

**REPORTABLE** (63)

**JUDICIAL SERVICE COMMISSION**  
**v**  
**ROMEO TAOMBERA ZIBANI**  
**and**  
**OTHERS**

**SUPREME COURT OF ZIMBABWE**  
**HLATSHWAYO JA, PATEL JA & ZIYAMBI AJA**  
**HARARE, 13 FEBRUARY 2017**

*A. Chinake*, for the appellant

*S. Hashiti*, for the first respondent

*E. Mukucha*, for the third respondent

Judgment No. SC 68/2017  
Civil Appeal No. SC 763/16

No appearance for the second, fourth, fifth, sixth, seventh and eighth respondents

*T. Mafukidze*, for the first *amicus curiae*

*Z. Chadambuka*, for the second *amicus curiae*

*T. R. Mugabe*, for the intervener

**PATEL JA:** After hearing argument from counsel, the court decided that the appeal should be allowed with no order as to costs. We further indicated that reasons for judgment would be handed down in due course. Those reasons are as follows:-

## The Parties

This is an appeal against the decision of the High Court granting an urgent Chamber Application filed by the first respondent. The appellant is the Judicial Service Commission, a Constitutional Commission established in terms of s 189 of the Constitution of Zimbabwe. It is enjoined by s 180 of the Constitution to invite candidates for appointment to judicial office, including that of Chief Justice, to conduct public interviews of prospective candidates and, thereafter, to prepare and submit a list of three qualified nominees for consideration and appointment by the President.

The first respondent is a final year law student at the University of Zimbabwe. The second respondent is the President of Zimbabwe, while the third respondent is the Vice President who is also responsible for the Ministry of Justice, Legal and Parliamentary Affairs. The first and third respondents are opposed to this appeal. However, as will be adverted to later, the first respondent has declined to file his heads of argument in the matter.

The fourth respondent was the incumbent Chief Justice and Chairman of the Judicial Service Commission. He was due to retire at the end of February 2017. The fifth, sixth and seventh respondents are incumbent judges of both the Constitutional and Supreme Courts of Zimbabwe. They applied as candidates for appointment to the office of Chief Justice and were subsequently interviewed for that position. The eighth respondent is the Judge President of the High Court of Zimbabwe, who also applied for

appointment as Chief Justice but did not attend the public interviews conducted for that purpose. None of these respondents participated in the proceedings before the court *a quo* or in this Court.

Prior to the commencement of proceedings in the main appeal, the Court was seized with three separate applications for intervention in the matter. The first and second applications were lodged by Beatrice Mtetwa, a registered legal practitioner, and the Law Society of Zimbabwe, respectively. They were both for admission as *amici curiae* to assist the Court in its determination of this appeal. The third application was lodged by the Abammeli Bamalungelo Abantu, a network of human rights lawyers, for leave to intervene in the matter. All three applications were granted by consent without any opposition from the other parties to this appeal.

Judgment No. SC 68/2017  
Civil Appeal No. SC 763/16

### Conduct of the First Respondent

Before outlining the background to this matter, it is necessary to comment on the conduct of the first respondent and, in particular, that of his attorneys and counsel. A few weeks after the matter had been set down for hearing, the first respondent's attorneys wrote two letters to the Registrar, dated 26 January and 2 February 2017. In those letters they intimated that the set down was unlawful, irregular and palpably tainted and, therefore, they demanded an undertaking that the matter would be removed from the roll. Their reasons for taking that view were not entirely clear, but the overall tenor of both missives was not only brusque and overbearing but also contumelious towards the Registrar and, by necessary implication, contemptuous of this Court. This is a matter of

grave concern and may well invite judicial censure of the legal practitioner concerned in the event of any similar conduct recurring in the future.

At any rate, what also emerged from these letters was that the first respondent was not willing or prepared to file his heads of argument. Following his failure to do so timeously, he was clearly barred in these proceedings and remained barred until such time as he sought and obtained the upliftment of that bar.

Undaunted by the obvious absence of any right of audience, the first respondent's counsel had the temerity to appear at the hearing of this appeal to ventilate his client's supposed claim to have the matter postponed on a variety of specious grounds. Among these was the request to file heads of argument in response to those filed by the three interveners, and the need to file a written application on oath from his client for the purpose of uplifting the bar. Crucially, despite being afforded the opportunity to do so, counsel was unable to proffer any explanation that might have justified upliftment of the bar. In response, counsel for the appellant argued that the application for postponement was not timeous or *bona fide* and simply designed to delay proceedings to the appellant's prejudice.

Having considered all of these submissions, the Court was of the unanimous view that the extant bar against the first respondent remained in operation and that, having had ample time to have the bar removed before the hearing and having

inexplicably failed to do so, he was not entitled to apply for any postponement of the proceedings.

### The Background

As already indicated, the fourth respondent was due to retire from the office of Chief Justice at the end of February 2017. The fact of his impending retirement was duly communicated to all the relevant functionaries. Thereafter, in conformity with its constitutional mandate, the appellant set in motion the prescribed processes for interviewing prospective candidates for appointment to that esteemed office. Four candidates applied and the requisite logistical arrangements were duly put in place for the conduct of public interviews scheduled to be held on 12 December 2016.

The urgent chamber application under consideration was filed in the High Court on 7 December 2016. The gist of the first respondent's averments was that the conduct of interviews as arranged was "not feasible, not transparent and not fair" and that the long term solution was to amend the Constitution to "allow the appointing authority unfettered powers to appoint persons to the post of Chief Justice". His application was successful. The interim order granted by the court *a quo* interdicted the appellant from conducting the scheduled interviews for the purpose of submitting names to the President for his consideration in appointing the new Chief Justice. The final order sought on the return date was to suspend the aforesaid interview process set in motion by the appellant pending the finalisation of the proposed amendment to s 180 of the Constitution.

The impugned interim order was granted on 11 December 2016. The appellant noted the present appeal against that order on 12 December 2016, the effect of which appeal was to suspend the order. The learned judge *a quo* handed down his very detailed reasons for judgment (16 pages in all) later that same day.

### High Court Judgment

Before determining the merits of the matter before it, the court *a quo* attended to several preliminary objections raised by the appellant herein. These related to the questions of urgency and the certificate of urgency, recusal of the judge, citation of the wrong parties, *locus standi* of the applicant, and the need for leave to sue some of the respondents. All of the objections raised were duly dismissed by the court with detailed reasons, which are not of direct relevance to the disposition of this appeal. Judgment No. SC 68/2017  
Civil Appeal No. SC 763/16

The court below held that the applicant had demonstrated a *prima facie* right to a fair and transparent process culminating in any appointment to public office. Relying on the values embedded in the preambular provisions of the Constitution as having been designed to attain higher democratic ideals, the court accepted that the executive functionaries assigned to administer peace would promote appropriate legislation to deal with the exigencies of any possible infraction of the peace not anticipated by the Legislature. In the instant case, there was a public perception of possible bias emanating from the close relationship between the Chief Justice and the candidates for appointment to that office. That being so, the responsible Minister had decided to amend s 180 of the Constitution in the interests of the integrity of the appointment process. This was a policy

issue that he was equipped to address in order to deal with an unforeseen eventuality. The courts are required to take notice of such executive intention and must allow elected representatives to safeguard liberal values and objectives. They must also take into account the relevant historical, economic, social, cultural and political context and interpret the Constitution in a manner that advances the rule of law and contributes to good governance. Thus, the judiciary must be politically accountable as regards its selection, tenure and conditions of service and in relation to inter-branch relations. In similar vein, the Judicial Service Commission must be independent but also politically accountable to the elected representatives of the people by dint of the prevailing social contract. This was a necessary precondition for its legitimacy in a democratic society.

In the case at hand, the court *a quo* noted that the responsible Minister had revealed an intention to canvass the public for a change in the law through his draft memorandum to the Cabinet. The appellant herein was bent on a process challenged by the policymaker, entailing a possible but unnecessary conflict between two arms of the State. Consequently, the court could not disregard the intentions of the policymaker and the probable infringement of the applicant's *prima facie* right. Moreover, the balance of convenience favoured the applicant because the relief that he sought was not opposed by the responsible Minister. Accordingly, the court granted the interim order with no order as to costs.

#### Grounds of Appeal and Relief Sought

The stated grounds of appeal herein relate to the merits of the judgment *a quo*. They may be summarised as follows:

- The court *a quo* had no authority or power to interdict the appellant from carrying out a lawful process authorised by s 180 of the Constitution.
- The Constitution cannot be abrogated, superseded or suspended by intended executive action relating to its provisions.
- The first respondent did not establish a *prima facie* case on the facts and at law to justify the grant of the interdict sought.

In the event of the appeal succeeding, the appellant prayed that the order granted by the court *a quo* be set aside and substituted with an order dismissing the urgent application with costs.

Judgment No. SC 68/2017  
Civil Appeal No. SC 763/16

### Supremacy of the Constitution

It is axiomatic that Zimbabwe is a constitutional in contradistinction to a parliamentary democracy. See *Biti & Anor v Minister of Justice Legal and Parliamentary Affairs & Anor* 2002 (1) ZLR 177 (S) at 190A-B. This fundamental principle and its concomitant legal ramifications and obligations are codified in s 2 of the Constitution as follows:

“(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.  
(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”



Section 3 of the Constitution enshrines the founding values and principles of Zimbabwe. In its relevant parts it provides that:

- “(1) Zimbabwe is founded on respect for the following values and principles—
- (a) supremacy of the Constitution;
  - (b) the rule of law;
  - (c) fundamental human rights and freedoms;
  - (d) ...;
  - (e) ...;
  - (f) ...;
  - (g) ...;
  - (h) good governance; and
  - (i) ....
- (2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include—
- (a) ...;
  - (b) ...;
  - (c) ...;
  - (d) ...;
  - (e) observance of the principle of separation of powers;
  - (f) respect for the people of Zimbabwe, from whom the authority to govern is derived;
  - (g) transparency, justice, accountability and responsiveness;
  - (h) ...;
  - (i) ...;
  - (j) ...;
  - (k) ...; and
  - (l) ....”

Judgment No. SC 68/2017

Civil Appeal No. SC 763/16

By virtue of the foregoing principles, the Constitution demands strict compliance with its substantive provisions and all laws enacted under its aegis. It also demands meticulous adherence to the procedures and processes prescribed under the Constitution. These principles bind everyone, including the appellant which, as an executive institution, is expressly bound to comply with the substantive and procedural requirements of the Constitution.

## Authority to Interdict Lawful Constitutional Process

The critical provision of the Constitution for present scrutiny is s 180, which provides for judicial appointments as follows:

- “(1) The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section.
- (2) Whenever it is necessary to appoint a judge, the Judicial Service Commission must—
  - (a) advertise the position;
  - (b) invite the President and the public to make nominations;
  - (c) conduct public interviews of prospective candidates;
  - (d) prepare a list of three qualified persons as nominees for the office; and
  - (e) submit the list to the President;whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.
- (3) If the President considers that none of the persons on the list submitted to him or her in terms of subsection (2)(e) are suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.
- (4) The President must cause notice of every appointment under this section to be published in the *Gazette*.”

(I note that s 180 was amended in September 2017, some seven months after the decision in this matter was handed down in February 2017. However, this amendment clearly does not affect the applicability of s 180 in its original form at that time or the reasoning of the Court in arriving at that decision).

In the instant case, the appellant duly invited nominations to fill the vacancy in the office of Chief Justice. The nominees were then invited to attend public interviews. In short, it is common cause that the appellant fully complied with its obligations under the Constitution. It is therefore difficult to perceive what wrong the appellant can be said

to have committed or how the first respondent's rights have been violated so as to justify the issuance of an interdict against the appellant from conducting the interviews as scheduled in terms of a valid and binding constitutional provision. A court of law simply has no power to interdict a constitutional body from performing its constitutional obligations.

It cannot be doubted that the courts are bound not only to respect the provisions of the Constitution but also to enforce them insofar as they dictate substantive and procedural requirements to be fulfilled by constitutional bodies. In the absence of any constitutional fiat to do so, it is clearly not within the ambit of the power or authority of a judge of the High Court to override or purport to suspend or limit the operation of an unambiguous provision of the Constitution under the pretext of pending executive action.  
As was lucidly enunciated in *The State v Mabena & Anor* [2006] SCA 132 (RSA) at para 2:

“The Constitution proclaims the existence of a State that is founded on the rule of law. Under such a regime legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with the law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the State. Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with the law. As in the case of other State authority, the exercise of judicial authority otherwise than according to law is simply invalid.”

The principal argument posited on behalf of the third respondent (the Minister) was that the majority of the interviewing panellists would have little or no knowledge of the law as compared to the candidates to be interviewed. Thus, so it was argued, the public's expectation of good institutional governance cannot be met where a

prospective Chief Justice is subjected to public interview by persons who are junior in terms of experience and the prevailing hierarchy. It was further argued that there is no timeframe prescribed in the Constitution to fill any vacancy for the post of Chief Justice. Given that s 181(1) of the Constitution expressly provides for the Deputy Chief Justice to act in place of the Chief Justice during such vacancy, there was no need for the appellant to insist on conducting interviews in light of the constitutional amendment proposed by the executive.

What these arguments overlook is the paramount need to strictly adhere to constitutionally prescribed procedures. Where a constitutional body has a positive duty to carry out certain functions and processes and fails to do so, its omission would constitute a violation of the Constitution attracting judicial censure. In this case, the Constitution prescribes how the vacancy in the office of Chief Justice is to be filled and the governing provisions have been duly adhered to. In these circumstances, no interdict can possibly arise against a constitutional body performing its constitutionally prescribed mandate.

the Constitution  
Civil Appeal No. SC 763/16

As regards the supposed absence of any specified timeframe for filling the vacancy, the third respondent's argument is palpably untenable in light of the peremptory injunction embodied in s 324 of the Constitution which demands that:

“All constitutional obligations must be performed diligently and without delay.”  
(my emphasis)

The plain wording of s 324 is clear and unequivocal. In the present context, the appellant was duty-bound to carry out its functions under s 180 to fill the impending

vacancy, not only diligently but also without delay. This is so notwithstanding the transitional filling of that vacancy in an acting capacity in terms of s 181. A court of law has no power to stop the lawful and diligent performance of a constitutional process or constitutional obligation imposed upon the appellant on the basis of an alleged intention of the executive to amend the Constitution.

Generally speaking, it is not permissible for a court to interdict the lawful exercise of powers conferred by statute. See *Gool v Minister of Justice & Anor* 1955 (2) SA 682 (CPD) at 688F-G. This approach applies *a fortiori* where a court is called upon to interdict the lawful and *bona fide* performance of a constitutional duty. In the instant case, the court *a quo* failed to assess whether or not it was “constitutionally appropriate to grant the interdict”. See *National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors* 2012 (6) SA 223 (CC) at para 66. In so doing, it failed to observe the long-observed doctrine of separation of powers. As was underscored in *Doctors for Life International v Speaker of the National Assembly & Ors* 2006 (6) SA 416 (CC) at para 37:

“Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.”

This principle was also clearly articulated in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 95:

“Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power

or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

To conclude on this aspect of this case, there can be no doubt that the decision of the court *a quo* to interdict the scheduled public interview process was fundamentally flawed for the following reasons. Firstly, there was no cogent allegation by the respondents of any breach or violation of the Constitution. The allegation that the public interview process is unfair, lacks transparency, is contrary to the precepts of good governance, and is therefore unjust, has no factual or legal basis and is entirely unsustainable. Secondly, there was no finding by the court that the appellant breached any provision of the Constitution or otherwise violated the first respondent’s rights. Indeed, the court accepted that the appellant was carrying out a legitimate constitutional process. In effect, it purported to interdict the appellant in a legal vacuum. In short and with all due respect, the reasoning and judgment of the court *a quo* defy logic and all established tenets of constitutional law.

appellant No. 68/2017  
Civil Appeal No. SC 763/16 4

#### Suspension of Constitutional Provisions by Intended Executive Action

I have already adverted to this aspect in passing in the preceding part of this judgment. However, it remains necessary to ventilate and address it more fully for the purposes of this appeal.

In doctrinal terms, the amendability of constitutional provisions has been theorised in recent judicial and academic discourse within the framework of the implicit limits doctrine or the basic structure doctrine. The gravamen and implications of both doctrines, as I comprehend them, are essentially the same insofar as concerns the juridical conclusions to be derived from them.

It is generally accepted that the present Constitution was prepared after a prolonged and rigorous people-centred constitution making process. It was the result of extensive consultations and negotiations in striking an appropriate balance of constitutional values, systems and structures chosen by the people of Zimbabwe. It may therefore aptly be characterised as being autochthonous (albeit not entirely original in formulation or content) and as an exercise of the so-called constituent power. On this premise, where an act is performed in proper exercise of the constituent power's mandate, a court cannot properly stay that conduct on the basis that a constituted power, *i.e.* the legislature, may eventually decide to approach the matter differently. It would follow that to stay the choice of the people in enacting s 180 of the Constitution, pending a proposed contrary view by the legislature, would be to stultify the greater voice of the people so that a lesser power that they have constituted may be exercised.

It was contended on behalf of the third respondent that the court below was correct in granting the impugned interdict pending the proposed amendment of the Constitution. No reasonable judge, so it was argued, could have ignored evidence from the executive indicating its intention to rectify an alleged defect in the Constitution. With

all due deference to the overarching political role of the executive, this argument is not only startling but patently outlandish in its disdain for the established norms of constitutionalism. It postulates the very antithesis of the rule of law.

One of the objectives of a constitutional democracy is to rein in the unbridled abuse of State power and resources. To that end, the introductory remarks of MOGOENG CJ in *Economic Freedom Fighters v Speaker of the National Assembly & Others* [2016] ZACC 11 at para 1, are very pertinent:

“To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.”

Judgment No. SC 68/2017  
Civil Appeal No. SC 763/16 6

It is trite that constitutional order hinges on the rule of law. For that reason, the learned Chief Justice opines, at para 75, that:

“The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or steps sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to.”

The third respondent’s conduct, in seeking to have the operation of a constitutional provision suspended on the basis of a proposed constitutional amendment is obviously inconsistent with his obligations in terms of s 2(2) of the Constitution. For a court to grant the privilege that he seeks would be tantamount to condoning a violation of



those obligations, thereby posing a serious threat to the rule of law enshrined in s 3(1)(b) of the Constitution.

In light of the constitutional imperative to maintain the rule of law, the judiciary is obliged to give effect to the provisions of the Constitution that are in force at any given time. Consequently, it is not open to the judiciary to pander to the whims of the executive by granting an interdict on the basis of a proposal to amend an extant law. A constitutionally mandated process, which is binding and being carried out in terms of the law, cannot be suspended on the back of a mere *spes* that there might be an amendment in the future the full effect of which is unknown. In other words, a court of law cannot ignore a valid and binding provision of the Constitution in order to effectuate the mere intention of one arm of the State to tinker with that provision, particularly when the process of tinkering is in itself fraught with legal uncertainty.

Judgment No. 36/2017  
Civil Appeal No. SC 763/16

As counsel for the appellant quite aptly phrased it, a constitutional Bill is no “walk in the park”. In terms of s 328 of the Constitution, the precise terms of the Bill must be gazetted at least 90 days before it is presented in the Senate or the House of Assembly. Additionally, members of the public must be invited to express their views on the proposed Bill through written submissions and public meetings. It is therefore undoubtedly irrational to suspend the operation of a constitutional provision by way of an interdict pending the completion of such an arduous process. Indeed, as counsel for the third respondent was eventually constrained to concede, Parliament is not a mere rubberstamp. Thus, there was no certainty that, after having debated the matter,

Parliament would necessarily accept the draft Bill and enact it into law without any alteration. In the interim, the office of Chief Justice would have remained vacant, in clear contravention of the appellant's obligation under s 324 to implement the requirements of s 180 by filling that vacancy "diligently and without delay".

The inescapable conclusion to be drawn from all of the foregoing is abundantly clear. It is that the Constitution cannot under any circumstances be abrogated, superseded or suspended by intended executive action relating to the prospective amendment of its provisions.

#### Whether Applicant Established *Prima Facie* Case for Grant of Interdict

This question has been rendered somewhat academic by the conclusions already made upholding the principal grounds of appeal. Nevertheless, it may be necessary and instructive to deal with it for the sake of completeness. Apart from this, the other issues raised in the appellant's heads of argument, relative to the lack of urgency of the application, the defective certificate of urgency, and the absence of leave to sue the President and judges of the High Court, are all ancillary matters that do not warrant determination for the purposes of this appeal.

The requirements for the grant of interim or temporary interdicts are trite. The applicant must establish a *prima facie* right, a well-grounded fear of irreparable injury, the absence of any other remedy, and that the balance of convenience favours the

applicant. See *ZESA Staff Pension Fund v Mushambadzi* SC 57/2002, at p 4 of the cyclostyled judgment.

Insofar as concerns the first requirement, it is settled in principle that the grant of an interdict is based upon the existence of a right which in terms of the substantive law is sufficient to sustain a cause of action. To sustain such cause of action, the applicant must prove a legal and not merely a moral right and that this right is being infringed or threatened with infringement. Where the alleged interference is in terms of an admittedly legal process, no legal right is established unless the applicant shows a right not to be disturbed in terms of such process. This is so because a party cannot have a right, whether *prima facie* or clear, contrary to the law. Thus, an interdict cannot ordinarily be granted where the allegedly offending conduct is properly premised on statutory authority. This principle must apply with even greater force where the conduct in question is, as it is *in casu*, predicated upon and mandated by the Constitution itself.

The court *a quo* appears to have proceeded upon the basis that the first respondent had a right to good governance which precluded the application of s 180 of the Constitution. This approach was highly questionable in the absence of any assertion or finding that s 180 was either internally inconsistent or otherwise constitutionally impeachable. Accordingly, the court could not have found the existence of any *prima facie* right or valid cause of action justifying the grant of an interdict.

In essence, the first respondent's case in the court below was founded upon his imagined fears and facile opinion on what would occur if the scheduled public interviews were to proceed in terms of s 180 in its prevailing state. The application was an abstract one, driven by surmise and conjecture, and which sought to invoke the jurisdiction of the court on imagined factual circumstances without any cogent foundational basis. In other words, the first respondent had no right, whether *prima facie* or otherwise, to have the unequivocal provisions of the Constitution applied in a manner that might have accorded with his distorted perception of how they should have been applied. It follows that the court *a quo* gravely and grossly misdirected itself in finding that the first respondent had any *prima facie* or other right and by consequently granting the interim relief sought by him.

Judgment No. SC 68/2017  
Civil Appeal No. SC 763/160

### Disposition

For the foregoing reasons, the Court was of the unanimous view that the appeal should be allowed. It was accordingly ordered that:

1. The appeal be and is hereby allowed with no order as to costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:

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

In light of the detailed substantive principles expounded in this judgment, it seems unnecessary and otiose to grant the various *declaratur*s prayed for by the intervener in the draft order accompanying its application to intervene in this matter.

**HLATSHWAYO JA:** I agree.

**ZIYAMBI AJA:** I agree.

*Kantor & Immerman*, appellant's legal practitioners

*Venturas & Samukange*, 1<sup>st</sup> respondent's legal practitioners

*Civil Division of the Attorney-General's Office*, 3<sup>rd</sup> respondent's legal practitioners

*Mtewa & Nyambirai*, legal practitioners for the 1<sup>st</sup> *amicus curiae*

*Law Society of Zimbabwe*, legal practitioners for the 2<sup>nd</sup> *amicus curiae*

*Phulu & Ncube*, intervener's legal practitioners