

REPORTABLE (2)

INNOCENT GONESE

V

**(1) PRESIDENT OF THE SENATE (2) PARLIAMENT OF ZIMBABWE
(3) PRESIDENT OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO
JCC, PATEL JCC AND GUVAVA AJCC
HARARE: 16 FEBRUARY 2022, 2 & 15 MARCH, 2022 AND 27 APRIL 2023,**

T. Biti, for the applicant

K. Tundu, for the first and second respondents

T. Magwaliba with G. Madzoka, for the third respondent

T. Zhuwarara, as *amicus curiae*

**Judgment No. CCZ 2/23
Constitutional Application No. CCZ 08/21**

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HLATSHWAYO JCC:

[1] The applicant is a Member of Parliament representing the Mutare Central Constituency. He filed this application essentially in terms of s 167 (2) (d) of the Constitution of Zimbabwe, 2013 – hereafter “the Constitution” –albeit with passing references to s 85 of the Constitution. In fact, in his answering affidavit the applicant made it abundantly clear that the application was indeed solely in terms of s 167(2)(d). Thus, any references to s 85 shall be taken merely as means to bolster the principal cause of action, and not as a separate cause of action.

[2] Initially, the applicant sought an order in the terms set out below:

“IT IS HEREBY DECLARED THAT:

1. The passage of Constitutional Amendment Bill (No. 1) of 2017 in Parliament on the 4th of May 2021 be and is hereby set aside on the basis that the bill had lapsed in July of 2018 and therefore its passage was in breach of S 147 of the Constitution of Zimbabwe:
Therefore:
 - i. The actions of Parliament, in passing Constitutional Amendment Bill No 1 of 2017 are in breach of the provisions of S 147 of the Constitution of Zimbabwe.
 - ii. The actions of the President of the Republic of Zimbabwe in assenting to Constitutional Amendment Bill No 1 are in breach of S 147 of the Constitution of Zimbabwe.
 - iii. Constitutional Amendment No 1 Act of 2017 gazetted on the 7th of September 2017 be and is hereby set aside.
2. That the judgment of the Constitutional Court, in the case of *Innocent Gonese & Jessie Majome v the Speaker of Parliament & Others* CCZ 4/2020, directing that part of the disposition of the Constitutional Court directing Senate passes Constitutional Amendment Bill No 1, within 180 days from the declaration of invalidity be and is hereby declared to be a nullity in breach of S 147 of the Constitution of Zimbabwe.
3. 2nd Respondent must pay cost (*sic*) of suit.”

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I have deliberately used the word “initially” for reasons that will shortly become apparent.

FACTUAL BACKGROUND

[3] The application relates to the enactment of Constitution of Zimbabwe Amendment (No. 1) Act, 2017. The relevant facts are all common cause. On 25 July 2017, the National Assembly passed Constitutional Amendment (No. 1) Bill, 2017. Thereafter, on 1 August 2017, the Senate purported to pass the same Bill. On 7 September 2017, the President assented to the Bill. The Bill was published in the Government Gazette, promulgated as law and thereafter became known as Constitution of Zimbabwe Amendment (No. 1) Act, 2017.

[4] It is crucial to note that a few days prior to the President's assent, the applicant and a fellow Member of Parliament had filed an application under case number CCZ 57/17, in terms of s 167(2)(d) of the Constitution, alleging that the second respondent had failed to fulfil a constitutional obligation. Subsequent to the promulgation of Constitution of Zimbabwe Amendment (No. 1) Act, 2017, the applicant, together with his fellow Member of Parliament aforesaid, filed another constitutional application under case number CCZ 58/17 on 13 September 2017. They alleged that the second respondent had failed to fulfil a constitutional obligation by its passing of a constitutional bill in the absence of a two-thirds majority as required by s 328 of the Constitution.

[5] The applications under CCZ 57/17 and CCZ 58/17 were consolidated and heard on 31 January 2018. After hearing the parties' submissions in respect of those applications, this Court reserved its judgment. Pending the delivery of the judgment, the country underwent harmonised general elections on 30 July 2018. Thus, Parliament stood dissolved at midnight on 29 July 2018, the day before the first polling day of the general election in terms of s 143 of the Constitution.

[6] On 31 March 2020, this Court passed judgment in respect of the applications under CCZ 57/17 and CCZ 58/17. That is the judgment of *Gonese & Anor v Parliament of Zimbabwe & Ors* CCZ 4/20 (hereafter referred to as "CCZ 4/20". The operative part of that judgment reads as follows:

“ 1. It is declared that the passing of Constitutional Amendment Bill (No. 1) of 2017 by the Senate on 01 August 2017 was inconsistent with the provisions of s 328(5) of the Constitution, to the extent that the affirmative votes did not reach the minimum threshold of two-thirds of the membership of the House. Constitutional Amendment Bill (No. 1) of 2017 is declared invalid to the

extent of the inconsistency. The declaration of invalidity shall have effect from the date of this order but is suspended for a period of one hundred and eighty days, subject to the provisions of paragraph 1(b).

Accordingly, the following order is made –

- (a) The proceedings in the Senate on 01 August 2017 when Constitutional Amendment Bill (No. 1) of 2017 was passed be and are hereby set aside, for the reason that a two-thirds majority vote was not reached in that House.
 - (b) The Senate is directed to conduct a vote in accordance with the procedure for amending the Constitution prescribed by s 328(5) of the Constitution within one hundred and eighty days of this order, failing which the declaration of invalidity of Constitutional Amendment Bill (No. 1) of 2017 in paragraph (1) shall become final.
2. The applicants’ allegation that there was no vote in the National Assembly on 25 July 2017 when Constitutional Amendment Bill (No. 1) of 2017 was passed be and is hereby dismissed for lack of merit.
 3. The applicants’ allegation that a two-thirds majority was not reached in the National Assembly on 25 July 2017 when Constitutional Amendment Bill (No. 1) of 2017 was passed be and is hereby dismissed for lack of merit.
 4. There is no order as to costs.”

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[7] For reasons that are not pertinent to the present application, the Senate failed to conduct another vote within the period that was set out in para 1(b) of the judgment under CCZ 4/20. As a result, the first and second respondents and the Speaker of the National Assembly implored this Court, by application, to extend the period that had been set out for conducting a second vote under case number CCZ 11/20. The application was heard on 10 November 2020 and judgment was reserved.

[8] On 25 February 2021, judgment was delivered in that application as the judgment of *President of the Senate & Ors v Gonese & Ors* CCZ 1/21 – hereafter referred to as “CCZ 1/21”. The order passed in CCZ 1/21 reads:

“Accordingly, I make the following order:

1. The application is granted.
2. The period referred to in para (b) of the order handed down on 31 March 2020 is extended by a further ninety days from the date of this order.
3. Each party shall bear its own costs.”

[9] I digress briefly to foreshadow that I will advert to more comprehensively later in this judgment. In view of the above order, the Senate conducted another vote on the Constitutional Amendment (No. 1) Bill of 2017. On 4 May 2021, it passed the Constitutional Amendment Bill (No. 1).

[10] The applicant contends that the passage of the Bill in the manner aforesaid on 4 May 2021 is unconstitutional. He principally considers the second and third respondents to have failed to fulfil constitutional obligations in the passage of the Bill contrary to the provisions of s 147 of the Constitution. The applicant also considers the impugned conduct of the respondents to have been accentuated by the simultaneous violation of his rights under s 56(1) of the Constitution. However, this last contention does not appear to have been persisted in with much vigour and conviction considering that the applicant stated unambiguously that his application was solely in terms of s 167(2)(d). In fact, the *amicus* considers this as applicant’s “fringe” contention. At any rate, in my view, there would be no *need* to invoke s 56(1) where the cause of action is one of failure to fulfil a constitutional obligation as that situation is specifically provided for *sufficiently* in s 167(2)(d), and requires no additional colouring through such invocation. *Compare, Central African Building Society v Stone & Ors* SC15/21

[11] All the respondents opposed the application. They deny that their conduct in the passage of Constitutional Amendment (No. 1) Bill of 2017 was in violation of s 147 of the Constitution. Instead, they contend that their actions are predicated on a valid order of this Court handed down under CCZ 4/20. They also maintain that none of the applicant's rights was violated by their conduct.

PROCEEDINGS ON 16 FEBRUARY 2022

[12] The first hearing of this application was conducted on 16 February 2022. Mr *Biti*, for the applicant, moved the Court to grant him a postponement so that he could respond to the *amicus curiae's* heads of argument. He submitted that the *amicus curiae's* heads of argument were unsympathetic towards the applicant and that the *amicus curiae* raised new issues in relation to the interpretation of s 56 of the Constitution.

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[13] Mr *Tundu*, for the first and second respondents, opposed the application for a postponement on the basis that the issues raised by the *amicus* had already been canvassed by the first and second respondents. On the other hand, Adv. *Magwaliba*, for the third respondent, had no objection to this application. He submitted that the applicant could not be denied the opportunity to respond to the *amicus curiae's* heads of argument.

[14] Following exchanges with all counsel, the Court then ordered by consent that the applicant was to file and serve heads of argument in response to the *amicus curiae's* heads of argument by no later than 4 pm on 25 February 2022. And further that, the respondents could, if so inclined, file and serve heads of

argument in response to the applicant’s heads of argument by no later than 4 pm on 4 March 2022. The matter was postponed to 15 March 2022

[15] In the applicant’s heads of argument filed pursuant to our order on 16 February 2022, Mr *Biti* made submissions on the role of an *amicus curiae*. On the subsequent hearing, Mr *Biti* indicated that he was persisting with his point on the impropriety of, and objection to, the *amicus*’ heads of argument.

[16] Therefore, the question of the propriety of the *amicus curiae*’s heads of argument confronts us for determination. In the applicant’s heads of argument filed on 25 February 2022, Mr *Biti* submitted that the *amicus curiae* took a side. In short, he was biased. He further contended:

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“this *amicus* has chosen to bolster a secretarian (*sic*) and partisan interest and not the interests of justice in the instant matter (of) whether or not the authorities, that is the president and parliament, breached s 147 of the constitution.”

[17] Proceeding from the above-cited contention, the *amicus*’ heads of argument were described as “operating (as) a stray bullet”, and Mr *Biti* submitted that was unacceptable and the *amicus* ought to have been replaced with “someone more professional and non-partisan”. In support of his contentions, Mr *Biti* drew our attention to a passage by I. Currie and J. De Waal in *The Bill of Rights Handbook 1st Edition*, (Cape Town: Juta & Company, 2013).

[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:

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“(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.”

[21] An *amicus curiae* is, as of right, entitled to raise new contentions which he considers to be useful to the Court. In *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 27, para. 63, the South African Constitutional Court observed that *amici* assist the Court “by furnishing information or argument regarding questions of law or fact”. Further, in *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign & Ors* 2002 (5) SA 713 (CC) at para. 5 it was observed:

“The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. ... an *amicus*

has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court.”

[22] An *amicus curiae* appearing upon invitation from the Court has a unique responsibility that is distinct from that of *amici curiae* appearing with the leave of the Court or appearing at the request of the Court to represent an unrepresented party or interest. He or she is obliged to advance submissions that s\he considers useful to the Court with objectivity. He or she must advance a rational, legal and logical argument of the position s\he urges the Court to reach.

[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.

[24] Having said this, I find nothing in the *amicus curiae*’s heads of argument that runs contrary to his role in this matter. The *amicus* advanced written submissions on the finality of judgments of this Court, the *locus standi* of the applicant and the competency of the draft relief among other things. He also considered whether or not the applicant’s rights under s 56(1) of the Constitution were violated. All these submissions were based on the pleadings and written contentions that had

already been filed. The *amicus* was at large to identify any procedural defect in the application that would have precluded the Court from determining the application because a decision that is based on invalid process cannot stand.

[25] For those with a literary bent, the court of justice in William Shakespeare’s play, *The Merchant of Venice*, eagerly awaits the arrival of the invited *amicus*, *Bellarion*, “a learned doctor”, but he is indisposed. However, in his place, the court “courteously” welcomes *Bellarion*’s recommended substitute, youthful yet reputedly equally knowledgeable *Balthasar*, who happens to be *Portia* in disguise. Thus, the principles of appointment of *amici*, their roles in assisting the court and their substitution where necessary, have stood the test of time – hence their reflection in popular culture as graphically demonstrated in this play, with stunning accuracy in portrayal of court practices, literary licence aside.

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[26] Accordingly, I will dismiss Mr *Biti*’s objections to the *amicus*. He could not impugn the *amicus*’ sincerity simply because the *amicus* reached a conclusion that was contrary to his client’s interests.

APPLICANT’S SUBMISSIONS

[27] On 15 March, the parties then advanced their oral submissions in respect of the application. Mr *Biti*, for the applicant, stated that the critical issue for determination was whether the passage of Constitution of Zimbabwe Amendment (No. 1) Act of 2017 on 4 May 2021 breached s 147 of the Constitution. To him, the crucial thing was to assess the status of the Bill as of 29 July 2018, which is the date on which Parliament stood dissolved. The date the judgment of this Court in *Gonese & Anor v Parliament of Zimbabwe & Ors* CCZ 4/20 was delivered was

immaterial. Citing decisions of this Court and the Supreme Court, Mr *Biti* stated that the order of this Court in CCZ 4/20 merely confirmed the invalidity of Constitution of Zimbabwe Amendment (No. 1) Act, which occurred in August 2017 when that Act was purportedly passed. It was, therefore, not a licence for the Senate to violate s 147. Accordingly, he submitted that Constitution Amendment (No. 1) Bill lapsed when Parliament was dissolved on 29 July 2018.

[28] In respect of the allegations that the applicant's constitutional rights were violated by the conduct of the respondents, Mr *Biti* submitted that s 56(1) of the Constitution does not qualify the nature of protection afforded by the section. In his view, the subsection had the same meaning as the equivalent provision under the previous Constitution of Zimbabwe.

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[29] Regarding the relief sought by the applicant, Mr *Biti* emphasised that the applicant simply sought a declaration that the passage of Constitution of Zimbabwe Amendment (No. 1) Act on 5 May 2021 was in breach of s 147 of the Constitution. He formally abandoned the second paragraph of the applicant's draft order set out above. He added that should the Court grant the declaratory relief sought, the order should not have retrospective effect. Mr *Biti* also abandoned his preliminary challenges to the authorities of the deponents to the first and second as well as the third respondent's opposing affidavits.

RESPONDENTS' CASE BEFORE THIS COURT

[30] Mr *Tundu* for the first and second respondents indicated that he was persisting with the preliminary points that he raised. Firstly, he submitted that the Court had

no jurisdiction as the applicant had improperly joined the President of the Senate to the President and Parliament in an application under s 167(2)(d) contrary to the judgment of this Court in *Mliswa v Parliament of the Republic of Zimbabwe* CCZ 2/21. Secondly, he submitted that the applicant had no cause of action because the conduct of the respondents was in compliance with an order of this Court. On the merits, Mr *Tundu* stated that the retrospective application of the order passed in CCZ 4/20 was limited. Further, the Court had the power to limit the retrospective application in terms of s 175(6)(b) of the Constitution. Therefore, the provisions of s 147 could not have been breached, so his submissions went.

[31] Adv. *Magwaliba* for the third respondent also put up ardent opposition to the application. Essentially, he took three points in response to Mr *Biti*'s submissions. He prefaced those points by stating that there are three broad steps in the enactment of a law. These are:

- i. The consideration of a Bill by the National Assembly;
- ii. The consideration of the same Bill by the Senate;
- iii. The President's assent to the Bill as the last step.

[32] Adv. *Magwaliba*'s first point was that the Presidential assent to the Bill in 2017 was not set aside by this Court. Therefore, there was no failure by the third respondent to "re-gazette" the Bill as the applicant had pleaded. His second point was that when Parliament was dissolved in July 2018, there was no Constitution Amendment (No. 1) Bill. It had become an Act. This meant that the declaration by this Court could not have affected the status of that Act as it had limited retrospective effect. Adv. *Magwaliba*'s third point was that s 147 of the

Constitution does not impose an obligation on the third respondent. In the absence of such, there cannot be a constitutional obligation that the third respondent breached.

[33] All the respondents prayed for the dismissal of the application.

AMICUS CURIAE'S SUBMISSIONS

[34] *Mr Zhuwarara*, the *amicus curiae*, made submissions last. His first submission was that the moment the applicant adverted to violations in terms of s 85 of the Constitution, he was obliged to allege that a fundamental right was infringed and to seek relief that is consistent with Chapter 4 of the Constitution. He further submitted that the applicant failed to base his relief on Chapter 4 of the Constitution and that ought to be the end of the matter. **Judgment No. CCZ 2/23**
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[35] On the merits of the application, the *amicus* submitted that judgments of the Constitutional Court are final. On this basis, the judgment in CCZ 4/20 could not be revisited. While agreeing that the Constitutional Court cannot pass unconstitutional judgments, he stated that this was not the situation *in casu*.

[36] Proceeding from this point, he added that in terms of s 175(6)(b), this Court passes corrective orders. For this reason, the order of this Court and the subsequent passage of the Bill by the Senate did not violate the Constitution. Mr *Zhuwarara* concluded his submissions by stating that the applicant's rights in s 56 of the Constitution could not have been violated because the applicant failed to identify a similarly positioned person who was afforded a favour.

PRELIMINARY OBJECTIONS

[37] The respondents raised several preliminary objections in these proceedings. However, in their oral submissions they emphasised and focused only on the following:

- a. That there is no cause of action against the respondents.
- b. That it was improper to cite the first respondent in an application under s 167(2)(d).

WHETHER THERE IS A CAUSE OF ACTION AGAINST THE RESPONDENTS?

[38] While Mr *Tundu* is of the view that there cannot be any perceivable cause of action against the respondents as they were acting in accordance with an order of this Court, Adv. *Magwaliba* considers the cause of action to be unclear.

[39] Without exception, the Rules require an applicant to set out all essential averments that are necessary to clarify and motivate the cause of action. See r 14(4)(d). See also *Apex Holdings (Pvt) Ltd (in liquidation) & Anor v Venetian Blinds Specialists* CCZ 11/19 at 8. This rule is in line with the salutary principle of pleading, which has become the gold standard in our jurisdiction, that an application stands or falls on the founding affidavit. See *Kufa & Anor v President of the Republic of Zimbabwe & Ors* CCZ 22/17 at 14, para. 34; *Chani v Justice Hlekani Mwayera & Ors* CCZ 2/20 at 6; *Chironga & Anor v Minister of Justice, Legal & Parliamentary Affairs* CCZ 14/20 at 8; and *Mpofu v ZERA & Ors* CCZ 13/20 at 3.

[40] A failure to set out the cause of action entitles a respondent to seek the dismissal of an application as of right. See Herbstein and Van Winsen, “*The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa*” 5th Ed. Vol 1 at 439.

[41] The requirements of an application made in terms s 167(2)(d) are that one must identify a functionary [the President/Parliament] and a constitutional obligation that the functionary is alleged to have failed to fulfil. See *Chirambwe v President of the Republic of Zimbabwe & Ors* CCZ–4–21 at p 39, para 86 and p 44, para 98 and *Mliswa v Parliament of the Republic of Zimbabwe* CCZ–2–21 at p 8.

[42] It automatically follows that the applicant cannot sustain a cause of action against the first respondent because the first respondent is not a functionary against whom an application in terms s 167(2)(d) can be made. That, in the case of **Judgment No. CCZ 2/23 Constitutional Application No. CCZ 08/21** the first respondent stands to be struck off without further ado.

[43] In respect of the second and third respondents, I am inclined to hold that there is a cause of action against those functionaries. In his founding affidavit, the applicant does identify the second and third respondents as functionaries upon whom constitutional obligations rest. He also identifies the constitutional obligations that Parliament and the President failed to fulfil. Against the President, he states that failure to gazette Constitutional Amendment Bill (No. 1) of 2017 in terms of s 131(6) of the Constitution is an illegality. Against Parliament, he essentially alleges that it failed to respect the Constitution by conducting a vote on a Bill that had lapsed contrary to s 147.

[44] However, the truthfulness or otherwise of the applicant’s allegations against the second and third respondents stands to be determined in the process of the assessment of the merits of his application. Accordingly, I am satisfied that there is a cause of action against the second and third respondents in so far as the application is based on s 167(2)(d) of the Constitution.

ISSUE ARISING FOR DETERMINATION

[45] The foremost issue arising for determination is whether or not the Constitution of Zimbabwe Amendment (No. 1) Act, 2017 was an Act of Parliament when Parliament was dissolved in 2018. In resolving this issue, one must accept that even though the applicant abandoned the part of his draft relief that would have nullified the decision of this Court in CCZ–4–20, which abandonment suggests that he no longer wishes to impugn that decision, the determination of this issue is inexorably tied to it. By no stretch of ingenuity can the applicant circumvent that decision in order to succeed in this application. Thus, the resolution of the main issue, perforce, demands one to also relate to the order in CCZ 4/20, in my view. All the applicant’s other contentions and claims are ultimately premised on this plank; whether it is the President’s alleged failure to “re-gazette” the “Bill” or Parliament voting on a “lapsed Bill” or the alleged failure by both Parliament and the President to discharge constitutional obligations ostensibly imposed by s 147.

[46] It is perhaps opportune at this juncture to dispose of the s 147 contentions. I am in agreement with the submissions of the respondents that s 147 does not impose any obligations upon Parliament or the President. It only provides for the fate of Bills, motions, petitions and other business which might be pending before the dissolution of Parliament. It does not require Parliament or the President to do

anything. It takes effect by operation of law. It is thus applicable to any person, be it a Minister, President, member of Parliament, member of the general public who might have business or a petition pending before Parliament. It simply declares that such business lapses, without imposing any obligation on anyone.

[47] But even more significantly, to found exclusive jurisdiction in terms of s 167(2)(d), the conduct complained of must not only be clearly identified but it must be a duty specifically imposed on Parliament or the President. See, for example, *Von Abo v Government of the Republic of South Africa* 2009(2) SA526. Furthermore, the obligation concerned must not be one shared by various other stakeholders such as is apparent in s 147, if at all that section imposes any duties, which it has been shown above it does not. In *Economic Freedom Fighters v Speaker of the National Assembly & Ors* 2016 ZACC11, the South African Constitutional Court stated:

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“An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation shared with other organs of State will always fail the section 167(4)(e) test...” (*equivalent to our s 167(2)(d)*)

In this case, the applicant has attacked Parliament, the President and even this Court for allegedly breaching s 147 of the Constitution. He cannot therefore invoke s 167(2)(d) in a matter impugning the conduct of the legislature, the executive and even the judiciary for breach of s 147.

**WHETHER THE CONSTITUTIONAL AMENDMENT BILL (NO. 1), 2017 HAD
BECOME AN ACT OF PARLIAMENT WHEN PARLIAMENT WAS DISSOLVED?**

[48] The applicant argues that Constitutional Amendment Bill (No. 1) of 2017 lapsed upon the dissolution of Parliament in July 2018, and anchors this contention on s 147 of the Constitution. That section reads:

“147 Lapsing of Bills, motions, petitions and other business on dissolution of Parliament

On the dissolution of Parliament, all proceedings pending at the time are terminated, and every Bill, motion, petition and other business lapses.”

[49] Any constitutional or statutory provision is dependent on the existence of specific juridical facts before it can come into operation. For s 147 to be invoked and set off any particular legal effect on Bills, specific juridical facts must be found to exist. These are:

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- Parliament must have been dissolved.
- There must have been proceedings before it. In its widest sense, the term ‘proceedings’ includes matters connected with, or ancillary to, the formal transaction of business in Parliament. *See Smith v Mutasa* 1989 (3) ZLR 183 (S) at 199, and also Erskine May’s *Treatise on the Law, Privileges and Usages of Parliament*, 25th Ed, 2019 at para 13.12.
- The proceedings must have been pending at the time of dissolution.
- There must have been a Bill. Section 332 of the Constitution states that “Constitutional Bill” means a Bill which, if enacted, would have the effect of amending any of the provisions of the Constitution.

[50] The status of the Bill in question must first be assessed at the time Parliament was dissolved. This is the only way that one can tell whether the Bill lapsed when Parliament was dissolved.

[51] Turning to the necessary facts which trigger the application of s 147 of the Constitution, all the parties are in agreement that Parliament was dissolved. However, I find that there were no pending proceedings in respect of Constitutional Amendment Bill (No. 1) of 2017 at the time of dissolution nor was that Bill still in existence as such. That Bill had become law – Constitution of Zimbabwe Amendment (No. 1) Act (Act 10 of 2017). The applicant accepts this fact. The respondents also accept that the Bill became law on 7 September 2017 prior to the dissolution of Parliament.

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[52] In the absence of the necessary facts envisaged by s 147, Constitutional Amendment Bill (No. 1) could not have lapsed since it was no longer pending. There also could not have been any proceedings in respect of that Bill. Suffice to mention that the question of the validity of the resultant Constitution of Zimbabwe Amendment (No. 1) Act does not arise at the point of dissolution of Parliament. This is because, upon the dissolution of Parliament, that Act was presumed to be constitutional and valid. See *In Re: Prosecutor-General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* 2017 (1) ZLR (CC) at 113 – 114.

[53] It is common cause that Constitution of Zimbabwe Amendment (No. 1) Act was subsequently nullified by this Court on 30 March 2020. That order obviously

does bear upon the status of the Bill at the time Parliament was dissolved. Therefore, one must look at the terms of the order in CCZ 4/20 to find out whether that order had the effect of returning the Bill to its status *quo ante* rendering it susceptible to the provisions of s 147.

THE IMPORT OF THE ORDER IN CCZ 4/20

[54] Until the passage of the order in CCZ 4/20, no person could have disregarded Constitution of Zimbabwe Amendment (No. 1) of 2017. That Act, as already stated, was presumed to be constitutional and valid.

[55] Pertinently, after declaring the passage of Constitutional Amendment Bill (No. 1) of 2017 to have been inconsistent with s 328(5) of the Constitution, this Court went further to set out the point at which the declaration of invalidity would take effect:

“The declaration of invalidity shall have effect from the date of this order but is suspended for a period of one hundred and eighty days, subject to the provisions of paragraph 1(b).”

[56] The above excerpt from the order in CCZ 4/20 entertains one interpretation only. The invalidity of the Constitution of Zimbabwe Amendment (No.1) Act took effect from the date of the order – 31 March 2020. Thus, despite the subsequent declaration of invalidity, the Bill was not susceptible to the effect of s 147 on 29 July 2018 because it was an Act at that date. Its invalidity takes effect in accordance with the order of this Court above.

[57] However, the constitutionality of the above order is in fact what the applicant is challenging. But that order was made in terms of a provision of our Constitution. Section 175(6) of the Constitution provides for the powers of courts to make orders in constitutional matters. It reads:

“(6) When deciding a constitutional matter within its jurisdiction a court may —
(a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;
(b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.”

[58] On a close reading of the above provision, one notes that a court may only declare a law or conduct to be invalid to the extent of its inconsistency with the Constitution, and no more. A court must preserve all the constitutional parts of any law or conduct and only cut out the unconstitutional part.

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[59] By way of analogy, and without restricting or qualifying the import of a court’s power to declare a law or conduct to be inconsistent with the Constitution to the extent of its inconsistency, s 175(6)(a) is comparable to the power of severance accorded to courts in contract law. This is known as the blue pencil rule.

[60] The common law blue pencil rule allows a court to sever an unenforceable portion of a contract so as to preserve the remaining enforceable portion of that contract. See *TBIC Investments (Pvt) Ltd & Anor v Mangenje & Ors* 2018 (1) ZLR 137 (S) at 140G. The purpose of the blue pencil rule is to ensure that the valid portions of a contract that the parties sought to have enforced are not

invalidated by reason of other void portions of the contract. So too are the powers of a court under s 175(6)(a) intended to ensure that this Court saves the portions of laws and conduct that were validly enacted or performed.

[61] Mr *Zhuwarara*, as *amicus curiae*, correctly submitted that this Court passes corrective orders under s 175(6)(b). As already noted, the section does give the Court discretion, where it is just and equitable, to suspend a declaration of invalidity conditionally or unconditionally for any period to allow the competent authority to correct the defect.

[62] The corrective or remedial power exercised by the Court is not incompatible with the object of s 147 nor any other provision of the Constitution at large. It permits this Court to curtail the retrospective effect of an order of invalidity as it did in **Judgment No. CCZ 3/23** **Constitutional Application No. CCZ 08/21** CCZ 4/20. An order made in terms of s 175(6)(b) is by the Constitution's own architecture, constitutional — provided that it is just and equitable.

[63] The formative opinion on the utility of s 175(6)(b) was set out in *M & Anor v Minister of Justice, Legal & Parliamentary Affairs* 2016 (2) ZLR 45 (CC); CCZ 12/15 at p 56. This Court held that an exercise of the power bestowed by s 175(6)(b) is done with the appreciation of “the immense disruption that a retrospective declaration of invalidity may cause on the persons who conducted themselves on the basis that the legislation was valid”.

[64] I note that the purpose of s 175(6)(b) of our Constitution is remarkably similar to s 172(1)(b) of the South African Constitution, even though the two provisions are not worded in the exactly the same manner. The South African equivalent reads as follows:

“Powers of courts in constitutional matters

172. (1) When deciding a constitutional matter within its power, a court—
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity;
 - and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[65] In this light, Madlanga J, writing for the majority in the South African case of **Judgment No. CCZ 2/23** *Corruption Watch NPC & Ors v President of the Republic of South Africa* [2018] ZACC 23, at 33, par. 67 concluded:

“There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make any order that is just and equitable. The operative word “any” is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.”

Dealing with the effect of Article 25(1)(a) of the Namibian Constitution which is the equivalent of our s 175(6)(b), DAMASEB, DCJ, in *CRAN V Telecom Namibia Ltd & Ors* NASC 18/2018 concluded that the article in question:

“...empowers the court to suspend the order of invalidity to afford the legislature the opportunity to correct the defect identified by the court. During the period of suspension, the implicated provision continues to have the full force of the law.”

[66] Given the wide jurisdiction that the Court has in making orders in terms of s 175(6)(b), it has invoked its power in several instances other than in CCZ 4/20. For instance, in *Democratic Assembly for Restoration and Empowerment & Ors v Saunyama & Ors* CCZ 9/18 at 17, the Court suspended the order of invalidity of a law to enable the competent authorities to attend to the defects, while in *Zimbabwe Law Officers Association & Anor v National Prosecuting Authority & Ors* CCZ 1/19, the Court suspended conditionally its order declaring the engagement of members of security services in the National Prosecuting Authority as unconstitutional to avoid paralysing its operations.

[67] The progressive implementation of the rule of law would be greatly undermined without s 175(6) of the Constitution. When one considers the endless list of circumstances over which declarations of unconstitutionality could possibly be passed, the potentially disruptive effects of such declarations can become overwhelming. Acts that were believed to be legal today would suddenly be illegal and invalidated. People who had legitimately enjoyed certain rights could suddenly lose them. Those who were in credit before a declaration of invalidity could suddenly become debtors. Couples who were legally married to each other for years would suddenly be deemed to be living 'in sin'. Thus, s 175(6) is inserted into our constitution to ensure just and orderly enforcement of the Constitution. It prevents the winding back of hands of time beyond our capacity to cope with the retrospective effects of declarations of unconstitutionality.

[68] The Canadian case of *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 SCR 721 exemplifies the far-reaching effects that orders of invalidity carry. The brief facts of that case are that the Governor in Council referred

questions to the Supreme Court of Canada relating to language rights under the Manitoba Act, 1870 and the Constitutional Act, 1867. The two Acts provided that the use of both the English and French languages in the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba was mandatory.

[69] The Supreme Court of Canada found that statutes that were not printed and published in both the English and French languages were invalid by reason of s 23 of the *Manitoba Act, 1870*. The result of the finding of invalidity was that statutes that were enacted in close to a century prior to the declaration were invalid. Consequently, the Court deemed them temporarily valid. Relying on the *de facto* doctrine – being a doctrine of necessity – the Court held at paras 80ff as follows:

“The application of the *de facto* doctrine is, however, limited to validating acts which are taken under invalid authority: it does not validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconstitutional laws. It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.”

[70] Therefore, in light of the above authorities and upon examination on the powers of this Court in terms of s 175(6), I am both compelled and bound, to restate without saying anything further that the order in CCZ 4/20 was validly passed as it accords with justice and equity.

FINALITY OF CCZ 4/20

[71] The *amicus curiae* advanced submissions on the finality of the order in CCZ 4/20 that this Court is mandated to take into account. Both the statutes governing this Court’s operations and judicial precedent confirm that our decisions are final.

[72] First is s 167(1) of the Constitution, which sets the Constitutional Court as the highest and final court in constitutional matters. Then, s 5(3) of the Constitutional Court Act [*Chapter 7:22*] entrenches the finality of our decisions. It provides:

“(3) Subject to section 22(2), there shall be no appeal from any judgment of the Court.

(4) The Court shall not be bound by any of its own judgments, rulings or opinions nor by the judgments or opinions of its predecessors.”

[73] I draw attention to the apposite remarks of MAKARAU JCC in *President of the Senate & Ors v Gonese & Ors* CCZ–1–21. She stated the following:

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“A decision of the Constitutional Court on a constitutional matter is final. No court has power to alter the decision of the Court. Only this Court can depart from its previous decisions, rulings or opinions. I venture to add for emphasis that only this Court, **in a future and appropriate constitutional matter**, may overrule or depart from its previous order. This application is not such a case where the court can overrule or depart from its previous order.”

[74] The position reached in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor* CCZ 11/18 at 23 is relevant to the facts of this case. A decision is “correct because it is final. It is not final because it is correct”. See also *Williams & Anor v Msipha NO & Ors* 2010 (2) ZLR 552 (S) at 567C.

[75] The applicant is mistaken that the correctness of the decision in CCZ 4/20 is determinative of its finality. A decision is final because the law says it is final. The subjective views of a litigant or any other person on the correctness or

otherwise of a decision are irrelevant in determining the finality of a decision. For this reason, the courts in *Lytton Investments (Pvt) Ltd* and *Williams (supra)* concluded that where a decision is final, it cannot be said to be incorrect because only an appeal court has the right to say a decision is correct or not.

[76] However, this Court may depart from its reasoning in a subsequent case. This is why the Court is not bound by any of its own judgments, rulings or opinions in terms of s 5(4) of the Constitutional Court Act. The possibility that this Court may depart from reasoning or a decision reached before does not entitle a litigant to seek to rely on the purportedly correct position on the basis that the decision was incorrect. As already stated, the finality of a previous decision is not conditional on its correctness. Therefore, once a decision has been passed it is final. The litigants and the Court must live with it. **Judgment No. CCZ 12/21 by Constitutional Application No. CCZ 08/21** subsequent challenge although its reasoning may later be departed from. The principle of *stare decisis et non quieta movere*, it would seem, operates as strongly horizontally as it does vertically.

[77] It may be tempting to believe that the conclusion I make in this case is at variance with the decision that was reached in CCZ 1/21. In that case, all the Judges agree that the judgment in CCZ 4/20 was final. They also agree that it could not be impugned. There is, however, a difference of dispute between the instant case and the case in CCZ 1/21. In CCZ 1/21, the preliminary point raised necessitated a determination of whether or not it was competent for this Court to extend the period within which the Senate could conduct another vote on the Bill. The Court had to determine whether the Bill lapsed in September 2020 after the expiry of

the 180 days that had been afforded to the Senate to conduct another vote. Quite differently, in *casu* the dispute relates to whether or not the Bill lapsed upon the dissolution of Parliament in July 2018. Thus, the judgment in CCZ 1/21 actually affirms the position reached herein that the question of whether the Bill lapsed in 2018 is beyond the competency of this Court to enquire into it since the judgment in CCZ 4/20 is final.

WHETHER THE APPLICANT’S RIGHTS TO EQUAL PROTECTION & BENEFIT OF THE LAW WERE INFRINGED?

[78] As a way of bolstering his principal claim under s 167 but not as a separate cause of action, the applicant alleged that the various acts of commission and omission by the respondents, violated his rights under s 56(1) of the Constitution. Mr *Biti* insisted on this point of bolstering his argument in his oral submissions. The respondents deny that either this Court or any one of them violated the cited right. **Judgment No. CCZ 2/23 Constitutional Application No. CCZ 08/21.**

[79] It is trite that the test for determining whether a law or conduct infringes a fundamental right is to consider the effect of the law or conduct on the fundamental right. See *D.A.R.E & Ors v Saunyama N. O. & Ors* CCZ 9/18 at 8 and *Retrofit (Pvt) Ltd v PTC and Anor* 1995 (2) ZLR 199(S) at 218

[80] The applicant alleges that his right to equal protection and benefit of the law was violated. In terms of s 56(1):

“All persons are equal before the law and have a right to equal protection and benefit of the law.”

[81] The import of the above provision is, *inter alia*, the following:

“It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected.”

See *Nkomo v Minister of Local, Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC) at 118H.

[82] In the case of *Greatermans Stores (1979) (Pvt) Ltd & Anor v Minister of Public Service, Labour and Social Welfare & Anor* 2018 (1) ZLR 335 (CC) at 348D, this Court held that the purpose of s 56(1) is “to ensure that those in similar circumstances and conditions who are the subjects of the legislation are treated equally, both in the privileges and in the liabilities imposed.”

[83] More recently, in *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 7/21 at 53–54, this Court clarified the meaning of the adjective “equal” as used in s 56(1). It held thus:

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“The use of the word “equal” does indeed qualify the protection and benefit of the law, but it does so by restricting rather than broadening the scope of s 56(1). What this provision means is that all persons in a similar position must be afforded equality before the law and the same protection and benefit of the law.”

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[84] According to the above body of case law, a person alleging a violation of s 56(1) must demonstrate that he was denied the protection of the law, while others similarly positioned were afforded such protection. Put differently, he must show that the law in question operated to discriminate against him in favour of others in the same or similar position. See the *Mupungu* case *op. cit.* In other words, the general right to protection of the law *simpliciter* no longer exists or is not to be found in s 56(1). Thus, in *Nkomo supra*, it was stated:

“The applicant has made no allegation of unequal treatment or differentiation. He has not shown that he was denied protection of the law while others in his

position have been afforded such protection. He has presented the Court with no evidence that he has been denied equal protection and benefit of the law.”

[85] One cannot, with the greatest respect, help but remark in passing that if a narrow interpretation is given to s 56(1) as a general anti-discrimination provision, then it will appear to be a replication of subsection (3) which is a comprehensive anti-discrimination provision. Given that in the former constitution a general protection of the law provision existed together with a narrow anti-discrimination clause, it would appear strange that the current constitution would broaden the specific anti-discrimination provision (ss3), back it up with a general anti-discrimination clause (ss1) and discard the general protection and benefit of the law!

[86] In the instant application, the applicant does not cite the law or circumstances upon which he was entitled to protection. He merely says in his founding papers that “the actions of the respondents...denied me the equal protection and benefit of the law as guaranteed in s 56(1)”. However, it has been shown above already that the applicants could not possibly violate this right by obeying a court order or by allegedly failing to fulfil a constitutional obligation ostensibly imposed by s 147 as this section is merely declaratory of the fate of pending business upon dissolution of the legislature. It imposes no exclusive obligation on Parliament or the President. Had there been any discernible or demonstrable lapse in fulfilling a constitutional obligation, the applicant would have had a speedy remedy in terms of s 167(2)(b) and it would have been completely unnecessary to invoke s 56(1), all be it just to embellish the claim. As a result, the applicant’s contention fails on the first hurdle and there is no need to enquire into whether he managed to allege,

as precedent currently makes it mandatory, that another person in a similar position as himself was afforded the protection or benefit of the law.

[87] Therefore, I am unable to find that the applicant's rights in terms of s 56(1) were violated at all. However, Mr *Biti*'s contention that the right to equal protection and benefit of the law under the current Constitution is broader or equivalent to the right under the former Constitution, may well have merit, and the Court, in a proper case, may have the opportunity to revisit and interrogate this issue further. For, one may ask, how can a right such as the general protection and benefit of the law, a right so notorious and screamingly loud in our jurisprudence, simply disappear without as much as a whimper? Some have suggested that it has diffused into the expansive Bill of Rights that the current constitution boasts of, but without pointing out the exact nooks and crannies wherein it now snugly resides. Could it be that this right is hiding in plain sight under s 56(1); that this right, like a binary system of stars, consists of two or even more rights closely held together by gravitational attraction and orbiting so tightly that from a distance it appears as just one right, one star? Sooner, rather than later, this Court, in my respectful view, must find a proper home for this right and stop its ghostlike wandering or formerly declare its existence or reincarnation in terms of s 47 of the Constitution, which unambiguously states:

Section 47 Chapter 4 does not preclude existence of other rights

This Chapter does not preclude the existence of other rights or freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution.

COSTS

[88] All the parties in the instant application prayed for costs to be awarded in the event of their respective successes. Rule 55(1) of the Rules codifies this Court’s general approach to costs. It provides as follows:

“(1) Generally no costs are awarded in a constitutional matter: Provided that, in an appropriate case, the Court or the Judge, as the case may be, may make such order of costs as it or he or she deems fit.”

[89] Thus, r 55(1) is not immutable. It may be departed from where the circumstances of the case warrant a departure. It is broader in scope than r 55(5) which further underlines and particularises the exercise of this exception by focusing on the conduct of the parties or their legal practitioners. It reads:

“(5) This rule shall not derogate from the power of the court or a Judge to make any other order to or give any direction, whether as to costs or otherwise, arising out of the conduct of a party or legal practitioner.”

[90] In the case of *Liberal Democrats & Ors v President of the Republic of Zimbabwe & Ors* CCZ 7/18 at 26, unwarranted attacks made on other litigants, witnesses or judicial officials were considered as an exceptional circumstance to the general rule on costs. The rationale for awarding costs against a litigant who employs scurrilous language was stated in *Moyo & Ors v Zvoma NO & Anor* 2011 (1) ZLR 345 (S), wherein MALABA DCJ (as he then was) stated that a court may decline to award costs where a litigant used language which:

“offended its sense of fairness and justice for the Court to be put in a position in which it had to read through all the papers containing some of the impolite and discourteous language.”

See also *Attorney-General v Siwela* S 20/17 at 13–14, where CHIDYAUSIKU CJ followed the approach laid down in the *Moyo* case *supra*.

[91] I also find the remarks of the learned former Chief Justice GUBBAY CJ in *Chivinge v Mushayakarara* 1998 (2) ZLR 500 (S) at 507 to be apt to reproduce her in *extenso*:

“Before concluding I feel obliged to express my strong disapproval of the many unnecessarily offensive and contemptuous remarks made of NSSA and its personnel in the sets of affidavits deposed to by the appellant in both proceedings. These affidavits were drawn for the appellant by his legal practitioner, Mr *Biti*, who happened to represent the appellant before the staff appeals committee of NSSA on 23 October 1996.

The affidavits make reference to a “kangaroo internal appeals committee”; “a recent kangaroo meeting between the so-called board of appeals”; and to one of NSSA’s officers being “tainted with turpitude”. NSSA is accused of “treating the labour laws of the country with contempt” and, in another instance, of “pure ignorance of the labour laws of the country”. Some of the averments made on NSSA’s behalf are termed “spurious”, “ridiculous”, “ludicrous”, “preposterous” and “absurd”. Finally, there is the implied aspersion that in seeking to terminate the appellant’s employment on notice, NSSA did not adhere to “the basic values of morality, decency and good faith”.

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For a legal practitioner to put such disparaging and insulting language in the mouth of a deponent is improper and reflects a total lack of restraint. It sullies the reputation for propriety and dignity that the legal profession in this country is so anxious to preserve.”

[92] In his founding affidavit, the applicant states that in CCZ 4/20, this Court gave Senate a “generous backdoor relief”. The third respondent rightly characterises that statement as casting “aspersions of improper conduct on [this] Honourable Court”. The applicant further refers to the court as “breaching its own written standards”. As if that was not scandalous enough, in his answering affidavit the applicant goes on overdrive describing the Judiciary as the “gatecrasher” of constitutionalism and the Constitution. Furthermore, in his heads of argument in response to the *amicus*’ heads of argument, Mr *Biti* describes the *amicus* as having clearly taken “a dangerous, toxic and subjective side”.

[93] The applicant clearly employs invective language with reckless abandon. That is uncouth. Such language undermines the objectivity of the parties in addressing the constitutional issues. The applicant's papers were done by his legal practitioner, Mr *Biti*. As GUBBAY CJ stated in the *Chivinge* case *supra*, it is improper for a legal practitioner to put such disparaging and insulting language into the mouth of a deponent and reflects a total lack of restraint.

[94] Accordingly, I hold that the applicant's language necessitates a departure from the general rule of costs in constitutional matters. Therefore, I will award costs against the applicant.

DISPOSITION

[95] The applicant has failed to satisfy this Court that there was indeed a failure by either the second or the third respondent to fulfil Constitutional Application No. CCZ 08/21. **Judgment No. CCZ 2/23** The respondents could not have violated s 147 of the Constitution because the Bill never lapsed. Furthermore, by reason of the finality of the order in CCZ 4/20, it is now beyond impugment.

[96] Equally, the order in CCZ 4/20 was limited to the declaration of invalidity that was stated. This Court only invalidated the passage of the Bill by the Senate. It did not extend the invalidity to the gazetting of the same Bill by the third respondent. Thus, there was no need for the Bill to be "regazetted" after the Senate had conducted another vote on it.

[97] For completeness, I also reject the applicant's contentions that his right in s 56(1) of the constitution was violated. On the issue of costs, I have concluded that the

invective language used by the applicant and his legal practitioner calls for an adverse order of costs.

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

1. *The claim against the first respondent is struck out.*
2. *The application is hereby dismissed with costs.*

MALABA CJ : **I agree**

GARWE JCC : **I agree**

MAKARAU JCC : **I agree**

GOWORA JCC : **I agree**

PATEL JCC : **I agree**

GUVAVA AJCC : **I agree**

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Tendai Biti Law, applicant's legal practitioners

Chihambakwe, Mutizwa & Partners, first and second respondents' legal practitioners

Civil Division of the Attorney-General's Office, third respondent's legal practitioners.