] Ms *Saunyama* stressed that the applicant would make additional and distinct submissions on the issues. In her view, the admission of the applicant as the *amicus curiae* would be an expression of a good constitutional culture.

[15] On behalf of the first and second respondents, Mr *Maanda*, submitted that although the applicant was well qualified in other respects, he was not qualified to be *amicus curiae* in the present matter. In his view, the issue that he sought to argue relating to the interpretation of ss 144 and 158 of the Constitution was not one in respect of which the court required assistance. Mr *Maanda* added that the applicant, being an interested

party, was disqualified from appearing as *amicus curiae* and should, in the first instance, have sought to be joined as a party instead. He argued that an *amicus* was required by law to be dispassionate which the applicant could not claim to be.

[16] Reliance was placed on the decision of the Constitutional Court of South Africa in *In Re Certain Amicus Curiae Applications relating to Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 13 for the proposition that the role of an *amicus* is simply to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn.

[17] Mr *Maanda* reiterated that an *amicus curiae* exists to assist the court. Accordingly, he contended that the applicant could not add any new matter as the parties had already canvassed, in great detail, those legal questions intended to address in the application under CCZ 20/23. The issues he sought to address were said to be addressed in several paragraphs of the heads of argument filed by the third respondent in the main application. He was of the firm view that the applicant would not add any value to the court's determination.

[18] Both Mr *Kanengoni*, for the third respondent, and Mr *Muradzikwa*, for the fourth and fifth respondents respectively, indicated that their clients would abide by the decision of the court.

THE LAW

[19] The Constitutional Court Rules, 2016 define and set out the procedural mechanism for the admission of *amicus curiae* in the Constitutional Court. It is to that rule that a litigant must turn to understand the requirements for admission as *amicus curiae*.

[20] It is evident that the considerations in an application for the admission of *amicus curiae* are embedded in r 10(4) of the Rules. The rule provides that:

“The court or a Judge may, if it or he or she considers it to be in the interests of justice, grant the application upon such terms and conditions, including the date of filing the written argument, and with such rights and privileges as it or he or she may determine.” (*my emphasis*)

[21] Rule 10(4) of the Rules describes the interests of justice as the consideration on which the question of whether or not leave for admission as *amicus curiae* should be granted turns. It, therefore, follows that the interests of justice are the paramount consideration in an application of this nature.

[22] What constitutes the “interests of justice” in this context will always depend on the circumstances of each case. The court however retains the discretion to determine the determination of whether to grant the application for a party to be admitted as an *amicus curiae*. No one factor can be said to be paramount. In doing so, the observations made in *Sibangani v Bindura University of Science Education* CCZ–7–22 at p. 17, para. 41 are relevant. The factors that may be considered in an endeavour to establish the interests of justice “are far from exhaustive” given that what the justice of each case demands may often vary from case to case.

[23] In *Chamisa v Mnangagwa and Others* 2018 (2) ZLR 251 (CC) at 277A this Court held that the consideration of what is “just and equitable” and what is in the “interests of justice” involves giving effect to the values of procedural justice and fairness. The consideration of fairness is central to the interests of justice. See *Mhora v Mhora* CCZ–5–22 at 11. The recognition of fairness as an essential component of justice is

confirmed by the author L Madhuku in *An Introduction to Zimbabwean Law* (2010) at 5, where he observes that:

“The ‘difficulty’ with justice is that it is almost impossible to state exactly what it is. It is submitted that justice is fairness. That fairness lies at the core of justice is reflected in almost all attempts to define justice. The Oxford English Reference Dictionary (2003) defines ‘just’ as ‘acting or done in accordance with what is morally right or fair’ and ‘justice’ as ‘just conduct, fairness’. Blacks Law Dictionary (2004) states that justice is ‘the fair and proper administration of laws.’”

[24] The inescapable conclusion is that fairness is at the centre of the enquiry as to whether or not a court must admit a person as *amicus curiae*. The admission of a party as *amicus* must not undermine the possibility of achieving fairness in the proceedings. To the contrary, it must facilitate a just and fair disposition of the matter. In order to make a proper assessment of the interests of justice, a court must take a robust view of the effect of the admission of *amicus* on the proceedings and the circumstances under which the application for admission as *amicus* is made. Accordingly, there are a number of factors that the court takes into account in assessing an application as *amicus* at the present.

Judgment No. CCZ 14/23

Constitutional Application No. COZ 28/23

8

[25] I agree with Ms *Saunyama*, for the applicant, that some of the considerations are embedded in subrule (3) of rule 10. Rule 10(3) provides that:

“An application in terms of subrule (2) shall be made no later than five days after the filing of the respondent’s heads of argument or after the time for filing such heads of argument has expired, and shall—

- (a) describe the particular expertise which the applicant possesses;
- (b) describe the interests of the applicant in the proceedings;
- (c) briefly identify the position to be adopted in the proceedings by the applicant; and
- (d) set out the submissions to be advanced by the applicant, their relevance to the proceedings and the applicant’s reasons for believing that the submissions will be useful to the court and different from those of the other parties.”

[26] Given this fact, some of the relevant considerations may be itemised as follows:

- i. whether or not the applicant possesses the requisite expertise relevant to the matter;

- ii. the nature of the applicant’s interest in the matter;
- iii. the nature of the dispute before the court;
- iv. the nature and relevance of the applicant’s proposed submissions to the proceedings;
- v. the applicant’s reasons for believing that the submissions will be useful to the court and different from those of other parties;
- vi. the fairness or otherwise to any of the parties of admitting the applicant as *amicus curiae*;
- vii. the public importance of the matter; and
- viii. the convenience of the court.

[27] The question of where the interests of justice lie therefore depends on weighing up all the relevant factors. This observation was persuasively made by MOSENEKE DCJ in **Judgment No. CCZ 14/23** **Constitutional Application No. CCZ 23/23** *De Lacy and Another v South African Post Office* 2011 ZACC 17 at para. 51 while commenting on the requirement that a person may be allowed to directly take a matter to the Constitutional Court when it is in the interests of justice. In the learned DEPUTY CHIEF JUSTICE’S words “where the interests of justice lie depends on the outcome of a meticulous weighing-up of relevant considerations”.

[28] The merits of the instant application are assessed against the foregoing factors.

WHETHER OR NOT IT WAS IN THE INTERESTS OF JUSTICE TO ADMIT THE APPLICANT AS *AMICUS CURIAE*

[29] Turning to the facts of this case, the first consideration in assessing the interests of justice were the applicant’s expertise. The applicant’s qualifications were not strongly

disputed by the parties. The applicant produced proof of his expertise and educational qualifications. He holds a Bachelor of Laws degree from the University of Zimbabwe as well as a Master of Laws in Constitutional and Electoral law with a specialisation in electoral law again obtained from the University of Zimbabwe. Additionally, he has practised law continuously for no less than 15 years. The applicant's curriculum vitae also shows that he has experience in issues related to the observation of elections. I was, therefore, satisfied that the applicant *prima facie* had the requisite expertise to appear as *amicus curiae*.

[30] The next enquiry was the nature of the applicant's interest in the main matter. This, by far, was the most contentious issue in this application. The question that the parties dwelt on was whether or not the nature of the applicant's interest in the matter disqualified him from admission as *amicus*.

Judgment No. CCZ 14/23
Constitutional Application No. CCZ 23/23

10

[31] Regarding the nature of his interest, the applicant had pleaded that he is a registered voter and he attached proof of his voter registration certificate. He specifically stated that:

“As a legal practitioner practising in the area of constitutional law, human rights and electoral law, I am keen assist (*sic*) this Court to arrive at a correct decision.

I do not seek to place any further or additional facts before the court and would confine my submissions to matters of the law by means of written submissions amplified by oral argument to be presented by counsel.”

[32] Mr *Maanda* submitted that the applicant ought to have applied for joinder due to the nature of his interest. In his view, the applicant's interest was not distinguishable from that of the other respondents before the court in the main matter.

[33] To determine whether or not the nature of the applicant’s interest disqualified him from admission as *amicus*. There was need to look at the requirements for joinder and the related form of participation in proceedings as an intervening party. This became necessary because it would not have been a judicious exercise of discretion on the part of the court to admit a party as *amicus curiae* in circumstances directly covered by the law on joinder or on intervention.

[34] I begin by considering the nature of interest required for the joinder of a party to proceedings from that required for admission as *amicus*. It is trite that a person seeking to be joined as a party to proceedings must establish to the satisfaction of the court the existence of a direct and substantial interest in the matter. The considerations were aptly canvassed in the case of *Matsvimbo v Stevenson and Others* S–123-20 at pp. 9 - 11, where the Supreme Court stated that:

Judgment No. CCZ 14/23

“The scholars Cilliers AC, Loots C and Nel HC, *Herbert Appel and van Winse* CCZ 23/23
Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Ed., Juta & Co. Ltd, Cape Town, 2009) vol. 1 at p 215 state as follows with regards to joinder:

11

‘A third party who has, or may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such a person has waived the right to be joined... In fact, when such person is a necessary party in the sense that the court will not deal with the issues without a joinder being effected and no question of discretion or convenience arises.’

Direct and substantial interest is defined as follows at p 217:

‘A ‘direct and substantial interest’ has been held to be an ‘interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.’ It is ‘a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only’. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists. **For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject-matter of the litigation, but also in the outcome of it.**’ (emphasis added)

In *Makanda and Others v Mosotho and Others* [2018] ZAFSHC 7 the court noted the test to be applied by a court in joinder of parties. The court noted the following:

‘The test for joinder of parties has been formulated thus by Erasmus-Superior Court Practice Volume 2 at 01-124:

‘The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.’

On page D1-125 the learned author further goes on to state:

‘The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, the court is satisfied that he has waived his right to be joined’

In *Zimbabwe Teachers Association & Ors v Minister of Education and Culture* 1990 (2) ZLR 48 (HC) at p 52 F the court held that:

‘It is well settled that, in order to justify its participation in a suit such as the present, a party such as second applicant has to **show that it has a direct and substantial interest in the subject-matter and outcome of the application.** In regard to the concept of such a “direct and substantial interest,

...

In the case of *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) at 103 I to 104 F LICHTENBERG J said:

‘To justify its participation in a suit or to bring proceedings for relief, **a party must show that it has a direct and substantial interest in the right which is the subject-matter of the litigation and in the outcome of the litigation** and not merely a financial interest which is only an indirect interest in such litigation...’

For a party to be joined at the institution of proceedings or to ongoing proceedings a direct and substantial interest in the subject matter must be established.” (*emphasis in original*)

[35] The above passage places the question beyond doubt that a direct and substantial interest in the subject matter and outcome of pending proceedings is the *sui generis* characteristic necessitating the joinder of a third-party to ongoing proceedings. It is an interest specifically recognised by the law in accordance with considerations of

procedural justice and fairness to ensure that all parties who may potentially be prejudiced by the outcome of litigation are given an opportunity to be heard. It accords with good law and common sense that a party exhibiting such an interest in pending proceedings must be joined as such.

[36] Turning to the related procedural concept of intervention in proceedings, it is settled that a court of inherent jurisdiction has the power under common law to permit a party to intervene in proceedings under certain circumstances. The prerequisites for the intervention of a party in pending proceedings were set out in the case of *Rothmans of Pall Mall (Zimbabwe) v Jackson* 1992 (2) ZLR 50 (H) at 54G – 55C:

“I will start with Mr *Colegrave*’s submission that s 16(1) of the [Insolvency] Act requires the respondent to appear and to show cause on a date specified in the rule nisi why his estate should not be sequestrated finally. This means that the debtor in this case ought to have appeared and showed cause but she did not. Instead, her husband, the intervening spouse, appeared and filed an affidavit which, in many respects appeared to substitute the affidavit of the respondent. The affidavit attacks the applicant’s averments and the findings of auditors. It calls upon the court to discharge the provisional order with costs. In my view there is no provision in the Act which allows a substitution of the respondent with another person. An interested party, however, can intervene at the discretion of the court. In allowing the intervention, the intervening party should show that he is specially concerned in the issue, and that the matter is of common interest to himself and the party who desires to join and that the issues are the same. The matter raised should be relevant to the question whether a final order should be granted. See *Hertz (supra)*. In that case the applicants, who were creditors of the respondent company in which its director Hertz petitioned the court for its liquidation, successfully applied for leave to intervene in the liquidation proceedings. This was because it was an intervening creditor and therefore wanted to safeguard its interest. However, an application for substitution as petitioning creditors was left open.” (*my emphasis*)

[37] A party may also seek to intervene in proceedings at the appeal stage. The nature of the legal interest necessary to intervene in proceedings on appeal must also be distinguished from that required for admission as *amicus curiae*. In this regard, I note that the question of the propriety of a party to intervene at the appeal stage of proceedings was discussed in the case of *Whaley and Others (Law Society of Zimbabwe*

Intervening) v Cone Textiles (Pvt) Ltd 1989 (1) ZLR 54 (SC) at 58E – 59F, whereat the Supreme Court stated that:

“The Law Society was not a party to the proceedings in the High Court. After it was learned, however, that EBRAHIM J had held that by-law 69 of the Law Society of Zimbabwe By-Laws 1982, insofar as it purported to grant the Council the power to fix tariffs and charges (and any consequent tariff issued in terms thereof by the Council), was *ultra vires* s 47 of the Legal Practitioners Act 1981, the Law Society applied on notice of motion to this Court for leave to intervene as a party in the pending appeal. It did so because it had a material interest in the validity of its Tariff of Fees and because it was concerned that possibly the appeal would be decided upon its particular facts and the issue of the validity of the Tariff left open. ...

The application came before a Judge in Chambers, who granted the Law Society leave to intervene in the appeal. It is as well that the reasons for doing so be stated briefly, especially as the matter appears to have been the first of its kind.

It is enacted in s 6 of the Supreme Court of Zimbabwe Act 1981 that in any matter relating to records, practice or procedure, in which no special provision is contained in the Act itself or in the Rules of the Supreme Court, the matter is to be dealt with by the Supreme Court or a Judge thereof as nearly as may be in conformity with the law and practice for the time being observed in England by the court of Appeal.

As both the Supreme Court of Zimbabwe Act and the Rules were silent upon the right of a person who was not a party to proceedings in a lower court to intervene at the appeal stage, regard to the position presently adopted by the court of Appeal in England justified the decision that it was proper that the Law Society be permitted to intervene in the appeal. In the words of LINDLEY LJ in *In re Securities Insurance Co* [1894] 2 Ch 410 (CA) at 413:

‘. . . the practice (is) perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out a *prima facie* case why he should have leave he will get it: but without leave he is not entitled to appeal.’

See also *Re B (an infant)* [1957] 3 All ER 193 (CA) at 195 E-G; Halsbury’s Laws of England 4 ed vol 37 at p 520; The Supreme Court Practice 1988 vol I at p 860.

That the Law Society was aggrieved or prejudicially affected by the judgment and that it had made out a *prima facie* case for the grant of leave was undeniable.” (my emphasis)

[38] Thus, it can be concluded that the definitive characteristic of the interest that would entitle a party to be admitted to proceedings as an intervening party is that he or she is

likely to be prejudiced by the final order. In other words, he or she is likely to be directly affected by the outcome of the litigation. It is comparable to a direct and substantial interest in the subject matter and outcome of proceedings, which is a necessity for joinder. A party joining proceedings through the avenue of joinder or as an intervening party participates as a matter of procedural right.

[39] The nature of the interest required for joinder or intervention is distinguishable from that required for admission as *amicus*. Rule 10 of the Rules provides insight into the nature of the interest required for one to be admitted as *amicus* in any matter. Subrule (1) states that a person must have “particular expertise which is relevant to the determination of any matter” before the court. Subrule (3) requires the application to “describe the particular expertise which the applicant possesses”. It seems to me that the nature of the interest envisaged by the Rules is one that is concerned with assisting the court to ensure the just and fair disposition of the legal question before the court. It is not a direct and substantive interest in the proceedings. This view is in keeping with the prior pronouncements by this Court and by respected authorities on the role of an *amicus*.

[40] In support of the above-stated conclusion on the role and function of an *amicus curiae* under r 10, it is appropriate to borrow from the Kenyan decision in the case of *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others* [2015] eKLR, where the following was said at para. 24:

“[24] We have in several cases, considered the role of *amicus* and outlined the difference between *amici curiae* and interveners. This guideline has been followed by other Courts in our jurisdiction, in cases such as *Judicial Service Commission v. Speaker of the National Assembly and Another*, High Court Petition No. 518 of 2013 [2013] eKLR; and *Justice Philip K. Tunoi & Another v. Judicial Service Commission & 2 Others*, High Court Petition No. 244 of 2014 [2014] eKLR. We elaborated the difference between interveners and *amici curiae* in the application to be enjoined as

amicus by the *Law Society of Kenya*, in this matter, - *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others*, Sup. Ct. Pet. No. 12 of 2013 - at paragraphs 17 and 18 of the ruling:

‘..... while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the courtroom.

‘Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an *amicus* is only interested in the court making a decision of professional integrity. An *amicus* has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the court, his [or her] cause is to ensure that a legal and legitimate decision is achieved.’” (my emphasis)

[41] A similar view was expressed in the South African decision of *Hoffman v South African Airways* 2001 (1) SA 1 (CC); [2000] ZACC 17 at para. 63:

Judgment No. CCZ 14/23

“An *amicus curiae* assists the court by furnishing information on legal questions of law or fact. An *amicus* is not a party to litigation, but believes that the court’s decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.”

[42] The nature of the interest envisaged by r 10 of the Rules must be accepted to mean that an *amicus* evinces an interest to assist the court in arriving at a correct and informed legal position on the matters in contention. An example is presented by the facts of the case of *S v Mutero* S–28–17 at 15, where counsel applied to assist the Supreme Court as *amicus curiae* on a legal question that neither of the parties to the case was in a position to assist. Similarly, the observations by HLATSHWAYO JCC in *Gonese v*

Parliament of Zimbabwe and Others CCZ-2-23 at pp. 8 – 9, paras. 18 - 23, support the view that an *amicus* must have an interest in assisting the court to arrive at the correct legal position. The Learned Judge held that:

“[18] In terms of r 10(1) of the Constitutional Court Rules, 2016 (“the Rules”), the court is entitled to invite any person with particular expertise which is relevant to the determination of any matter before it to appear as *amicus curiae*. The *amicus*, in this case, was invited in terms of the foregoing rule. He was obliged to file heads of argument within the time that was stipulated by the court.

[19] Where an *amicus curiae* is invited by the court to appear in any matter, such an invitation accords with one of three conceptions of *amici* that is offered by Geoff Budlender, “Amicus Curiae” in Woolman *et al*, eds, *Constitutional Law of South Africa* 2nd Ed, 2012 at 8–1. The author states:

“A second form of *amicus* responds to a request by a court for counsel to appear before it to provide assistance in developing answers to novel questions of law which arise in a matter, or (less commonly) where a person asks leave to intervene for this purpose. In such cases, the *amicus curiae* does not, ostensibly, represent a particular interest or point of view.”

[20] Rule 10(5) is particularly instructive to any person who is appointed as *amicus curiae*. It reads:

Judgment No. CCZ 14/23

Constitutional Application No. CCZ 23/23

“(5) An *amicus curiae* shall have the right to file heads of argument which raise new contentions which may be useful to the court and do not repeat any submissions set forth in the heads of argument of the other parties.” ...

17

[23] An *amicus curiae* will not be faulted for reaching an incorrect conclusion of the law, although he likely will reach a correct conclusion by reason of his presumed disinterest. An *amicus curiae* appearing upon the court’s invitation must be courteous to the court and treat the actual litigants’ submissions with due consideration and respect. He or she must ride on his disinterest to settle on legal positions and resist the temptation of subjectivism that the actual parties may, themselves, be wont to display. Finally, s/he must put themselves in the court’s position and wonder what conclusion he would have reached on the evidence available and the law.”

[43] In this regard, the observations made in *Blue Ribbon Foods Limited v Dube NO and Anor* 1993 (2) ZLR 146 (S) are also insightful. In that case, Blue Ribbon Foods Limited had obtained authorisation from a Labour Relations Officer to dismiss one of its employees. Aggrieved by the dismissal, the employee concerned appealed to a Regional Hearing Officer. The employee succeeded before the Regional Hearing

Officer prompting Blue Ribbon Foods Limited to institute a review in the High Court. Before the High Court, the Regional Hearing Officer and the employee were represented by the same lawyer from the Civil Division of the Attorney-General Office. Observing the impropriety of the manner of participation of the practitioner from the Attorney-General's Office, the Supreme Court made incisive remarks at 150, which shed light on the role of *amici*. MCNALLY JA held that:

“For the future, therefore, it should be noted that in matters such as this the substantive parties, i.e the employer and the employee, should have their own legal representation. It will not be appropriate, generally speaking, for the Civil Division of the Attorney-General's Office to act for either of them, or to instruct counsel jointly with either of them. ...

That is not to say that in a proper case where an important point of law or statutory interpretation arises, the Minister or the Attorney-General may not intervene in order to put forward the State's attitude on the point of law or the question of interpretation. But that is not what happened in the present case. It was quite clear that Mr Simelane was attempting to put forward arguments on the merits on behalf of his client, the RHO, with whom it appears he was in personal communication by telephone.

Judgment No. CCZ 14/23
Constitutional Application No. CCZ 25/23

Where the Minister or the Attorney-General wishes to appear in such matters, we would expect that he would appear in effect as *amicus curiae*, seeking to assist the court on the matter of interpretation. He would avoid the appearance of partisanship. It is this impression of “ganging up” which is, in retrospect, the undesirable feature of the two earlier cases.” (my emphasis)

18

[44] The restrictions placed by the principles of the law on the role of an *amicus curiae* also suggest that the interest of *amici* contemplated under r 10 of the Rules must ideally be limited to assisting the court in arriving at the correct legal position. The principles include the following:

- An *amicus curiae* cannot move for positive relief. See, for instance, the decision of the High Court in *Masiyiwa v The Master and Anor* 2011 (2) ZLR 441 (H) at 448D where it was held that an *amicus curiae* cannot move for the dismissal of an application. See also the *Hoffman* case *supra*.

- Costs are not to be awarded to an *amicus curiae* except in extraordinary circumstances. See *In re Prosecutor-General, Zimbabwe on his Constitutional Independence and Protection from Direction and Control* 2017 (1) ZLR 107 (CC) at 116C and *Ndlovu and Anor v Maunze and Others* 2006 (2) ZLR 324 (H) at 327B-C.

[45] Quite clearly, the limitations placed by the above principles would not be ideal for a litigant who carries a direct and substantial interest in the proceedings. They are designed to apply to a neutral party whose direct interests are not adversely affected by the outcome of the proceedings. It would not be in the interests of any person directly affected by the outcome of litigation to have his procedural rights to seek positive relief and to be awarded costs curtailed. Consequently, it would be inappropriate for any person with a direct and substantial interest to seek to participate in proceedings as an *amicus curiae* since he or she would not be able to protect his interests in such a capacity.

Judgment No. CCZ 14/23
 Constitutional Application No. CCZ 23/23

19

[46] In addition, commenting on the varying conceptions of an *amicus curiae*, Geoff Budlender, “Amicus Curiae” in Woolman and Bishop (eds), *Constitutional Law of South Africa* 2nd Ed, 2012 at 8–1 – 8-2, observes:

“(a) Traditional conceptions of the amicus curiae

The term *amicus curiae* can have a wide variety of meanings. Traditionally, the most common form of *amicus curiae* is a person who appears at the request of the court to represent an unrepresented party or interest. The task of such an amicus is to present the best possible case for the unrepresented party or interest. In such cases, the role of the amicus does not differ in principle from that of the paid legal representative of a party. A second form of *amicus* responds to a request by a court for counsel to appear before it to provide assistance in developing answers to novel questions of law which arise in a matter, or (less commonly) where a person asks leave to intervene for this purpose. In such cases, the *amicus curiae* does not, ostensibly, represent a particular interest or point of view. A third common type of *amicus curiae* takes the form of the Law Society or Bar Council’s intervention in an application for the admission of a legal practitioner. The professional body makes submissions to the court not to

represent the interests of the professional body’s members, but to assist and to advise the court in promoting the interests of the administration of justice.

(b) Amicus curiae in the new constitutional order

The new constitutional order introduced a fourth form of amicus curiae: a non-party requests the right to intervene so that it might advance a particular legal position which it has itself chosen. This form of *amicus* was not permitted under the common law. This new form of *amicus curiae* reflects two important changes brought about by our new constitutional democratic order. First, it reflects the underlying theme of participatory democracy in the Final Constitution. In matters of broad public interest, such as the interpretation of the Final Constitution, courts are more disposed towards listening to the voices of persons other than the parties to a particular dispute. Secondly, it reflects the fact that constitutional litigation often affects a range of people and interests that go well beyond those of the parties already before the court.” [my emphasis]

[47] The commentary by G Budlender above is largely centred on the law prevailing in South Africa. In the Constitutional Court of South Africa, *amici* are admitted in terms r 10 of the Rules of the Constitutional Court. Strikingly, the Rules of the Constitutional Court require an application to be admitted as *amicus curiae* to describe the interest of the *amicus curiae* in the proceedings. **Judgment No. CCZ 14/23 Constitutional Application No. CCZ 23/23** 20
Constitutional Court provides:

“An application to be admitted as an *amicus curiae* shall — briefly describe the interest of the *amicus curiae* in the proceedings;”

[48] Thus, Budlender contends, persuasively so, that an *amicus curiae* is an interested party. His observations at 8–2 to 8–3 also shed light on the nature of interest appropriate for *amicus*:

“Rule 10(6) makes it clear that to qualify as an *amicus*, the person must be ‘interested’ in the proceedings. That interest must be described in the application for admission. The rule also requires that the would-be amicus identify the ‘position’ which it will adopt in the proceedings. The amicus curiae is, therefore, by definition not a disinterested party. The amicus curiae in constitutional litigation under Constitutional Court rule 10 — or equivalent rules in other courts — is similar to an amicus curiae in the Supreme Court of the United States. In the US Supreme Court, an ‘amicus brief’ is ‘filed by someone not a party to the case but interested in the legal doctrine to be developed there because of the relevance of that doctrine for their own preferred policy or later litigation’.” (my emphasis)

[49] It follows from the above that an *amicus curiae* under r 10 of the Rules has a legal interest, which, nonetheless, is limited to the advancement of a legal position chosen by him or her.

[50] In *casu*, having distinguished between the interest required of an *amicus curiae* and that required for joinder, it became clear that Mr *Maanda* was essentially arguing that the applicant had a direct interest in the matter and, thus, ought to have applied for a joinder. It cannot, however, logically be disputed that the applicant had an appropriate interest in the matter. The applicant was a voter and a qualified legal practitioner. He had practised in matters of elections and constitutional governance. He particularly stated and demonstrated that he had been keen to assist this Court to arrive at a correct decision.

Judgment No. CCZ 14/23

Constitutional Application No. CCZ 23/23

21

[51] Consequently, I was unable to accept the contention by Mr *Maanda* that the applicant should have sought for joinder. Although the nature of the applicant's interest may have been comparable to that of a litigant seeking joinder, it is not actually so. The distinction between the applicant's interest and a direct interest required for joinder was somewhat blurred by the electoral tenor of the dispute. The main matter was generally one of public importance and interest.

[52] I must observe that our Constitution and the rules of this Court, under r 10(3) envisage the admission of *amicus* who intends to advance a legal position that he has chosen and considers to be of benefit to the court. Inevitably, the submissions of an *amicus* will be inclined to one side. What, however, an *amicus* cannot do is to seek positive relief.

[53] Finally, I considered that this was a matter which is of public interest. No doubt the question of whether the delimitation was properly carried out and whether the proclamation of election dates may thereby be affected are issues in the public interest. This requirement goes hand in hand with the factor relating to the nature of the dispute before the court. There is no doubt that the dispute before the court was one of public interest and importance. Its disposition had a bearing on the conduct of general elections in this country.

DISPOSITION

[54] I was satisfied that it was in the interests of justice for the applicant to be admitted as *amicus curiae*. He had demonstrated that he had the necessary expertise and that he had the appropriate interest in the matter contemplated under r 10 of the Rules of this Court. I also considered the public importance of the matter as tilting the interests of justice in favour of the admittance of *amicus curiae*.

Judgment No. CCZ 14/23
Constitutional Application No. CCZ 23/23

22

[55] In admitting the applicant as *amicus*, I took into account the draft relief he had placed before the court. The applicant sought relief in the following terms:

“IT IS ORDERED THAT:

1. The applicant Jeremiah Mutongi Bamu be and is hereby admitted to the proceedings in *Douglas Togaraseyi Mwonzora and Movement for Democratic Change-T v Zimbabwe Electoral Commission, President of the Republic of Zimbabwe, and Minister of Justice, Legal & Parliamentary Affairs CCZ20 /2023* as *amicus curiae*.
2. The *amicus curiae* is granted the right to lodge written submissions by no later than the 5th of May, 2023.
3. The *amicus curiae* is granted the right to make oral submissions on the date of the hearing of the application.”

[56] Against the above analysis, I was satisfied that the applicant had met the requirements for admission as *amicus*. In terms of r 10(4) of the Rules, I considered it necessary to

admit the applicant as *amicus* on terms that would avert an injustice occurring to any of the parties.

[45] Regarding costs, I followed the usual practice of not awarding costs in constitutional matters.

[46] In the result, I made the following order:

“It being in the interests of justice that the applicant be granted leave to appear as amicus curiae in case number CCZ 20/23, it is ordered that:

- 1. The application be and is hereby granted.*
- 2. The applicant be and is hereby admitted to appear as amicus curiae in case number CCZ 20/23.*
- 3. The applicant shall file his submissions by 1800 hours on 4 May 2023.*
- 4. In terms of rule 10(4), the applicant may only advance submissions consistent with his averments in paragraphs twenty to thirty-nine.*
- 5. The respondents, if so inclined, may file responses to the applicant’s heads of argument by no later than 12.00 pm on Friday 5 May 2023.*
- 6. Subject to the directions of the full Court, the applicant’s oral submissions shall be consistent with and confined to the arguments raised or made in his written submissions.*
- 7. There shall be no order as to costs.*
- 8. The full reasons will be availed in due course.”*

Zimbabwe Human Rights NGO Forum, legal practitioners for the applicant

Maunga, Maanda & Associates, legal practitioners for the first and second respondents

Nyika Kanengoni and Partners, legal practitioners for the third respondent

Civil Division of the Attorney-General's Office, legal practitioners for the fourth and fifth respondents

Judgment No. CCZ 14/23
Constitutional Application No. CCZ 23/23