

REPORTABLE: (10)

LAW SOCIETY OF ZIMBABWE

v

**(1) PARLIAMENT OF ZIMBABWE (2) THE PRESIDENT
OF THE SENATE (3) THE SPEAKER OF THE
NATIONAL ASSEMBLY (4) PRESIDENT OF THE
REPUBLIC OF ZIMBABWE (5) MINISTER OF
JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
(6) ATTORNEY-GENERAL N.O**

CONSTITUTIONAL COURT OF ZIMBABWE

**GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC, PATEL
JCC, UCHENA AJCC & MAKONI AJCC**

HARARE: MARCH, 16 2022 & 26 JULY 2023

T.R. Mafukidze with A.Y Sawunyama for the applicant

T Zhuwarara for the first and third respondents

**Judgment No. CCZ 10/23
Court Application No. CCZ 09/21**

1

T Magwaliba with G Madzoka for the fourth and fifth respondents

E Mubaiwa as Amicus Curiae

GOWORA JCC:

[1] The applicant approaches this Court under s 167(2)(d) as read with s 85(1) of the Constitution of Zimbabwe. It seeks an order declaring that the Constitution of Zimbabwe Amendment No1 Bill, alternatively, the Constitution of Zimbabwe Amendment No1 Act, and the Constitution of Zimbabwe Amendment No2 Act are invalid. Ultimately the applicant seeks an order that both be set aside following a declaration of invalidity.

THE PARTIES

[2] The applicant herein, the Law Society of Zimbabwe, hereinafter “the LSZ”, is a statutory corporate body set up in terms of the Legal Practitioners Act [Chapter 27:07]. It is the body responsible for the welfare and regulation of and for representing the legal fraternity in the country. It is capable of suing and being sued in its own right.

[3] The first respondent is the Parliament of Zimbabwe (“Parliament”), with the second and third respondents being the heads of the Senate and the National Assembly, respectively. The third respondent (hereinafter the “Speaker”) has deposed to the opposing affidavit on behalf of Parliament and the second respondent. The fourth respondent is the President of Zimbabwe (hereinafter referred to as the “President”), and the fifth respondent is the Minister of Justice Legal and Parliamentary Affairs (hereinafter referred to as the “Minister”). The sixth respondent is the Attorney-General of Zimbabwe. He is the Chief Legal Adviser to the government and has deposed to the opposing affidavit on behalf of the fourth and fifth respondents as well as himself.

Mr. *Mubaiwa* appears as *amicus curiae*.

THE FACTS

[4] Sometime in 2017, Parliament enacted the Constitutional Amendment No1 Act after it had gone through both the National Assembly and Senate. Its promulgation was challenged in this Court on the premise that it had not been validly enacted. On 31 March 2020, the Court set aside the proceedings of the Senate of 1 August 2017 because a two-thirds majority had not been reached. The Senate was directed to conduct a vote by the procedure set out in s 328(5) of the

Constitution within a prescribed period. For reasons not germane to this dispute, the Senate could not conduct a vote and applied to the Court for an extension of the time to do so. On 6 April 2021, the Senate passed the Constitution Amendment No1 Bill pursuant to an order of the Court granting an extension.

[5] The applicant contends that the Constitution Amendment No1 Bill, alternatively, Constitution Amendment No 1 Act 2021, is invalid for the reason that Parliament failed to fulfil a constitutional obligation in that-:

- (i) It passed the Constitution Amendment No 1 Bill 2017 in violation of s 147 of the Constitution;
- (ii) It failed to follow the procedure set out in s 328 of the Constitution;
- (iii) It acted contrary to its constitutional duty under s 119 of the Constitution in failing to protect the Constitution and promote democratic governance in Zimbabwe;
- (iv) In conformity with its constitutional duty under s 119 of the Constitution, it still needs to ensure that its provisions are upheld and that it acts constitutionally and in the national interest.

[6] On 17 January 2020, Parliament gazetted the Constitutional Amendment No 2 Bill. On 8 June 2020, Parliament notified the public through the Clerk to Parliament that the Portfolio Committee on Justice, Legal & Parliamentary Affairs was to conduct nationwide public hearings on the Constitutional Amendment (No 2) Bill. The dates scheduled in the notice were the 15th to 19 June 2020. The record shows that the hearings were conducted from 14 to 19

June 2020. On 20 April 2021, Parliament passed the Constitutional Amendment (No 2) Bill of 2019.

[7] The applicant contends that Parliament failed to comply with the provisions of s 328(4) in that it did not immediately invite members of the public, as required by the section, to express their views on the proposed Bill in public meetings. The applicant contends that Parliament should have convened meetings or availed facilities for holding public meetings for the said consultations. In this regard, the applicant argues that Parliament failed to fulfil a constitutional obligation.

[8] Consequently, it seeks relief against Parliament only, in respect of both Constitutional Amendment No 1 Act and Constitutional Amendment No 2 Act, more specifically an order declaring that both were promulgated in violation of the Constitution and are thus invalid.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

4

[9] The respondents have all filed papers opposing the application on various bases. Parliament has raised preliminary points in its opposing papers. Although the other respondents did not raise any preliminary objections in their sole opposing affidavit, Mr *Magwaliba*, on behalf of the fourth, fifth and sixth respondents, has, in oral argument before the Court, set out several points *in limine*, which I will advert to hereunder before determining the merits of the application.

[10] At the outset of the matter being heard, Mr. *Mafukidze*, who appeared for the applicant, informed the Court that the applicant no longer relied on s 85 of the Constitution to seek relief. He submitted that the applicant did not seek an express

declaration of rights. Therefore, the application would be solely based on the provisions of s 167 (2)(d) in that, in respect of both matters, Parliament had failed to fulfil its obligations under the Constitution in the manner in which both Acts were passed into law.

[11] The first, second, and third respondents have raised several points *in limine*, which they contend are dispositive of the application, thus obviating the need to determine it on the merits.

[12] The fourth, fifth, and sixth respondents did not raise any objections in the opposing affidavit or their heads of argument. The objections were, however, raised in oral argument by counsel at the inception of the hearing. They are all on points of law relating to the procedural aspects of the application and therefore stand for resolution by the Court. This is a trite position in our court system which requires that any issue placed before the court by the parties must be determined and a decision rendered in respect of the same.

OBJECTIONS IN LIMINE BY PARLIAMENT

[13] The first objection raised by Parliament, the first respondent herein, is that the applicant lacks the required *locus standi* to approach this court for the relief sought. Mr. *Zhuwarara* argued that the concession by the applicant that it was no longer proceeding under s 85 of the Constitution left it without a cause of action. Secondly, it is contended on behalf of Parliament that the matter is not properly before the Court. In this regard, Parliament suggests that the challenge by the applicant of both the Constitution of Zimbabwe Amendment No1 Act and the

Constitution of Zimbabwe Amendment No2 Act on the basis that the respondents have failed to fulfil a constitutional obligation cannot be bundled up in one application. The obligations sought to be invoked are disparate and distinct.

[14] A challenge to the alleged absence of jurisdiction on the part of the Court raised in the opposing affidavit was not motivated in the written submissions, nor was it moved in the oral argument. I take the view that it has been abandoned.

[15] The last objection is that the applicant has no *causa* for the relief it seeks from the Court. Counsel submitted that the applicant conceded that the Constitution of Zimbabwe Amendment No 1 Act was promulgated pursuant to an order of court. It is the position of counsel that once the applicant accepted that the amendment was effected in compliance with an order from the Court, then it cannot found a cause of action under s 167(2)(d) of the Constitution alleging that the respondents had failed to fulfil a constitutional obligation.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

SUBMISSIONS ON BEHALF OF THE FOURTH, FIFTH AND SIXTH RESPONDENTS

[16] Mr. *Magwaliba*, counsel for the fourth, fifth, and sixth respondents, submitted that the application was invalid. This objection stemmed from the fact that in the founding affidavit the applicant states that the application was premised on s 167(2)(d) as read with s 85 of the Constitution and r 27 of the Constitutional Court Rules, 2016. He argued that the validity of the application was determinable at the date of filing at which stage the applicant had stated that it was proceeding in terms of the provisions stated above. Counsel argued further that the Court enjoys exclusive jurisdiction under s 167(2)(d), and the joinder of

an application under s 85 was impermissible. In this instance, he argued that the combination of the two causes of action rendered the application a nullity.

[17] The second objection related to the relief being sought. He argued that the draft order was defective as it was unclear whether the Court was being asked to invalidate the Act or the Bill.

[18] Regarding the issue of *locus standi*, counsel argued that the relief in the application was not sought in terms of s 85. The applicant did not seek a *declaratur* that a fundamental right had been violated and that consequential relief be issued by way of redress. Consequently, the cause of action had failed to relate to the relief being sought from the Court.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

7

SUBMISSIONS ON BEHALF OF THE APPLICANT

[19] Mr. *Mafukidze*, on behalf of the applicant, made the following submissions in response. Counsel submitted that the applicant had not sought an express declaration of a violation of a right enshrined in [Chapter 4] of the Constitution. As a result, he was no longer relying on s 85 for relief. Instead, he would pray for an order to the effect that Parliament had failed to fulfil its constitutional obligation in passing both Constitutional Amendment Act No1 and No 2 and that, consequently, both are invalid and should be set aside.

[20] Regarding *locus standi*, counsel submitted that the applicant had standing under the Legal Practitioners Act. He contended that the applicant had alleged that it had a substantial and direct interest in the matter, thus establishing its standing.

He argued further that his counterparts were misconstruing the principle in *Mudzuri's*¹ case and that instead of limiting standing, the authority extended the basis on *locus* for any approach to the Court.

SUBMISSIONS BY THE AMICUS CURIAE

[21] Mr. *Mubaiwa*, who appeared as *amicus curiae* at the behest of the Court, made the following submissions. He suggested that the applicant had pleaded standing under s 85 of the Constitution. As a result, it was his view that its reliance on s 167 for standing did not pass muster. He contended that the applicant must have pleaded standing under s 167, but failed to do so. The abandonment of s 85 left the applicant needing *locus standi* to approach the Court. He prayed that as a consequence the application should be dismissed.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

[22] Mr *Mafukidze*, in supplementary heads of argument filed in response to the written submissions of the *amicus curiae*, has raised a number of issues relating to the appointment of the *amicus curiae*, the terms of his appointment by the Court, whether it was good practice for the parties herein to express their views on the matter and the importance for the Court not to follow a procedure that does not speak to the transparency of the process of appointment.

[23] As regards the substance of the submissions by the *amicus curiae*, counsel contended that an *amicus* should not seek the dismissal of a matter. His contention was that the prayer by the *amicus* for the dismissal of the application was irregular.

¹ *Mudzuri & Anor v Minister of Justice, Legal and Parliamentary Affairs* 2016 (2) ZLR 45(CC)

[24] The appointment of *amicus curiae* in proceedings before the court is provided for in the Constitutional Court Rules 2016. Rule 10 provides as follows:

“10. Amicus curiae

- (1) The Court may invite any person with particular expertise which is relevant to the determination of any matter before it to appear as *amicus curiae* and the *amicus curiae*, so invited shall file heads of argument within the time stipulated by the Court.
- (2) A person with the expertise described in subrule (1) may apply to the Court or a Judge for an order to appear as *amicus curiae*.
- (3) An application in terms of subrule (2) shall be made no later than five days after the filing of the respondent’s heads of argument or after the time for filing such heads of argument has expired, and shall—
 - (a) describe the particular expertise which the applicant possesses;
 - (b) describe the interests of the applicant in the proceedings;
 - (c) briefly identify the position to be adopted in the proceedings by the applicant; and
 - (d) set out the submissions to be advanced by the applicant, their relevance to the proceedings and the applicant’s reasons for believing that the submissions will be useful to the Court and different from those of the other parties.
- (4) The Court or a Judge may, if it or he or she considers it to be in the interests of justice, grant the application upon such terms and conditions, including the date of filing the written argument, and with such rights and privileges as it or he or she may determine.
- (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.
- (6) An *amicus curiae* shall be limited to the record on appeal, application or referral and shall not add thereto.
- (7) Except in the most exceptional circumstances, no order of costs shall be made either for or against any person appearing as *amicus curiae*.”

[25] There is no suggestion by counsel that the appointment of the *amicus* was not done in terms of the rules of court. Further, there is no suggestion that, apart from praying for the dismissal of the application, the *amicus* associated himself in any other manner with any party in the dispute. The role of *amicus curiae* was succinctly set out by GARWE JCC in *Mushoriwa v Parliament of Zimbabwe & Anor* CCZ 4/23, wherein the learned judge said the following:

“[62] The role of *amicus curiae* invited by the court is to provide assistance in developing answers to difficult, and usually unsettled, questions of law. He or she is there to provide cogent and helpful submissions that assist the court. *Amicus curiae* can raise new contentions which he or she considers to be useful to the court and which contentions would otherwise not be drawn to the attention of the court. However he or she cannot introduce new contentions that are not based on the record and which require fresh evidence. In making submissions *amicus* can choose a side it wishes to join unless requested by the court to urge a particular position. In other words, whilst the primary obligation of *amicus curiae* is to contribute new contentions to the court, there would be nothing amiss in *amicus* reiterating a party’s submissions, so long as this is done colourlessly and objectively, without the impression of bias being given in favour of a particular party. In this regard attention may be drawn to the South African Constitutional Court decisions in *Hoffman v South African Airways* 2001 (1) SA 1 CC, 2000 (11) BCLR 1211 (CC) at para 63; *In Re: Certain amicus curiae applications; Minister of Health and Others v Treatment Action Campaign and Others* (CC78/02) (2002) ZACC 13 95 July 2002.”

[26] Similar remarks were also made by HLATSHWAYO JCC, in *Gonese v President of the Senate & Ors* CCZ 2/23. At para 21-23 the learned judge remarked thus:

“[21] An *amicus curiae* is, as of right, entitled to raise new contentions which he considers to be useful to the Court. In *Hoffman 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 he or she 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."

[28] *In casu*, on closer examination, it seems to me that counsel's objections stemmed mainly from a perceived impression that the Court was obliged to consult the parties to the dispute on the decision to appoint *amicus curiae* and the identity of the person to be so appointed. The suggestions from counsel imply that the court required the consent of the parties prior to inviting a person to appear as *amicus*. The rules are clear and unambiguous. The decision remains that of the Court in the exercise of its inherent jurisdiction to control its **Judgment No. CCZ 10/23** to the prayer by the *amicus curiae* for the dismissal of the application was well **Court Application No. CCZ 09/21** taken. However, such prayer does not move the Court into reaching a conclusion to dismiss the application on that score alone. The Court is alive to the fact that *the amicus* is not a party to the dispute and that he or she cannot move for a particular relief. That is not the role of an *amicus*.

[29] *THE CAUSE OF ACTION*

I turn next to the objections raised by the respondents. In this regard propose to address the alleged absence of a cause of action in so far as such *causa* is linked to the *locus standi* pleaded by the applicant. Depending on its determination, I will proceed to determine the remaining objections *ad seriatim*.

[30] The respondents have all taken issue with the alleged absence of a cause of action on the papers. Even though Mr. *Mafukidze* abandoned reliance on s 85 for relief, this remains the sole cause of action pleaded by the applicant. The respondents contend that the cause of action has been destroyed by the applicant failing to plead and establish *locus standi* in terms of s 167(2)(d) before the Court.

[31] I proceed to consider that objection simultaneously with the second objection, which is that the applicant has joined two causes of action in a single application. This objection is premised on the averment in the founding affidavit that the application is brought in terms of s 167(2)(d) as read with s 85 of the Constitution.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

12

[32] It is contended by the fourth, fifth, and sixth respondents that an application under s 167 does not permit the citation of any party other than the President or Parliament. Under s 167(2)(d), so the argument went, this court enjoys exclusive jurisdiction, and the joinder of an application under s 85 is bad at law and highly improper. Counsel also argued that the joinder of the two applications is improper and renders the application a complete nullity.

[33] This court has previously considered and determined the impropriety of joining two causes of action in one application premised on the above provisions. The jurisdiction exercised by the Court under s 167(2)(d) is clear and distinct from that exercised under s 85. Regarding s 167(2)(d), only the Constitutional Court may determine whether the President or Parliament has failed to fulfil a

constitutional obligation. On the other hand, under s 85, the Constitutional Court enjoys parallel jurisdiction with different courts as it permits any person to approach any court alleging the violation of a fundamental right enshrined under Chapter 4. Section 85(3) is pertinent in this regard. It provides that “the rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1) and those rules must ensure that

[34] Thus, the conflation of the two causes of action under one application is impermissible and bad at law. This Court underscores this in *Zimbabwe Human Rights Association case, supra*. In that decision, PATEL JCC stated at p of the cyclostyled judgment:

“For the sake of completeness, it is necessary to point out that the application, to the extent that it is premised on s 85(1) of the Constitution, has been made without leave in terms of r 21 of the Rules. The need to comply with the Rules generally, and with r 21 in particular, was forcefully reaffirmed by Makarau JCC in the recent case of *Museredza & Ors v Minister of Agriculture, Lands, Water and Rural Resettlement & Ors* CCZ 11-21, at pp. 9, 11, 13-14 and 15. The Court noted the critical distinction between the jurisdiction of a court, which is a matter of substantive law, and access to that jurisdiction, which is a question of adjectival or procedural law. It was further observed that applications for leave to obtain direct access under r 21 serve the dual purpose of confirming that it is in the interests of justice to determine the matter at hand and as a gate-keeping function to sieve matters that this Court must determine in the interests of justice. The learned judge accordingly held, at p. 15, that:

‘The practice of this Court therefore is that, where a litigant wishes to bring a new and fresh cause and the matter is not listed in r 21 as one for which leave is not required, then leave must be sought even if the matter is in the exclusive jurisdiction of the Court.’ (My emphasis)”

[35] The above remarks apply with equal force *in casu*. Not only has the applicant not properly pleaded its cause of action, it has also conflated two causes of action into a single in a situation where the rules of the Constitutional Court set different

procedural requirements in any approach to the court justifying the exercise of its specialized jurisdiction.

[36] Section 167(5) of the Constitution provides that the Rules of the Court must permit any person when it is in the interests of justice, with or without leave, to bring an application directly to the Court or to appeal directly to the Court from any other court. Thus s 167(5) speaks directly to those persons approaching the Court, either directly, or wishing to appeal against the decision of a subordinate court, on the premise that it is in the interests of justice for the Court to grant them direct access. In my view, the important phrase therein is “when it is in the interests of justice.” There is no suggestion by the applicant that it seeks to approach the Court for relief and that its application falls in the category of applications contemplated under s 167(2)(d) of the Constitution. From a construction of the provisions of s 85 and s 167(2)(d), I find that the former is an application brought in the interests of justice whereas an application under s 167(2)(d) is not. It seems to me that there is a clear distinction between applications under s 85 and applications under s 167(2)(d) of the Constitution. While an application under s 85 may, depending on the peculiar circumstances of the case, require leave of court, one under s 167(2)(d) does not. whilst the rules have therefore made provision for the requirement of leave under r 21, the requirement for leave has been dispensed with in an application under s 167(2)(d) of the Constitution.

[37] It seems to me therefore that the objection by counsel for the fourth, fifth and sixth respondents on the joinder of two causes of action was properly taken. The objection is therefore upheld.

[38] Ordinarily this should be dispositive of the application but I take the view that it is pertinent and necessary to determine the issue of whether or not the applicant has satisfied the obligation to plead *locus standi* which is linked to or premised on the cause of action and relief sought before the Court.

LOCUS STANDI

[39] The starting point, in my view, is the courts' approach to standing under the common law, which is stringent and restrictive. In general terms, under the common law, a litigant who approaches the court for relief must establish that he or she has a direct and substantial interest in the matter in question. To be properly before the court, such a litigant must show the infringement of some right or that his or her personal interests have been adversely affected, resulting in the litigant approaching the court for redress.

[40] Thus, a party must show that he or she has a direct, personal, and substantial interest in the matter in contention. In *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07, MALABA JA (as he then was) said:

“The common law position on *locus standi in judicio* of a party instituting proceedings in a court of law **is that to justify participation in the action, the party must show that he or she has a direct and substantial interest in the right, which is the subject matter of the proceedings and the relief sought.**”(my emphasis)

[41] *Locus standi in judicio* refers to one's right, ability, or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the subject-matter and outcome of the litigation: see *Zimbabwe Teachers Association & Ors v Minister of Education and Culture* 1990 (2) ZLR 48 (HC). See also *Dalrymple & Ors v Colonial Treasurer* 1910 TS 372; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); *United Watch Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C); *Deary NO v Acting President & Ors* 1979 RLR 200 (G); *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O); *Molotlegi & Anor v President of Bophuthatswana & Ors* 1989 (3) SA 119 (B).

[42] In *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18, HLATSHWAYO JA (as he then was) considered the principle of *locus standi* and stated the following:

“It is trite that *locus standi* is the capacity of a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi* a party must show a direct and substantial interest in the matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (c) at 415 AC and *Matambanadzo v Goven* SC 23-04.”

[43] In accordance with the general rule that the party instituting proceedings must allege and prove that he has *locus standi*, the *onus* of so establishing rests upon the applicant. Consequently, a litigant must show that he has the right or capacity to bring a matter to court and a right to appear in court. *Locus standi* is the other side of the coin to jurisdiction. It is incumbent therefore that the applicant establishes *locus standi in judicio* to invoke the jurisdiction of the court to

exercise its power in its favour. See *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (AD) at 575 H

[44] A party instituting legal proceedings of any nature must show that both he and the party being sued, in layperson's terms, have a real interest in the matter being brought to court. A litigant must show his authority to sue or be sued and that the other party is one over which the court can exercise its jurisdiction. Any party instituting process in which relief is sought from the court is obliged to place itself as a party before the court seized with the dispute.

[45] The applicant approached the court pursuant to s 85 of the Constitution. It did so more specifically in terms of s 85(1)(e) as the association has an obligation in terms of the Legal Practitioners Act to represent the interests of the legal fraternity in the country. The applicant also states that it has **“a direct and substantial interest to see that laws are passed and or amended in compliance with the Constitution, including the Constitution itself.”**(my emphasis)

[46] The contention made on the respondents' behalf is that the applicant has not pleaded any basis upon which it could be found as having *locus standi in judicio* under s 167(2)(d) in terms of which it sought relief.

[47] *In casu*, in its papers, particularly the founding affidavit, the applicant had specifically pleaded that it is approaching this Court in terms of s 85 of the Constitution. The reasonable expectation that arises from this statement or

averment is that a litigant approaching a court in terms of s 85 of the Constitution intends to enforce a fundamental human right or freedom.

[48] The approach of the courts generally on the question of *locus standi* under the common law is rather restrictive. The South African Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) considered the requirements of *locus standi*. It held that – “The logical starting point is *locus standi* — whether, in the circumstances, the plaintiff had an interest in the relief claimed, which entitled it to bring the action.” Generally, the requirements for *locus standi* are these. The plaintiff must have a sufficient interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove *locus standi* rests on the party instituting the proceedings.

[49] On the other hand, the courts have adopted a broad and generous approach when it comes to standing to give access to court to those litigants wishing to enforce rights under the Constitution. The principle upon which the courts exercise this discretion is that the effective enforcement of a justiciable bill of rights requires that courts adopt a broad approach in so far as standing under the Constitution is concerned.

[50] This Court has extensively canvassed the issue of *locus standi* in the case of *Gonese & Anor v President of Zimbabwe & Ors* CCZ 10/18, wherein Patel JCC elucidated the approach of this Court as follows:

“In the *Doctors for Life* case (supra), at para 218, Ncgobo J recognized the need to find a proper balance between avoiding improper intrusions into the domain of Parliament and ensuring that constitutional provisions are sufficiently justiciable so as not to be rendered nugatory. **The latter consideration, in my view, behoves this Court to adopt a liberal and generous approach to locus standi in matters involving constitutional rights and obligations. This is so notwithstanding the constitutional and statutory independence enjoyed by Parliament in the control of its own affairs.** See *Smith v Mutasa N.O. & Anor* 1989 (3) ZLR 183 (SC) at 208 & 209. See also *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* CCZ 12/2015, at pp. 13-15, where this Court, per Malaba DCJ (as he then was), **eschewed the narrow traditional conception of locus standi in favour of a broad and generous approach to standing in constitutional matters.**”(my emphasis)

[51] What I must consider, therefore, is whether the applicant has sufficiently placed enough factual allegations to lead to a conclusion that the applicant has *locus standi* to approach the Court for relief under s 167(2)(d) of the Constitution. **Judgment No. CCZ 10/23
Court Application No. CCZ 09/21**

19

[52] From a perusal of the founding affidavit, in setting out the premise of its *locus standi*, the applicant avers that, in addition to it approaching the Court in terms of s 85 on behalf of its members, it “has substantial interest to see that laws are passed and or amended in compliance with the Constitution including amendments to the Constitution.”

[53] Although the applicant pleads that it has primarily approached the Court in terms of s 85 of the Constitution, in other portions of its founding affidavit, it purports to approach the Court in terms of s 167(2)(d). As already noted, the rules relating to standing for each approach are different. Whilst the applicant brought the

matter premised on an alleged violation of a fundamental right enshrined in Chapter 4 of the Constitution, the relief sought, however, is an order to the effect that Parliament failed to fulfil a constitutional obligation in the manner in which the amendments were passed into law.

[54] Section 85(1) defines the different classes of people who may approach the Court to seek redress in terms of that section. This Court has settled the position that s 85(1) of the Constitution has liberalised standing, thus allowing a person who ordinarily could not seek redress for an injury another person had suffered to do so. See *M & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* 2016 (2) ZLR 45 (CC) and *Mawarire v Mugabe & Ors* 2013(1) ZLR 466 (CC).

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

20

[55] Section 167(2)(d) however, is silent on the nature of standing entitling a person to approach this Court under it. Rule 27 is also silent on the nature of standing that an applicant is expected to set out. The generous approach to *locus standi* in constitutional matters does not excuse a litigant from satisfying the Court that he or she has the requisite standing to bring the suit. A comparison of the provisions of r 21, allowing for access under s 85, and r 27, in terms of which the conduct of the President or Parliament may be impugned for failing to comply with a constitutional obligation shows that those provisions are very different. Whereas r 21 obliges an applicant to establish that the application is in the interests of justice, the latter rule premises the application on an allegation of failure to comply with a constitutional obligation.

[56] The requirement for a litigant approaching the court in terms of a provision of the Constitution to properly plead its cause and adhere to the rules was emphasized in *Zimbabwe Human Rights Association v Parliament of Zimbabwe & Ors* CCZ 6/22, wherein PATEL JCC opined:

“I should also highlight the other imperative of the rules of practice and procedure to the effect that the pleadings relied upon by every litigant must be framed with crystal clarity to enable the court and the other parties involved to comprehend and respond to that litigant’s cause of action and assertions. This aspect was crisply underscored by Garwe JA (as he then was) in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* 2018 (1) ZLR 449 (S), at 455G:

‘In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law.’

After citing various authorities, both in this jurisdiction and elsewhere, the learned judge concludes, at 457G:

‘The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent.’ (My emphasis)”

Attention may also be drawn to the cautionary sentiments of MAKARAU JCC in *Mliswa v Parliament of the Republic of Zimbabwe* CCZ 2-21, on the need to plead one’s cause of action with precision.

[57] *In casu*, a perusal of the founding affidavit reveals that even though the applicant pleaded *locus standi* under s 85, there is no cause of action linked to s 85 on the papers. Instead, all the averments in the affidavit point to an alleged failure to fulfil a constitutional obligation on the part of Parliament.

[58] It seems to me that the applicant, in framing the application, wished to place itself before the Court under s 85 in order to establish its *locus standi*, but sought relief

under s 167(2)(d) of the Constitution. It is apparent that the applicant assumed and, was under the misapprehension that it was entitled to plead both s 85 and s 167(2)(d) as the vehicle to place itself before the Court. What an applicant needs to plead to establish locus standi under s 167(2)(d) was clarified by the Court in *Chirambwe v President of the Republic of Zimbabwe & Ors* CCZ 4/23.

This Court remarked as follows from para 40 of the judgment:

“.....That the new Constitution expanded the *locus standi* of persons seeking to approach the court is now settled. For example, in direct applications brought under s 85(1) of the Constitution, torch bearers are now permitted to seek redress on behalf of the general public or in the interests of a group or class of persons. In respect of an application alleging that the President or Parliament has failed to fulfil a constitutional obligation, r 27 of the Constitutional Rules, 2016 requires an applicant to depose to an affidavit setting out the constitutional obligation in question and what it is alleged the President or Parliament failed to do in respect of such obligation.

[40] That the *locus standi* of applicants seeking constitutional protection and enforcement has been extended is now accepted by this Court. In *Everjoy Meda v (1) Maxwell Matsvimbo Sibanda (2) Zambe Nyika Gwasira (3) The Sheriff of the High Court of Zimbabwe (4)The Registrar of Deeds* CCZ 10/2016, MALABA CJ made pertinent remarks at p 5 of the judgment that:

‘The purpose of the section is to allow litigants as much freedom of access to the courts on questions of violation of fundamental human rights and freedom with minimal technicalities ...’

Similarly in *Innocent Gonese (2) Jesse Majome v (1) The President of Zimbabwe (2) Parliament of Zimbabwe (3) Minister of Local Government, Public Works and National Housing N.O.* CCZ 10/2018, PATEL JCC, writing for the court, remarked at pp 13-14 of the judgment that:-

“... the latter consideration, in my view, behoves this Court to adopt a liberal and generous approach to *locus standi* in matters involving constitutional rights and obligations See also *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O. & Ors* CCZ 12/2015 at pp 13-15 where this Court, per MALABA DCJ (as he then was), eschewed the narrow traditional conception of *locus standi* in favour of a

broad and generous approach to standing in constitutional matters.... In my view, the applicants have an unquestionable right both as citizens and as legislators, to vindicate any perceived violation of the Constitution....’

[41] Considering the whole tenor of the current Constitution and the cases cited above, I have no doubt in my mind that it is no longer a requirement for an applicant in a constitutional application, such as the present, to demonstrate that a particular constitutional right has been violated in respect of him/her personally. The applicant makes it clear that he approaches the court in his capacity as a citizen and resident of Zimbabwe. The point *in limine* taken on this aspect must therefore fail.”

[59] Given the above *dicta* as clearly expressed by this Court, it is apparent that the applicant must aver in its affidavit facts which, if proved, would establish a failure to fulfil a constitutional obligation. The complete absence of a factual basis upon which to approach the Court for relief under s 167(2)(d) may leave a litigant without obtaining relief.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

23

[60] When describing the nature of the application, the applicant stated that it was an application brought in terms of s 167(2)(d) as read with s 85 of the Constitution. This is all that it pleaded in justifying its approach to the Court under s 167(2)(d) of the Constitution. This must be read in conjunction with its claim to *locus standi* under s 85 wherein it states that it has a direct and substantial interest to see that laws are passed and or amended in compliance with the Constitution, including amendments to the Constitution itself. This statement is vague as it only speaks to laws being passed and /or amended in compliance with the Constitution, including amendments to the Constitution itself. It does not make specific reference to the intention to hold Parliament to account and the standing upon which the applicant considers that it is clothed with the requisite *locus*

standi to do so. This is against the settled position that legal standing should be pleaded or established.

[61] The need to comply with the rules in any application under the Constitution was reaffirmed by PATEL JCC in *Zimbabwe Human Right Association v Parliament of Zimbabwe & Ors*, (*supra*) wherein the learned judge stated:

““Having regard to the relevant passages in the founding affidavit that I have referred to earlier, it is abundantly clear that the applicant has predicated its *locus standi* on s 85(1) of the Constitution. On the other hand, its cause of action is specifically founded on the alleged failure of the first and second respondents to fulfil their constitutional obligations. Thus, the applicant’s claim to activate the jurisdiction of this Court is exclusively anchored in s 167(2)(d) of the Constitution. This is then mirrored in the declaratory and substantive relief that it seeks both of which are confined to the juridical ambit of s 167(2)(d). The order prayed for makes no mention whatsoever of any infringement of a fundamental right giving rise to *locus standi* under s 85(1) and the jurisdictional competence of this Court under that provision. In essence, what the applicant has purported to do is to proceed under two mutually exclusive provisions of the Constitution, viz. s 85(1) and s 167(2)(d). This course of action was pointedly frowned upon in *Central African Building Society v Stone & Ors* SC 15-21, at p. 17, para. 38, where GWAUNZA DCJ observes that:

‘... an application under s 85 of the Constitution should not be raised as an alternative cause of action Section 85(1) is a fundamental provision of the Constitution and an application under it, being *sui generis*, should ideally be made specifically and separately as such’.”

[62] I find myself in agreement with the *dicta* in the above authorities and I respectfully associate myself with the remarks therein. The applicant was obliged to plead its *locus standi* with the precision and clarity required. It ought to have pleaded a cause of action properly starting with *locus standi*, thus enabling the court to exercise its special jurisdiction under s 167(2)(d) of the Constitution. I find that in the circumstances, the matter can be resolved in favour of the

respondents. The applicant, therefore, has not established *locus standi in judicio* to approach the court for relief under s 167(2)(d) of the Constitution.

DISPOSITION

[62] Thus, it is the duty of the party instituting court proceedings to make out a case that he or she has *locus standi* to approach the Court for appropriate relief and that the Court can exercise jurisdiction over the party on the other side. If he fails to do so, his case will fail. He will not have an opportunity to correct his error. An opposing party can raise the issue of an absence of *locus standi* at any time in the proceedings. The Court may not condone the lack of *locus standi*, even if the parties agree between them to litigate with one another. If *locus standi* is absent, the proceedings are invalid.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

25

[63] While the question of *locus standi*, to an extent, is a procedural issue, it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in litigation justifying a basis for that person to be accepted as a litigating party. The sufficiency or the existence of the requirement of interest depends on the facts of each case. It is for the party instituting proceedings to allege and prove its *locus standi*.

[64] The *onus* to establish any issue rests on that party relying upon it. It is thus necessary for a party in all cases to allege in its pleadings facts sufficient to show that it has *locus standi* to bring an action. This applies to all proceedings, whether by application or summons. The applicant has not met the *onus* to establish *locus standi in judicio*.

[65] In addition, the applicant has conflated two causes of action and, in practical terms, this resulted in the applicant placing itself out of the Court’s jurisdiction. The application must therefore fail and should be dismissed.

[66] In opposing the application, the respondents prayed for the application to be dismissed with costs. The prayer for costs was not persisted with in argument. This is a proper approach as the general principle is that courts should not order costs against the losing litigant in constitutional matters lest deserving litigants are discouraged from approaching the courts for redress.

[67] In the premises, I make the following order:

The application is dismissed with no order as to costs.

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21

GARWE JCC	:	I agree
MAKARAU JCC	:	I agree
HLATSHWAYO JCC	:	I agree
PATEL JCC	:	I agree
UCHENA AJCC	:	I agree
MAKONI AJCC	:	I agree

Law Society of Zimbabwe, applicant’s legal practitioners

Chihambakwe Mutizwa and Partners, 1st, 2nd and 3rd respondent’s legal practitioners

Civil Division of the Attorney-General’s Office, 4th, 5th and 6th respondent’s legal practitioners

Judgment No. CCZ 10/23
Court Application No. CCZ 09/21