Judgment No. S.C. 10/02

Civil Application No. 46/02

(1) TENDAI LAXTON BITI
(2) THE MOVEMENT FOR DEMOCRATIC CHANGE
v

(1) THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
(2) THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 27, 2002

A P de Bourbon SC, for the applicants

M Majuru, for the respondents

EBRAHIM JA: The applicants sought the following order:

"1. THAT the rights of the applicants as contained in section 18(1) of (the Constitution of Zimbabwe) have been breached.

2. THAT the General Laws Amendment Act (No. 2 of 2002) was not lawfully enacted by Parliament.

Consequently

IT IS ORDERED:

1. THAT the General Laws Amendment Act (No. 2 of 2002) is illegal and of no force or effect.

2. THAT the first respondent shall pay the applicants' costs of suit."

The respondents submitted:

> "… that this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regard to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act Number 2 of 2002).

It is respectfully submitted that even if such competency were to be assumed, the passage of the Bill was wholly consistent with Constitutional provisions and Parliamentary Standing Orders."

At the conclusion of the hearing the Court made an order effectively as prayed. These are the reasons for that order.

FACTUAL BACKGROUND

The undisputed facts are that the General Laws Amendment Bill was introduced into Parliament and was the subject of the usual procedures within Parliament, that is to say, a first reading, a second reading and committal to the committee of the whole House. During that process it was referred to the Parliamentary Legal Committee.

On 8 January 2002 the Bill was re-committed to the committee of the whole House for further amendments to be made. Once these amendments had been agreed, the Bill was then reported to the House, and referred again to the Parliamentary Legal Committee. Subsequently that same day, a non-adverse report was received from the Parliamentary Legal Committee. The first respondent then

moved the third reading of the Bill, but when a division was called, it was defeated by 36 votes to 24.

On 9 January 2002 the first respondent gave notice that he would move a motion that the House rescind its decision on the third reading in terms of Standing Order 69. In addition, he gave notice that he would move to suspend the provisions of Standing Order 127 in respect of the General Laws Amendment Bill. He later emphasised that he was acting also in terms of Standing Order 190, which provides as follows:

> **"190.** (1) Save as is provided in Standing Order No. 21, any Standing or Sessional Order or Orders of the House may only be suspended upon motion moved after notice: …".

On 10 January 2002 the two motions by the first respondent were debated by Parliament, both were affirmed, and a new third reading of the General Laws Amendment Bill took place. On this occasion the third reading was approved by a vote of 62 to 49.

On 4 February 2002 the General Laws Amendment Act 2002 (Act 2 of 2002) was promulgated.

The applicants complain that the manner in which the third reading of the General Laws Amendment Bill was undertaken for a second time by Parliament failed to afford them due process and protection of law and failed to follow correct legal processes, in that the provisions of the Constitution of Zimbabwe and Standing Orders were breached, and that therefore the General Laws Amendment Bill was not properly passed by Parliament, and is invalid legislation. In this regard their complaints in terms of the papers filed by them are:

> "… that the purported amendments to the Electoral Act are of major importance and are having, and if they are to be continued to be implemented, will continue to have a crucial and decisive impact on the forthcoming Presidential election.

… that there is a real danger that the impact of these amendments on the forthcoming Presidential election will be to completely undermine the validity and legitimacy of the election and to deny the electorate their constitutional right to elect a President of their choice.

… that the various amendments made by the purported General Laws Amendment Act to the Electoral Act. … in terms of the new section 14B(1) of the Electoral Act, monitors have substantial and far-reaching powers.

… that the appointment of monitors is restricted to members of the Public Service.

… that this Government (has) for a long time packed the Public Service with their own supporters and they will therefore act in a biased manner at the forthcoming Presidential election in favour of their candidate. It is of course very important for

them to act as impartial monitors."

There were also allegations made relating to the appointment of the Observers Accreditation Committee, the issue of voter education and that some of the amendments had done away with the "fundamental concept of universal adult suffrage".

It seems to me that these assertions justify that the Court sit as a Constitutional Court to determine the issue whether s 18(1) of the Constitution has been breached. It follows that I hold that the applicants have satisfied the provisions of s 24(1) of the Constitution, which is the provision which gives them a right to seek redress before this Court.

Mr *de Bourbon* submitted that in terms of s 3 of the Constitution, the Constitution is the supreme law of Zimbabwe, and any law inconsistent with the Constitution is void. Section 3 provides:

> "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

Section 18 of the Constitution guarantees all persons, whether inside or outside Parliament, the right to the protection of the law, which includes the right to due process. In this regard see *Marumahoko v Chairman of the Public Service Commission & Anor* 1991 (1) ZLR 27 (HC) at 42-44, where the following passages appear:

> "AMERICAN AUTHORITIES
>
> The Constitution of the United States of America under the Fifth Amendment provides –
>
> > 'No person shall … be deprived of life, liberty, or property, without due process of law …'
>
> and under the Fourteenth Amendment in Section 1 specifies –
>
> > '… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the law.'

It was only well after the Civil War that the United States Supreme Court began significant developments under these Amendments. The 'due process' clause governed both procedure and also what came to be known as 'substantive due process'. At first, on procedural content the United States Supreme Court in *Don v Hoboken Land and Improvement Co* (1856) 18 How 272, 15 L Ed 372 (US Sup Ct) spoke of due process of law as having the same meaning as 'by the law of the land' in the English Magna Carta and sought guidance from English practice. Subsequently after *Hurtado v California* (1884) 110 US 516, 28 L Ed (US Sup Ct) it was not English practice itself but 'principles of liberty and justice' that determined due process. It was over quite some time that the United States Supreme Court under substantive due process evolved what formed constitutionally protected 'liberty' and 'property' under these Amendments. Beginning with *Goldberg v Kelly* (1970) 397 US 254, 25 L Ed 2d 287 (US Sup Ct) the United States Supreme Court acknowledged the rise of government as an important source of wealth that dispensed money, benefits, services, contracts, franchises and licences which usually also involved claims by individuals and so to adjudication. In a number of cases involving claims the United States Supreme Court upheld that the due process mandated some form of adjudicatory hearings and dealt at length with the kind of hearings that was required under those Amendments – *Perry v Sindermann* (1972) 408 US 593, 33 L Ed 2d 570 (US Sup Ct).

In *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 33 L Ed 2d 548 (US Sup Ct) STEWART J at 572 pronounced on 'liberty' and 'property' in the following manner:

> '"Liberty" and "property" are broad and majestic terms … the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.

The Court has also made clear that the property interests protected by procedural due process extends well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by criminal process … For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

> While this Court has not attempted to define with exactness the liberty … guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized … as essential to

> the orderly pursuit of happiness by free men. *Meyer v Nebraska* 262 US 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. … There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated.'

At the same time the equal protection clause of the Fourteenth Amendment was also touched. Initially it merely played a marginal role in judicial intervention – *Railway Express Agency v New York* (1949) 336 US 106, 93 L Ed 533 (US Sup Ct). But during the era of the Warren Court a dynamic period of equal protection scrutiny unfolded with the United States Supreme Court identifying appropriate areas for intervention – *Griffin v Illinois* (1956) 351 US 12, 100 L Ed 891 (US Sup Ct). It was under the 'fundamental rights or interests' element, which allowed the United States Supreme Court, just as in the case of substantive due process, to articulate that certain protected constitutional rights could be derived directly from the equal protection clause – *Douglas v California* (1963) 372 US 353, 9 L Ed 2d 811 (US Sup Ct).

SCOPE OF SECTION 18 OF THE ZIMBABWE CONSTITUTION

It is accepted that the notion of 'fair hearing' includes 'procedural fairness' and from this the courts have generally formulated a sort of code of fair-play akin in some measure to the due process of the United States Constitution. It was by speaking of natural justice, as found in the two Latin maxims *audi alteram partem* ('hear the other side') and *nemo judex in causa sua* ('no man a judge in his own cause'), that the courts imposed upon other adjudicating authorities the duty to act fairly. The form that natural justice took varied, as was clearly recognised by TUCKER LJ in *Russell v Duke of Norfolk & Ors* [1949] 1 All ER 109 (CA) at 188E, when he said:

> 'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.'

In other words, it is true that under the maxims *audi alteram partem* and *nemo judex in causa sua* adjudicating bodies did not necessarily have to adopt all those important principles so fundamental to court proceedings – *Jeewa v Dönges NO & Ors* 1950 (3) SA 414 (A) at 422-3.

It is correctly pointed out that the words 'civil rights' are wide and their ambit is not easily defined – *Cole v Commonwealth of Australia* (1961) 106 CLR 653 (HC of Aust) at 656-657. Suffice to say that 'civil rights and obligations' would certainly include, not only, the prejudicial effect on 'property' and 'liberty' set forth by STEWART J in *Board of Regents v Roth supra*, but also, the recently extended use of what is said to be the reasonable and legitimate expectations of the aggrieved person – *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A)."

See also *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (SC), where

BARON JA at 7 F-H stated:

> "We arrive at the same result if we consider simply the general structure of s 24 and the proper construction of subs (2) in the context of that structure. The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this Court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation. Subsection (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division."

And see also *Smith v Mutasa NO & Ano* 1989 (3) ZLR 183 (SC) at 208B, where DUMBUTSHENA CJ stated:

> "The independence enjoyed by Parliament in the control of its internal affairs does not prevent its Members from defending their fundamental rights should they believe that Parliament has wrongfully abrogated or infringed them. Section 24 of the Constitution of Zimbabwe enables such Members to apply to the Supreme Court for redress."

I am satisfied therefore that this matter is properly before this Court.

The Constitution creates Parliament as the law-making body in Zimbabwe. Schedule 4 to the Constitution lays down in broad terms the procedures regarding the introduction of Bills, motions and petitions in Parliament. The Constitution distinguishes between a Bill and a motion. In this regard see Schedule 4, which provides:

> "PROCEDURE WITH REGARD TO BILLS AND OTHER MATTERS IN PARLIAMENT

1 Introduction of Bills, motions and petitions

(1) Subject to the provisions of this Constitution and Standing Orders –

(a) any member of Parliament may introduce any Bill into or move any motion for debate in or present any petition to Parliament;

(b) a Vice-President, Minister or Deputy Minister may introduce any Bill into or move any motion for debate in or present any petition to Parliament.

(2) Except on the recommendation of a Vice-President, Minister or Deputy Minister, Parliament shall not –

(a) proceed upon any Bill, including any amendment to a Bill, which, in the opinion of the Speaker, makes provision for any of the following matters –

(i) imposing or increasing any tax;

(ii) imposing or increasing any charge on the Consolidated Revenue Fund or other public funds of the State or varying any such charge otherwise than by reducing it;

(iii) compounding or remitting any debt due to the State or condoning any failure to collect taxes;

(iv) authorizing the making or raising of any loan by the State;

(v) condoning unauthorized expenditure;

(b) proceed upon any motion, including any amendment to a motion, the effect of which, in the opinion of the Speaker, is that provision should be made for any of the matters specified in subparagraph (a); or

(c) receive any petition which, in the opinion of the Speaker, requests that provision be made for any of the matters specified in subparagraph (a).

(3) The provisions of subparagraph (2) shall not apply to any Bill introduced, motion or amendment moved or petition presented by a Vice-President, Minister or Deputy Minister."

By virtue of s 57 of the Constitution, it is clear Standing Orders have

constitutional standing. This section provides as follows:

> **"57 Standing Orders**
>
> (1) Subject to the provisions of this Constitution and any other law, Parliament may make Standing Orders with respect to –
>
> (a) the passing of Bills;
>
> (b) presiding over Parliament;
>
> (c) any matter in connection with which Standing Orders are required to be made by this Constitution; and
>
> (d) generally with respect to the regulation and orderly conduct of proceedings and business in Parliament.
>
> (2) Standing Orders made in terms of subsection (1) shall provide for the appointment, membership and functions of a Committee on Standing Rules and Orders."

There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of a club". Standing Orders constitute legislation which must be obeyed and followed.

I turn now to deal with Standing Order 127, which provides as follows:

> **"Same Bill may not be twice offered in same session**
>
> **127.** Subject to the provisions of the Constitution, no Bill shall be introduced which is of the same substance as some other Bill which has been introduced during the same session and which has not been withdrawn." (emphasis added)

The reference therein to the Constitution clearly is a reference to subss 51 (3a) and

(3b) of the Constitution. They provide:

> "(3a) Where the President withholds his assent to a Bill, the Bill shall be returned to Parliament and, subject to the provisions of subsection (3b), the Bill shall not again be presented for assent.
>
> (3b) If, within six months after a Bill has been returned to Parliament in terms of subsection (3a), Parliament resolves upon a motion supported by the votes of not less than two-thirds of all the members of Parliament that the Bill should again be presented to the President for assent, the Bill shall be so presented and, on such presentation, the President shall assent to the Bill within twenty-one days of the presentation, unless he sooner dissolves Parliament."

It seems to me that the only Bill that may be re-introduced into Parliament during the same session is one where the President has withheld his assent to the Bill.

Standing Order 127 is based on the convention in the United Kingdom to the same effect, see p 499 of Erskine May *Parliamentary Practice* 22 ed, where appears the following passage:

> ***"Bills with the same purpose as other bills of the same session***. There is no general rule or custom which restrains the *presentation* of two or more bills relating to the same subject, and containing similar provisions. But if a decision of the House has already been taken on one such bill, for example, if the bill has been given or refused a second reading, the other is not proceeded with if it contains substantially the same provisions; nor could such a bill be introduced on a motion for leave (see p 493). On the same principle, in July 1994 the House agreed that the presentation of a bill substantially the same as one for which leave had previously been refused under the 'ten-minute' rule should be prohibited. The Speaker has declined to propose the question for the second reading of a bill which would have had the same effect as a clause of a bill which had already received a second reading. Similarly, a new clause offered at the consideration stage of one bill was ruled out of order when it substantially repeated the provisions of another bill of the same session, the consideration stage of which had been adjourned. But if a bill is withdrawn, after having made progress, another bill with the same objects may be proceeded with." (emphasis added)

There is therefore merit in the submission that Parliament, having set the rules in terms of s 57 of the Constitution, cannot suspend those rules for the expedience of a party. Not only does Standing Order 127 embody a convention, it is

the rule or law applicable by virtue of s 57(1)(a) of the Constitution in relation to the passing of Bills.

Standing Order 69 reads as follows:

"Proceedings may be expunged, discharged or rescinded

69. The House may, by resolution after notice, direct that any motion submitted or any resolution or other vote, or entry in the Journals, be expunged or discharged from the Order Paper or rescinded during the same session, or at any time thereafter. Such motion shall be moved only by a Vice-President, a Minister or by the member who had been in charge of the business concerned." (emphasis added)

It is clear that this provision refers only to motions. It is made in terms of s 57(1)(d) of the Constitution, and finds its place in Standing Orders in relation to what is termed Public Business, Standing Orders 31-81, and not in relation to Public Bills, Standing Orders 101-128.

Insofar as this rule applies in the House of Commons, Erskine May *supra* at p 368 state:

> "The power of rescission has only been exercised in the case of a resolution resulting from a substantive motion, and even then sparingly. It cannot be exercised merely to override a vote of the House, such as a negative vote. Proposing a negatived question a second time for the decision of the House, would be, as stated earlier, contrary to the established practice of Parliament." (emphasis added)

At p 370, the learned editors state:

> "The reason why motions for open rescission are so rare and the rules of procedure carefully guarded against the indirect rescission of votes, is that both Houses instinctively realise that parliamentary government requires the majority to abide by a decision regularly come to, however unexpected, and that it is unfair to resort to methods, whether direct or indirect, to reverse such a decision. The practice, resulting from this feeling, is essentially a safeguard for the rights of the minority, and a contrary

practice is not normally resorted to, unless in the circumstances of a particular case those rights are in no way threatened." (emphasis added)

The reasoning of the learned editors is clear. Once Parliament has taken a vote, that vote cannot be rescinded simply by changing allegiances or changing numbers in the House in order to reverse the decision.

In any event, I agree that Standing Order 69 does not deal with Bills. It is a matter legislated by Parliament "with respect to the regulation and orderly conduct of proceedings and business in Parliament", in terms of s 57(1)(d) of the Constitution. It deals with motions, not with the passing of Bills. Thus, Standing Order 69 could not be used to achieve the purpose sought by the first respondent.

Even assuming that Parliament was entitled to suspend Standing Order 127 and allow a second Bill in terms thereof to be introduced in the same session, that Bill must be introduced and dealt with in terms of the Constitution. Such requirement, as set out in para 1 of Schedule 4, is for the matter to be dealt with in terms of Standing Orders. Thus, it must be introduced and a first and second reading held. It cannot have been the intention that one could go straight into debating the Bill at the point where it had been negatived. The procedures relating to the introduction, or be it re-introduction, of Public Bills must follow the procedures stipulated in Standing Orders 101-128.

What happened in this matter is that the first respondent truncated the constitutional requirements regarding legislation and, having introduced a second Bill of the same substance as that already dealt with, by virtue of purporting to suspend Standing Order 127, truncated the procedures in Parliament, and dealt only with a third reading, and then presented the Bill for assent. This is clearly not permissible

and was improper. Had the Minister arranged to prorogue Parliament and within days reintroduced the Bill in terms of the Standing Orders 101-128 there might have been no problem. See Erskine May *supra* at 501 where it is stated:

> "In 1721 a prorogation for two days was resorted to in order to enable Acts relating to the South Sea Company to be passed, contradictory to clauses contained in another Act of the same session, CJ (1718-1721) 640 (1721)."

This was held to be acceptable.

JURISDICTION OF THE COURTS

Commonsense dictates that Parliament is required to comply with its own laws regarding the enactment of legislation. This principle stems from as far back as the decision in *Minister of the Interior & Anor v Harris & Ors* 1952 (4) SA 769 (A), in which the Appellate Division struck down legislation passed by the Nationalist Government in South Africa to create a High Court of Parliament to override the Appellate Division's earlier decision in respect of voting rights of non-white persons, see *Harris & Ors v Minister of the Interior & Anor* 1952 (2) SA 428 (A).

In other jurisdictions, the courts have applied the principle that legislation which is enacted by a legislative body without compliance with the existing law in respect to the enactment of legislation will be declared void by the courts, even where the constitution provides for a parliamentary democracy form of government. See –

Attorney-General of New South Wales v Trethowan [1932] AC 526 (PC, Australia);

Bribery Commissioners v Ranasinghe [1965] AC 172, [1963} 2 All ER 785 (PC, Ceylon);
R v Mecure [1988] 1 SCR 234 (Supreme Court of Canada); and
Re Manitoba Language Rights [1985] 1 SCR 721 (Supreme Court of Canada).

Zimbabwe, unlike the United Kingdom, is not a parliamentary democracy, but a constitutional democracy – see *Chairman, Public Service Commission & Ors v Zimbabwe Teachers' Association & Ors* 1996 (1) ZLR 637 (SC) at 651, 1997 (1) SA 209 (ZS) at 218-219 (following *Smith v Mutasa NO & Ano* 1989 (3) ZLR 183 (SC) at 192, 1990 (3) SA 756 (ZS) at 761-762). The majority of the Court said:

> "We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament but a supreme law (the Constitution)."

The learned judges continued:

> "Similarly the principle of the separation of powers is a broad but flexible principle. The fact that certain powers, for an interim period, are given to a body other than the Executive, the Legislature or the Judiciary, should be seen as a variation rather than a negation of the principle. And, of course, the Legislature retained the power, which it has now exercised, to reclaim from the Commission the functions it exercised under the Constitution. But it had to do so by amending the Constitution, by following the procedures required. The Legislature could not, by the ordinary process of passing an Act by a simple majority, have ousted the authority of the Commission."

In a constitutional democracy it is the courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament.

In *Smith v Mutasa supra* it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens, see p 192. It was also held that Parliament could not disregard the fundamental rights enshrined in the Constitution, see p 192-193:

> "In Zimbabwe the question of Parliamentary privileges has not remained static. It has to some extent been affected by the Declaration of Rights contained in the Constitution. The result is that the Parliament of Zimbabwe, unlike the House of Commons on 24 September

1923, may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution. If in Zimbabwe there is a conflict between fundamental rights and the privileges of Parliament the conflict can only be resolved by the courts of justice.

The Constitution of Zimbabwe is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds of the authority prescribed to it by the Constitution. As GAJENDRAGADKAR CJ said in *Special Reference No 1 of 1964* [1965] 1 SCR at 445 G-H:

> 'If the Legislatures step beyond the legislative fields assigned to them, or acting within their respective fields they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by courts in India. Therefore, it is necessary to remember that though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution.'

The difference between the powers of the House of Commons and our House of Assembly is that the Constitution of the United Kingdom does not permit the Judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all legislation. In Zimbabwe the Judiciary is the guardian of the Constitution and the rights of the citizens.

It is essential to understand that all the three branches of Government, the Executive, the Legislature and the Judiciary, are bound by and work within the confines of the Constitution. For instance, the House of Assembly cannot, in the name of Parliamentary privileges, immunities and powers, disregard the fundamental rights enshrined in the Constitution. If it does that, it invites the intervention of the Judiciary:

> '… there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the Legislature is valid or not. Just as the Legislatures are conferred legislative authority and their functions are

> normally confined to legislative functions, and the functions and authority of the Executive lie within the domain of Executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened can be decided by the Legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country …' per GAJENDRAGADKAR CJ in *Special Reference No 1 of 1964 supra* at 446 D-G." (emphasis added)

The Supreme Court in that matter referred to and approved the approach of the Supreme Court of India in *Special Reference No 1 of 1964* [1965] 1 SCR 413.

Likewise, in South Africa it has been held that all branches of the Government are subject to scrutiny by the courts, and that even the President is subject to the provisions of the Constitution – see *President of the Republic of South Africa & Ano v Hugo* 1997 (4) SA 1 (CC) at paras 12 and 28, as well as *Executive Council, Western Cape Legislature & Ors v President of the Republic of South Africa & Ors* 1995 (4) SA 877 (CC).

The matter was dealt with more fully in the judgment of HLOPHE J (as he then was) in *De Lille & Ano v Speaker of the National Assembly* 1998 (3) SA 430 (C). Reference is made to paras 22-25. At para 25, p 449, he said:

> "The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in

> conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."

On appeal – see *Speaker of the National Assembly v De Lille & Ano* 1999 (4) SA 863 (SCA) – MAHOMED CJ put the matter thus in para 14, pp 868-869:

> "This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. It is supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligation imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution, is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

See also *Sonderup v Tondelli & Ano* 2001 (1) SA 1171 (CC) at para 27, p 1183.

There is therefore no merit in the submission of Mr *Majuru* when he said that:

> "… this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regards to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act Number 2 of 2002)."

It is my view that this Court has not only the power, but also the duty, to determine whether or not legislation has been enacted as required by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution.

The manner in which the third reading of the General Laws Amendment Bill was done on 10 January 2002 was contrary to the Constitution and the legislation thereunder, and accordingly was not validly enacted.

Section 3 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] provides as follows:

> **"3 Privileges, immunities and powers generally**
>
> Parliament and members and officers of Parliament shall hold, exercise and enjoy –
>
> (a) the privileges, immunities and powers conferred upon Parliament, respectively, by this Act or any other law; and
>
> (b) all such other privileges, immunities and powers, not inconsistent with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on the 18th April 1980."

The powers of Parliament by virtue of s 3 of that Act are those conferred upon Parliament by this Act or any other law (which would include the Constitution and Standing Orders), as well as the powers which are not inconsistent with the powers applicable to the House of Commons on 18 April 1980. Those powers are part of the general and public law, see s 4 of the Act.

Nowhere in that legislation is it provided that Parliament can bring for the second time the third reading of a Bill; nor is it provided that a Bill may be brought for the second time before the same session; nor is it provided that a matter that has been negatived may be brought again before the same session. Indeed, by virtue of s 3(b) of that Act, such would be inconsistent with the powers of the House

of Commons as at 18 April 1980, and therefore also inconsistent with the law of Zimbabwe. Section 3 of the Privileges, Immunities and Powers of Parliament Act itself expressly forbids what was done in the present case. In terms of s 3 of the Act, our legislation provides succinctly that our Parliamentary practice is guided by practices in the House of Commons. The "Bible", on Parliamentary practice of that body, is enshrined in Erskine May *supra* and the editors of that work have no doubt that a negatived Bill should not be re-introduced in the same session of Parliament. We therefore must stand guided by what the editors in Erskine May *supra* have indicated.

Accordingly, it must be held that the General Laws Amendment Act 2002 was invalidly enacted by Parliament.

I believe that we were left with no choice but to grant the application with costs. The order we made was as follows –

> "THAT the General Laws Amendment Act (No. 2 of 2002) is invalid and of no force or effect.
>
> THAT the first respondent shall pay the applicants' costs of suit."

SANDURA JA: I agree.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I have read the judgment of the majority written by EBRAHIM JA but disagree with the decision reached and the reasons thereof. The assumption on which the applicants sought relief

before the Supreme Court was that the majority vote of 8 January 2002 in the House was valid at law. That is also the basis on which the decision of the majority has been reached. The assumption on the validity of the majority vote of 8 January 2002 is, in my view, wrong.

Section 51(1) of the Constitution of Zimbabwe provides that subject to the provisions of Schedule 4 thereof the power of Parliament to make laws shall be exercised by Bills passed by Parliament and assented to by the President.

Parliament has power under s 57(1)(a) of the Constitution to make Standing Orders with respect to the passing of Bills. Standing Orders have constitutional standing and are binding on Parliament until repealed.

Section 56 provides that save as otherwise provided in the Constitution all questions proposed for decision at a sitting of Parliament shall be determined by a majority of the votes of the members present and voting.

The presumption is that the questions proposed for decision are lawfully put to the House at the time they are proposed for decision. If the question proposed for decision cannot by force of law be put at the time it is proposed for decision, the vote on it, whether affirmative or negative, is of no legal force and effect. It is a nullity with no binding effect on Parliament.

In pursuance of the legislative power granted to it in s 57(1)(a) of the Constitution Parliament made Standing Order 124 in respect to the passing of Bills. In clear and mandatory language Standing Order 124 provides that:

"After the third reading no further questions shall be put and the Bill shall be deemed to have been passed by Parliament."

It is clear to me that putting a question on the passing or otherwise of a Bill after it has been read the third time is prohibited by Standing Order 124. A Bill is passed immediately after it is read the third time.

It is clear from the record of proceedings before the House, attached as annexures to the applicants' founding affidavit, that the Bill was in fact read the third time on 8 January 2002 and thereafter a question, probably as to its passage, put to the House for determination. It is then that the House divided on a majority of 36 to 24 in favour of the applicants. In para 23 of the founding affidavit the first applicant accepts the fact that the Bill was read the third time. He avers therein that "Parliament had no power to rescind the third reading of the Bill".

My interpretation of Standing Order 124 is that the question put to the House on the passage of the Bill after it had been read the third time was not legally permissible. By the time that question was put the Bill had passed and the majority vote on the question proposed for decision could not affect the passage of the Bill. The vote was in fact null and void. It was of no legal consequence purporting, as it did, to determine a question, the putting of which was strictly prohibited by Standing Order 124. Erskine May *Parliamentary Practice* 20 ed states at p 509 that: "according to established usage, a bill, when read the third time, has passed".

In my view, the General Laws Amendment Bill was properly passed by Parliament after it was read the third time on 8 January 2002. It was unnecessary for the Minister of Justice, Legal and Parliamentary Affairs, who had introduced the Bill into Parliament, to take all the trouble he took trying to have the majority vote rescinded when that vote was a nullity insofar as the passage of the Bill after the third reading was concerned. It was therefore a moot question before the Supreme Court whether what the Minister did was lawful or not.

My decision is therefore as follows:

"The application is dismissed with costs".

Gill, Godlonton & Gerrans, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners