

REPORTABLE (3)

(1) COMBINED HARARE RESIDENTS' ASSOCIATION (2)
BORROWDALE RESIDENTS' ASSOCIATION (3) CLEVER
RAMBANAPASI (4) IAN MAKONE (5) ELVIS RUZANE

v

THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING

CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO
JCC, PATEL JCC & MATHONSI AJCC
HARARE 26 JULY 2023 AND 6 FEBRUARY 2024.

Confirmation of order of constitutional invalidity.

L. Madhuku, for applicants

L. Uriri, for respondent.

MAKARAU JCC

INTRODUCTION

1. On 11 January 2023, the High Court issued an order declaring the provisions of s 314 of the Urban Councils Act [*Chapter 29:15*], (“the Act”), inconsistent with the Constitution and therefore invalid.

2. By deliberate design aimed at ensuring consistency and certainty in the interpretation of the Constitution, it is an imperative of constitutional litigation in this jurisdiction that an order concerning the constitutional invalidity of any law or conduct of the President or Parliament made by any court, must be confirmed by this Court. Unless so confirmed, such order has no force or effect. In turn, the Rules of this Court set out a procedure that directs the clerk or registrar of the court making such an order to place the relevant record of proceedings before this court for the confirmation of the order. Acting in accordance with this procedure, the Registrar of the High Court placed this matter before the Court for an appropriate order.
3. This is the judgment of the Court in the confirmation proceedings.

BACKGROUND FACTS

4. The first applicant as its name denotes, is an amalgam of Residents' and Rates Payers' Associations in the Harare Metropolitan area. It is a voluntary association. The second applicant is one of the associations that is a member of the first applicant. It is also a voluntary association. The third applicant is a resident in one of the suburbs of Harare. The fourth and fifth applicants were at the time of the application *a quo*, elected Councillors in the City of Harare representing Wards 18 and 42 respectively.
5. The respondent is the Minister of Local Government and Public Works. He is responsible for administering the Act. Whilst *a quo* he was cited as the Minister of Local Government, Public Works and National Housing, since October 2022, he is no longer responsible for the National Housing portfolio. Nothing however turns on the

improper or ill-citation of the respondent at the time of the hearing of the matter before us.

6. On 15 July 2022, the applicants approached the court *a quo* alleging that s 314 of the Act, is inconsistent with one or more provisions of the Constitution. They contended in the main that the section breaches Chapter 14 of the Constitution which sets up urban local authorities as a distinct institution of local governance. They argued that the impugned law grants undue and excessive powers upon the respondent to interfere with the smooth operations of local authorities as it gives the respondent unnecessary powers to make decision on urban council matters even on non-policy matters. They further argued that to the extent that the directives made and given by the respondent in terms of the impugned law will interfere with the rights of local authorities to be run and managed by duly elected councillors, the law offends against s 274 of the Constitution which defines the functions of local authorities.
7. In addition to raising concerns about the provisions of s 314 of the Act, the applicants contended and alleged in their founding papers that various other laws wrongfully emphasise the subordination of local authorities to central government. They however did not challenge the validity of such laws.
8. The challenge to the validity of the impugned law was also made against a backdrop of allegations by the applicants that the respondent had used the powers granted to him under the law to interfere in the contractual relationship between the City of Harare and a company called Geogenix BV for the management of waste in the City. It was alleged as background information that the City of Harare had formed the view that the contract

between itself and Geogenix BV was onerous. It consequently resolved to rescind the contract. Using his powers under s 314 of the Act, the respondent allegedly directed the City of Harare to reverse its resolutions in this regard.

9. The first, second, fourth and fifth applicants, being representatives of rate payers and residents within the Harare Metropolitan area, based their standing to bring the application before the court *a quo* on their status as such and as the ultimate beneficiaries of all services rendered by the Harare City Council. The third applicant based his status on being a rate payer and resident within the metropolitan area.
10. The application was resisted.
11. The respondent raised two points *in limine*. The first related to the *locus standi* of the applicants. The second alleged fatal mis-joinder of the City of Harare and Geogenix BV whose contract had been referred to in the applicants' founding papers. It was the respondent's view that the two should have been joined as parties to the proceedings since the order sought by the applicants would impact on their contract.
12. Regarding the merits of the application, the respondent argued that the impugned law did not violate the Constitution as alleged. He contended that he retains administrative obligations to ensure that the operations of local authorities are in the best interests of the residents of the local authority concerned and that such operations are also in the national interest.
13. The court *a quo* dismissed the two preliminary points on the *locus standi* of the applicants and the misjoinder of the City of Harare and Geogenix BV. Regarding the

merits of the matter, it held that s 314 of the Act “singularly gives unfettered powers to the respondent to reverse, suspend or rescind resolutions or decisions made by the people through their democratically elected representatives and is therefore *ultra vires* the Constitution.” The court considered that this was especially so in view of the fact that the decision to reverse suspend or rescind resolutions or decisions of council is taken “by an individual without consultation whatsoever”.

14. In due course and in accordance with the rules of this Court, the order of constitutional invalidity was duly set down before this Court for confirmation.

THE ISSUES FOR DETERMINATION

15. At the confirmation proceedings, the matter narrowed down to two broad concerns. These were consecutively, whether the challenge to the provisions of the Urban Councils Act was properly before the court *a quo* and if so, whether the order of constitutional invalidity made by that court was correct and in consequence thereof, should be confirmed. The first broad question encompasses two or more issues relating to the jurisdiction of the court *a quo*, the *locus standi* of the applicants before that court and all the procedures that were adopted by the court in making the order of invalidity. The second focuses on the merits of the matter and raises issues connected therewith.
16. I pause momentarily to note that the two broad questions that arose for the Court’s consideration in this matter are invariably the two that will arise in all confirmation proceedings under s 167 (3) of the Constitution. This is so because confirmation proceedings under the section are hybrid in nature, combining both a review of the procedures that were adopted by the court *a quo* and an examination of the correctness of the decision thereby made. This two pronged inquiry if I may call it that, will have

to be undertaken even if the papers filed of record by the parties to the confirmation proceedings do not so reflect. I venture to say that this inquiry will have to be made even if the confirmation proceedings are unopposed and the order of invalidity is sought to be confirmed with the consent of all parties.

Confirmation proceedings before this Court are essentially a validation not only of the ultimate order of invalidity made, but of the process by which such an order was made and, the competence of the court that made the order. Put differently, before confirming an order of constitutional invalidity, this Court must be satisfied that the order of constitutional invalidity was not only properly raised before the court *a quo*, but that it was correctly made by that court and represents a correct interpretation of the Constitution. (See *S v Chokuramba* CCZ 10/19 and *Mupungu v Minister of Justice Legal & Parliamentary Affairs and Others* CCZ 7/21).

17. The detailed heads of argument filed by Mr *Uriri* for the respondent in my view, provide a convenient framework for the inquiry that the Court must now proceed to undertake. He argued in the first instance that the constitutional jurisdiction of the court *a quo* was not competently engaged and consequently, that court did not have jurisdiction to declare the impugned law unconstitutional. In the alternative, he argued that the applicants did not in any event establish a standing to directly challenge the constitutionality of the impugned law or to directly enforce the Constitution before the court *a quo*. Regarding the merits of the application, he argued that the impugned law is constitutional and therefore valid.
18. Using the above three premises upon which the confirmation proceedings were resisted, I set out the following issues for the Court's determination:

- (a) Did the court High Court have jurisdiction in the matter?
- (b) Did one or more of the applicants possess the requisite *locus standi* to challenge the constitutional validity of the impugned law, and
- (c) If the matter was properly before the court *a quo*, is the order of constitutional invalidity that it made correct?

19. I turn to the first issue.

DID THE HIGH COURT HAVE JURISDICTION IN THE MATTER?

20. The question of the jurisdiction of the court *a quo* arises for the first time in these proceedings. It is raised as a preliminary point by the respondent but, as indicated above, even if it was not so raised, this Court would have proceeded as of right to satisfy itself that the court *a quo* had jurisdiction to make the order of constitutional invalidity that it did.
21. Mr *Uriri* raised the issue on a very narrow basis. He argued that the direct enforcement of the Constitution in this jurisdiction at the instance of a private citizen in his capacity as such, or in the public interest, is procedurally competent only under s 85 of the Constitution. This is the section that provides a mechanism for the enforcement of fundamental rights and freedoms. Put differently, he submitted that, absent an allegation and proof that the impugned law violates a fundamental right or freedom of the applicants, the direct enforcement of a substantive provision of the Constitution in this jurisdiction is not competent.
22. If we are persuaded to adopt the submission by Mr *Uriri* as representing the correct position at law, then, the applicants *in casu* are non-suited as they did not predicate their

application *a quo* on any such allegations. Put differently, they did not seek to enforce any fundamental right or freedom before the court *a quo*. They simply challenged the validity of the impugned law.

23. In pressing this argument, Mr *Uriri* relied exclusively on the remarks made by this Court in the case of *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422, (SC). In that case, the Prosecutor-General approached this Court directly to set aside a judgment of the Supreme Court that had directed him to issue a certificate *Nolle Prosequi* to Telecel Zimbabwe (Pvt) Ltd which had applied for such. In denying the Prosecutor-General audience, this Court held that the Prosecutor-General was improperly before the Court as he had not approached the Court in terms of s 85 (1) or any other constitutional provision that provides for direct access to the Court.

The application by the Prosecutor-General had been brought directly to this Court purportedly in terms of ss 167 (1) and 176 of the Constitution.

The court went on further to hold that the application by the Prosecutor-General was neither an appeal against the Supreme Court judgment nor a referral from that court in terms of s 175 (4) of the Constitution.

24. Properly understood, the authority that the respondent urged us to rely on concerned the jurisdiction of this Court in a matter where it had been approached directly and at first instance, to enforce a substantive provision of the Constitution. It held that, absent an allegation and proof that a fundamental right or freedom has been infringed, such an approach was impermissible.

25. The facts giving rise to the authority sought to be relied on are clearly distinguishable from the facts of this matter. Notably, whilst the Prosecutor-General sought to approach this Court directly, the applicants did not. The appearance by the applicants before this Court in these proceedings is mandated by the law itself. It is not in the first instance.
26. Accepting as we must, that the first and direct approach to enforce a substantive provision of the Constitution was made to the court *a quo*, it must stand to reason that it is the jurisdiction of the court *a quo* that matters in these confirmation proceedings. In other words, this Court must be satisfied that the court *a quo* had the requisite jurisdiction when it made the order of invalidity. It cannot be the jurisdiction of this Court that matters. The jurisdiction of this Court is assured and is in no doubt. The jurisdiction or the competence of the court that fell for determination in *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd (supra)* and the issue that we have to determine in this matter are disparate and must not be conflated or confused.
27. I make the above observation keenly aware that Mr *Uriri* further urged us to regard the *ratio* in *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd (supra)* as establishing a principle of general and universal application. He submitted that any approach to any court at first instance to enforce a substantive provision of the Constitution must be founded on an allegation that a Chapter 4 right or freedom has been or is likely to be breached in respect of the applicants. Fully developed, his argument is that absent such allegations, the approach is improper and impermissible.
28. I am unable to agree. I do not read the decision in the *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd (supra)* as going beyond the facts of that matter. Put

differently, I do not read it as laying down a principle of general and universal application.

29. I am of the further view that in disposing of the application that had been brought directly to it by the Prosecutor-General, this Court did not regulate the right of direct access to the High Court as a court of first instance in matters where the direct enforcement of the Constitution is sought. This is so because different considerations govern the jurisdiction of this Court as a specialised constitutional court and the High Court as the general court of the land. Whereas the jurisdiction of this Court has to be specially triggered, the jurisdiction of the High Court is inherent and generally open to all. Being omniscient and aware of the fundamental differences between its jurisdiction and that of the High Court, this Court could not have been laying down a rule of general and universal application, one that could apply to both courts. In any event, this Court could not have debated the jurisdiction of the High Court in the matter that was before it as such a debate could not have conceivably been relevant.
30. I further note that whilst the Prosecutor-General had indicated in his application that he wished to approach this Court *“for an order setting aside the Supreme Court judgment on the basis that it interferes with the independence of his office and as such it is ultra vires provisions of s 260 of the Constitution of Zimbabwe...”* the Court formed the view that his application was a disguised appeal against the decision of the Supreme Court. It did not regard the application as a direct enforcement of s 260 of the Constitution. Pointedly, the Court did not at any stage advert to s 2 of the Constitution nor was its attention drawn to this section in support of whatever application the Prosecutor-General intended to make to protect the independence of his office.

31. I conclude on this issue by drawing attention to the disposition of the matter in *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd (supra)*, which in my view is most telling. The Court held in the first instance that:

“Direct applications to the Constitutional Court are to be made only in terms of the provisions referred to above, as well as in terms of and as provided for in s 85(1). The specialised nature of the applications referred to in s 167(1) (b) and s 167(2) (b) (c) and (d), however makes these provisions irrelevant to this case.”

It then proceeded to deny the Prosecutor-General direct access by observing that:

“Thus, in as much as the application failed to meet the test for a direct approach to this Court, it meets the same fate in relation to any notion (expressed or implied) of an appeal against the decision of the Supreme Court.” (My emphasis).

This Court was thus clearly dealing with its own jurisdiction and not that of any other court.

32. It is therefore my finding that the decision of this Court in *Prosecutor-General v Telecel (supra)* does not lay down a general rule on the jurisdiction of the High Court in matters wherein the direct enforcement of the Constitution is sought before that court. It is therefore not binding in this matter.

33. It is my further view that the High Court as a general rule, has jurisdiction to enforce the Constitution directly and therefore had the requisite jurisdiction in this matter. I say for the reasons that follow below.

34. That the High Court has constitutional jurisdiction in addition to its original jurisdiction at common law over all civil and criminal matters throughout Zimbabwe is not debatable. The position is put beyond debate by the provisions of s 171 (1) of the Constitution. Regarding constitutional matters, s 171 provides that the High Court may

decide constitutional matters save those where this Court has exclusive jurisdiction. The application *a quo* was clearly not one where this Court has exclusive jurisdiction and quite appropriately and correctly, it was not so argued for the respondent.

35. The debate on the jurisdiction of the court *a quo* was intricately tied to the cause of action that the applicants had relied on to challenge the constitutional validity of the impugned law. The issue of the applicable cause of action in the matter was not raised *a quo*. It was raised before us as part of the debate that ensued regarding the applicability of the *ratio* in *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd (supra)*. It was argued on behalf of the respondent that s 85(1) of the Constitution constitutes the only permissible cause of action for any challenge to the constitutional validity of any law, practice, conduct or custom. In view of the fact that the applicants did not seek to rely on s 85(1) aforesaid, they did not have a cause of action, the argument proceeded.
36. Mr *Madhuku* for the applicants argued that the application *a quo* was brought under s 2 (1) of the Constitution which provides that:
- “2 Supremacy of Constitution**
(1) The 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.”
37. In my view, the clear import of this section is to deny any legitimacy to, and thereby make void and of no force, any law, practice custom or conduct that is inconsistent with the Constitution to the extent of the inconsistency. This denial of legitimacy and force and effect is by operation of law. Put differently, by virtue of this section, all laws, practices, customs or conduct that are not consistent with the Constitution are invalid *ipso facto*. Such cannot lay any claim to legality and cannot therefore have the force

and effect of regulating the conduct of the citizenry. This much is not debatable but, does the section create a cause of action as s 85 (1) of the Constitution does? Mr *Madhuku* submits that it does.

He is probably correct. Arguably s 2 of the Constitution does create a cause of action. Whilst it does not employ the explicit language of s 85 that anyone whose fundamental right or freedom is violated or threatened, is entitled to approach a court for appropriate relief, it expressly declares that any law custom, practice or conduct inconsistent with the Constitution is void. This in turn implies in my view, that anyone showing some connection to the impugned law, is entitled to approach a court and have such law custom, practice or conduct declared invalid.

38. Quite apart from relying on the provisions of s 2 of the Constitution, it is my further view that one may readily locate the cause of action for the direct enforcement of the Constitution under the broad principle of legality. This is the principle by which all laws, conduct and practices regulating the exercise of power must be tested against a law to find not only authority to exercise the power, but the legitimacy to do so. It is the application of the principle broadly that has given rise to the trite position in our law that anything done in contravention of or contrary to the provisions of statute is of no force and effect. This is commonly known as the *ultra vires* doctrine. This, though a common law precept, applies with equal force to anything done in contravention of the Constitution.

39. As stated above, it is my finding that the High Court ordinarily has jurisdiction to make an order of constitutional invalidity of any law, practice, custom, or conduct. The

applicable cause of action in such matter among others is the principle of legality and in particular the *ultra vires* doctrine. Consequently, it is my finding that the court *a quo* had the requisite jurisdiction to make the order that it did.

40. Having resolved the first issue in favour of the applicants, I now turn to determine whether one or more of the applicants had the requisite standing to bring the proceedings *a quo*.

THE LOCUS STANDI OF THE APPLICANTS

41. Only the standing of the first and second applicants was challenged *a quo*. Before this Court, the standing of all the applicants was challenged in *pari passu* with the challenge to the cause of action that they brought before the court *a quo*. In particular, it was argued that they had failed to establish any *locus standi* under s 85 (1) of the Constitution, the only permissible cause of action that they had. That issue having been determined in favour of the applicants the entire question of the *locus standi* falls off.
42. Whilst the question of the standing of the applicants has fallen off, the *obiter* that follows is in my view necessary.
43. Whilst under the common law, legal standing is confined to persons who can demonstrate a direct or substantial interest in the matter, it is now well established that the test for legal standing in constitutional matters is significantly broader. (*Mupungu v Minister of Justice & Others*) (*supra*). The legal standing required for asserting the supremacy of the Constitution is clearly not similar to the legal standing required for enforcing a fundamental right or freedom which has been defined in s 85 (1) of the

Constitution. Legal standing under s 85 (1) of the Constitution is embedded in the cause of action set up by the section. It can only be established on that narrow premise. On the other hand, as was correctly submitted by Mr *Madhuku*, all that a litigant who wishes to directly challenge the constitutional validity of any law, custom or practice must show is some connection with the subject matter raised in the proceedings. That connection in the past has been satisfied by such broad assertions as that the applicant, a citizen, is bringing a matter of public importance or is motivated by a desire to protect the Constitution. (See *Mawarire v R G Mugabe and Others* 2013 (1) ZLR 469 (CC) and *Mupungu v Minister of Justice & Others* CCZ 7/21).

44. It is my view that the legal standing to assert the supremacy of the Constitution is patently broader than that required under s 85 (1) and is notably broader than the common law requirements.
45. It is my further view that direct challenges to assert the supremacy of the Constitution must be open to all citizens who are civic minded and wish to see the rule of law prevail. Only those who bring frivolous and vexatious proceedings without any intention of obtaining relief from such proceedings must be denied standing and audience by the courts. This is so because a law, custom or practice that is unconstitutional is void to the extent of the inconsistency with the constitution and remains void at all times and for all purposes. It should therefore matter little and concern the court less by whom such invalidity is brought to its attention for an appropriate order to be made.

46. It is therefore my finding as was the finding *a quo* that all of the applicants had the requisite standing to challenge the constitutional validity of s 314 of the Urban Councils Act.
47. I now turn the final issue. This is whether the order of constitutional invalidity issued by the court *a quo* was correct.

Is s 314 of the Urban Councils Act [Chapter 29.15] unconstitutional?

48. The section reads as follows:
- “314 Minister may reverse, suspend, rescind resolutions, decisions, etc. of councils**
- (1) Where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action.
 - (2) Any direction of the Minister in terms of subsection (1) to a council shall be in writing.
 - (3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1).”
49. The applicants contend in the main that this section breaches the provisions of Chapter 14 of the Constitution generally and in particular, ss 264, 265, 274 and s 276.

THE DECISION A QUO

50. In its judgment, the court *a quo* correctly set out the approach that a court determining the constitutionality of any law custom or practice must take. This entails interpreting the Constitution first and then determining whether the impugned law, practice or

custom is consonant with the Constitution. (*Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)).

51. The accepted approach referred to above calls upon the Court to interpret the relevant provisions of the Constitution in full as the first step. Having thus established the meaning of the Constitution, the court must then proceed to interpret the full content of the impugned law as the second step. The final step entails comparing the meaning ascribed to the impugned law with the provisions of the Constitutions. If the impugned law is capable of two meanings, one contrary to the Constitution and the other in keeping therewith, the court must adopt the meaning that will give effect to the Constitution. (*Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (supra)*).
52. Whilst the court *a quo* recited the correct approach to adopt in the matter, its judgment does not reflect that it followed through with the enquiry that it ought to have then made.
53. Having identified the several provisions of the Constitution that are allegedly violated by the impugned law, the court *a quo* did not interpret each and every one of such provisions to ascertain the true meaning of the Constitution. Instead, it gave all the sections a general meaning. It appears to me that in this regard, the court *a quo* explained the purpose of the various constitutional provisions instead of interpreting them. For instance, without specifying which particular provision it was interpreting, the court *a quo* found that the Constitution generally and unequivocally confers on local authorities' powers to govern and manage and which powers should not be interfered with. In its words:

“The Constitution unequivocally confers local authorities with governing and management powers which should not be clandestinely interfered with. Pertinent are the following constitutional provisions attesting to that:....”

The court then proceeded to cite the provisions of ss 274 and 276 of the Constitution before proceeding to observe that these two provisions assert the powers of urban local authorities in a representative capacity to manage the affairs of the people in urban areas. It did not at any stage interpret these two sections.

54. I note that the judgment *a quo* proceeds in this fashion and assigns broad interpretations of two or more sections of the Constitution in one breath.
55. I opine in passing that in determining the constitutional invalidity of any law, where the position is governed by two or more provisions of the Constitution as was *in casu*, it is prudent to interpret each provision separately to arrive at the true meaning of the Constitution. A broad and conglomerate interpretation of the Constitution may not lead to a correct interpretation of the Constitution. Rarely is a word used superfluously in the Constitution.
56. It is therefore my finding that the court *a quo* fell into error in its approach to the matter that was before it. It did not interpret the Constitution fully to ascertain the true meaning of the supreme law before it sought to analyse the impugned law. Further, it did not at any stage consider whether the impugned law could be interpreted in a manner that would fall within the Constitution, fully interpreted. In other words, it did not apply the presumption of constitutionality to the impugned law before it declared the law unconstitutional. Its decision cannot therefore stand.

57. I now turn to consider whether notwithstanding the incorrect approach that the court *a quo* took in the matter, its decision was nevertheless correct.

THE CONSTITUTIONAL PROVISIONS

58. The applicants allege that s 314 of the Act contravenes the provisions of Chapter 14 of the Constitution in general and ss 264, 265 and 274 in particular.

59. Chapter 14 provides for provincial and local government. It is in three parts. Part 1 provides for preliminary matters and provides for the devolution of governmental powers and responsibilities from central government to the lower tiers of government. Part 2 provides for provinces, provincial and metropolitan councils. This part is to a large extent not relevant for the determination of this matter. Part 3 provides for urban local authorities, establishing such and defining their functions.

60. The preamble to Chapter 14 reads:

“Whereas it is desirable to ensure:

- (a) The preservation of national unity in Zimbabwe and the prevention of all forms of disunity and secessionism;
 - (b) The democratic participation in government by all citizens and communities in Zimbabwe; and;
 - (c) The equitable distribution of national resources and the participation of local communities in the determination of development priorities within their areas;
- there must be devolution of power and responsibilities to lower tiers of government in Zimbabwe.”

61. The preamble provides for devolution of power and responsibilities to lower tiers of government. It also lists three core values that underpin and overarch such devolution. The three core values are then restated in s 264 (2) as part of the objectives of the

devolution of powers and responsibilities to the lower tiers of government. To the extent that these require interpretation, I deal with them when I specifically deal with s 264 of the Constitution.

62. The applicants took a broad swipe against s 314 of the Act as negating devolution as provided for in Chapter 14 generally. The court *a quo* appears to have adopted this outlook wholesale as is evident from its judgment. I however pause very briefly to note that the court *a quo* emphasised only one of the three values reflected in the preamble and did not advert at all to the other two in its judgment. It dwelt to a large extent and almost exclusively with the need to uphold the democratic participation in government by all citizens and communities in Zimbabwe. In fact, it omitted from its reproduction of the preamble the first paragraph that provides for the preservation of national unity and a unitary state as an underpinning value. Quite clearly, it did not consider that this was a relevant consideration in the determination of the matter that was before it.
63. The term “devolution” is not defined.
64. The 8th Edition of the Oxford Dictionary defines the term as “the act of giving power from a central authority or government to an authority or a government in a local region.” Thus, devolution in its ordinary sense entails the transfer of power from central government to a lower tier of government. Some literature refers to it as the “de-concentration of power”.
65. Whilst devolution was developed politically as an antidote to the fragmentation of states and the clamour by separatists for independence especially in Spain and the United

Kingdom, it has evolved as a strategy of structuring state institutions to enhance democracy and the participation of people in the making of decisions that affect them at the local level, through their elected representatives. Thus, whilst the United Kingdom has enacted three Acts of Parliament to provide for the devolution of governmental powers and responsibilities to Scotland, Wales and Northern Ireland, Kenya has provided for the devolution of governmental powers and responsibilities in its Constitution.

66. In the United Kingdom, devolution is reportedly viewed as the delegation of central government powers without the relinquishing of sovereignty. (See the *Kilbrandon Report (1973) Report of the Royal Commission on the Constitution, London, HMSO Cmnd 5460.*)
67. It stands to reason in my view to regard devolution as an evolving concept and notion, and one whose ambit and full effect in any given jurisdiction is best understood by making reference to the legal framework setting it up.
68. In this jurisdiction, s 264 provides for devolution of governmental powers and responsibilities to local authorities. As indicated above, this is a new constitutional provision. The wording of the section is clear and admits of no debate. It requires no interpretation. It reads:
 - “264 **Devolution of governmental powers and responsibilities**
 - (1) Whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out these responsibilities efficiently and effectively.
 - (1) The objectives of the devolution of governmental powers and responsibilities to provincial and metropolitan councils and local authorities are-

- (a) to give powers of local governance to the people and enhance their participation in the exercise of the powers of State and in making decisions affecting them;
- (b) to promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as a whole;
- (c) to preserve and foster the peace, national unity and indivisibility of Zimbabwe;
- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to ensure the equitable sharing of local and national resources; and
- (f) to transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority.”

69. Whilst s 264 provides for devolution of governmental powers and responsibilities to provincial and metropolitan councils as well as to local authorities, this judgment will constrain its remarks and findings only to local authorities. Having said that, I wish to note in passing that devolution of power and responsibilities to lower tiers of government in terms of s 264 (1) must occur when it is appropriate and the provincial or metropolitan council or local authority is competent to carry out these responsibilities efficiently and effectively. The discretion to determine when it is appropriate to devolve power and responsibilities to the lower tiers and the power and authority to determine that each council or local authority can carry out such responsibilities efficiently or effectively must vest in some authority. One can only surmise that such discretion and authority vests in central government.

70. The further import of s 264, in addition to providing for devolution, is in my view to recognise the continuing role of central government. This counters the argument by Mr *Madhuku* that once power is devolved to local authorities, the central government has no role whatsoever. The Constitution recognises the role of central government to determine when devolution may occur and to assess the efficiency and effectiveness of local authorities upon whom power and responsibilities may devolve.

71. I now turn to s 274 of the Constitution which establishes local authorities for urban areas. It provides in subsections (1) and (2) as follows:

“274 Urban local authorities

- (1) There are urban local authorities to represent and manage the affairs of people in urban areas throughout Zimbabwe.
- (2) Urban local authorities are managed by councils composed of councillors elected by registered voters in the urban areas concerned and presided over by elected mayors or chairpersons, by whatever name called.”

72. Again, in my view, the language used in the section is clear and admits of no ambiguity. As correctly observed by the court *a quo*, the section asserts the devolution of local governance as provided for in s 264, to urban local authorities and entrenches the democratic participation of urban dwellers in their local affairs through their elected representatives.

73. Section 276 sets out the functions of local authorities as follows:

“276 Functions of local authorities

- (1) Subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.
- (2)

74. The language used in the section is clear. It is the function of local authorities to run the affairs of local authorities. Conversely expressed, local authorities have the right to run the affairs of their respective areas and must manage and govern the affairs of their respective local areas. The right to govern is however to be exercised subject to the Constitution and the provisions of any statute governing local authorities. The right to govern is therefore not absolute but must be exercised in such a manner that it remains consistent with the relevant provisions of the Constitution and in accordance with the provisions of any relevant statutory law.

75. In summary therefore, the Constitution establishes as a new institution of governance, the devolution of governmental powers and responsibilities from the national government to local authorities. It provides the objectives of such devolution as well as the guiding principles to be observed in implementing the new order of governance. The Constitution further grants in clear language the right to local authorities to manage and govern the affairs of local authorities, making the enjoyment of such a right subject only to the Constitution and to an Act of Parliament.
76. It is against the above framework of the constitutional dispensation that an examination of the provisions of s 314 of the Urban Councils Act will now be undertaken.
77. The provisions of the section have been cited in full at the beginning of this judgment. In essence, the section grants power to the Minister administering the Act the power to reverse, suspend, or rescind resolutions, decisions of councils where in his view such resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest.
78. I entertain no doubt whatsoever that to ensure that the core values of devolution are always upheld, the minister responsible for local government, on behalf of central government, must retain some residual oversight powers to step in when necessary.
79. If it is accepted, which it must, that the role of central government to oversee local authorities to whom power may have devolved remains, then it must be accepted in turn that the Minister must be vested with powers and authority to redress and address issues of concern in the administration of the local authority. Quite conceivably and for

instance, where a decision of the local authority threatens national unity and has the effect of creating a stand-alone and independent local authority, un-coordinated with no other local authority or the central government, then and in that event, it must be accepted that the exercise of the powers granted to the Minister in terms of s 314 will not be inappropriate.

80. Equally conceivable are instances where decisions by local authorities to whom governmental power and responsibilities may have devolved, are inward- looking and threaten the equitable distribution of national resources. Again, in such instances, the exercise of the residual oversight powers vesting in central government in terms of s 314 will not be amiss.
81. Seen in the above light, the provisions of s 314 of the Urban Councils Act are necessary. The Minister administering local government has a helicopter view of all local authorities. He or she is legally empowered and centrally positioned to ensure that the objectives of the devolution of power and responsibilities are met and that the core values attendant upon devolution are always upheld.
82. I have somewhere in this judgment adverted to the presumption of constitutional validity. If the impugned law is capable of another meaning that is contrary to the Constitution, it is still possible to interpret it in consonance with the Constitution and that is the meaning that ought to prevail. I accordingly adopt such as it will give effect to the Constitution.
83. On the basis of the foregoing, it is my finding that the power granted to the Minister in s 314 is constitutional.

84. The power granted to the minister by the provision is not exercisable at the mere whim of the Minister. It is not exercisable on the basis that the Minister would have personally preferred a different decision in the matter and were he or she present in the meeting where the decision was made, would have voted against the adoption of the decision. Expressed differently, the section does not confer upon the Minister a casting vote in the debates of local authorities. As correctly observed by the court *a quo*, “*it is improper that the Minister as an individual decides that a decision or resolution is in his view not in the interests of the inhabitants of the concerned area.*” His or her view in this regard must be an informed rational decision and for which reasons must be proffered. Needless to say, the reasons must show in which respect the decision or resolution by the local authority fails to be in the national or public interest or in the interests of the inhabitants of the local area concerned. This is so because the view of the Minister and his or her consequent decision to reverse, suspend or rescind the decision of a local authority are always subject to judicial control under the Administrative Justice Act [*Chapter 10:28*].
85. The devolution of power envisaged in the Constitution is to leave local authorities to manage and govern the affairs of local authorities thereby giving effect to and enhancing the democratic participation of the citizenry through its elected representatives, subject to the Minister reversing, suspending or rescinding only those decisions and resolutions that are demonstrably not in the interests of the inhabitants of the local authority or are not in the public and national interest.

86. Not only is the decision and conduct of the Minister under the provisions of the Act to be considered in each case in the light and framework of the Constitution, such decision or conduct remains subject at common law to the administrative review of the courts as it is made in the exercise of public power. These built-in control mechanism save the power granted to the Minister in terms of the provision from being “*overriding powers which have no checks and balances*” as was found by the court *a quo*. More importantly, these built-in control mechanisms save the impugned provision from being unconstitutional.

DISPOSITION

87. The general position of this Court regarding costs is regulated by R 55 of the Constitutional Court Rules 2016. The general position is that no costs are awarded in a constitutional matter. There are no reasons in these proceedings that justify a departure from this position.
88. In the result, I make the following order:
1. The order of constitutional invalidity made by the High Court on 11 January 2023 in respect of s 314 of the Urban Councils Act [*Chapter 29:15*] is hereby not confirmed and is accordingly set aside.
 2. There shall be no order as to costs.

GWAUNZA DCJ: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GARWE JCC:

89. This matter comes before this court for confirmation pursuant to the requirements of ss 167 and 175 of the Constitution as read with Rule 31 of the Rules of this Court. In short, this court is obligated to consider whether procedurally and substantively the judgment of the High Court declaring s 314 of the Urban Councils Act [*Chapter 29:15*] (“the Urban Councils Act”) was correct. In the event that this court comes to the conclusion that the judgment of the court was correct then it must confirm it. As a consequence of such confirmation, the declaration of invalidity would then become effective. Conversely, the Court must decline confirmation of the order of invalidity if it finds that the judgment of the High Court was not correct.

90. The background facts of this matter have been aptly set out in the main judgment by MAKARAU JCC. No purpose would be served in regurgitating the same except to the extent necessary to highlight the various issues that arise for determination during this confirmation process.

91. In large part, I am in agreement with the conclusions reached by MAKARAU JCC. More specifically I agree, for slightly different reasons, that the High Court does have jurisdiction to entertain an application for the direct enforcement of the Constitution. In doing so however, the High Court must remain alive to the need for proper pleadings and specificity in pleadings filed in a constitutional matter, just as in any other matter coming before it. The High Court must also avoid the temptation to involve itself in matters in which there is no real dispute between the parties or where the dispute exists in the abstract.

92. For reasons that follow shortly, the determination by the High Court declaring s 314 to be unconstitutional was incorrect. Consequently this court should, as MAKARAU JCC has concluded, decline to confirm the declaration. I proceed to determine the individual issues that arise during this confirmation.

**WHETHER THE APPLICANTS SHOULD HAVE APPROACHED THE COURT A
QUO UNDER S 85 (1) OF THE CONSTITUTION**

93. It was the submission by Counsel for the respondent that the applicants, having approached the High Court otherwise than in terms of s 85 (1) of the Constitution, had no cause of action in the absence of an allegation of the violation of their fundamental rights. Therefore, so it was argued, the High Court should have found that, in the absence of a cause of action predicated on s 85 (1) of the Constitution, it had no jurisdiction to entertain the application.
94. I am of the firm view that the High Court has jurisdiction, outside of s 85 of the Constitution, to entertain a direct challenge to the constitutionality of a law. It is correct that, in terms of s 2 of the Constitution, any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency. Section 2 of the Constitution, however, is but a substantive provision that does not bestow jurisdiction by itself on any court to declare any law invalid for being at variance with the Constitution. In the main judgment by MAKARAU JCC reference is also made to the High Court having jurisdiction on account of the principle of legality. In my considered view the situation is a lot simpler and not as complicated as it might appear.
95. Section 171 of The Constitution states in no uncertain terms that the High Court has original jurisdiction over all civil and criminal matters in Zimbabwe. It further provides

that the Court may decide Constitutional matters except those that are the preserve of the Constitutional Court. Put another way, the Court has the jurisdiction, save where the Constitutional Court has exclusive jurisdiction, to entertain any matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution.

96. In order to give effect to s 171 one must then look at the High Court Act and the rules of court made thereunder. Section 56 (1) of the High Court Act, [*Chapter 7:06*] gives the Chief Justice the power to make rules of court for the regulation of all matters in relation to proceedings of the High Court. In terms of s 56 (2) (aa), rules of court may give full effect to the jurisdiction conferred upon the High Court by any enactment.

97. Rule 107 of the High Court Rules, 2020, in turn, provides as follows:

“(1) A party who intends to raise a constitutional issue before the Court should do so by court application filed with the registrar ...”

The rule then proceeds to lay down the procedure to be followed by a party wishing to raise a constitutional issue before the Court as well as on the set down of the matter before the Court by the registrar. Rule 59 then provides that a court application shall be in form No 23 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

98. It is apparent from the foregoing that the High Court has jurisdiction to entertain any constitutional application, save for those applications which fall exclusively within the domain of the Constitutional Court. In doing so, it is clear that a party need not predicate its application on s 85 of the Constitution, unless it is the intention of that

party to enforce fundamental human rights or freedoms in terms of Part 4 of the Constitution.

99. I am aware that the respondent, in submitting that the High Court had no jurisdiction to relate to an application outside of s 85 of the Constitution, relied heavily on the determination by this court in the case of *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422(SC). Mr *Uriri* urged this court to find that the *ratio decidendi* in the *Prosecutor-General* case, *supra*, had established the general principle that in approaching a court a party had to do so in terms of s 85 of the Constitution.
100. I am inclined to agree with MAKARAU JCC that the above decision did not go beyond the particular facts of the matter and that, in disposing of the application, this Court did not purport to regulate the right of access to the High Court as a court of first instance in those instances where the direct enforcement of the Constitution is sought. Whether or not a party had a right of access to the High Court was not an issue before the Court. The issue in contention was whether the Court could be approached by the Prosecutor-General directly in terms of s 167 of the Constitution without him predicating his cause of action on s 85 of the Constitution. It was in that context that the Court held that direct applications to the Constitutional Court are to be made only in terms of the provisions that allow direct access to the Court as well as s 85 (1) of the Constitution.
101. In the final analysis, I find that, by command of the Constitution itself, the High Court has jurisdiction to entertain applications that impugn the constitutional validity of statutes and that in doing so a party need not approach the Court under s 85 of the Constitution.

THE APPLICANTS' CAUSE OF ACTION WAS HOWEVER NOT PROPERLY PLEADED.

102. In approaching the High Court, the applicants did not state in terms of what law they sought an order declaring s 314 of the Urban Councils Act invalid. They did not state in terms of what rule of procedure they were approaching the court. The application was stated simply as one to challenge the constitutionality of s 314 of the Urban Councils Act. To add to the confusion, on the same date the application was filed, the applicants further filed a “notice of constitutional application to set aside s 314 of Urban Councils Act, [Chapter 29:15]”. In terms of para 2 of the notice, the applicants stated that the application was “one brought in terms of s 85 (1) (a) by the applicants praying for a declaration that s 314 of the Urban Councils Act [Chapter 29:15] is *ultra vires* the provisions of s 274, 264 (2) and 265 (1) and (2) of the Constitution of Zimbabwe.”
103. The reference to s 85(1) of the Constitution only served to further confuse and obfuscate the applicants’ cause of action. Appreciating the difficulty, Mr *Madhuku*, for the applicants, conceded at the hearing of this matter that the reference to s 85 (1) in the “notice of constitutional application” was “an obvious error” as it was not referred to anywhere else in the papers. However, to make matters worse, it was Mr *Madhuku*’s submission that the application had been made under s 2 of the Constitution. As noted earlier, s 2 is a substantive provision and, on its own, does not grant access to a court. Moreover reliance on s 2 of the Constitution had not been pleaded *a quo*. It became clear, during the proceedings before this court, that the applicants had not, in approaching the court *a quo*, delineated the exact procedural provisions in terms of which they had sought to approach that court. It is axiomatic that the provision in terms of which a matter is brought to court must be stated clearly.

104. In this jurisdiction, a court must be approached in terms of a procedure specifically provided for. The rule relied upon must establish or found both the court's jurisdiction and the jurisdictional facts required to establish the *locus standi* of a party. An application cannot be launched in the air. All relevant issues must be pleaded for jurisdiction to be properly engaged. Whilst it goes without saying that the Constitution is the supreme law and that statutory provisions derogating from the Constitution must be narrowly and restrictively interpreted, it ought to be borne in mind that the supremacy of the Constitution can only be asserted and enforced in accordance with a set of procedural rules. Therefore, whilst the High Court, in accordance with the Constitution and its own rules, has jurisdiction in direct constitutional litigation, it must be emphasised that such jurisdiction has to be properly engaged.

105. The importance of stating the provision of the law in terms of which a party approaches a court has been emphasized in a long line of cases. In *Minister of Mines and Mining Development and Anor v Fidelity Printers and Refineries (Pvt) Ltd and Anor* CCZ 9/22, this Court stated as follows, at pp 11-12:

“It must be emphasized that litigants must proceed in terms of the relevant rule as that is what informs the respondent and the Court as to the nature of the application and the relief sought. It is the rule that delineates the processes to be followed by the parties and the time frames demanded for each process”.

106. In *Sibangani v Bindura University of Science Education* CCZ 7/22, this Court, quoting Woolman and Bishop, *Constitutional Law of South Africa 2 ed, Vol 1* 2014 stated, at para. 34, that:

“Irrespective of how and in which forum a constitutional matter arises, it has been frequently stated that constitutional matters must be properly pleaded. The general principles of civil procedure and the need to alert a party to litigation of the case must be met.”

107. More recently, in *Innocent Tinashe Gonese v Minister of Finance and Economic Development*, CCZ 11/23 this Court underscored the need for careful attention to detail in constitutional matters. The Court, in emphasizing the need for accuracy in matters where the parties place reliance on the Constitution in asserting their rights, cited with approval remarks by ACKERMAN J in *Shaik v Minister of Justice and Constitutional Development and Others* (CCT 34/03) (2003) ZACC 24; 2004 (3) SA 559 CC; 2004 (4) BCLR 333 (CC) (02 December 2003), at para. 24- 25 that:

“(24) the minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of uniform r 16A (1). The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of constitutional challenge in order that they may take steps to protect their interests.....

(25) It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity.....”

Attention may also be drawn to similar remarks made by CHITAPI J in *Bramwell Bushu v Grain Marketing Board and Two Ors* HH 326/17, particularly at p 3 of the judgment.

108. In the present matter there can be little doubt that the applicants fell woefully short of the standard required in application proceedings in general and constitutional litigation in particular. The applicants appear to have been unclear, from the beginning, as to the correct procedure they had to follow in order to obtain a declaration of constitutional invalidity of s 314 of the Urban Councils Act.

109. In these circumstances, the court *a quo* should have found that the application was not properly before it. It should therefore have struck the matter off the roll accompanied by such order of costs as it considered appropriate.
110. I would, partly for the foregoing reason, decline to confirm the declaration of invalidity made by the court *a quo* as the jurisdiction of the court was not competently engaged. There are, however, two additional reasons why the declaration of the court *a quo* cannot be sustained.

THE PROCEEDINGS BEFORE THE COURT A QUO WERE NOT PREDICATED ON AN ACTUAL DISPUTE

111. In the application before the court *a quo*, the applicants sought an order declaring s 314 of the Urban Councils Act as unconstitutional. The order they sought did not relate to any particular decision that the Minister had made. They did not plead any consequential or tangible benefit they were to obtain from such a declaration. There was no dispute against which they cited the unconstitutionality of s 314. In making the order it did, the court erred in failing to appreciate that the order was being made in the abstract.
112. In their founding papers, the applicants complained of several instances of interference in the running of the affairs of local authorities by the Minister and the consequent lack of autonomy by such authorities. They cited instances such as the need for governmental approval in the employment of certain council officials, the requirement that all purchases by local authorities be subjected to the government tender process, the collection of vehicle licensing fees by Zinara instead of local authorities, the need

for government approval of council budgets and the suspension of a council or elected councillors and the appointment of a caretaker council (as happened in the case of *Sekai Makwavarara*). The applicants then proceeded to cite s 314 as one of the offending powers that are reposed in the respondent which allows him to interfere and direct councils to reverse, suspend or rescind council resolutions. As an example of the misuse of the powers under s 314, the applicants then gave the example of the agreement between the City of Harare and Geogenix BV for the latter to operate the Pomona Waste Management project. The applicants proceeded to give details of the events that unfolded pursuant to that agreement and the ultimate directive by the respondent for the City of Harare to reverse its resolution suspending the operation of the agreement.

113. In support of the application, the second applicant stated that “the directives issued by the Minister in terms of s 314 amount to an unlawful interference with the autonomy of a local authority guaranteed in terms of Chapter 14...” The third applicant, Clever Rambanapasi, also stated that he attributed “many of the challenges that the City of Harare is facing to interference by the respondent as well as structural legal issues in the Urban Councils Act...”, whilst the fourth and fifth applicants, Ian Makone and Elvis Ruzane, averred that “Section 314 of the Urban Councils Act, has resulted in gross interference with our work as council by the Respondent.”
114. In his opposing papers, the respondent took two points *in limine*. The first was that the first and second applicants had not demonstrated that they had the *locus standi* to institute the application. The second was that there had been a material non-joinder of Geogenix BV and the City Of Harare, the parties to the Pomona Waste Management agreement.

115. In the applicants' answering affidavit, deposed to by Ian Makone, the applicants stated as follows:

"17. It is not correct that the City of Harare and Geogenix BV ought to have been cited in the instant matter.

18. The instant matter is simply a prayer for a constitutional declaration that s 314 of Urban Councils Act [*Chapter 29:15*] is unconstitutional.

19. That is the matter between the first Respondent and the applicants.

20. Geogenix BV nor the City of Harare cannot defend an Act of Parliament."

116. The court *a quo*, in its determination, also accepted that the matter before it did not involve the City of Harare or Geogenix BV. On the issue of whether or not there should have been joinder of the City of Harare and Geogenix BV, the court remarked as follows:

"...Counsel for the respondent submitted that the City of Harare and a company called Geogenix BV ought to have been joined to the proceedings as the applicants referred to a contract between the two parties. It was argued that the two parties ought to be heard as the order sought will affect their rights. This argument is not only devoid of merit but untenable. This is an application challenging the constitutionality of the provisions of an act as not conforming to the dictates of the Constitution. It has nothing to do with contracts (*sic*) between the parties mentioned. The application has everything to do with putting to the test whether the section cited is not contrary to the provisions of the cited sections of the Constitution. This issue arises above individuals, entities or contracts. It pertains to whether the section deserves to live or should be decimated for want of conformity. The argument presented having no merit the court dismissed the same."

117. From the foregoing, it is quite apparent that the declaration of invalidity was not predicated upon a live dispute between the parties. Examples were given of the instances when the Minister allegedly interfered with the operations of Councils in general. Those instances did not, however, constitute the basis upon which the applicants had sought the declaration of invalidity. Those instances, once they had occurred, could have formed the basis of separate constitutional applications seeking

declarations of invalidity as well as consequential relief. Indeed in the case of the Pomona Waste Management agreement, the applicants, amongst others, instituted proceedings in the High Court in Case No HC 2766/22 seeking an order setting aside the council resolution in terms of which the agreement had been adopted and approved. It goes without saying that the applicants could have, in that same suit, challenged the constitutionality of s 314 of the Act and sought, as consequential relief, the setting aside of the directive given by the Minister. But that is not what the applicants sought. It is clear the applicants decided to challenge the validity of s 314 of the Act merely on account of their perception that the section was not consistent with the Constitution.

118. I entertain no doubt in my mind that this is not permissible and that the court *a quo* should have declined jurisdiction to deal with a dispute arising in an abstract context. The legal question placed before the court *a quo* did not rest upon existing facts or rights.

THE DOCTRINE OF JUSTICIABILITY

119. The applicable law falls under a body of procedural rules relating to the justiciability of constitutional matters. I Currie and J De Waal, *The Bill of Rights Handbook*, 6 Ed (2013) lay out the conceptual foundation for the principles of justiciability. At p 72 they state that:

“There are three principal sets of rules and principles that can be grouped under the broad heading of ‘justiciability’. They are standing, which relates to the relationship between the applicant in the case and the particular relief sought, and ripeness and mootness, which relate to the timing of the application. All can be understood as elaborations of a more fundamental principle that the courts should decide only cases entailing a ‘real, earnest, and vital controversy’ between litigants and not entertain merely ‘hypothetical’ cases, or cases that are only of ‘academic’ interest’.

120. In this jurisdiction, the doctrine of justiciability was considered, *inter alia*, in the case of ***Khupe and Anor v Parliament of Zimbabwe and Others CCZ 20/19*** at p.7, thus:

”Justiciability deals with the boundaries of law and adjudication. Its concern is with the question of which issues are susceptible to becoming the subject of legal norms or adjudication by a court of law. Justiciability is not a legal concept with a fixed content or one that is susceptible to precise scientific verification. Its utilisation is the result of many subtle pressures. *Poe v Ullman* 367 U.S. 497 (1961) at 508.”

121. As noted by Currie and De Waal, *op. cit.*, one of the principles of justiciability relates to ripeness. There are two main senses in which the principle of ripeness has been understood. In the first sense, the principle has been applied in situations where all the facts forming the constitutional cause of action are yet to materialise. Where this is the case, a matter will be said to be unripe for determination because a live dispute or controversy would not yet have arisen. It would, in such circumstances, be premature for a court to pass upon the constitutional dispute before it has actually arisen. This would extend to situations where there are no facts at all relating to the intended cause of action.

122. The principle of ripeness, as understood in the foregoing sense, found application in this court in the case of ***Zimbabwe Women Lawyers Association v Minister of Justice, Legal and Parliamentary Affairs and Others CCZ 13/21*** (‘the ZWLA case’). In that case, the applicant sought an order to the effect that the definition of “marriage” that was provided in s 2 of the Matrimonial Causes Act [*Chapter 5:13*] was constitutionally invalid as it discriminated against persons in unregistered customary unions. At the material time, the Minister of Justice, Legal and Parliamentary Affairs had introduced a Marriages Bill in Parliament, which among other objectives, was intended to consolidate the laws relating to marriages and to provide for the recognition and

registration of customary law unions. The Court, while discussing the doctrine of ripeness, observed at pp. 6-7, paras. 15 and 16 of the cyclostyled judgment that:

“The rule in essence postulates that there can be no anticipation of a constitutional issue in advance. The principle of ripeness is therefore part of the doctrine of avoidance...

Hoxter, Administrative Law in South Africa, 2nd Ed 2012 at p 585 describes the doctrine in the following terms:

“The idea behind the requirement of ripeness is that the complainant should not go to court before the offending decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts’ time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.”

123. Applying the principle to the facts of the case that was before it, this Court in the *ZWLA* case went on, at para. 24 of the judgment, to conclude that:

“The conclusion is inescapable that the issue raised in this application is not ready for adjudication by this Court. Until the fate of the Bill is known, it would not only be inappropriate and unwise but also premature for this Court to make a determination on the constitutionality of the definition of marriage in s 2 of the Matrimonial Causes act.”

124. In the second sense, the principle of ripeness has been applied in situations where, although the essential facts necessary to establish a cause of action would have arisen, there are other non-constitutional and subsidiary remedies that can be relied on to resolve a dispute. Thus, in *Chariwa & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors 2017 (1) ZLR 117 (CC)* at p. 123C, this Court held that:

”..... in the normal run of things, courts are generally loathe to determine a constitutional issue in the face of alternative remedies.”

125. Currie and De Waal, *op. cit.* at p.85, discuss the principle of ripeness in the following terms:

“In the United States, the primary rationale for the ripeness doctrine has been said to be ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.’ The powers granted to the judiciary by the Constitution must be used to decide real and not hypothetical disputes and, therefore, before a court is willing to provide constitutional relief it has to be established that the applicant faces an actual or imminent harm to a right.

The doctrine forms part of South African constitutional law. According to ACKERMANN J, ripeness is a justiciability doctrine stemming from the principle of avoidance of constitutional issues.

While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.

Ripeness entails consideration of the timing of a constitutional challenge. The fitness of the constitutional issue in a case for judicial decision must be outweighed alongside the hardship to the parties of withholding the court’s consideration. When a constitutional issue can be dealt with more conveniently at a later stage and the applicant will get no tangible advantage from an earlier ruling, the doctrine of ripeness requires the applicant to wait until the court can go ground its decision in concrete relief.”

126. It is also worthwhile to make reference to the decision in *Zimbabwe School Examination Council v Mukomeka and Anor* S 10/20 at p.6, in which the Supreme Court of Zimbabwe passed upon the doctrine of justiciability. The Court remarked thus:

“With specific reference to justiciability, the same court, in *Flast v Cohen* 392 US 83 (1968) at 95, opined that:

‘Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the ‘case and controversy’ doctrine. Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.’” (Underlining for emphasis)

127. In the same connection, in *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 U.S. 33 (1885) the Supreme Court of the United States of America held, at p.39, that the Court:

“... has no jurisdiction to pronounce any statute, either of a State or of the United States, void because [it is] irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” (Emphasis added)

128. The above principle must be tied together with the law governing the determination of claims for ordinary declaratory orders. In the case of *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) at p.336, the Supreme Court of Zimbabwe stated that:

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415 in fine; *Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. [Emphasis added]

129. NDOU J in, *Mpukuta v Motor Insurance Pool and Others* HB 25/12 at 3, held that “a matter that does not present a live controversy having practical consequences is not justiciable.” Similarly, in *Dengezi v Nyamaruru* HH 693/22 at p.6, para.16, the High Court held that “Prospective or past disputes which no longer have any bearing on the parties or which have not yet become justiciable have no place on the roll of the court.”

130. In this matter, the instances of abuse of s 314 of the Act cited by the applicants have no real connection with the case that was before the court *a quo* as pleaded. Before the court *a quo*, the applicants' sought a *declaratur* that s 314 of the Urban Councils Act is unconstitutional. That is the only relief they sought. The applicants did not plead a tangible benefit that they were to obtain from the granting of the order they sought. There was no live controversy that stood to be resolved by the order issued by the High Court. There was no background dispute against which they cited the unconstitutionality of the impugned provision. Their application was purely academic and abstract. The applicants appeared to have simply anticipated a dispute relating to the provisions of s 314 of the Act. Regrettably, there was no attempt by the High Court to consider the propriety of the timing of the application.
131. It can, therefore, be justifiably concluded that the High Court decided in the abstract a controversy that was not yet justiciable.

LOCUS STANDI

132. Related to the foregoing is the question of *locus standi*. The absence of a live controversy between the parties undermines the applicants' standing to claim the relief they sought. *Locus standi* depends on the existence of a direct and substantial interest in the subject matter of litigation. Logically, if the subject matter of the litigation is hypothetical and academic and does not present a live controversy for determination by a court, a litigant will not be able to demonstrate a direct and substantial interest in the matter. This is because a direct and substantial interest is a legal phenomenon whose characteristics are defined by the law. In other words, a litigant cannot assert *locus*

standi by simply claiming to have a direct and substantial interest in the matter. Several decisions of the courts in this jurisdiction have passed upon what amounts to a direct and substantial interest.

133. In *Mupungu v Minister of Justice, Legal and Parliamentary Affairs and Others CCZ 7/22* at 22, the following observations were made:

“Under the common law, legal standing in civil suits is ordinarily confined to persons who can demonstrate a direct or substantial interest in the matter. See *Zimbabwe Teachers Association & Ors v Minister of Education* 1990 (2) ZLR 48(HC), at 52F-53B. However, it is now well established that the test for *locus standi* in constitutional cases is not as restrictive but significantly wider. This approach was aptly articulated in *Ferreira v Levin N.O. & Others* 1996 (1) SA (CC), at 1082 G-H:

“...I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.”

The broad approach to *locus standi* in constitutional cases was also affirmed by this Court in *Mawarire v Mugabe N.O. & Ors* 2013 (1) ZLR 469 (CC), where the applicant’s standing was endorsed on the basis that he had invoked the jurisdiction of the Court on a matter of public importance.”

134. In my view, the above considerations cannot be understood to mean that a litigant does not need to show a direct and substantial interest in constitutional matters. All it means is that the test is applied less restrictively. In the case of *Zimbabwe Teachers Association & Ors v Minister of Education and Culture* 1990 (2) ZLR 48 (HC), at pages 52-53B, EBRAHIM J (as he then was) on the accepted considerations with regards to the question of *locus standi* stated as follows:

“It is well settled that, in order to justify its participation in a suit such as the present, a party such as second applicant has to show that it has direct and substantial interest in the subject-matter and outcome of the application. In regard to the concept of such a “direct and substantial interest”, CORBETT J in

United Watch Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) quoted with approval the view expressed in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) that it connoted- ‘... an interest in the right which is the subject-matter of the litigation and ... not thereby a financial interest which is only an indirect interest in such litigation’ and then went on to say (at 415H): “This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two (sic) in this Division ... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (See *Henri Viljoen’s* case *supra* at 167). This requirement of a legal interest as opposed to a financial or commercial interest also received judicial endorsement in *Anderson v Gordik Organisation* 1962 (2) SA 68 (D) at 72B-E.” [Emphasis added]

135. It seems to me that the only difference that the requirement regarding standing in constitutional matters would have on the test of a direct and substantial interest is that the standard for establishing such an interest is wider. Although the ordinary rules of standing are, by constitutional design, deliberately relaxed in litigation brought under s 85 of the Constitution, the same is not always the case in matters brought in terms of other provisions of the Constitution.
136. For the record, it should be stressed that the Constitution has provided different gradations of *locus standi*, the nuances of which may vary from case to case. Some are wide whilst others are restricted. For example, under s 85 (1) of the Constitution, any person would have standing to approach a court in their own interests or on behalf of another alleging a violation of a fundamental right. A person may also act on behalf of a member of a group of persons or in the public interest. An association may also act in the interests of its members. That section, in clear terms, stipulates the requisite standing of any person intending to enforce a fundamental right. Then there are applications to challenge the election of a person as President or Vice President. Some interest on the part of an applicant in the election of the President or Vice President

would need to be demonstrated. A resident of Lusaka, Zambia who is also a Zambian citizen is unlikely to show such standing. Then para 8 of the Fifth Schedule gives standing to a Vice President or Minister to apply for a declaration that a provision of a Bill resolved by Parliament to be unconstitutional would, if enacted, in fact be in accordance with the Constitution. Para 9 (2) of the Fifth Schedule then also provides standing to an enacting authority to apply for a declaration that a statutory instrument is in accordance with the Constitution whilst an application for the review of a decision by President to dissolve Parliament in terms of s 143 of the Constitution may be made by a member of Parliament and not anyone else. In terms of s 175 (3), any person with a sufficient interest, and not just any person, may appeal or apply to the Court to confirm or vary an order concerning constitutional invalidity.

137. Applications for constitutional relief do not, therefore, require the same standing in all cases. As stated, the standing is wide in some instances whilst it is restricted in others. It therefore depends on the subject matter of the application. What is clear however is that an applicant in a constitutional matter must show some legal interest in the matter.
138. Therefore it is not sufficient for an applicant, in a matter such as the present, to simply aver that he or she or it is interested in a particular area of the law or in a particular subject matter in order to show that he/she/it has *locus standi*. The only way that a litigant, such as each of the applicants in this case, may demonstrate that he or she or it has *locus standi* is by referring to a cause of action in which his or her legal interest in the subject matter of litigation may be discerned.

139. It follows from this that if there is no cognisable cause of action, it would be impossible for a litigant to demonstrate a direct and substantial interest in a matter. The point was made by the Supreme Court of Zimbabwe in *Allied Bank Ltd v Dengu & Anor* 2016 (2) ZLR 373 (S) at 376G-H, per MALABA CJ, that:

“The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has a direct and substantial interest in the right which is the subject matter of the cause of action.”

140. In the matter under consideration, the grounds upon which the applicants claimed *locus standi* did not relate to an existing, future or contingent right. The determination by the High Court was thus made in circumstances where an abstract question that was unrelated to any legal interest had been raised. No *locus standi* was established.

141. In light of the above, there was therefore no ripe matter before the court for determination. The matter was therefore not justiciable.

142. Finally, reference should be made to the provisions of s 69 of the Constitution providing a right to a fair hearing. The provision reads:

“69 Right to a fair hearing

(1)(n/a)

(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

(3) 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.

(4)(n/a)” [Emphasis added]

143. The underlined portions of the above provision refer to “the determination of civil rights and obligations” as well as the right to access the court “for the resolution of any

dispute”. One can conclude that, even from the perspective of the Declaration of Rights, the object of adjudication is to resolve disputes and to determine civil rights and obligations. On the strength of the wording of s 69 of the Constitution, one can go further to say that there seems to be no constitutional preclusion to a court declining jurisdiction on the basis that a constitutional matter is not yet justiciable.

144. In my view, it is not in the public interest for constitutional matters to be determined in the absence of justiciable issues. First, determining matters in the absence of concrete disputes would lead to the waste of judicial resources. Second, it may result in chaos and disorder as litigants may challenge the constitutionality of every piece of legislation in the absence of any live disputes. Therefore, there seems to be good policy grounds for precluding the determination of abstract constitutional questions until a live controversy relating to those questions has arisen.
145. Put another way, in abstract or hypothetical terms, virtually any subsidiary law may be argued before a court to be unconstitutional. In the absence of a material and identifiable cause of action, the determination by a court of the constitutionality of legislation in these circumstances would set a dangerous precedent. It goes without saying that the background facts of a case add colour to the dispute and exemplify the constitutionality or otherwise of a matter or of impugned conduct.

THE CONSTITUTIONAL VALIDITY OF S 314

146. The gravamen of the complaint by the applicants was that s 314 is unconstitutional because it gives the Minister the power to singularly and without reference to anyone else, interfere in the operations of local authorities. The further argument was that local

authorities are now autonomous. On the face of it, the argument might appear correct and persuasive. On a careful analysis of the law as a whole, however, it appears to me that the respondent does not, in fact, have unbounded powers to interfere with the operations of local authorities.

147. I am inclined to agree with MAKARAU JCC that Zimbabwe remains a unitary state and that the discretion to determine when it is appropriate to devolve power and responsibilities to local authorities and the power to determine whether each local authority can carry out such responsibility can only be the responsibility of central government. I further agree with her that, to ensure that the core values of devolution are always upheld, the Minister of Local Government, on behalf of central government, must retain some residual oversight powers to step in when necessary, particularly where the decision of a local authority threatens national unity or is otherwise not in the interests of the residents of the local authority area.
148. I further agree with MAKARAU JCC that the power granted to the Minister is not exercisable at whim. The law expects that whatever decision he makes must be rational, rooted in legality and that reasons therefore must be provided. Any decision he makes can be subjected to a challenge under the common law and, more importantly, the Administrative Justice Act. I note that the court *a quo* at no stage referred to the Administrative Justice Act and its effect on any possible decisions made by the Minister in terms of s 314. The suggestion that the Minister exercises untrammelled powers that are not subject to any checks and balances is, in the circumstances, therefore not correct.

THE FAILURE TO LIMIT THE RETROSPECTIVE APPLICATION OF

INVALIDITY

149. Having found s 314 to have been inconsistent with the Constitution and declared it invalid, the court *a quo* should have, in light of the doctrine of objective constitutional invalidity, done two things. First, the court should have, in terms of s 175 (6), ordered that the declaration would not have any retrospective effect. Secondly, the court should have suspended the order of invalidity for a given period of time to give the Minister the opportunity to regularise the invalidity and obviate the possibility of a *lacuna* occurring in the law. Attention is drawn in this regard to the recent decision of this court in *Innocent Tinashe Gonese v Minister of Finance & Economic Development, supra*, particularly at paras 64-67.

150. However, in view of the conclusion I have reached that the declaration of invalidity cannot be confirmed, the above observation falls away. It was however one worth mentioning for the benefit of the judge *a quo* and other judges who may, in the future, make such declarations of invalidity.

CONCLUSION

151. By way of conclusion and for the above reasons, I agree that the declaration of invalidity cannot be confirmed and that it should, consequently, be set aside with no order as to costs.

152. I would so order.

PATEL JCC:

PRELIMINARY ISSUES

153. I have read the lead judgment of my learned sister MAKARAU JCC and fully agree with her conclusions on the legal standing of the applicants and their cause of action before the High Court, justifying its assumption of jurisdiction in the constitutional matter before it. To summarise, the applicants have established the requisite *locus standi* by dint of having raised a matter of public importance and having been motivated by a desire to protect the Constitution and assert its supremacy. Their cause of action, in turn, is embedded in s 2 of the Constitution which expressly declares that any law, custom, practice or conduct that is inconsistent with the Constitution is invalid to the extent of such inconsistency. Their *causa* is further buttressed by the broad principle of legality, to wit, that every law, conduct or practice regulating the exercise of public power must be grounded not only in the authority to exercise that power but also in the legitimacy to do so. As regards the jurisdiction of the High Court to entertain the matter, s 171 (1) (c) of the Constitution makes it abundantly clear that the High Court may decide constitutional matters save those that are assigned to the exclusive jurisdiction of the Constitutional Court.

154. I would make the following additional remarks in support of the position adopted by her Ladyship. The first concerns the procedural route to be taken to invoke the constitutional jurisdiction of the High Court. This arises through s 171 (1) (c) of the Constitution, as read with r 107 of the High Court Rules, 2021, which prescribes the procedure to be followed by a party who intends to raise a constitutional issue before that court. The second relates to the overarching stature of s 2 of the Constitution. In this regard, I take the view that the supremacy of the Constitution, coupled with the

principle of legality, endows every concerned citizen with the requisite *locus standi* and *causa actionis*, and the High Court with the correlative jurisdiction, to enforce the strictures of that section and thereby vindicate the Constitution. Any contrary position would operate to render the section otiose or nugatory and virtually moribund. It is a key provision that serves to undergird the entire structure and enforceability of the Constitution itself.

155. Lastly, as a preliminary matter, I should address the reservations raised in his separate opinion by my learned brother GARWE JCC, concerning the apparently abstract nature of the dispute placed before the High Court. I am inclined to agree that, as a general rule, the courts should eschew pronouncements on matters that are entirely abstract or academic. However, my assessment of the instant case is that it raises a constitutional question of paramount public and national importance. I therefore take the view that this question, notwithstanding its ostensibly abstract character, warrants a definitive determination of the constitutionality of s 314 of the Urban Councils Act vis-à-vis the principles enshrined in Chapter 14 of the Constitution. It is clearly in the interests of justice that this Court should adjudicate the merits of the matter.

PRINCIPAL FINDINGS OF THE LEAD JUDGMENT

156. Having made the foregoing preliminary observations, I now turn to consider the merits of the matter. It is here that I must respectfully differ and disagree with her Ladyship's disposition of this case. The principal features of her judgment, as I understand them, are as follows:

- In order to secure the core values of devolution, the Minister responsible for local government, on behalf of central government, must retain residual oversight powers to step in when necessary.
- For that purpose, the provisions of s 314 of the Urban Councils Act are necessary and must be construed in consonance with the presumption of constitutionality.
- On the foregoing premises, the power granted to the Minister in s 314 of the Act is constitutional.
- In the exercise of that power, the Minister must act rationally and give reasons for his or her decision, which is always subject to judicial control under the Administrative Justice Act.
- The devolution of power envisaged in the Constitution is to leave local authorities to manage and govern their own affairs, subject to the Minister's reversing, suspending or rescinding those decisions that are demonstrably not in the local, public or national interest.
- The decisions and conduct of the Minister being subject at common law to judicial review, the impugned s 314 is thereby saved from being unconstitutional.

DEVOLUTION UNDER THE CONSTITUTION

157. It is necessary at this stage to revisit the provisions relied upon by the applicants, *viz.* Chapter 14 of the Constitution in general and ss 264, 265 and 274 in particular. The Preamble to Chapter 14 articulates the broad principle that there must be devolution of power and responsibilities to lower tiers of government in Zimbabwe. Section 264 (1) elaborates the principle that governmental powers and responsibilities, must be devolved, where appropriate, to councils and local authorities which are competent to carry out those responsibilities efficiently and effectively. The specific objectives of

devolution are spelt out in s 264 (2). These are, amongst other things, to give “powers of local governance to the people in making decisions affecting them”, to promote “democratic and effective government”, to recognise “the right of communities to manage their own affairs and to further their development”, to ensure the equitable sharing of local and national resources, and to transfer resources in order to establish a sound financial base for each council and local authority.

158. Section 265 (1) delineates the general principles of provincial, metropolitan and local government. Councils and local authorities are enjoined, within their respective spheres, to ensure good governance, to exercise their functions in a manner that does not encroach on the functional integrity of another tier of government, to co-operate with one another, and to secure the public welfare. Section 265 (3) stipulates that an Act of Parliament must provide “appropriate mechanisms and procedures” to facilitate co-ordination between central government, provincial and metropolitan councils and local authorities.

159. Last but not least, there is s 274 of the Constitution which addresses the role and structure of urban local authorities. Section 274 (1) recognises that these authorities exist “to represent and manage the affairs of people in urban areas” throughout Zimbabwe. Section 274 (2) states that urban local authorities are managed by councils composed of councillors elected by registered voters and presided over by elected mayors. The remainder of s 274 deals with different classes of local authorities, the qualifications and procedures for election to council office and the conferment of executive powers on mayors elected directly by registered voters in the urban areas concerned.

160. Mr *Madhuku*, for the applicants, reiterates the point that devolution is intended to grant urban councils the power to determine their own affairs. In that regard, the responsible Minister must conform with the principle of legality. He or she cannot determine what is in the public or national interest contrary to the concept of devolution. The Minister's power under s 314 of the Urban Councils Act undermines that concept.
161. Mr *Uriri*, for the respondent, submits that councils and local authorities assume and exercise their powers as delegates of central government. Zimbabwe is a unitary State and, within that framework, s 264 of the Constitution provides for devolution where appropriate, while s 265 empowers councils and local authorities within their respective spheres of governance.
162. The provisions of ss 264, 265 and 274 of the Constitution are critical to addressing the question at hand: How should powers and responsibilities in a unitary State be devolved to lower tiers of government and, in particular, to urban councils? The provisions that I have cited derive their authority and inspiration from the principles enshrined in the Preamble to Chapter 14 of the Constitution. These are: the preservation of national unity and the prevention of disunity and secessionism; the democratic participation in government by all citizens and communities; the equitable allocation of national resources; and the participation of local communities in the determination of national priorities within their areas.
163. My reading of these principles and their exposition in ss 264, 265 and 274 is that they contemplate a balanced relationship between central government on the one hand and the lower tiers of government on the other. Admittedly, this relationship does allow, in

the interests of preserving national unity, for the centralised supervision of the conduct and activities of local government so as to ensure efficient and effective administration throughout the land. However, this supervision is conceived as being benign, supportive and permissive rather than authoritarian and oppressive. What it does not envisage, in my view, is the paternalistic exercise of central oversight such that it becomes overbearing and destructive of the crucial principles of democratic participation in government by all citizens and their participation in the determination of development priorities within their areas. That form of supervision and control negates the possibility of any balanced relationship between central government and local institutions. It entails a top-to-bottom as opposed to a centrally dispersed relationship that enables local tiers of government to contribute to the common good the national interest.

SECTION 314 OF THE URBAN COUNCILS ACT

164. Mr *Madhuku* submits that s 314 of the Act predates the current Constitution and is out of line therewith. It enables the Minister to determine what is in the national or public interest and to order local authorities to do what he or she wants. The Minister should not be allowed to direct the daily running of local authorities and should not be involved at all in attempting to enforce public authority. How and to what extent central government should be involved in the running of local affairs are questions for further policy debate.
165. Mr *Uriri* counters that s 314 of the Act only empowers the Minister to invoke its provisions where and when necessary. He or she is guided by the principle of legality and the resultant decision must be rational, procedural and lawful. Section 314 does not

take away local governance. In this respect, the application lacks specificity as to which particular provisions of ss 264 and 265 of the Constitution are violated by s 314 of the Act.

166. The critical components of s 314 are as follows: (i) The Minister may form the view that a resolution, decision or action of an urban council is not in the interests of its inhabitants or is not in the national or public interest. (ii) He or she may then direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action. (iii) Any direction of the Minister to a council must be in writing. (iv) The council concerned must, with all due expedition, comply with any such direction.

167. The ordinary grammatical meaning of s 314 is relatively clear and uncomplicated. The Minister may at any time decide that any decision or action of any council is contrary to the interests of local inhabitants or the citizenry at large. The determination as to what is or is not in the local, national or public interest rests exclusively in the Minister's prerogative. The council concerned has absolutely no say in the matter. Furthermore, it is the Minister alone who exercises the discretion to have the council's decision or action reversed, suspended or rescinded. Again, the council or its inhabitants cannot make any meaningful input or contribution to the manner in which the Minister exercises his or her discretion. They must simply obey and comply with the Minister's direction, and they must do so "with all due expedition". There is no room for any interchange whatsoever between the Minister on the one hand and the council and its inhabitants on the other. In essence, the provisions of s 314, taken as a whole, bear all the hallmarks of diktat rather than discourse.

168. When s 314 is evaluated against the principles embedded in Chapter 14 of the Constitution, it becomes evident that the section does not allow for democratic participation in government by the citizens concerned. Nor does it comprehend the participation of local communities in the determination of development priorities within their areas. It is bluntly undemocratic in both its construction and in its practical implementation.
169. I have no doubt that the Minister, as the duly anointed executive representative of central government in our unitary State, is properly entitled to oversee the operations of councils and local authorities, and to intervene whenever it becomes necessary to do so, in order to ensure the effective and efficient functioning of all of the lower tiers of government. However, it must surely be possible for him or her to do so in a less dictatorial and coercive fashion. In my view, virtually everything contained in s 314 of the Act offends the concepts of devolution and democratic governance embodied in Chapter 14 of the Constitution. And it is not even possible, as is enjoined by para 11 of the Sixth Schedule to the Constitution, to construe it benevolently in such a manner as to apply it in conformity with the Constitution. It cannot be salvaged in any way and is patently unconstitutional. It needs to be appropriately palliated and recast so as to conform with the Constitution.
170. In taking the position that I have adopted, I remain alive to the twin doctrines of subsidiarity and avoidance. In that context, the way is undoubtedly open for any council or citizen, who might be aggrieved by any decision of the Minister taken in terms of s 314, to challenge that decision, either by way of judicial review at common law or under

the provisions of the Administrative Justice Act. However, as was correctly pointed out by counsel for the applicants, this piecemeal approach would entail a multiplicity of litigation with its attendant problems of being both costly and time-consuming. For this reason, I would espouse a single approach to the legislature to attend to the revision of s 314.

THE APPROPRIATE REMEDY

171. By virtue of s 175 (6) of the Constitution, this Court is at large to fashion an appropriate remedy in the event that it finds any law to be inconsistent with the Constitution. In the present case, had the position of the minority prevailed, the appropriate remedy would have been to set aside the entirety of s 314 but suspend the declaration of its invalidity for a stipulated period of time, so as to enable the legislature, within that period, to formulate an appropriate policy and thereafter re-enact a constitutionally coherent provision to replace s 314 of the Urban Councils Act. The underlying objectives of the re-enacted provision, in keeping with s 265 (3) and s 274 (1) of the Constitution, should be to provide appropriate mechanisms and procedures to facilitate co-ordination between the different tiers of government and to enable urban councils to meaningfully represent and manage the affairs of people in their respective urban areas.
172. For the reasons earlier stated, I would confirm the order of the High Court, declaring the provisions of s 314 of the Urban Councils Act as being inconsistent with the Constitution and therefore invalid and, pursuant to such declaration, I would make an order in accordance with the remedy postulated in the foregoing paragraph.

MATHONSI AJCC:

I agree

Tendai Biti Law, applicants' legal practitioners

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