MUSA KIKA HC 2128/21
versus
MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
and
LUKE MALABA N.O.
and
ELIZABETH GWAUNZA N.O.
and
PADDINGTON GARWE N.O.
and
RITA MAKARAU N.O.
and
ANNE-MARY GOWORA N.O.
and
BEN HLATSWAYO N.O
and
BHARAT PATEL N.O.
and
ANTONIA GUVAVA N.O.
and
SUSAN MAVANGIRA N.O.
and
CHINEMBIRI ENERGY BHUNU N.O.
and
TENDAI UCHENA N.O.
and
NICHOLAS MATHONSI N.O.
and
CHARLES HUNGWE N.O.
and
FELISTAS CHATUKUTA N.O.
and
ALFAS CHITAKUNYE N.O.
and
SAMUEL KUDYA N.O.
and
LAVENDER MAKONI N.O.
and
JUDICIAL SERVICE COMMISSION

YOUNG LAWYERS ASSOCIATION OF ZIMBABWE HC 2166/21
and
FREDERICK CHARLES MOSES MUTANDA
versus

JUDICIAL SERVICE COMMISSION
and
HONOURABLE CHIEF JUSTICE LUKE MALABA N.O.
and
ATTORNEY-GENERAL N.O.

HIGH COURT OF ZIMBABWE
ZHOU, CHAREWA & MUSHORE JJJ
HARARE, 15 May 2021

Urgent Application

T. Mpofu, with him *T. Biti* and *T. L. Mapuranga,* for the applicant in HC 2128/21
D. Drury, with him *A. Dracos*, for the applicants in HC 2166/21
T. Magwaliba, with him *G. Madzoka* and Ms *F. Chimbaru* for the 1st respondent in HC 2128/21 and the 3rd respondent in HC 2166/21
A. B. C. Chinake, with him *N. Mugandiwa*, for the 2nd to 19th respondents in HC 2128/21 and 2nd respondent in HC 2166/21

ZHOU, CHAREWA & MUSHORE JJJ:

Introduction.

This judgment is in respect of two matters, HC 2128/21 and HC 2166/21. The two matters were heard together because the substance of their complaints is the same. Both matters were brought by way of application. HC 2128/21 was instituted as an urgent court application while HC 2166/21 was brought as an urgent chamber application. Both applications are opposed by some of the respondents. Opposing papers, answering affidavits and heads of argument were filed following a case management meeting with the parties' representatives at which the dates for filing the papers were set by consent.

In case no. HC 2128/21 the applicant, a legal practitioner and director of the Zimbabwe Human Rights NGO Forum, cited the Minister of Justice, Legal and Parliamentary Affairs, and all the judges of the Constitutional Court and Supreme Court as well as some of the judges of the High Court on the basis that they are acting judges of the Supreme Court or have been called upon to act as such. The judges were cited in official capacities. The Judicial Service Commission (JSC) was joined in the proceedings at its instance at the case management conference. In HC 2166/21 the respondents cited are the JSC. The Chief Justice of Zimbabwe Honourable Luke Malaba NO,

and the Attorney General NO. The applicants in that case are Young Lawyers Association of Zimbabwe and Frederick Charles Moses Mutanda, a liberation war veteran.

Background.

On 7 May 2021 the Constitution of Zimbabwe Amendment (No.2) Act, 2021, became law after being assented to by the President. The contentious aspects of the Amendment Act which are the subject of the instant applications are found in its s 13. That section repealed section 186 of the Constitution of Zimbabwe and substituted it with a new s 186.

Upon gathering that s 186 introduced by the amendment would apply to the second to eighteenth respondents the applicants instituted the two applications. The applicant in Case No. HC 2128/21 seeks the following relief:

> "IT IS DECLARED THAT:
>
> 1. In accordance with provisions of sections 186(1)(a) and 186(2) (of the Constitution of Zimbabwe 2013) in their original form and notwithstanding provisions of Constitutional Amendment Number 2, second to eighteenth respondents hold office until they reach the age of seventy years, whereupon they must by operation of law retire.
> 2. The attempt to subvert the position encapsulated in the "original" section 186(1)(a) and 186(2) of the Constitution of Zimbabwe, 2013 is contrary to law and therefore in breach of applicant's right to the protection of the law as set out in section 56(1) of the Constitution of Zimbabwe, 2013.
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> IT IS CONSEQUENTLY ORDERED THAT:
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> 3. LUKE MALABA must or did at midnight on 15 May 2021 cease to hold the office of CHIEF JUSTICE OF ZIMBABWE.
> 4. Any action, conduct or deed of LUKE MALABA post the 15th of May 2021 purportedly as CHIEF JUSTICE OF ZIMBABWE is null and void and of no effect.
> 5. In accordance with the provisions of section 181 of the Constitution of Zimbabwe, 2013, with effect from midnight on the 15th of May 2021, ELIZABETH GWAUNZA became/becomes the ACTING CHIEF JUSTICE OF ZIMBABWE until such a time as a substantive CHIEF JUSTICE OF ZIMBABWE is appointed.
> 6. In accordance with the provisions of section 181 of the Constitution of Zimbabwe, 2013, with effect from midnight on the 15th of May 2021, PADDINGTON GARWE became/becomes the ACTING DEPUTY CHIEF JUSTICE OF ZIMBABWE until such a time as a substantive DEPUTY CHIEF JUSTICE OF ZIMBABWE is appointed.
> 7. There shall be no order as to costs."

During argument counsel for the applicant abandoned the relief sought in para 6 of the draft order and moved that the draft be amended accordingly. We point out that notwithstanding the statement suggesting that what is being sought in paragraphs 3-7 of the draft order is consequential relief, the relief is clearly in the form of a declaration.

The second to eighteenth respondents did not file opposing papers. They will therefore be taken not to have opposed the application, see *Prosser & 35 Others* v *Ziscosteel Company Ltd*[1] and *Panganai and 20 Others* v *Kadir & Sons (Pvt) Ltd.*[2] We do not accept the submission by their counsel that they oppose the application without filing opposing papers. This is because the directions issued on 12 May 2021 required the respondents to file opposing papers if they were opposing the application. Their grounds of opposition would have to be contained in the opposing affidavits.

In Case No. HC 2166/21 the applicant sought declaratory relief as follows:

> "IT IS DECLARED THAT:
> 1. The first respondent in failing to activate the provisions of section 180 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013 and/or the provisions of section 180 of the Constitution of Zimbabwe as amended by Constitution of Zimbabwe Amendment (No. 2) Act, 2021 (No. 2 of 2021) diligently and without delay violated section 324 of the Constitution of Zimbabwe as amended.
> 2. The second respondent cannot, by virtue of section 328(7) of the Constitution of Zimbabwe, as amended, benefit from the term limit extension as introduced by an amendment of section 186 by the Constitution of Zimbabwe Amendment (No. 2) Act, 2021 (No. 2 of 2021).
> 3. As a consequence of 2 above, the second respondent shall vacate office as the Chief Justice of Zimbabwe on (*sic*) midnight of 15 May 2021.
> 4. Any action, conduct, act or deed of second respondent post the 15th of May 2021 purportedly as Chief Justice of Zimbabwe is null and void and of no force or effect.
> 5. Any attempt to continue in office by second respondent as Chief Justice of Zimbabwe and/or any continuation in office by second respondent purportedly as Chief Justice of Zimbabwe violates applicants' right of access to a court of law established by law and applicants' right to protection of the law in accordance with section 69(4) and section 56(1) of the Constitution of Zimbabwe as amended.
> 6. The second respondent, in any event, can no longer be a judge of the Constitutional Court for more than 15 years in violation of section 186(1) of the Constitution of Zimbabwe as amended.
> 7. In the alternative, section 14 of the Constitution of Zimbabwe Amendment (No. 2) Act, 2021 (No. 2 of 2021) is invalid for violating section 56(3) of the Constitution of Zimbabwe and is accordingly struck down.
> 8. There shall be no order as to costs."

The relief set out in the first paragraph was not persisted with as it was predicated upon a misreading of the constitutional provisions pertaining to the appointment of a Chief Justice in Zimbabwe. The applicants were under the mistaken belief that the first respondent, the JSC, had the mandate to call for candidates to participate in an interview. Section 180 of the Constitution provides that the Chief Justice is appointed by the President after consultation with the JSC. The

[1] HH 201-93, pp. 2-3.
[2] HH 26-95.

relief sought in paragraphs 2, 3, 4 and 5 is the same one being sought by the applicant in HC 2128/21 save for the reference to s 69(4) of the Constitution. The relief sought in paragraph 6 of the draft order was abandoned during argument. Also, the applicant did not make any submissions in support of the alternative relief being sought in paragraph 7 of the draft order. We take it that this relief seeking the declaration of invalidity in respect of s 13 (which was incorrectly referred to as s 14) of the Constitution of Zimbabwe Amendment (No. 2), 2021, is not being persisted with.

Preliminary issues and objections.

The parties raised preliminary issues and objections. The first issue pertained to the recusation of the judges sitting in this matter. We dismissed the application and advised that the full reasons would be contained in the final judgment. Brief reasons were given in the *ex tempore* judgment that we delivered on 15 May 2021.

Before dealing with the substance of the matter it is important to advert to two issues. These issues arise from the submissions made on behalf of the respondents by the legal practitioners representing them as well as from the affidavit of the Attorney-General. The first one is the suggestion that judges are employees of the JSC, the nineteenth respondent in HC 2128/21 and first respondent in HC 2166/21. That is a misapprehension of the constitutional position. Judges are not employees but are constitutional appointees. They are appointed by the President in terms of the Constitution. The second point is the reference to the High Court as an inferior court. That, too, is a misapprehension. The High Court, under both the old constitutions and the current Constitution, is a superior court. These are fundamentals that the court expects every legal practitioner to be aware of, hence the need to highlight them herein.

Application for recusal.

The application on behalf of the second to nineteenth respondents pertained only to ZHOU J. As already noted, the second to eighteenth respondents have not opposed the applications.

The grounds advanced are that the judge is conflicted in that he was a Commissioner of the JSC for a period of 6 years and, secondly, that he participated in the interviews for the selection of Constitutional Court judges which were held in September 2020. There was also the submission that the entire High court bench, or, alternatively, the judges who constitute the panel *in casu*, would be biased.

An application for the recusal of a member of a court or tribunal based on interest has its foundations in the principle of natural justice known as *nemo judex in sua causa*. The test for bias

is an objective one. Applicant must show a reasonable possibility of bias.[3] In the case of *Bernert v Absa Bank Ltd*, the Constitutional Court of South Africa held that in the context of an allegation of judicial bias the "double requirement of reasonableness" must be satisfied, that both the person who apprehends bias and the apprehension itself must be reasonable.[4] When one considers that there is a presumption of impartiality, the need for genuine evidence or facts upon which the allegations of bias are founded is enjoined.[5] On the other hand, it is understood that an application for recusal of a judge necessarily places the party making it, particularly the legal practitioner, in an unenviable position. For this reason, courts must not be over-sensitive to such an application being made for their recusal as the rules of natural justice are an important feature of the right to a fair hearing.

Zhou J having left the JSC in February 2020, a period of about 15 months has passed. The matters in this case do not arise from what happened up to mid-February 2020. Mr *Chinake* referred to a resolution by which the deponent to the nineteenth respondent's affidavit was authorized to act. He submitted that the resolution was made during the period prior to February 2020, and that some of the applicants had challenged the authority of the Secretary of the JSC. The resolution speaks for itself and no evidence outside it or pertaining to how it came into existence was debated in this case. The challenge pertained to whether the Secretary had been authorized by the JSC to apply for its joinder and to defend the applications. No interest arising out of previous membership of the JSC has been shown which would suggest a reasonable possibility of bias.

The issue of the interviews for appointment to the Constitutional Court does not arise in this case. The provisions which are the subject matter of these applications introduce a new regime for appointment of sitting judges to the Constitutional Court and Supreme Court. No interest can be imputed arising out of the interviews which would have a bearing on the present applications. The move for the recusation of the entire panel of judges was predicted upon two grounds as advanced by Mr *Magwaliba* for the first respondent and the Attorney General. The first ground was that the amendments which were introduced by s 186 of the Constitution of Zimbabwe Amendment (No. 2) 2021 disadvantage High Court judges because their retirement age limit was

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[3] *Leopard Rock Hotel Company (Pvt) Ltd & Anor v Walenn Construction* 1994 (1) ZLR 255(S).
[4] 2011 (3) SA 92 (CC) para 34
[5] *Bernert v Absa Bank Ltd, supra*, para 35.

not extended to 75 years. The submission was that the High Court should not therefore hear the instant applications. This startling submission which was directed at all the High Court judges, including those who are not on the panel, assumes that extension of working age to 75 years is a benefit. That is a misapprehension not based on an interview of any of the High Court judges.

The additional ground was that the judges sitting in this matter were constituted by the Judge President who is a commissioner of the Judicial Service Commission, and would be conflicted. The allocation of cases to judges is an administrative function which judges have no control over. The involvement of the office of the Judge President is purely in the discharge of his administrative function. The insinuation by Mr *Magwaliba* that the judges may have been picked for some other improper purpose in this matter is not based on evidence and is a reckless submission by a legal practitioner who is an officer of this court.

The suggestion that the panel of judges was biased because they truncated the deadline for filing papers is unsound. The dates were discussed and agreed upon having regard to the basis of the urgency, which was that the second respondent was turning 70 years old on 15 May 2021. The court has inherent power to control its processes and procedures. Secondly, the dates were established with the involvement and consent of those who instructed Mr *Magwaliba*. The directions issued in respect of the filing of papers could therefore not be evidence of bias or an interest in the matter as suggested.

For these reasons, we dismissed the application for recusal of the judges.

Urgency.

The respondents revisited their objection that the matters were not urgent and consented to the matters being dealt with on an urgent basis. Accordingly, we relate to the matters on an urgent basis. Mr *Chinake* advised that his clients were abandoning the points *in limine* based on the grounds that the case had become moot and that the form used in the court application rendered the application invalid. He, however, persisted with the objections pertaining to misjoinder of the second to eighteenth respondents and jurisdiction of this court. The first respondent persisted with all the objections *in limine* except the one pertaining to the urgency of the matter. These objections therefore have to be considered.

The jurisdiction of this Court.

The objection to the jurisdiction of this court dealing with the matter was not argued notwithstanding the indication that it was being persisted with. Mr *Chinake* accepted that this

court does have the jurisdiction to grant a declaratur, in terms of s 14 of the High Court Act [*Chapter 7:06*]. He, however, made two points. The first one, namely, that any order that this court makes remains not operational until it is confirmed by the Constitutional Court is incorrect. Only the orders referred to in s 175(1) of the Constitution become effective after confirmation by the Constitutional Court. The second submission was that this court has no authority to appoint judges or decide on the hierarchy of the courts. However, this application is not concerned with the appointment of judges or the setting of the hierarchy of the courts. These are matters which are contained in the Constitution. Both points are in any event irrelevant to the issue of jurisdiction which had been raised.

The objections set out in paragraphs 17.1 and 17.2 of the opposing affidavit of the first respondent in HC 2166/21 were not persisted with in argument. These objections were that this court has no jurisdiction to grant consequential relief and that such consequential relief would be in violation of s 167(3) of the Constitution. However, as has been pointed out above, notwithstanding that in the draft order being sought the relief is presented as if it is consequential relief what is being sought is in fact and substance a declaratur.

The raising of the point *in limine* that the court has no jurisdiction is misconceived. The objection is therefore dismissed.

The form used in the court application.

The respondents' objection is that the court application filed on behalf of the applicant is not in Form 29, as is required by r 230 of the High Court Rules, 1971. The respondents point out that the form filed does not alert the respondents to their procedural rights, such as the consequences of any failure to oppose the application. The only missing portion of Form 29 is the one that warns the respondents that if they fail to file their opposing papers within the *dies induciae* then the matter would be dealt with as an unopposed application. In all the other respects the Form complies with the requirements of Form 29. The *dies induciae* are not contained in the Form 29 itself but are stated in r 232. The failure to state the period of ten days cannot therefore be a failure to comply with Form 29.

The other requirements of Form 29 like the need to file a notice of opposition and opposing affidavit, the need to serve opposing papers, and the entitlement to attach annexures to the opposing affidavits, are stated. Given that this application was filed under a certificate of urgency and with truncated periods for filing papers, and would be subject to the directions to be issued by

the judges who would be seized with the case, we do not believe that it would have been up to the applicant to warn the respondents of the consequences of a failure to file opposing papers within the proposed *dies induciae* which were, after all, proposed by the applicants. These would be subject to whatever directions that the court would give. These directions were given with the consent of all the parties. No prejudice was occasioned by the failure to state the consequences of a failure to file the opposing affidavit within the period proposed. Those who intended to oppose the applications did file their opposing papers in accordance with the directions issued.

We take note of, and draw attention to, the provisions of s 85(3)(c) of the Constitution, which state that: "the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities". Given that all the parties had the opportunity, by consent, to file the opposing and answering affidavits and heads of argument, the objection pertaining to the form used cannot be sustained having regard to the important constitutional questions which arise from the papers. For these reasons we dismiss the objection.

No leave sought to sue sitting judges.

The respondents rely on r 18 of the High Court Rules, 1971 for the objection that the failure to obtain the leave of the court to sue the judges renders the proceedings fatally defective. That rule provides as follows:

> "No summons or other civil process of the court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose."

A document which initiates application proceedings is not "civil process", save for the purposes of Order 5.[6] That is the reason why in terms of r 18 leave to sue out process is sought by way of court application. If a court application was "process" there would be the absurdity that one would then require the leave of court to institute the court application provided for in r 18 since the affected judge would have to be cited in that application. Rule 18 falls under Order 3 which deals with summons matters. In Order 32 which deals with applications there is no provision which is similar to r 18. So clearly r 18 is not of general application to all proceedings irrespective of how they are instituted.

Further, the applications *in casu* were made in terms of s 85 of the Constitution. There is no requirement for such leave to be granted in an application made in terms of that section. Further

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[6] See Order 5 r 1.

and, in any event, second to eighteen respondents are cited in their official capacities. They have not filed opposing papers challenging their citation without leave. In any case, even if they had done so and the court had found that such leave was required, the effect of that finding would not have been to nullify the entire proceedings.

The *locus standi* of the applicants.

The objection taken by Mr *Magwaliba* for the first respondent in HC 2128/21 and third respondent in HC 2166/21 is that the applicants have not shown a legal interest which would be or has been interfered with or a constitutional right which has been or would be infringed. The applicants in both applications allege violation of their fundamental rights as well as violation of the Constitution if the second to eighteenth respondents are to continue to occupy the office of judge after attaining the age of seventy years.

The Constitution of Zimbabwe widened the scope of *locus standi* in respect of matters pertaining to infringement of fundamental rights, see s 85(1) of the Constitution. The applicants are alleging violation of their fundamental rights. This gives them the *locus standi* to approach the court for relief.

A restrictive interpretation of *locus standi* in respect of alleged violations of the Constitutional rights was rejected in the case of *Mawarire* v *Mugabe NO & Ors* 2013 (1) ZLR 469(CC) at 477D-E where the Court said:

> "Certainly this court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave off the threat . . ."

In the *Mawarire* case the applicant alleged that his right to protection of the law in terms of s 18(1) of the old Constitution of Zimbabwe had been, was being or was likely to continue to be violated by a failure to fix a date for the holding of elections. In the instant applications the applicants allege violation of s 56(1) and s 69(3) of the Constitution. In any event, ensuring compliance with the provisions of the Constitution is not only an entitlement but an obligation of every citizen of Zimbabwe. This gives them the *locus standi* to approach the court for enforcement of the constitutional rights. Whether the violations will be established is a matter for argument on the merits.

In the premises, the objection to the *locus standi* of the applicants to approach the court is unfounded and must fail.

Misjoinder of the second to eighteenth respondents in HC 2128/21 and their citation.

The first and nineteenth respondents took the point that there was misjoinder of the second to eighteenth respondents. In the case of *Zimbabwe Teachers Association and Others* v *Minister of Education*[7], it was held that a party is entitled to participate in a suit if it has a direct and substantial interest in the subject-matter and outcome of the application. What is required is a legal interest, not a financial interest which is only an indirect interest in the litigation. In this case the respondents are the persons who held or occupied the offices of judges of the Constitutional Court and Supreme Court. The question of whether they should retire at the age of seventy years or they have an election to have their stay in office extended affects them directly. In fact, the second respondent reached seventy years old on 15 May 2021, and the extension of his term of office beyond the age of seventy is a question to be determined in the instant matters. Whether the fifteenth, sixteenth and seventeenth are affected by the order if granted is a matter that pertains to the merits of the case. The fact is that they are cited and relief is being sought against them as well. In any event, the first and nineteenth respondents cannot plead a case on behalf of parties who have not defended the suit.

After all, r 87(1) of the High Court Rules, 1971, provides that the misjoinder or non-joinder of a party does not defeat the cause as long as the issues before the Court can be determined in respect of the parties before it. It goes further to state that the court may in any cause or matter, determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. The objection is dismissed.

Non-joinder of Parliament and the President.

The objection is that Parliament, the Speaker of the National Assembly, the President of Senate and the President of the Republic of Zimbabwe ought to have been cited in these proceedings. The basis of this objection, as appears from paras 18.1-18.4 of the nineteenth respondent's opposing affidavit in HC 2128/21, is that what is being sought to be impugned is the Constitution of Zimbabwe Amendment (No. 2), 2021. However, what is involved is the interpretation of that Act and the Constitution and the constitutionality of some of the provisions of the Amendment Act. These are matters that fall within the domain of the court. Interpretation

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[7] 1990 (2) ZLR 48(HC) at 52F-53E.

of the law is the primary duty of the Court. Neither Parliament nor the President has a role in that process. Once the Legislature makes a law it would have discharged its mandate. It cannot be called upon to appear before a court to answer to questions pertaining to the alleged unconstitutionality of the law or the meaning or effect of that law, unless what is being raised is whether it has complied with the constitutional procedures in making the law.

In relation to the President of the Republic, there is the submission that he has written the letter of 11 May 2021 in terms of which the second respondent's term of office was extended. However, the cause of action in both applications is not founded upon the letter of 11 May 2021. Accordingly, this objection is without merit and is dismissed.

The alleged absence of a cause of action.

This objection is taken by the third respondent in HC 2166/21, in paras 7-11 of the heads of argument. Although it is raised as an objection *in limine* the submissions show that it is an argument on the merits of the matter. The point being made is that the applicants in HC 2166/21 failed to establish their entitlement to the right of access to courts as enshrined in s 69(3) of the Constitution and how the continued occupation of the office of Chief Justice by the second respondent violates the applicants' rights as protected by s 69 and s 56 of the Constitution. This objection is therefore dismissed.

Whether the matter has become moot.

The first respondent in HC 2128/21 and the third respondent in HC 2166/21 contend that the dispute between the applicants and second respondent has become moot by reason of the first respondent's term having been extended prior to the hearing of the matter. It is common cause that a letter was written on behalf of the President on 11 May 2021, the same day that the first application was instituted. The letter was produced as an annexure to the opposing papers for the JSC. In terms of the letter the President agreed to extend the second respondent's continued stay in office as Chief Justice with effect from 16 May 2021.

The doctrine of mootness is one of the prudential considerations on the basis of which on public policy considerations a court may decline to exercise its jurisdiction to determine a matter which has come before it. This would arise where there is no remaining triable issue. A case is moot and therefore not justiciable if it no longer raises an extant or live dispute, harm, controversy or threat of prejudice to the applicant, see *S* v *Dlamini; S* v *Dladla; S* v *Joubert; S* v *Schietekat*.[8]

[8] 1999(4) SA 623(CC) para 27.

In the case of *National Coalition for Gay and Lesbian Equality and Another* v *Minister of Justice and Others* the court stated that a matter ceases to be justiciable on the ground of mootness if it "no longer presents an existing or live controversy".[9] The doctrine is applicable where a matter is brought to court too late when the issues to be determined have been resolved or, as is sometimes said, when the horse has already bolted out of the stable. See, for example, *DeFunis* v *Odegaard*,[10] a case in which the applicant challenged the decision of the Admission Committee of the University of Washington Law School to deny him admission. He alleged that he had been denied enrolment on grounds of racism. By the time that the matter got to the Supreme Court the Law School had admitted the applicant as a student and he was now registered for his final quarter in the Law School. The Supreme Court of the US held that it could not consider the substantive constitutional issues raised because the controversy had been resolved. The jurisprudential rationale for the doctrine, as explained in the case of *JT Publishing (Pty) Ltd and Another* v *Minister of Safety and Security and Others*, courts should avoid deciding points that are "abstract, academic or hypothetical".[11]

In casu the dispute remains alive notwithstanding the writing of the letter of 11 May 2021. The issue of whether s 186 of the Constitution has the effect of extending the tenure of office of the second to eighteenth respondents as judges beyond the age of seventy years remains alive. The question of the retirement age for the second respondent and the other judges of the Constitutional Court and Supreme Court was not resolved by that letter. For these reasons the matters raised are not abstract; they are not moot. The objection must therefore fail.

The applicants' objections *in limine*.

The applicants in their answering papers also raised objections *in limine* to the respondents' papers. The authority of Walter Chikwana, the Secretary of the JSC, to motivate the joinder of the nineteenth respondent was questioned. The application for joinder was not made on affidavit but was made orally at the case management conference. It was not based on any affidavit. The joinder was granted with the consent of the applicants. Therefore, the objection to the joinder cannot stand.

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[9] 1999 (1) SA 6(CC) para 21.
[10] (1974) 416 US 312.
[11] 1997 (3) SA 514(CC) para 15.

There was also the question as to whether the JSC had authorized the deponent to the affidavit to defend the matter or participate in it, it being clear from the resolution attached that the authority given is merely "to sign documents on behalf of the JSC in litigation matters". It is not in every case that the court would insist on a resolution to authorize or defend proceedings. Where a juristic entity has brought itself before the court, particularly where it is represented by a legal practitioner, it is up to the person alleging want of authority to produce evidence to support the allegations.

In the case of *Madzivire & Others* v *Zvarivadza & Others*[12] the dispute involved directors who were competing to control a company, hence the issue of the authority of the company to participate in the proceedings had to be proved after being put in issue. In the present cases there is no evidence led to suggest that the legal practitioner who appeared had no authority to represent the JSC to apply for its joinder or to file opposing papers on its behalf. Accordingly, the objection is dismissed.

The other points taken are that the Attorney-General has no authority to depose to an affidavit on behalf of the first respondent in HC 2128/21 and that, in any event his opposing affidavits in both cases were not properly commissioned and are therefore invalid. The Attorney-General is the principal legal advisor to the Government and has the authority to represent the government in civil and constitutional proceedings. If he has knowledge of the facts to which he deposes he would not be disqualified from deposing to an affidavit on behalf of the Government. In this case he explains why the first respondent was unable to depose to the affidavit himself by reason of being unavailable. He further explains that his defence is largely based on legal issues which would be within his domain. We therefore do not believe that he is disqualified from deposing to the affidavit.

The second ground of objection is that the affidavits deposed to by the Attorney-General were sworn to before the very same legal practitioner, Ms *F. Chimbaru*, who is appearing in these proceedings. Ordinarily she would be disqualified from commissioning the affidavits by reason of her interest in the matter given her involvement. No acceptable reason was given as to why no other commissioner of oaths could commission the documents. Be that as it may, given the urgency involved in these matters, the court is prepared to turn a blind eye to these deficiencies in

[12] 2006 (1) ZLR 514(S).

order to deal with the substance of the matter. Accordingly, the objections in respect of the affidavits are dismissed.

The dispute on the merits.

This dispute stands to be resolved on the effect of section 186 of the Constitution of Zimbabwe as introduced by the Constitution of Zimbabwe Amendment (No.2) 2021 in light of the provisions of s 328 of the constitution of Zimbabwe.

The new section 186 provides:

"186 Tenure of office of judges

(1) The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of 70 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years:
Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to their mental and physical fitness so to continue in office.

(2) Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years, but-
(a) they must retire earlier if they reach the age of 70 years unless, before they attain that age, they elect to continue in office for an additional five years:
Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office;
(b) After the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment.

(3) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of 75 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years:
Provided that the election shall be subject to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office.

(4) Notwithstanding subsection 7 of section 328, the provisions of subsections (1), (2) and (3) of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court.

(5) Judges of the High Court and any other judges hold office from the date of their assumption of office until they reach the age of 70 years, when they must retire.

(6) A person may be appointed as a judge of the Supreme Court, the High Court or any other court for a fixed term, other than in an acting capacity, he or she ceases to be a judge on reaching the age of 75 years (In the case of a judge of the Supreme Court.) or 70 years (in the case of a judge of the High Court or any other court) even if the term of his or her appointment has not expired.

(7) Even though a judge has resigned or reached the age of retirement or, in the case of a judge of the Constitutional Court, reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.

(8) A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission.

(9) The office of a judge must not be abolished during his or her tenure of office."

Its effect is to extend the retirement age of the Chief Justice, deputy chief justice and judges of the Constitutional and Supreme Court as will be dealt with in due course.

Section 328 of the Constitution reads as follows:

"**328 Amendment of Constitution**

(1) In this section—

"Constitutional Bill" means a Bill that seeks to amend this Constitution;

"term-limit provision" means a provision of this Constitution which limits the length of time that a person may hold or occupy a public office.

(2) An Act of Parliament that amends this Constitution must do so in express terms.

(3) A Constitutional Bill may not be presented in the Senate or the National Assembly in terms of section 131 unless the Speaker has given at least ninety days' notice in the *Gazette* of the precise terms of the Bill.

(4) Immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection (3), Parliament must invite members of the public to express their views on the proposed Bill in public meetings and through written submissions, and must convene meetings and provide facilities to enable the public to do so.

(5) A Constitutional Bill must be passed, at its last reading in the National Assembly and the Senate, by the affirmative votes of two-thirds of the membership of each House.

(6) Where a Constitutional Bill seeks to amend any provision of Chapter 4 or Chapter 16—

(a) within three months after it has been passed by the National Assembly and the Senate in accordance with subsection (5), it must be submitted to a national referendum; and

(b) if it is approved by a majority of the voters voting at the referendum, the Speaker of the National Assembly must cause it to be submitted without delay to the President, who must assent to and sign it forthwith.

(7) Notwithstanding any other provision of this section, an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment.

(8) Subsections (6) and (7) must not both be amended in the same Constitutional Bill nor may amendments to both those subsections be put to the people in the same referendum.

(9) This section may be amended only by following the procedures set out in subsections (3),(4), (5) and (6), as if this section were contained in Chapter 4.

(10) When a Constitutional Bill is presented to the President for assent and signature, it must be accompanied by—

(a) a certificate from the Speaker that at its final vote in the National Assembly the Bill received the affirmative votes of at least two-thirds of the membership of the Assembly; and

(b) a certificate from the President of the Senate that at its final vote in the Senate the Bill received the affirmative votes of at least two-thirds of the membership of the Senate."

We draw particular attention to the provisions of s 328 (7) because this matter revolves around its relationship with section 186, and the effect of that relationship on the tenure of office of the Honourable Justice Luke Malaba and the other judges who are cited as respondents in Case No. HC 2128/21.

The applicants' and respondents' contentions.

The applicants' case is summarized in paras 61-65 of the founding affidavit in HC 2128/21 and paragraphs 17-21 of the founding affidavit in HC 2166/21. It is that the second respondent and the other persons cited who occupy the offices of judges of the Constitutional Court and Supreme Court cannot remain in office beyond the age of 70 years notwithstanding the provisions of s 186 of the Constitution as substituted by the Constitution of Zimbabwe Amendment (No. 2) 2021. The essence of the respondents' case is that s 186 did not affect the term-limit or tenure of the judges of the Constitutional and Supreme Courts, and is therefore not affected by the provisions of s 328(7) of the Constitution.

In other words, what has to be decided *in casu* is whether the second to eighteenth respondents retire upon reaching the age of 70 years or are entitled to elect to continue in office for an additional five years until they reach the age of 75 years. This issue can only be resolved by interpretation of sections 186 and 328(7) of the Constitution. It is important to give an overview of the principles of interpretation which apply to constitutional provisions in general insofar as these have a bearing on how these two sections should be understood.

The approach to constitutional interpretation.

According to Iain Currie & Johan de Waal *The Bill of rights Handbook 6th ed.* p. 133, "Constitutional interpretation is the process of determining the meaning of a constitutional provision." Thus, interpreting a constitution entails giving "meaning", which we understand in its wide sense, to the provisions of a constitution. An interpretation that does not give effect to the purpose of the provision does not give meaning to it, see *Judicial Service Commission* v *Zibani & Others.*[13] The textual provisions of the constitution under consideration are the starting point but they should not be considered and interpreted piecemeal or in isolation. We therefore do not agree with the submission by Mr *Magwaliba* that the cases of *Natal Joint Municipal Pension Fund* v *Endumeni Municipality*[14] and *Zambezi Gas (Pvt) Ltd* v *NR Barber (Pvt) Ltd & Another*[15] introduce a new and different paradigm to the interpretation of constitutional provisions. The textual provisions must be construed contextually having regard to the constitution as a whole, see *Matatiele Municipality* v *President of the republic of South Africa.*[16] The preferred approach is

[13] 2017 (2) ZLR 114(S) at 123G-H.
[14] 2012 (4) SA 593.
[15] SC 3 – 20.
[16] 2007 (6) SA 477(CC), para 36.

the 'generous' and 'purposive' interpretation that gives expression to the underlying values of the Constitution, as was held in *S* v *Makwanyane*.[17]

Section 46(1) of the Constitution provides as follows:

> "(1) When interpreting this Chapter (read 'Constitution'), a court, tribunal, forum or body –
>
> (a) must give full effect to the rights and freedoms enshrined in this Chapter;
> (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
> (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
> (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
> (e) may consider relevant foreign law."

The starting point is to appreciate that in Zimbabwe the Constitution is the supreme law. This fundamental tenet of democracy is enshrined as a rule and as one of the values and principles upon which the nation of Zimbabwe is founded. Section 2 of the Constitution provides as follows:

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

Section 3 of the Constitution states the following, among other things:

> "**3 Founding values and principles**
> (1) Zimbabwe is founded on respect for the following values and principles –
> (a) Supremacy of the Constitution;
> (b) The rule of law;
> (c) Fundamental human rights and freedoms;
> (d) . . .
> (e) . . .
> (f) . . .
> (g) . . .
> (h) Good governance; and
> (i) . . .
> (2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include –
> (a) . . .
> (b) . . .
> (c) . . .
> (d) . . .

[17] 1995 (3) SA 391(CC) para 9; see also s 331 of the Constitution of Zimbabwe, which provides as follows: "Section 46 applies, with any necessary changes, to the interpretation of this Constitution apart from Chapter 4."

(e) Observance of the principle of separation of powers;
(f) Respect for the people of Zimbabwe, from whom the authority to govern is derived;
(g) Transparency, justice, accountability and responsiveness;
(h) . . ."

The essence of the constitutional supremacy doctrine, as distinct from parliamentary sovereignty, is that the Constitution is the litmus test, the ultimate measure, by which the validity of any law, practice, custom or conduct is assessed. This aspect distinguishes constitutional supremacy from parliamentary supremacy or parliamentary sovereignty. Where the latter system obtains, parliament is supreme, and any law that it passes cannot have its content questioned for validity. Zimbabwe is a constitutional democracy in which the constitution is supreme, and not a parliamentary democracy in which parliament is supreme, see *Judicial Service Commission* v *Zibani and Others*.[18]

The principle of separation of powers which is explicitly provided for in s 3 and guaranteed by the architecture of our Constitution has in it that among the three arms of the State the judiciary has the primary duty to interpret the law, see *In Re: Prosecutor-General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control*.[19] Therefore, the exercise of determining what s 186 of the Constitution means in light of the provisions of s 328(7) falls squarely within the mandate of the courts.

The principles which are encapsulated in the principle of good governance demand a new and different way of doing things from what may have been done in the past, hence the special mention of transparency, justice, accountability and responsiveness. This is the context in which the entrenchment of s 328(7) of the Constitution must be understood. The provision's purpose is, among the other important considerations, to ensure that a person who holds or occupies public office does so for a limited time, to prevent turning persons into institutions thereby compromising on the precepts enjoined in s 3 of the Constitution. It is also to ensure that a person who occupies or holds public office does not influence changes in the law in order to entrench his or her occupation of the public office by extending the length of time that he or she remains in that office. With particular reference to judicial officers, entrenchment of provisions relating to terms of office for incumbents ensures confidence in the judiciary by dispelling any suspicion that favours are

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[18] 2017 (2) ZLR 114(S) at 118G; see also *Doctors for Life International v speaker of the National Assembly* 2006 (6) SA 416(CC) at para 38.
[19] 2017 (1) ZLR 107(CC) at 113D-H

being extended to them contrary to the provisions of the Constitution that would undermine the independence of the judiciary. As was held in the case of *Justice Alliance of South Africa* v *President of the Republic of South Africa & Others*:

> "In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it . . . The power of extension in section 176(1) must therefore, on general principle, be construed so far as is possible to minimize the risk that its conferral could be seen as impairing the precious won institutional attribute of impartiality and the public confidence that goes with it."[20]

Public confidence in the independence of the judiciary would be severely undermined if there was a belief or even suspicion that the judiciary or members thereof are, like nocturnal spooks acting under cover of darkness, knocking on the doors of the Executive and Legislative arms of government begging or lobbying for extension of their terms of office. This is the reason why there is need for certainty regarding the tenure of office of judicial officers in order to dispel any thinking that if they behave in a certain way they might get the benefit of favourable constitutional amendments. In order to guard against subtraction from the founding values and principles, including the independence of the judiciary, the court must embrace substantive reasoning, an interpretive model which gives substance to those values and principles, and eschew legal sophistry which would result in narrowing down the meaning of these values.

Further, the entrenchment ensures that if there is any change in the Constitution the effect of which is to extend the length of time that a person may hold or occupy public office such a change in the law must be subjected to the rigorous processes in s 328, which include a referendum. We point out that s 328 does not stop the legislature from amending the Constitution by extending term limits in general. If the changes in the Constitution do not have the effect of extending the length of time that the incumbent may hold office they do not have to go through the rigorous processes required by s 328. However, if the effect of such amendments is to extend the length of time that a person holds or occupies public office then they must be subjected to those entrenched processes. Section 328 has not been repealed by the Constitutional Amendment. It must therefore be given effect.

Interpretation of section 186 and 328 (7).

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[20] *Justice Alliance of South Africa v President of the Republic of South Africa and Others, Freedom Under Law v President of the Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of the Republic of South Africa and Others* 2011 (5) SA 388(CC) at para 75.

It is an established principle that sections of the constitution must not be read in isolation but must be read together and in the context of the whole text in order to give effect to the purpose and objective of the Constitution.[21] In this case, the two sections are not in conflict but must be read together and with the constitution as a whole. Section 328 which deals with amendment of the Constitution entrenches certain provisions. This entrenchment is by requiring, in addition to the usual procedure for passing an amendment to the Constitution, that such amendments be submitted to a referendum and get approval from a majority of the voters voting at the referendum. One such provision which is entrenched is s 328 (7), which, as recited above, provides the following:

> "(7) Notwithstanding any other provision of this section, an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment."

The Constitution of Zimbabwe Amendment (No. 2) 2021 amends s 186 of the Constitution through its s 13. The Constitution in s 332 defines the term "amend" to include "vary, alter, modify, add to, delete or adapt". In this instance the existing s 186 was repealed and substituted with a new s 186. This is an amendment. In order to determine whether or not the amendment is one that falls within the ambit of s 328(7) two requirements must be satisfied – namely (a) it must be an amendment to a term limit, and (b) it must have **the effect** of extending the length of time that a person may hold or occupy a public office. 'Effect' simply means result, consequence or impact, irrespective of the expressed purpose of the amendment. Once it satisfies these two requirements then such an amendment is excluded from applying to "any person who held or occupied that office, or an equivalent office, at any time before the amendment." The reference to an "equivalent office" is no doubt meant to deal with a situation where an amendment might seek to rename or reconfigure what is essentially the same office in order to escape the consequences of s 328(7), thereby extending a person's stay in office.

There can be no question that judges occupy public office. There was debate as to whether s 186 is a term-limit provision which has the effect of extending the length of time that the second respondent and the other judges of the Constitutional Court and Supreme Court may hold or occupy office. The respondents contended that it was not a term-limit provision. The submission

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[21] *Tsvangirai v Mugabe & Others* 2017 (2) ZLR 1(CC) at 9C.

was that the only term limit which is contained in s 186 is one that is contained in subsection (2), which states that "Judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years". Their argument was that the retirement age stipulated does not limit the term of office of the judges. This argument means that judges of the Supreme Court and High Court have no term limit. That argument is not sustainable. Section 328(1) defines 'term-limit provision" to mean "a provision of this Constitution which limits the length of time that a person may hold or occupy a public office".

We therefore come to the conclusion that s 186 is a term limit provision and that it has the effect of extending the length of time that a person may hold the office of judge of the Constitutional Court and Supreme Court. It increases the retirement age of the judges in these courts from the original 70 to 75 years. The fact that this extension of the tenure of office is subject to election by the concerned judge and acceptance by the President after consultation with the Judicial Service Commission and production of a medical report does not change its nature as an extension of a term limit. In respect of the judge of the Constitutional Court, the term limit is based on two dimensions, namely, (i) the period of 15 years which is provided in section 186, and (ii) the age of the affected judge. It is clear that whichever of these 2 occurs first terminates the tenure of the judge. This is what is generally referred to as a hybrid tenure arrangement.[22] There are thus three types of valid tenure arrangements in use generally the world over: Life limits (when one dies), age limits (when one reaches a specified retirement age), and a fixed term limit (when a specified period of service is reached). These three tenure arrangements are contained in s 186 of the Constitution of Zimbabwe. Tenure has to do with term of office; term of office has to do with time. Both fixed term (fixed time), and age-based term (age-based time), have to do with time. Time is the underlying factor in both of them. Therefore, the inescapable conclusion is that varying retirement age is varying term limits.

In respect of Supreme Court judges, the tenure of office is defined by age only. Thus, for instance, a Constitutional Court judge who is aged 70 years at the time of his or her appointment has his or her term limited to only five years. That term limit is defined by his or her age. He or she must retire upon turning seventy-five years after serving for only five years. On the other hand, a judge of the same court who is fifty years old at the time of his or her appointment has his

[22] Brian Opeskin, "Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges" *Oxford Journal of Legal Studies* Vol. 35, No. 4 (Winter 2015) pp. 627-663.

or her term defined by the period of fifteen years. The judge retires from the Constitutional Court at the age of sixty-five years. On the other hand, a judge of the Supreme Court under the new amendment retires at the age of seventy-five years irrespective of how many years he has served on that bench.

That s 186 is a term-limit provision, and that it is concerned with extending the length of time that judges of the Constitutional Court and the Supreme Court hold or occupy public office, is also evident from the provisions of s 186 (4). This provision explicitly refers to s 328 (7). This reference to s 328(7) would be rendered superfluous or nugatory if, as suggested by the respondents, it is found that s 186 is not a term-limit provision. The respondents have not suggested why the legislature would engage in a superfluous exercise, especially in light of the presumption against superfluity in the interpretation of statutes. Also, in the affidavits filed in this court, the respondents referred to its effect as extending the term of office.[23] The submission made on behalf of the respondents reads the reference to the fifteen years in isolation from the rest of subsection (2) of s 186. That is the approach to interpretation which must be discarded. The case of *Justice Alliance of South Africa* v *President of the Republic of South Africa & Others* which has been referred to by both the applicants and respondents also confirms that age can, and does, indeed define and can be used to extend a term of office, as has happened following the enactment of s 186:

> "It follows that in exercising the power to extend the term of office of a Constitutional Court Judge, Parliament may not single out the Chief Justice . . . **Age is an indifferent criterion that may be applied in extending the term of office of a Constitutional Court Judge.**"[24] (Emphasis added).

Section 186(4) and s 328(7) can be read together. In our conclusion, section 186 (4) does not apply to the person of the second respondent and the other persons who were judges of the Constitutional Court prior to the amendment. It also does not apply to the persons who were judges of the Supreme Court. This is because these are persons who fall within the ambit of s 328(7) in that they held or occupied the public office prior to and at the time if the amendment of the Constitution. Consistent with the hallowed principle of interpretation which avoids an interpretation which results in a conflict in constitutional provisions, we come to the conclusion

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[23] See paras 25.4 (b) and (c) of the nineteenth respondent's opposing affidavit in HC 2128/21.

[24] *Justice Alliance of South Africa v President of the Republic of South Africa and Others, Freedom Under Law v President of the Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of the Republic of South Africa and Others* 2011 (5) SA 388(CC) at para 91.

that section 186 (4) does not apply to the judges of the Constitutional Court and Supreme court who held office before the amendment. There is no confusion which results from the wording of s 186 (4). It says that the section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court. This means it would apply to the continuation of the mentioned public officer other than those who were judges before the amendment. The provision mentions offices rather than the persons occupying them. Section 186(4) must therefore be understood as applicable to persons who are appointed to the named offices subsequent to the amendment. It does not mention 'persons', and does not state that the persons who were in office prior to the amendment would benefit from it. If it did so this would put it in conflict with the express provisions of s 328(7), and its constitutionality would be in question given that it was not submitted to a national referendum. On the other hand, an interpretation that excuses the persons who held public office as judges of the Constitutional and Supreme Courts prior to the amendment from the ambit of s 328(7) would reduce the Constitution to a wooden iron, because any person who already holds or occupies public office can easily cause their term of office to be lengthened by enactment of a provision similar to s 186(4) thereby perpetuating the mischief which was meant to be addressed by the entrenchment of s 328.

The status of Honourable Justice Malaba.

It is common cause that the Honourable Justice Malaba is the only judge of the Constitutional Court who has turned 70. At the time that the applications were filed, he had not turned 70. He turned 70 years old on 15 May 2021. The applications were filed following indications that he might or would benefit from the new section 186 of the Constitution by having his tenure of office extended by another 5 years. The respondents in their opposing affidavits have referred to a letter dated 11 May 2021 by which his tenure was to be extended with effect from 16 May 2021.

In view of the conclusion we have reached, Honourable, Justice Luke Malaba ceased to be a judge of the Constitutional Court and Supreme Court at 0000hours on 15 May 2021 when he turned 70 years. Equally, he ceased to be the Chief Justice of the Republic of Zimbabwe at that time. Nothing turns on the letter of 11 May 2021. When it was written that was the same day that the application was filed. The letter of 11 May 2021 was intended to take effect only on 16 May 2021, on which date the then incumbent would have ceased to be a judge some twenty-four hours earlier. An absurd situation, which neither the Executive nor the Legislature would have intended,

would have resulted whereby the country would be without a Chief Justice for the period of 24 hours, between 0000 hours on 15 May 2021 and 0000 hours on 16 May 2021. There would have been nothing to extend since he would have ceased to be a judge and Chief Justice of Zimbabwe. Thus, any purported extension of the second respondent's occupation of the office of judge or Chief Justice remains a nullity because there was nothing to extend once he ceased to be a judge at the inception of 15 May 2021. This is so whether the extension is said to have been constituted by his election to remain in office or by the letter of 11 May 2021. The celebrated statement in the case of *MacFoy* v *United Africa Co. Ltd* decidedly seals the effect of that letter:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad . . . And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."[25]

In the case of *Muchakata* v *Netherburn Mine* the Supreme Court of Zimbabwe (Per KORSAH JA) said that if an act is void *ab initio* it is "void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it".[26] In making these observations, we are mindful of the fact that the two applications were not based on the letter of 11 May 2021. That letter was produced in opposing papers. Our conclusion is that the letter does not affect the conclusions which we have reached based upon an interpretation of the constitutional provisions considered above.

The position of the other judges of the Constitutional Court and Supreme Court.

The effect of the conclusion reached above is that the persons who occupied the positions of judges of the Constitutional and Supreme Courts prior to the amendment cannot have their term in office extended beyond the age of 70 years based on section 186 of the Constitution as presently worded. This is because they held or occupied the concerned office before the amendment introduced by s 13 of the Constitution of Zimbabwe Amendment (No. 2), 2021.

We point out, however, that acting judges be they in the Constitutional Court or Supreme Court are not affected by the provisions of s 328 (7) as read with s 186 of the Constitution. These include the fourth to fourteenth and the eighteenth respondents in so far as they have been acting Constitutional Court judges as well as the fifteenth, sixteenth and seventeenth respondents in case no.HC2128/21 in so far as they are substantive High Court judges who have been acting as

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[25] [1961] 3 All ER 1169 at 1172I.
[26] 1996 (1) ZLR 153 (S) at 157B.

Constitutional Court and/or Supreme Court judges. There is no extension to the length of their term in office since they are just acting judges.

The violations of the applicants' rights.

The applicants in both applications allege that the continued occupation of public office as judge and/or Chief Justice of Zimbabwe by the second respondent would violate their fundamental rights enshrined in s 56(1) and s 69(3) of the Constitution. The parties accepted that the reference to s 69(4) in the draft order in HC 2166/21 was an error, the correct and intended citation being s 69(3).

Section 56(1) provides as follows:

> "All persons are equal before the law and have the right to equal protection and benefit of the law."

Section 69(3) provides as follows:

> "Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute."

This court is concerned with substantive equality and equal protection and benefit of the law rather than formal equality. In the case of *Mawarire* v *Mugabe NO & Others, supra,* the applicant alleged violation of, *inter alia*, s 18(1) of the old Constitution which provided as follows: "Subject to the provisions of this Constitution, every person is entitled to the protection of the law." The Court came to the conclusion that the failure to perform a constitutional duty violated the applicant's fundamental right as protected by s 18 of the Constitution.[27] Section 56(1) of the Constitution of Zimbabwe 2013 is wider in its scope than s 18 of the old Constitution. It qualifies the protection of the law with the word "equal"; it also adds the entitlement to "equal benefit" of the law which was not there in the old Constitution.

We conclude that the continued occupation by the second respondent of the offices of judge and Chief Justice after he has turned seventy years old violates the applicants' right as enshrined in s 56(1) of the Constitution. The applicants are entitled to protection and benefit of the law in the sense of having public office occupied in accordance with and not in violation of the provisions of the Constitution. The applicants are therefore entitled to the declaratory relief which they seek.

The second violation of fundamental rights alleged by the applicants in Case No. HC 2166/21 is of s 69(3) of the Constitution.[28] It has been held that the right of access to courts is

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[27] *Mawarire v Mugabe NO & Others, supra*, p. 486F.
[28] Para 9(a) of the affidavit of Emma Kate Drury.

essential for constitutional democracy and the rule of law.[29] In the case of *Bernstein* v *Bester NO* 1996 (2) SA 751(CC) para 105, the purpose of the right of access to courts was explained by the Constitutional Court of South Africa as:

> "to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. . . (It) achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the '*regstaatidee*', for it prevents legislatures at whatever level, from turning themselves by acts of legerdemain into 'courts' . . . By constitutionalizing the requirements of independence and impartiality the section places the nature of the courts or other adjudicating fora beyond debate . . ."

We respectfully endorse the above exposition of the law. Both the separation of powers principle and the rule of law are enshrined in s 3 of the Constitution. The essence of the rule of law is that any person may challenge the legality of any law, conduct, practice etc in a separate, impartial and independent court or other forum, one that is free from the control of the perpetrator of the illegality, Currie & de Waal, *The Bill of Rights Handbook* 6th ed., p. 711. If a sitting judge can have his or her term of office extended by amendment of the Constitution just one week before he or she is due to retire, or judicial officers have their age limit extended contrary to the express provisions of the Constitution which prevent incumbents from having terms of office extended for them while they are in office, questions will reasonably abound as to the extent to which the Court can be independent. The intended extension of the length of time that the persons in office as judges of the Constitutional Court and Supreme Court, do have the effect of compromising on the independence of the judiciary and the rule of law. Significantly, the election to continue in office introduced by s 186 (1), (2) and (3) is not an automatic guarantee that the judge concerned will continue in office. It is subject to acceptance by the President. It is not guaranteed. This has the effect of subjecting the term of office (or extension thereof) to the control of the Executive.

If any extension is to be afforded to the second to fourteenth and the eighteenth respondents then there would be violation of the applicants' right as protected by s 69(3). This is so given the conclusion that we have reached that such extension contemplated by s 186 does not apply to persons who were in office as judges before the amendment.

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[29] *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) paras 1 and 64; *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429(CC) para 11.

Conclusion.

Our conclusion is that the extension of the retirement age amounts to extension of tenure. Tenure is defined by both the fixed time and the stipulated retirement ages. In terms of s 328 (7) of the constitution, such an extension of tenure is an amendment to the Constitution. It cannot benefit the persons who held or occupied the office at any time before the amendment. Any extension of the length of time that persons who were judges of the Constitutional Court and Supreme Court prior to the amendment of s 186 through the Constitution of Zimbabwe Amendment (No. 2), 2021 would be a violation of the applicants' rights as protected by s 56(1) and s 69(3) of the Constitution of Zimbabwe.

Costs.

We consider that the issues raised in these two matters are of national importance. They relate to the interpretation of provisions of the Constitution and how those provisions affect the persons who were judges of the Constitutional Court and Supreme Court before the amendment which triggered the filing of the applications. For these reasons, in accordance with the approach of the courts in matters of this nature, we do not believe that any of the parties should be ordered to pay costs.

Disposition.

In the result, we make the following order:

IT IS DECLARED THAT:

1. The second respondent in HC 2128/21 who is also the second respondent in HC 2166/21 ceased to hold the office of the Chief Justice of Zimbabwe and judge by operation of law on 15 May 2021 at 0400 hours.
2. The extension of the length of time in the office of the judge beyond the age of 70 years provided for in section 186 of the constitution does not apply to the second to fourteenth and the eighteenth respondents.
3. There shall be no order as to costs.

CHAREWA J agrees .....

MUSHORE J agrees .....

Zimbabwe Human Rights NGO Forum, applicant's legal practitioners in HC 2128/21
Honey & Blanckenberg, legal practitioners for the applicants in HC 2166/21
Kantor & Immerman, legal practitioners for the 2nd to 19th respondents in HC 2128/21 and for the 1st and 2nd respondents in HC 2166/21
Civil Division of the Attorney-General's Office, legal practitioners for the 1st respondent in HC 2128/21 and for the 3rd respondent in HC 2166/21