

H.B. 11, 2019.]

CONSTITUTIONAL COURT BILL, 2019

MEMORANDUM

Constitutional Court is a creature of the Constitution established in terms of section 166 of the Constitution. Courts are generally created by the Constitution. Section 167 of the Constitution provides for the jurisdiction of the Constitutional Court. An Act of Parliament provides for other issues not provided for by the Constitution which are necessary to facilitate the proper functioning of the Court. In light of this, the main purpose of this Bill is to enhance the operation of the Constitutional Court. The Bill confers additional jurisdiction upon the Constitutional Court. In particular the Bill provides for the following—

Clause 1 provides for the short title of this Bill.

Clause 2 provides for interpretation of terms used in the Bill.

Clause 3 provides that the Constitutional Court must be a court of record. It further provides for the seal of the Constitutional Court which must be in the custody of the Registrar.

Clause 4 reiterates the provisions of section 166 of the Constitution in relation to the composition of the Constitutional Court.

Clause 5 provides for the manner in which decisions are made by the Constitutional Court. Decisions are made by the majority of Judges sitting at any particular time. This Clause also gives power to the Chief Justice to appoint an Acting Judge where one of the Judges is no longer able to continue sitting as the Judge due to death, physical incapacity or retirement. Generally, the decisions of the Constitutional Court are final. In the handing down of judgments, the Court shall not be bound by its previous decisions.

Clause 6 provides for an exception to the appeal procedure. Generally, the effect of the appeal in civil proceedings is that the decision made by the inferior court is suspended until the appeal is finalised. An appeal from the Supreme Court shall not suspend the decision made by the Supreme Court except where the Constitutional Court has ruled otherwise.

Clause 7 provides for the conflict of interest situation for Judges. No Judge may be permitted to sit in a matter where he or she has formally participated in the making of the previous decision concerning the same matter.

Clause 8 provides for the scope and execution of processes for the Constitutional Court. The judgments of the Constitutional Court shall be executable throughout Zimbabwe. A copy of the certified judgment handed to the Registrar of the High Court or Clerk of the Magistrates Court shall empower the Registrar or Clerk to execute the judgment of the Constitutional Court.

Clause 9 provides for the admissibility of the certified copies of judgments and records.

Clause 10 provides for the power of Chief Justice to, before the beginning of the year, publish a calendar for the sitting of the Court.

Clause 11 creates an offence of contempt of court committed by any person who demonstrates any dishonourable conduct to the Court.

Clause 12 provides for a right of any person to appear before the Court.

Clause 13 creates the right of every person to be heard by the Court.

Clause 14 provides for the Registrar's powers to refer any person to the legal aid organisation where the Registrar is of the opinion that the person concerned deserves legal aid services.

Clause 15 provides that all proceedings, generally, must be in English and in open court.

Clause 16 provides for the appointment of Registrar and such other staff for the Court.

Clause 17 provides for the Court's powers in hearing appeals or confirming decisions made by the inferior courts.

Clause 18 provides for the procedure which the Court may follow in hearing applications or referrals brought before it.

Clause 19 provides for the Court's or Judge's power to review constitutional decisions made by inferior courts.

Clause 20 provides for the Court's inherent jurisdiction. In terms of this Clause, the Constitutional Court has got power to protect and regulate its process and develop common law and customary law with particular attention being given to the interest of justice and the provisions of the Constitution.

Clause 21 provides for the procedure which may be followed in determining the question of law which has arisen.

Clause 22 provides for the procedure for the invalidation of the law. The Minister responsible for the administration of the law in question and the Attorney-General may be invited to make their own representations before the Court hears the matter concerning the invalidation of a law.

Clause 23 provides for the Court's power to refuse to hear any matter instituted by any person where there is another remedy available to such person.

Clause 24 provides for the Court's power to correct, rescind or vary the its judgments or orders where such judgments or orders have been erroneously made or where there Court needs to clear ambiguity in the judgments or order. The correction, rescission or variation of the judgment or order shall not be effected unless all the affected parties have been notified.

Clause 25 provides for Minister's powers to make Regulations for fixing fees or allowances.

Clause 26 provides for the procedure of making the Rules of Court.

Clause 27 provides for the power of the Chief Justice to make practice directions.

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY

Section

1. Short title.
2. Definitions.

PART II

COMPOSITION AND ADDITIONAL JURISDICTION OF COURT

3. Nature of Court and seal.
4. Composition of Court.
5. Decisions of Court.
6. Appeals from the Supreme Court.
7. Judge not to sit on a matter he or she has previously decided.
8. Scope and execution of process.
9. Certified copies of court records admissible as evidence.
10. Sittings and vacations.
11. Contempt of Court.

PART III

GENERAL

12. Right of person to be present at hearing of his or her matter.
13. Right of audience.
14. Legal Aid.
15. Proceedings in open court and in English.
16. Appointment of Registrar and officers of Court.
17. Powers of Court in appeals and confirmations.
18. Powers of the Court in applications and referrals.
19. Review powers.
20. Inherent powers of the Court.
21. Statement of case or question of law arising in a matter before the Court.
22. Procedure for invalidation of law.
23. Conflict of constitutional and statutory remedies.
24. Correction, variation or rescission of judgments or orders.
25. Regulatory powers to fix fees and allowances.
26. Rules of Court.
27. Practice directions.

BILL

To provide for the manner in which the Constitutional Court may exercise its jurisdiction; to confer additional jurisdiction upon the Constitutional Court; to provide for the powers, practice and procedure of the Constitutional Court; to provide for the making of rules and regulations in connection therewith; to make provision for appeals from decisions of inferior courts; and to provide for matters incidental to or connected with the foregoing.

WHEREAS sections 166 and 167 of the Constitution provide as follows—

10 166 Constitutional Court

- (1) *The Constitutional Court is a superior court of record and consists of—*
- (a) *the Chief Justice and the Deputy Chief Justice; and*
 - (b) *five other judges of the Constitutional Court.*

15 (2) *If the services of an acting judge are required on the Constitutional Court for a limited period, the Chief Justice may appoint a judge or a former judge to act as a judge of the Constitutional Court for that period.*

(3) *Cases before the Constitutional Court—*

- (a) *concerning alleged infringements of a fundamental human right or freedom enshrined in Chapter 4, or concerning the election of a President or Vice-President, must be heard by all the judges of the Court;*
- (b) *other than cases referred to in paragraph (a), must be heard by at least three judges of the Court;*

but an Act of Parliament or rules of the Court may provide for interlocutory matters to be heard by one or more judges of the Court.

H.B. 11, 2019.]

(4) Judges or former judges appointed to act under subsection (2) may continue to sit as judges of the Constitutional Court after their appointments have expired, for the purpose of dealing with any proceedings commenced before them while they were so acting.

167 Jurisdiction of Constitutional Court 5

(1) The Constitutional Court—

- (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;*
- (b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(b) and paragraph 9(2) of the Fifth Schedule; and* 10
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.*

(2) Subject to this Constitution, only the Constitutional Court may—

- (a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;* 15
- (b) hear and determine disputes relating to election to the office of President;*
- (c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or* 20
- (d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.*

(3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force. 25

(4) An Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court.

(5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court— 30

- (a) to bring a constitutional matter directly to the Constitutional Court;*
- (b) to appeal directly to the Constitutional Court from any other court;*
- (c) to appear as a friend of the court:*

NOW, THEREFORE, be it enacted by the Parliament and the President of Zimbabwe as follows:— 35

PART I

PRELIMINARY

1 Short title

This Act may be cited as the Constitutional Court Act, 2019.

2 Definitions 40

In this Act—

“Chief Justice” means the Chief Justice appointed in terms of section 180 of the Constitution;

“Court” means the Constitutional Court established by section 166 of the Constitution;

“Deputy Chief Justice” means the Deputy Chief Justice appointed in terms of section 180 of the Constitution;

5 “Judge” means a judge of the Court;

“legal practitioner” means a legal practitioner who is registered in terms of the Legal Practitioners Act [*Chapter 27:07*];

10 “Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“Registrar” means the Registrar appointed in terms of section 16;

“rules” means the rules of the Court made in terms of section 26.

PART II

COMPOSITION AND ADDITIONAL JURISDICTION OF COURT

15 **3 Nature of Court and seal**

(1) The Court shall be a court of record.

(2) The Court shall have a seal of such design as is prescribed by the President by proclamation in the *Gazette*.

(3) The seal of the Court shall be kept in the custody of the Registrar.

20 **4 Composition of Court**

(1) The Court’s composition shall be as specified in section 166(1) of the Constitution.

25 (2) For the purpose of exercising its jurisdiction in a case concerning alleged infringements of a fundamental right enshrined in Chapter 4 of the Constitution, or the election of a President or Vice-President, the Court shall be constituted by all the Judges in accordance with the provisions of section 166(3)(a) of the Constitution.

30 (3) Where the leave of the Court is required in terms of the rules to bring a matter directly to the Court or to appeal directly to the Court from any other court or to appear as an *amicus curiae* of the Court, the matter may be heard by a Judge in chambers or by such number of Judges as the Chief Justice may direct.

5 Decisions of Court

(1) The decision of the Court shall be the decision of the majority of the Judges.

35 (2) If at any stage during the hearing of any matter, any Judge dies or retires or is otherwise unable to sit as a member of the Court or is absent, the Chief Justice shall, for that period, appoint an acting Judge to sit in accordance with the provisions of section 166(2) of the Constitution as read with the provisions of section 166(4) of the Constitution.

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

40 (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.

6 Appeals from the Supreme Court

An appeal from the Supreme Court to the Court shall not suspend the decision being appealed against unless the Court orders otherwise.

7 Judge not to sit on a matter he or she has previously decided

A Judge shall not sit at the hearing of any matter if he or she has previously— 5

- (a) made a decision in that matter; or
- (b) concurred; or
- (c) registered his or her dissenting remarks; or
- (d) been formally consulted.

8 Scope and execution of process 10

(1) The process of the Court shall run throughout Zimbabwe, and its judgments and orders shall, subject to the rules, be executed in any area in like manner as if they were judgments or orders of the High Court or the Magistrates Court having jurisdiction in such area.

(2) A copy of a judgment or order of the Court duly certified by the Registrar and delivered by him or her to the Registrar of the High Court or clerk of the Magistrates Court shall constitute authorisation to such court to institute execution of the judgment or order. 15

9 Certified copies of court records admissible as evidence

Whenever a judgment, order or other record of the Court is required to be proved or inspected or referred to in any manner, a copy of such judgment, order or other record duly certified as such by the Registrar under the seal of the Court shall be *prima facie* evidence of the authenticity of the signature of the Registrar concerned. 20

10 Sittings and vacations

The Chief Justice shall, before the beginning of each year, cause to be published a calendar of the sittings of the Court for the ensuing year. 25

11 Contempt of Court

(1) Any person who—

- (a) during the sitting of the Court, wilfully insults any member thereof or any officer of the Court present at the sitting, or who wilfully hinders or obstructs any member of the Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties; or 30
- (b) wilfully interrupts the proceedings of the Court or otherwise misbehaves himself or herself in the place where the sitting of the Court is held; or
- (c) does anything calculated to improperly influence the Court in respect of any matter being or to be considered by the Court; 35

may, by order of the Court, be removed and detained in custody until the rising of the Court and may be subjected to such other penalty as the Court may deem fit.

(2) Removal and detention in terms of subsection (1) shall not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court. 40

PART III

GENERAL

12 Right of person to be present at hearing of his or her matter

5 (1) A person who is not in custody shall be entitled to be present, if he or she so desires, at the hearing of his or her appeal or any application made by him or her.

(2) A person who does not appear when his or her matter is being heard, or who is not legally represented may present his or her case and argument in writing and the case or argument so presented shall be considered by the Court:

10 Provided that any party who does not appear binds himself or herself to any order of costs made against him or her.

(3) A person who is in custody, whether or not he or she is legally represented shall not be entitled to be present at the hearing of his or her appeal or any application made by him or her to the Court, except with the leave of a Judge.

15 (4) The right of a person who is in custody to be present at the hearing of any matter referred to in subsection (3) shall be subject to he or she paying all expenses of, and incidental to, his or her transfer to and from the place where the Court sits:

Provided that a Judge may direct that he or she be brought before the Court in any case where, in the opinion of the Judge, his or her presence is desirable, in which event such expenses shall be borne by the State.

20 **13 Right of audience**

Subject to any other law, in all proceedings before the Court the parties may appear with or be represented by a legal practitioner.

14 Legal Aid

25 (1) If it appears to the Registrar that it would be in the interests of a party to be represented by a legal practitioner, he or she shall refer such party to the Zimbabwe Human Rights Commission established in terms of section 242 of the Constitution, the Legal Aid Directorate established in terms of the Legal Aid Act [*Chapter 7:16*], a law clinic of a university or such other appropriate body or institution that may be willing and is competent to assist that party.

30 (2) The Registrar shall not be liable for any damage or loss resulting from assistance given in good faith by the Registrar in terms of subsection (1).

15 Proceedings in open court and in English

35 Except as otherwise provided in the Constitution or rules, all proceedings in the Court shall be carried on in open court and the pleadings and proceedings thereof shall be in the English language.

16 Appointment of Registrar and officers of Court

(1) There shall be a Registrar, and such other officers of the Court to assist the Registrar as may be required who shall be appointed by the Judicial Service Commission whose offices shall be public offices and shall form part of the Judicial Service.

40 (2) All officers of the Court shall be subject to the direction of the Registrar.

17 Powers of Court in appeals and confirmations

(1) Subject to any other enactment, at the hearing of any appeal or any confirmation, the Court—

- (a) shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;
- (b) may, if it thinks it necessary or expedient in the interests of justice;
 - (i) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; 5
 - (ii) order any witness who would have been a compellable witness at the trial or proceedings in question to attend and be examined before the Court, whether he or she was or was not called at the trial or proceedings, or order the examination of any such witness to be conducted in the manner provided by rules of court before any Judge or before any officer of the Court or justice of the peace or other person appointed by the Court for the purpose, and allow the admission of any deposition so taken as evidence before the Court; 10
 - (iii) receive the evidence, if tendered, of any witness, including any party, who is a competent but not compellable witness and, if the appellant makes application for the purpose, of the husband or wife of that party in cases where the evidence of the husband or wife could not have been given at the trial or proceedings except on such application; 15 20
 - (iv) having set aside the judgment appealed against, remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary;
 - (v) where any question arising at the appeal involves prolonged examination of documents or accounts or any scientific or local investigation which cannot, in the opinion of Court, be conveniently conducted before that Court, order the reference of the question in the manner provided by rules of court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as the Court thinks fit to adopt it; 25 30
 - (vi) appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the Court that such knowledge is required for the proper determination of the case; 35
 - (vii) issue any warrant necessary for enforcing any order or sentence of the Court;
 - (viii) make such order as to costs as the Court thinks fit;
 - (ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case; 40
 - (x) appoint, if it is in the interests of justice, any legal practitioner to appear as *amicus curiae*;
- (c) may, if it appears to the Court that a new trial or fresh proceedings should be held, set aside the judgment appealed against and order that a new trial or fresh proceedings be held. 45

(2) When the Court receives further evidence or gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine every witness whose evidence is taken.

18 Powers of the Court in Applications and Referrals

Subject to any other enactment, the Court may— 50

- (a) at the conclusion of the hearing or at any stage thereafter, refuse the application or grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for; and
- 5 (b) make such order as to costs as it thinks fit.

19 Review Powers

(1) Subject to this section, the Court and every Judge shall have, in constitutional matters, the power to review the proceedings and decisions of the Supreme Court, the High Court and all other subordinate courts, tribunals and administrative authorities.

10 (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Court or a Judge that an irregularity has occurred in any proceedings or in the making of any decision, notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Court.

15 (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Court or a Judge, and provision may be made in rules of Court, and a Judge may give directions, specifying that any class of review or any particular review shall be instituted before, or shall be referred or remitted to the Supreme Court, the High Court or the Labour Court, as the case may be, for determination.

20

20 Inherent powers of the Court

The Court shall have inherent power to protect and regulate its own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution.

21 Statement of case or question of law arising in a matter before the Court

25

(1) Where a matter involves a question of law only, a Judge may, if he or she thinks fit, request the parties thereto to state the question for determination by the Court.

30 (2) Upon a request made in terms of subsection (1) the parties shall, if they are able to agree thereon, state the question, together with all the circumstances under which that question has arisen, in such manner and within such period as may be prescribed by rules of court.

35 (3) If the parties are unable to agree upon the statement of the question and the circumstances under which it has arisen, they shall inform the Registrar of the Court and thereupon the appeal shall be dealt with as if such request had not been made.

22 Procedure for invalidation of law

40 (1) If in any proceedings it is alleged that anything contained in or done under the authority of any law is in contravention of the Constitution and the court decides, as a result of hearing the parties, that the complainant has shown that the court should not accept that the provision of the law concerned is fair, reasonable, necessary and justifiable in a democratic society as are relied upon by the other party without proof to its satisfaction, it shall issue a rule *nisi* calling upon the responsible Minister to show cause why that provision should not be declared to be in contravention of the Constitution.

45 (2) If in any proceedings it falls to be determined whether any law is in contravention of the Constitution, the Attorney-General shall be entitled to be heard

by the court on that question and if in any such proceedings any law is determined by the court to be in contravention of the Constitution, then, whether or not he or she has exercised his or her right to be heard in those proceedings, the Attorney-General shall have the like right with respect to an appeal from that determination as if he or she had been a party to the proceedings. 5

23 Conflict of constitutional and statutory remedies

The court may decline to exercise its powers in relation to any claim for redress founded upon the contravention of the Constitution if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law. 10

24 Correction, variation and rescission of judgments or orders

(1) The court may, in addition to any other power it may have, on its own initiative or upon the application of any party affected, correct, rescind or vary any judgment or order—

- (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or 15
- (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
- (c) that was granted as the result of a mistake common to the parties.

(2) The court shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed. 20

25 Regulatory powers to fix fees and allowances

The Minister may make regulations providing for the fees and allowances which shall be payable in respect of instruments, services or other matters received, issued, provided or otherwise dealt with by the Registrar or any other officer of the Court in the course of his duties. 25

26 Rules of Court

(1) Subject to subsections (2) and (3), the Chief Justice, after consultation with a committee appointed by him or her, may make rules relating to any of the following matters— 30

- (a) the manner and form of procedure before the Court;
- (b) all matters relating to the manner and form of procuring and adducing evidence;
- (c) securing the attendance of witnesses and the production of books, papers or documents, and penalties for non-attendance or non-production of such books, papers or documents; 35
- (d) the authentication of documents executed outside Zimbabwe;
- (e) the manner of service;
- (f) the manner for the filing and hearing of certain matters on an urgent basis; 40
- (g) the records to be kept;
- (h) when and how security shall be given by a party;
- (i) the time within which any requirement of the rules is to be complied with and the extension of such time;
- (j) the conduct and dress of persons appearing before or attending hearings of the Court; 45

- (k) the manner of executing judgments;
- (l) the duties of officers of the Court;
- (m) taxation of bills of costs;
- 5 (n) the forms to be used, including, unless otherwise provided for under any other enactment, the forms to be used in connection with the powers to be exercised by the Court under this Act and any other enactment;
- (o) the tariff of fees chargeable by legal practitioners in respect of any matter before the Court;
- 10 (p) the summary determination of any matter which appears to the Court to be frivolous or vexatious or to have been brought for purpose of delay;
- (q) leave to apply or appeal directly to the Court where it is necessary in the interests of justice;
- (r) the sittings of the Court;
- (s) generally to give effect to the jurisdiction conferred upon the Court by
15 any enactment; and
- (t) generally for the effective administration of the Court and matters before it.

(2) Rules shall have not effect until they have been approved by the Minister and published in a statutory instrument.

20 (3) The Constitutional Court Rules, 2016 published in Statutory Instrument 61 of 2016 shall continue to be in force until they have been repealed or amended.

27 Practice directions

25 The Chief Justice may issue practice directives on any matter in respect of which, in the opinion of the Chief Justice, it is necessary or desirable to make provision in order to ensure or facilitate the proper dispatch and conduct of the business of the Court.

