

REPORTABLE (7)

MARX MUPUNGU

v

**(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY
AFFAIRS (2) JUDICIAL SERVICE COMMISSION (3) MUSA KIKA
(4) YOUNG LAWYERS ASSOCIATION OF ZIMBABWE (5)
FREDERICK CHARLES MUTANDA (6) ATTORNEY GENERAL (7)
PRESIDENT OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA ACJ, GARWE JCC, MAKARAU JCC, GOWORA JCC,
HLATSHAWAYO JCC, PATEL JCC & GUVAVA AJCC
HARARE: 14 & 16 JULY & 22 SEPTEMBER 2021**

L. Madhuku & L. Uriri for applicant
T. Magwaliba & F. Chimbaru for first, sixth and seventh respondents
A.B.C. Chinake for second respondent
E. T. Matinenga for third respondent
A. Dracos for fourth and fifth respondents
T. Zhuwarara as *amicus curiae*

MAKARAU AND PATEL JJCC:

MAKARAU JCC: This is an application in terms of s 175(3) of the Constitution of Zimbabwe, for the setting aside in its entirety, of a High Court declaratory order handed down on 15 May 2021. The order, issued in respect of two distinct and separately filed applications, invalidated certain conduct by the President as unconstitutional. This it allegedly did in the first of its two parts.

Background

We summarise the facts giving rise to this application from the two applications that were filed in the High Court under case numbers HC 2128/21 and HC 2166/21, respectively. The facts are not complex.

The facts of this application coalesce, and relevantly so, around 15 May 2021 when the Chief Justice, Judge Malaba, reached the age of seventy. A few days before that date, on 7 May 2021 to be precise, the Constitution of Zimbabwe Amendment (No. 2) Act (No. 2 of 2021) came into force. Among other provisions, it amended s 186 of the Constitution to provide for the tenure of judges in the following terms:

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

- (4) Notwithstanding subs (7) of s 328, the provisions of subs (1), (2) and (3) of this section shall apply to the continuation in office of the Chief Justice, the Deputy Chief Justice, Judges of the Constitutional Court and Judges of the Supreme Court.”

Acting in accordance with the provisions of s 186, as amended, the Chief Justice exercised the option to extend his tenure of office beyond the age of seventy for an additional five years. By letter dated 11 May 2021, the seventh respondent, the President, accepted a medical report as to the mental and physical fitness of the Chief justice to continue in office.

The third, fourth and fifth respondents formed the firm view that the seventh respondent, by accepting the medical report that the Chief Justice was mentally and physically fit to so continue in office, had subverted the correct constitutional position. They filed the two applications in the High Court that we have detailed above, challenging the continuation in office of the Chief Justice for an additional five years beyond 15 May 2021.

In his application, the third respondent, in addition to the Chief Justice, cited as respondents all the judges of the Supreme Court and some judges of the High Court. At the time of the filing of the application, the five judges of this Court, other than the Chief Justice and the Deputy Chief Justice, were Supreme Court judges, acting as Supreme Court judges and were cited as such. Substantive appointments to this Court were made subsequent to the filing of the applications *a quo* but before the hearing of this application.

Whilst materially and correctly so, the third respondent averred in his application that the Chief Justice had opted to exercise the option introduced by the amendment, no such averment

was made in respect of any or all of the other judges who were cited as respondents under case number HC 2128/21. We revert to this fact in detail later.

The primary relief sought in the applications *a quo* was a declaration that the amendment to the Constitution in s 186 did not apply to the Chief Justice and the judges cited as respondents. Specifically, it was claimed that the amendment did not have any force and effect on the tenure of the Chief Justice and the cited judges as such an interpretation would fall foul of the provisions of s 328 (7) of the Constitution.

Section 328 (7) of the Constitution provides that:

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

The two applications, both brought urgently, were opposed on truncated *dies induciae* in accordance with the terms of a case management meeting order to which all the parties agreed. At the end of the hearing of the applications, as indicated above, the court *a quo* issued a singular order in the following terms:

“IT IS DECLARED THAT:

1. The second respondent in HC 2128/21 who is also the second respondent in HC 2166/21 ceased to hold the office of the Chief Justice of Zimbabwe and judge by operation of law on 15 May 2021 at 4.00 hours.
2. The extension of the length of time in the office of the judge beyond the age of seventy provided for in section 186 of the Constitution does not apply to the second to fourteenth and eighteenth respondents.
3. There shall be no order as to costs.”

The respondents *a quo*, including the judges of this Court, were aggrieved by the order. Under separate and different covers, they filed notices of appeal in the Supreme Court challenging the correctness of the decision. It is not necessary that we set out the grounds of appeal of each appellant in full. As and when it is necessary to do so, we shall advert to the notices of appeal.

The applicant, strongly believing that the effect of the first part of the order was to declare constitutionally invalid the letter of 11 May which constituted the legal authority for the Chief Justice to continue in office, filed this application in terms of s 175 (3) of the Constitution. As indicated above, he sought the setting aside of the entire order. This he did notwithstanding that on its mere reading, the High Court order did not in any way refer to the conduct of the seventh respondent as constitutionally invalid.

We observe at this stage that the interpretation of the High Court order by the applicant in this regard was conceded as correct by the fourth and fifth respondent's counsel during the hearing of the application. We shall advert to this concession in detail in due course.

The application in terms of s 175 (3) of the Constitution

It is common cause that the applicant was not a party to either of the two applications that were determined by the High Court. He brought this application in the first instance. In the application he alleged that he is an adult Zimbabwean who is asserting his right to access this Court directly to defend and protect the Constitution.

Arguing that the state of affairs in the country following the issuance of the High Court order was undesirable as there should never in any jurisdiction be doubt as to who the Chief Justice is, the applicant made two basic contentions. Firstly, he contended that the juristic act by the seventh respondent of accepting a medical report as to the mental and physical fitness of the Chief Justice to remain in office for an additional five years after attaining age seventy was valid and the High Court orders purporting to hold such as constitutionally invalid had to be set aside. Secondly, he contended that s 328 (7) of the Constitution relied upon by the third, fourth and fifth respondent as precluding the amendment of the Constitution from applying to the Chief Justice and other sitting judges was not applicable as s 186 (4) was the applicable section.

The third, fourth and fifth respondents opposed the application. The first, second, sixth and seventh respondents were content to keep a watching brief during the hearing of the application.

The third respondent opposed the application on the basis of a sole preliminary point. It was his position that this court should refrain from exercising jurisdiction in the matter. Put differently, it was his position, edified during the proceedings by an oral application, that this Court should recuse itself. In his view, since the second part of the High Court order declared that the judges of this and the Supreme Court could not extend their respective terms of office beyond the age of seventy, the order under scrutiny in the confirmation proceedings affects the judges of this Court directly. In this regard, he was keen to highlight and place it on record that the judges of this Court had not only participated in the proceedings before the High Court but had since filed a notice of appeal against the High Court order. It was therefore the mainstay of his exception and

position that the judges of this Court were completely non-suited to hear this application on account of their positions as active litigants who were already seeking the vacation of the High Court order by way of appeal. In his further view, the determination of the application by this Court as constituted would in the circumstance of the matter implicate a breach of the common law principle *nemo judex in sua causa*.

In opposing the application, the fourth and fifth respondents raised a number of issues. Firstly, they challenged the competence of this Court to determine the application. They also sought the recusal of the entire bench of this Court on the same ground that the third respondent had relied upon. Secondly and before a competently constituted Court, the fourth respondent took issue with the *locus standi* of the applicant to bring the application in the manner that he did. In essence, it was the fourth respondent's position that the applicant, not having obtained any rights under the High Court order, could not purport to challenge the order.

Thirdly and regarding the merits of the matter, the fourth respondent challenged the procedural steps taken and leading to the acceptance by the seventh respondent of a medical report as to the mental and physical fitness of the Chief Justice to continue in office for an additional five years after his seventieth birthday.

Thus, broadly speaking, the application raised for determination three distinct issues. The second issue would only become relevant and fall for determination if the respondents were not successful on the first issue and the third issue would only require determination if the respondents failed on the second issue. The first issue was whether this Court should recuse itself.

If the Court did not recuse itself, the second issue would be whether the applicant had *locus standi* to bring the application under s 175(3) of the Constitution, and finally, if he did have the requisite standing, whether the application had merit.

After hearing submissions from counsel on the first issue, this Court dismissed the application for its recusal on the turn and indicated that full reasons would be availed in the main judgment. We now set these out.

The application for recusal

The third, fourth and fifth respondents applied for this Court, in its entirety, to recuse itself. In making the application, they relied solely on the fact that the third respondent had cited all the judges of this Court as respondents in the application before the High Court.

We again pause to note that whilst the third, fourth and fifth respondents went further to point out that judgment was given against all the judges of this Court who subsequently caused a notice of appeal to be noted on their behalf, these and other averments in the same vein are of no independent legal import. They all stem from the fact that the judges were cited as respondents before the High Court and all ensuing proceedings depend for their validity on that fact. It stands to reason that if the citation of the judges was legally inept, nothing valid would flow from it.

The observations that we make above apply with equal force to the argument that was advanced on behalf of the fourth and fifth respondents, erroneous as it was, that due to the order that was granted against them, the judges of this Court are disenfranchised from exercising the

right to extend their respective tenures of office. We say erroneous because the order that was granted by the High Court was against the judges of this Court in their acting and not in their substantive capacities as judges of this Court.

The same applies to the further argument by the fourth and fifth respondents that the application before this Court must be seen as pre-empting the Supreme Court decision in that the draft order in the present application seeks to achieve in essence that which the judges of this Court seek to achieve in their notice of appeal before the Supreme Court.

The law of recusal

The law of recusal is entrenched in this jurisdiction. It is settled. It has found expression in many words some of which reflect approval of decisions of other jurisdictions. It is the law against bias and where after investigation it is established that the judicial officer or decision maker was biased, the ensuing decision is afflicted and must be vacated. Thus, the law of recusal is an expression at a very general level of the principle that justice must not only be done but must appear to have been done. This is so because justice is rooted in confidence and confidence is destroyed when right thinking people go away thinking that the court was biased or conflicted.

It is in keeping with this general principle that at all times, courts must conduct their affairs in such a way that the court's open-mindedness, its impartiality and fairness are manifest to all those who follow the proceedings and review the outcome. This Court has recognized this broad principle in the case of *Konson v S 7/15* where it referred with approval to the remarks of

TROLLIP AJA in *S v Rall* 1982 (1) SA 828, who, in dealing with the limit to which a court can go in questioning an accused person during a criminal trial, had this to say in part:

“.....the judge must ensure that “justice is done”. It is equally important, I think, that he should ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, *S v Wood* 1964 (3) SA 103 (O) at 105G; *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) at 589G; *Solomon and Anor NNO v De Waal* 1972 (1) SA 575 (A) at 580H). The judge should consequently refrain from questioning any witness or the accused in such a way that, because of its frequency, length, timing, form, tone, content or otherwise conveys or is likely to convey the opposite impression (cf *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E-F; *Jones v National Coal Board* (1957) 2 All ER 155 (CA) at 159F).”

As correctly submitted by counsel for the respondents, the law of recusal also finds expression in our supreme law, where it is part and parcel of the bundle of rights that make up the right to a fair hearing as guaranteed in s 69 of the Constitution. The law provides in s 69(2) of the Constitution that in the determination of their 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.

It is self-evident that at the heart of the principle of recusal is the need to protect the right to a fair hearing, which in turn lies at the heart of the rule of law. Put differently, an application for recusal is invariably an allegation that the litigant’s right to a fair hearing, as constitutionally guaranteed, is under threat of violation.

The law of recusal therefore seeks to re-assert the independence and impartiality of the court that is demanded by s 69 of the Constitution. It further seeks to enhance the notion of even handedness, the universal standard that is required from all those who dispense justice.

It then presents itself to us that, conceptually, an application for recusal is largely an exchange between the court and the litigant who is apprehensive that his or her right to a fair hearing is under threat. There is hardly room or comfort for that matter, and self-evidently so, for the adversary litigant to fight in the corner of the court and show by way of submissions or evidence that the court is not biased towards it or does not have some interest in the matter. See *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Company (Pvt) Ltd* 2001 (1) ZLR 226, at 233. Having made the observation we remain grateful for the submissions that were made on behalf of the applicant.

But the above is not all. The law of recusal is not concerned solely with the rights of the apprehensive litigant. It is concerned with the fairness of the hearing in its totality.

It therefore stands to reason that the law of recusal and the guarantees in s 69(2) require some degree of reciprocity of fairness and good faith from the apprehensive litigant. In other words, a litigant alleging a violation of his or her right to a fair trial must not have created or contributed to the dire circumstances that he or she finds himself or herself in. Put differently, the application for recusal must be brought on genuine grounds and must not be contrived merely for the purposes of embarrassing the court. But above all, the apprehensive litigant must bring the

application for recusal on tenable positions at law. The application must be based on sound and sustainable positions at both the adjectival and the substantive law.

Analysis

Applying the law then to the facts of this matter, firstly, it is common cause *in casu* that the third respondent did not give any prior notice that he intended to sue all the judges of this Court as is required by the Rules of the High Court 1971. Thus, Rule 18 of the High Court Rules was not complied with. This is a procedural rule that is not dependent on the cause of action intended to be brought. Its purpose is not only to give the judge concerned notice of the intended suit, but to also act as a sieve. It has a gate-keeping function that keeps unmeritorious suits out of court. We deal with this aspect in greater detail later in the judgment.

Secondly, it is further common cause that the third respondent did not, and correctly so, allege that any of the judges of this Court, in their respective capacities as Acting Constitutional Court judges, or as substantive judges of this Court for that matter, had exercised the option, as had the Chief Justice, to continue in office for an additional five years after they each attained the age of seventy. Perchance, for a myriad of reasons, some of the judges may not exercise the option. Clearly there was no evidence placed before the High Court that one or more of the judges had an intention of so doing at the time the application a quo was filed. A necessary and material averment to complete the cause of action against the judges, other than the Chief Justice, was therefore missing. Thus, whilst the cause of action against the Chief Justice may have been complete, it was not in respect of the other judges even for the declaration of any future or contingent rights of the judges. In the absence of a sustainable cause of action against the judges, the citing of the judges

and the order sought against them was not only unwarranted but was also incompetent and undeserved.

Thirdly, we observe, common cause as it is, that although the two applications *a quo* were brought on a certificate of urgency, such urgency was not demonstrated regarding the issuance of the second part of the order. The third respondent made no averment in his application that the judges had indicated by word or by deed, that they were about to exercise the option to remain in office for an additional five years at the same time that the Chief Justice did, or immediately thereafter. It was clearly not the position of the third respondent *a quo* that the harm sought to be cured or arrested by the second part of the order *a quo* was imminent or needed the urgent attention of the court.

Fourthly, there is a discernible disconnect between the manner in which the judges were cited and the relief that was sought against them. Whilst the judges of this Court were cited *nomine officio* as Supreme Court judges, albeit acting as Constitutional Court judges, the relief sought was claimed against them personally and individually. Indeed the order sought has since followed them individually and collectively to this Court.

Furthermore, we emphasise the point that at the time when the orders *a quo* were handed down, *i.e.* on 15 May 2021, five of the judges of this Court were substantive judges of the Supreme Court while acting as judges of the Constitutional Court. Subsequently, they were appointed as substantive judges of this Court on 20 May 2021, after s 186 of the Constitution was amended and after the above-mentioned orders were handed down. Consequently, as of that date,

the judgment and orders *a quo* would have ceased to have been applicable to or binding upon them in their personal capacities. There was therefore no legitimate basis for seeking their recusal in the present matter as their personal rights and interests, then or in the future, could no longer have been in issue.

Finally and in any event, an interpretation of s 186 of the Constitution in a suit against the Chief Justice alone would have been binding on all other similarly circumstanced judges. This is a trite position at law. The relief sought *a quo* was an interpretation of the Constitution which is binding on all persons as it is a declaration of what the law is. There was thus no need to cite in addition to the Chief Justice, the judges of this Court, or any other judge for that matter, in the application *a quo*.

On the basis of the above, we venture to suggest that the legally inelegant citation of the judges *a quo* and the subsequent application for the recusal of this entire bench on the basis of such, was not made in good faith but merely to place this court in an exceedingly embarrassing position.

We find, therefore, that the citing of the judges of this Court *a quo* was both procedurally and substantively *maladroit*. Because of the number of procedural and substantive law lapses and errors that were attendant upon it, such citing cannot be a basis for the recusal of the judges of this Court. The recusal of this Court cannot be granted on the basis of an untenable legal position.

To seek the recusal of the entire court on an untenable legal position is synonymous with seeking the recusal on no grounds at all. It makes the application frivolous. We further observe in this regard that, when questioned as to which persons should properly constitute the bench to hear the merits of this matter, in the event that all the incumbent judges of the Constitutional Court and Supreme Court were to recuse themselves, and which authority could be called upon to legitimately appoint such persons to that bench, both counsel for the respondents were studiously unable to enlighten the Court with any meaningful answers to those very pertinent questions.

In *Bernert v Absa Bank* 2011 (3) SA 92 (CC), Ngcobo CJ repeated the position earlier on taken by that court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), that the judicial function, together with the oath of office that judges subscribe to, creates a presumption of impartiality in favour of the Constitutional Court.

By the same reasoning as emerges from the South African cases, there is a presumption of impartiality in favour of this Court, for we do we carry out similar judicial functions and subscribe to a similar oath. It is our finding that *in casu*, the presumption that this Court is impartial was not displaced.

Had the application for recusal been validly taken, we may have proceeded to determine whether the common law doctrine of necessity, an exception to the *nemo iudex in sua causa* principle, was of any application. It is not necessary that we encumber this judgment with a discussion of the principle and its applicability in this jurisdiction. Suffice it to say that, where it

is applicable, it operates to obviate a situation of administrative or judicial paralysis where no person other than the biased decision maker can make a decision in the matter.

For the above reasons, we dismissed the application for recusal.

PATEL JCC: It is pertinent at this juncture, before addressing the substance of the matter, to make an observation concerning the conduct of the third respondent. Even though he was primarily instrumental in initiating the proceedings *a quo*, he deliberately chose not to address any issue other than that of recusal, either in his opposing affidavit or in his heads of argument. Equally curiously, at the end of the proceedings on the question of recusal, he and his counsel elected not to appear in any further proceedings before the Court. In the event, the matter proceeded in the absence of the third respondent and without the benefit of his submissions on the substantive merits of the matter.

The relief sought by the applicant in this matter is essentially threefold. The first is a *declaratur* to the effect that paras 1 and 2 of the operative part of the High Court judgment No. 264-21, handed down on 15 May 2021, are orders of constitutional invalidity within the contemplation of s 175(1) of the Constitution. The second is a further declarator to the effect that the aforesaid High Court orders have no force unless confirmed by this Court. Lastly, the applicant seeks a substantive order declining to confirm and setting aside the impugned High Court orders.

My learned sister, Makarau JCC, in addressing the application for recusal, has earlier outlined the broad issues raised by this application. Having regard to the averments contained in the affidavits filed by the parties and the arguments presented before us, the specific issues that now arise for determination in this matter are as follows:

- Whether the applicant has the requisite *locus standi* to institute this application.
- The effect of the failure by the applicant in the proceedings *a quo* (*i.e.* the third respondent herein) to seek and obtain leave to sue all the judges that were cited as respondents in that matter.
- Whether the orders of the court *a quo* are orders of constitutional invalidity requiring the confirmation of this Court.
- The correctness of the judgment of the court *a quo* (i) in its interpretation of ss 186 and 328 of the Constitution and (ii) as regards the alleged violation of the right to equal protection of the law and the right of access to the courts.
- Whether this Court should decline to confirm and accordingly set aside the orders granted by the court *a quo*.

I propose to address and determine the foregoing issues *ad seriatim*.

The applicant's legal standing

Section 175 of the Constitution regulates the powers of the courts in constitutional matters. Of particular relevance in the present matter are subss (1) and (3) of s 175 which provide as follows:

- “(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.
- (2)
- (3) Any person with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subs (1).
- (4)
- (5)
- (6)

I shall address the significance of s 175(1) later in this judgment when dealing with the import and effect of the High Court orders that are the subject of scrutiny *in casu*. For the present, it is first necessary to consider the applicant’s *locus standi in judicio* to institute the application before us. By virtue of s 175(3), it is incumbent upon the applicant to show that he is “a person with a sufficient interest” in an order concerning constitutional validity.

In paras 27 to 29 of his founding affidavit, the applicant asserts that he is a person with sufficient interest within the contemplation of s 175(3) of the Constitution. He avers that, as a citizen by birth, he has a sufficient interest in defending and protecting the Constitution and that s 175(3) exists for his protection as a citizen. He further elaborates the factors which give rise to his particular interest as an ordinary citizen. These include his belief that the President acted constitutionally in approving Justice Malaba’s election to continue in office as Chief Justice for an additional 5 years and that he is in office in accordance with the Constitution following the President’s approval. The applicant further believes that all persons who were judges of the Supreme Court and those acting as judges of the Constitutional Court as at 7 May 2021 are entitled to elect to retire at the age of 75 years in accordance with s 186(4) of the Constitution and that the

High Court cannot contradict that position without also declaring s 186(4) of the Constitution to be constitutionally invalid. The applicant takes issue with the fact that the Registrar of the High Court has not acted in terms of r 31(1) of the Constitutional Court Rules 2016, to place the record of proceedings in that court before this Court for confirmation. The High Court orders will therefore remain as if they are orders unaffected by s 175(1) of the Constitution and the respondents are acting as if s 175(1) is not in issue.

The applicant accordingly affirms that he is entitled to a correct and final pronouncement on these issues in keeping with his right to the protection of the law coupled with his duty as a citizen to observe the Constitution and respect its institutions. He is of the strong view that the third, fourth and fifth respondents have a well thought out strategy to avoid s 175(1) and that the first, second and sixth respondents appear not to have realised the impact of that strategy. However, he is very alert as a citizen and this is the source of his sufficient interest because every citizen of Zimbabwe has automatic standing to challenge any attempt to render redundant the provisions of the Constitution, such as s 175(1).

Mr *Madhuku*, for the applicant, submits that the applicant, as a citizen, has a sufficient interest and the right to approach this Court to vindicate and protect the Constitution. The common law requires a direct and substantial interest in order to found *locus standi*, but that is not the test to be applied *in casu*. It does not matter that the applicant was not a party to the proceedings *a quo*. He is entitled to defend the Constitution as a citizen so as to avoid overreach by a subordinate court within the separation of powers framework. Mr *Madhuku* further argues that citizenship is a key element in giving rise to a sufficient interest within the meaning of s 175(3) of the Constitution

and that every citizen has an automatic and sufficient interest in any matter relating to the Constitution. Apart from being a citizen by birth, the applicant also has a sufficient interest by reason of being concerned and aggrieved by the conduct of the Registrar of the High Court and the strategy of avoidance adopted by the third, fourth and fifth respondents.

Mr *Dracos*, for the fourth and fifth respondents, submits that s 175(3) of the Constitution, as read with r 35 of the Constitutional Court Rules, requires the demonstration of a right to approach this Court. The present matter is a review relating to a dispute between the parties to the proceedings *a quo* and the applicant was not a party to those proceedings. Section 85(1) of the Constitution is different from s 175(3) which goes further to require a sufficient interest. The applicant's claim is based on his personal views and not on any sufficient interest. He therefore lacks the requisite *locus standi in casu* because he was not cited in the proceedings *a quo*.

Per contra, Mr *Zhuwarara*, the *amicus curiae* in this matter, submits that this Court has an investigative role in confirmation proceedings. Consequently, the question of *locus standi* pales into insignificance. In any case, a citizen has a sufficient interest in questions relating to judicial authority by virtue of s 162 of the Constitution which states that judicial authority derives from the people and is vested in the courts. What is more important is the role of this Court on questions relating to the invalidity of any law. Any declaration of a subordinate court is subject to the overarching jurisdiction and supervisory role of the Court, irrespective of the *locus standi* of any applicant.

The critical question to be determined is this: What is the meaning to be assigned to the phrase “any person with a sufficient interest” as used in s 175(3) of the Constitution? The word “interest”, *qua* legal interest, is employed variously in the Constitution. It appears in s 85(1) with reference to litigation “in any person’s own interests” or “in the interests of a group or class of persons” or “in the public interest” or by “any association acting in the interests of its members”, alleging that a fundamental right or freedom has been, is being or is likely to be infringed. It also appears in s 113(7) which enables “any interested person” to approach this Court to determine the validity of a declaration or extension of a state of public emergency. Again, s 167(5) provides that the Rules of the Court must allow a person, “when it is in the interests of justice”, to approach the Court in relation to any constitutional matter or any issue connected with a decision on a constitutional matter.

The foregoing enumeration is obviously not exhaustive. Nevertheless, it serves to illustrate that the use of the word “interest” and its derivatives in the Constitution is variegated and that its specific meaning depends upon the particular context in which it appears. The instances cited also demonstrate that the provisions in question are designed to preserve the integrity of the Constitution through the conferment of broad and expansive legal standing in the determination of constitutional questions and matters.

Reverting to s 175(3), it is necessary to have regard to the point that the word “interest” is coloured and qualified by the use of the word “sufficient”. The latter is defined in various dictionaries as “enough to meet the needs of a situation or a proposed end” or “enough for a particular purpose”. These definitions underscore the need to have regard to the specific purpose

for which sufficiency is required. In the context of s 175(3), the central objective that is to be attained is the confirmation or variation of a court order concerning the constitutional invalidity of any law or any conduct of the President or Parliament. What this means is that in order to assess the sufficiency of any person's legal interest in the matter, it is necessary to ascertain the particular purpose which has actuated that person to approach this Court to seek the confirmation or variation of the order made by the subordinate court concerning constitutional validity.

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 984 (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. The position advanced on behalf of the fourth and fifth respondents is that the applicant lacks the requisite sufficient interest *in casu* because he was not a litigant in or party to the proceedings *a quo*. This position is palpably unsustainable for several very compelling reasons.

First and foremost is the wording of s 175(3) itself. The reference to “any person” with a sufficient interest makes it abundantly clear that it is not confined to litigants or parties before the subordinate court that has rendered the order of constitutional invalidity. This is fortified by the fact that confirmation proceedings under s 175(3) to confirm or vary the order can be brought to this Court not only by way of appeal but also by means of an application. This clearly signifies that *locus standi* is extended to any person with a sufficient interest, even if he or she has not been a party to the proceedings *a quo*.

Secondly, unlike the position that obtains under s 85(1) of the Constitution, a person invoking the Court’s jurisdiction under s 175(3) is not required to allege and prove any infringement of his or her own fundamental rights or those of any other person. See in this regard *Ferreira’s case, supra*, at para. 235; *M & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* 2016 (2) ZLR 45 (CC); *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 12/15. What is more important in assessing the requisite sufficient interest is the nature, substance and gravity of the constitutional matter that has prompted the person concerned to apply to this Court for a determination and consequential relief.

Thirdly, it is pertinent to have regard to the provisions of r 31 of the Constitutional Court Rules. This rule governs the procedure for confirmation of an order of constitutional invalidity. Rule 31(2) relates specifically to the filing of heads of argument by the parties to the proceedings before the court *a quo*, where the registrar or clerk of that court has, acting in terms of r 31(1), filed with the Registrar of this Court the relevant record of proceedings, including the court order for confirmation. On the other hand, r 31(3) entitles “any person or entity of State” to

appeal against an order of constitutional invalidity, while r 31(5) enables “a person or entity of State” to apply for the confirmation of any such order. Both subrules require the appellant or applicant in question to be “entitled to do so”, *i.e.* to appeal or apply, as the case may be. What is not provided for, and what is obviously a *casus omissus*, is the recourse to an appeal or application to vary an order concerning constitutional validity, as is expressly envisaged by s 175(3) of the Constitution. In any event, what is self-evident from the provisions of r 31 is that the prescribed procedures for confirmation or otherwise are not confined to the parties or litigants *a quo* but extend as well to any person or State entity that is entitled to appeal or apply by reason of being vested with a sufficient interest in the matter.

The submission made on behalf of the applicant is that every citizen has a sufficient interest under s 175(3) of the Constitution to approach this Court to vindicate and protect the Constitution. It is also contended that any citizen has an automatic and sufficient interest in any matter relating to the Constitution. It is therefore necessary, so it is argued, to draw a distinction between citizens and non-citizens. This position, in my view, is not entirely tenable. While I agree that being a citizen by birth is a relevant factor, I do not think that citizenship *per se* can invariably be regarded as an automatic and exclusive criterion in order to establish legal standing under s 175(3). It is perfectly conceivable that a non-citizen and even a foreign resident might be entitled to approach this Court as having the requisite sufficient interest in the matter. Each case will depend upon the terms and ramifications of the court order that is the subject of confirmation proceedings as well as the personal attributes and circumstances of the individual applicant concerned. The fact that he or she is not a citizen, whether by birth or otherwise, does not preclude

him or her from approaching this Court in order to either vindicate or challenge an order concerning constitutional validity made by any subordinate court.

As I have postulated earlier, in assessing “sufficient interest” in the context of s 175(3), it is of critical importance to have regard to the purpose for which the person in question has appealed or applied to this Court to confirm or vary the order of constitutional invalidity rendered by the lower court. Turning to the applicant *in casu*, the reasons that he proffers for mounting the present application revolve around the nature and effect of the orders made by the court *a quo* and what has transpired thereafter. To recapitulate, he firmly believes that the President acted constitutionally in extending the tenure of office of the incumbent Chief Justice for a further 5 years. He also believes that judges of the Supreme Court and those acting as judges of the Constitutional Court are entitled to elect to retire at the age of 75 years. He is concerned by the fact that the Registrar of the High Court has failed to process the orders of the court *a quo* in conformity with the Rules of this Court, thereby leaving them intact and unaffected by the requirements of s 175(1) of the Constitution. He is also aggrieved by what he perceives to be the deliberate strategy adopted by the third, fourth and fifth respondents to avoid and subvert the requirements of s 175(1) and the failure of the first, second and sixth respondents to realise the impact of that strategy. He accordingly claims that he is entitled to a correct and final pronouncement on the matter so as to avoid the relevant provisions of the Constitution being rendered redundant.

As against this, none of the respondents *in casu* has questioned the veracity of the applicant’s convictions, other than to ridicule them as the subjective views of a mere “busybody”.

In the event, his averments and assertions remain substantially unchallenged and I see no cogent reason to discredit or discount them. As an “alert citizen”, he wishes to ensure that the strictures of the Constitution are duly complied with and that its integrity is appropriately preserved. He also wishes to defend the conduct of Parliament in the enactment of s 186 of the Constitution as well as the conduct of the President extending the tenure of the incumbent Chief Justice pursuant to that section.

All in all, I am of the considered view that the applicant is motivated in instituting the present application both by his own interest as a concerned citizen and in the general public interest in a matter of paramount public importance. In short, he is actuated by the desire to vindicate the provisions of the Constitution pertaining to judicial tenure. In these circumstances, I am of the considered opinion that the applicant has put forward a very compelling case for establishing the requisite “sufficient interest”, within the contemplation of s 175(3) of the Constitution, for the purpose of contesting the propriety of the orders rendered by the court *a quo* under judgment No. HH 264-21 on 15 May 2021. It follows that the preliminary objection to the applicant’s *locus standi in judicio* is without merit and cannot be sustained. It is accordingly dismissed.

Ultimately, what must be borne in mind is that the respective positions and contentions of the parties in confirmation proceedings do not constitute any valid limitation to the wide and relatively unfettered review jurisdiction conferred upon this Court by the provisions of s 175 of the Constitution. As was appositely observed in *S v Chokuramba* CCZ 10/19, confirmation proceedings require this Court to conduct a thorough investigation of the matter at hand “irrespective of the finding of constitutional invalidity by the lower court and the attitude of the

parties” (at p 6). This is because “the involvement of the Constitutional Court in the process of determination of the constitutionality of the law or the conduct of the President or Parliament through confirmation proceedings is mandatory” (at pp 2-3).

Absence of leave to sue respondent judges

It is common cause that, before instituting proceedings in the court *a quo*, the third respondent herein did not seek and obtain leave to sue the second to the eighteenth respondents in that matter, who were at that time the Chief Justice, Deputy Chief Justice, Acting Judges of the Constitutional Court, Judges of the Supreme Court and Acting Judges of the Supreme Court. The court *a quo* reasoned that such leave to sue was unnecessary for a variety of reasons. The first was that the relevant rule of court only applied to actions instituted by way of summons and not to application proceedings. The second was that the applications before the court were made in terms of s 85 of the Constitution and there was no requirement for leave to be granted in an application made in terms of that section. Lastly, the court opined that the respondents in question were cited in their official capacities and had not filed any opposing papers challenging their citation without leave. In the event, the court found that the failure to obtain the leave of the court to sue the judges in question did not nullify or render the entire proceedings fatally defective.

Rule 18 of the High Court Rules 1971 stipulates as follows:

“No summons or other civil process of the court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose.” (my emphasis)

It is not in dispute that both the Chief Justice and the Deputy Chief Justice are also judges of the High Court by operation of s 170(a) of the Constitution. In my view, it must also be

accepted that r 18 of the High Court Rules applies as well to judges of the Supreme Court by dint of r 73 of the Rules of the Supreme Court 2018. The latter rule provides that in any matter not dealt with in the Rules of the Supreme Court the practice and procedure of that court shall follow, as closely as may be, the practice and procedure of the High Court in terms of the High Court Act [Chapter 7:06] and the High Court Rules. Thus, any suit lodged in the Supreme Court against a judge of that court would be subject to the grant of leave to sue in accordance with r 18, as applied by extension to the practice and procedure of the Supreme Court. That being so, it would be highly illogical and irregular if a suit instituted in the High Court against a judge of the Supreme Court were to be excluded from the protective ambit of r 18. Having regard to the purpose underlying r 18, *viz.* to shield and safeguard judges against frivolous or vexatious litigation, it seems to me that the rule must perforce be extended and construed so as to embrace and protect all judges of the superior courts, in addition to judges of the High Court, irrespective of the court in which they may be sued. At the relevant time, the fourth to the eighteenth respondents in the proceedings *a quo* were substantive judges of either the Supreme Court or the High Court. It follows that r 18 of the High Court Rules would have been applicable to any “summons or other civil process sued out against” the second and third respondents as well as the fourth to the eighteenth respondents in the proceedings *a quo*.

Mr *Dracos* defends the stance taken by the third respondent, *qua* applicant *a quo*, and the position adopted by the court *a quo* in that regard. He submits that an application made under s 85 of the Constitution does not require leave to sue any judge in terms of r 18 of the High Court Rules. He relies for this proposition on the decision in *Zimbabwe Lawyers for Human Rights & Anor v President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (SC) (the *ZLHR* case). Rule 18 is designed to avoid frivolous or vexatious suits against sitting judges or the President and this

aspect, so he argues, is already catered for in s 85 of the Constitution. Mr *Dracos* accepts that the court *a quo* did not address or consider whether the citation of the judges was frivolous or vexatious. However, so he contends, the consideration of that question was not necessary or relevant given the relief that was sought from the High Court.

As against this, Mr *Zhuwarara* distinguishes the decision in the *ZLHR* case on the basis that the judgment in that case did not relate to s 85 of the Constitution but turned on the absence of any equivalent to r 18 of the High Court Rules in the Supreme Court Rules that were in force at that time. He submits that the rationale behind r 18 is to protect the President and sitting judges against frivolous and vexatious proceedings. He further relies upon *Nicolle v Minister of Lands & Anor* 2003 (1) ZLR 280 (H) for the submission that the intention behind r 18 is that leave to sue must be sought and obtained first before proceedings are filed for substantive relief against a judge. Before valid proceedings could eventuate in the matter *a quo* it was imperative that a separate application be instituted beforehand to obtain leave to sue the judges concerned. Consequently, the decision of the court *a quo* was a nullity because the court proceeded without regard to r 18 and therefore lacked the necessary jurisdiction to deal with the matter. This renders the proceedings *a quo* susceptible to summary negation by this Court for want of jurisdiction. Accordingly, so it is argued, there is no need for this Court to relate to the merits of the present dispute. As there were no valid proceedings *a quo*, it follows that the constitutional issues therein were improperly determined. Therefore, this Court, employing its supervisory review powers, should set aside the impugned orders *a quo* and substitute them with an order dismissing the application for want of leave to institute proceedings.

Mr *Uriri*, for the applicant, agrees that the court *a quo* misdirected itself in finding that r 18 of the High Court Rules does not apply to applications but only to actions by way of summons. This was contrary to the rationale of r 18. Although the court took the view that the judges were sued in their official capacity, the substance of the suit was against the judges in their personal capacity. Consequently, the proceedings *a quo* were a nullity for want of jurisdiction. Nevertheless, Mr *Uriri* submits that the matter should not end there. This is because the substance of the present proceedings is fundamental to the integrity of the Constitution and the meaning of s 186(4) of the Constitution must be pronounced upon. Because of the effect of the orders *a quo* on the application of s 186(4), there must be a decision by this Court to ensure finality in this matter. This is so despite the nullity of the proceedings *a quo*.

As I have explained earlier, the court *a quo* rejected the objection to its assumption of jurisdiction on three grounds: that r 18 of the High Court Rules did not apply to applications; that there was no requirement for leave to sue to be granted in applications under s 85 of the Constitution; and that the respondents in question were cited in their official capacities only. For the reasons set out below, I am of the view that the court *a quo* manifestly misdirected itself in all three respects.

Dealing firstly with the last aspect, there can be no doubt that the second to the eighteenth respondents *a quo* were cited *nomine officio*, *i.e.* in their official capacities. However, it is equally evident that those respondents were cited on the basis that they would or might benefit personally, either immediately or in the indeterminate future, from the amendments to s 186 of the Constitution. In any event, the court *a quo* nonetheless proceeded to issue two distinct declarators.

The first declared that the second respondent, the incumbent Chief Justice, ceased to hold office by operation of law. The second declared that the extension of judicial tenure provided for in s 186 of the Constitution did not apply to the second to the fourteenth and the eighteenth respondents. (The exclusion of the fifteenth, sixteenth and seventeenth respondents from the latter *declaratur* appears to have been premised on the finding that they were High Court judges who were “just acting judges” of the Constitutional Court and/or the Supreme Court). It is abundantly clear that the substantive impact of both declarators had a definitive impact on the rights and interests of the respondents in question. Accordingly, although they were cited in their official capacities, they were substantively affected by the orders of the court *a quo* in their personal capacities. This serves to fortify the point that leave to sue them should have been obtained before they were cited in the proceedings *a quo*.

As regards the scope of r 18 of the High Court Rules, the court *a quo* patently misinterpreted the provisions of that rule. There is absolutely nothing in the wording of r 18 or any other rule to justify the purported distinction between actions by way of summons on the one hand and suits by way of application on the other. Nor is there anything in r 18 to support the curtailment of the obvious breadth of the phrase “other civil process” so as to exclude applications from its scope of coverage. This finding is reinforced by having regard to the rationale behind the rule, to wit, to shield the head of State as well as judges from being harassed by frivolous or vexatious claims. See *Gluck v The Governor* 1947 SR 143 at 146, cited with approval in the *ZLHR* case, *supra*, at 277.

This is an aspect that the court *a quo* pointedly overlooked in determining the preliminary objection before it. It thereby failed to properly exercise its discretion in the matter. If it had applied its mind to the question, it would undoubtedly have found that the blanket citation of all the sitting judges of the Constitutional Court and Supreme Court was nothing less than deliberate and gratuitous vexation.

I now turn to examine the proposition, which was advanced by the applicants *a quo* and endorsed by the court *a quo*, to the effect that there is no requirement for leave to sue to be granted in an application made in terms of s 85 of the Constitution. The judgment of the full bench of the Supreme Court in the *ZLHR* case, *supra*, appears to support this position. In considering the provisions of s 24 of the former Constitution (the precursor to s 85 in the current Constitution), Gubbay CJ stated as follows, at 277-278:

“The fundamental purpose behind s 24(1) of the Constitution is to afford anyone who has lawful cause for complaint to come directly before the Supreme Court. Yet the right to do so is subject to certain in-built limitations.

First, where the question as to a contravention of the Declaration of Rights was not referred by the High Court or a court subordinate to the High Court in terms of s 24(2), no application for the determination of such question will lie to the Supreme Court under subs (1).

Second, the Supreme Court in the exercise of its original jurisdiction may, by virtue of s 24(4)(a), determine without a hearing any such application, which, in its opinion, is merely frivolous or vexatious. This stricture is a sufficient protection against the possibility of harassment being caused to the cited respondent. Where therefore the relief claimed is against the office of the President, the aim of r 18 is recognised and implemented in subs (4)(a).

Third, in accordance with the proviso to s 24(4) the Supreme Court may, in the exercise of its discretion, decline to entertain an application under s 24(1), or a referral under s 24(2), if satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law. This is precisely the same consideration material to an application for leave under r 18.”

The first in-built limitation referred to above is not directly relevant *in casu*, but the second and third limitations are obviously pertinent. They demonstrate that s 24(4) of the former Constitution contained specific safeguards against any direct application that was merely frivolous or vexatious or which could be resolved through the availability of other adequate means of redress. These safeguards rendered it unnecessary to invoke r 18 of the High Court Rules or any equivalent provision in any matter involving an application made under s 24(1) of the Constitution.

Turning to s 85 of the current Constitution, one finds that it does not incorporate any similar safeguards against applications that are afflicted with frivolity or vexatiousness or which are susceptible to resolution through alternative remedies. What this means is that the application of r 18 or any other equivalent is not rendered unnecessary or redundant in the context of s 85. Therefore, the contention that there is no need for leave to sue in an application in terms of s 85, because it is already catered for in that provision, is patently erroneous. It follows that the decision in the *ZLHR* case, predicated on a provision which is materially different in certain respects from the present s 85, is clearly distinguishable and inapplicable *in casu*. It also follows that the requirement of prior leave to sue stipulated by r 18 of the High Court Rules remains fully operative and enforceable in relation to any application made in terms of s 85.

Additionally, it is necessary to underscore the point that access to this Court or any subordinate court under s 85 is subject to regulation by rules of court. This is made explicitly clear by s 85(3) which dictates that the rules of every court must provide for the procedure to be followed in cases where relief is sought under s 85(1). It is also spelt out in s 167(5) of the Constitution *vis-à-vis* direct access to the Constitutional Court.

One cannot institute an action or application in the High Court, or any other court, without due observance of and compliance with the Rules of that court. The Rules inform a litigant of what is required of him to access the court concerned. If he fails to observe or comply with those Rules, he will inevitably be non-suited.

To conclude this aspect of the matter, I am satisfied that the proceedings *a quo* were fatally defective and constitute a nullity for failure to comply with r 18 of the High Court Rules and consequential lack of jurisdiction by the court *a quo*. That, however, does not signal the end of the matter. The question that remains is whether or not, despite the nullity of those proceedings, this Court should nevertheless proceed to canvass the merits of the application before us. I am of the considered opinion that it is necessary for the Court to address and determine the merits of the application for the following very compelling reasons.

First and foremost, it cannot be disputed that the matter is one of paramount public importance. Whether or not the incumbent Chief Justice should continue in office to perform the functions of that office for a further 5 years is undoubtedly a question of critical public significance. The publicity surrounding that question bears ample testimony to that fact. By the same token, it is equally important that the possible extension of tenure availed to other senior judges by s 186 of the Constitution be resolved in order to obviate future controversy in that regard.

The obvious objection is that the substantive correctness of the judgment *a quo* is currently pending before the Supreme Court on appeal from the court *a quo*. In my view, however, the pendency of that appeal and the possibility of its being pre-empted should not detract from the

overarching supervisory jurisdiction of this Court, by virtue of s 167(3) of the Constitution, in critical constitutional matters. Ultimately, it is this Court that makes the final decision as to whether or not any law or conduct of the President or Parliament is constitutional. And it is this Court that must confirm any order of constitutional invalidity made by another court before that order has any force or effect.

In exercising its jurisdiction under s 175(3), the Court is not confined to purely procedural or preliminary issues that may arise for determination. In confirmation proceedings, the Court is duty-bound to adjudicate all the relevant issues. These include not only the procedural propriety of the proceedings *a quo* but also, more importantly, the juridical correctness of the substantive findings of the subordinate court.

Moreover, s 176 of the Constitution endows this Court with the inherent power to protect and regulate its own process, taking into account the interests of justice and the provisions of the Constitution. In all the circumstances, I am of the firm view that this Court should proceed to address and determine the merits of this matter, not only in order to bring it to finality but also in the interests of justice.

Orders of constitutional invalidity requiring confirmation

As already stated, the court *a quo* issued two declaratory orders. The first declared that the second respondent (the Chief Justice) ceased to hold that office by operation of law. The second declared that the extension of office beyond the age of 70 years provided for in s 186 of the

Constitution does not apply to the second to the fourteenth and the eighteenth respondents (the senior judges). The question that arises for determination is whether or not these declarators amount to orders concerning constitutional invalidity within the meaning of s 175(1) requiring the confirmation of this Court in terms of s 175(3) of the Constitution.

Mr *Uriri* submits that this question must be answered in the affirmative and that the orders made *a quo* have no effect unless confirmed by this Court. The nature of a judgment is not determined by its characterisation but by its dictates and effects. One must look at its substance and true nature and not at its form. The court *a quo* stated that the purported extension of office of the incumbent Chief Justice remains a nullity and was void *ab initio*. In effect, the court found that the election to continue in office made by the Chief Justice, as approved in writing by the President, was invalid. The court also found, albeit indirectly, that s 186(4) of the Constitution was invalid and ineffective. The effect of both orders was to render invalid the conduct of the President as well as that of Parliament. There was clearly a declaration of invalidity within the meaning of s 175(1) and it requires confirmation under s 175(3) of the Constitution.

In response, Mr *Dracos* concedes that the orders of the court *a quo* declared the conduct of the President and Parliament to be invalid without directly citing them. Mr *Zhuwarara* notes that this concession on behalf of the fourth and fifth respondents is correct. One must look to the reasons and orders of the court *a quo* to determine the effect of their substance. These orders invalidated the decision of the President to allow the extension of office of the incumbent Chief Justice as well as the conduct of Parliament in enacting s 186 of the Constitution. They are therefore subject to confirmation by this Court.

There can be no doubt that, in terms of s 175(1) of the Constitution, the High Court, as a subordinate court, is perfectly competent to make an order of constitutional invalidity. However, any such order will have no force or effect unless it is confirmed by this Court. This is because s 167(3) and s 175(1) explicitly declare that an order of constitutional invalidity made by another court has no force before and unless that order is confirmed by the Constitutional Court. Section 167(3) also makes it clear that this Court makes the final decision as to whether an Act of Parliament or conduct of the President or Parliament is constitutional. Sections 175(1) and 167(3) serve distinct yet harmonious purposes, emphasising the express oversight of this Court over orders of constitutional invalidity made by subordinate courts. See *Makamure v Minister of Public Service, Labour and Social Welfare & Anor* CCZ 01/20, at p. 2. Thus, s 175(3) vests in this Court the exclusive competence to preside over confirmation proceedings, in which proceedings the Court makes the final determination as to whether any law or conduct of the President or Parliament is consistent or inconsistent with the Constitution.

Turning to the two orders made by the court *a quo*, it will be seen that they contain no direct reference to the concept of constitutional invalidity. Nevertheless, it is a settled principle of law that the true nature of a court order is a matter of substance and not form. Thus, to determine whether an order is an order of constitutional invalidity, one must look to the substance of the order. See *President of the Republic of South Africa v SARFU* 1999 (2) SA 14 (CC); *Eke v Parsons* 2015 (2) BCLR 1319 (CC).

A closer reading of the orders *in casu* and their substance shows the following. The first order declares that the incumbent Chief Justice ceased to hold that office by operation of law.

The inescapable effect of that order was to declare as invalid the conduct of the President, as *per* his letter of 11 May 2021, which conduct validated the extension of tenure of the Chief Justice. As a result, the court *a quo*, in substance, held that the conduct of the President was invalid as being contrary to the provisions of the Constitution.

Turning to the second order, by holding that s 186 of the Constitution did not apply to all the judges who were cited as respondents, the court *a quo* effectively declared that s 186(4) was invalid. The provisions of s 186 give the judges in question the option to elect to retire upon reaching the age of 70 years or to continue in office until they reach the age of 75 years. The court *a quo* arrived at the decision that the election to extend tenure did not apply to sitting judges upon its finding that Parliament had amended a term limit provision and thereby violated the provisions of s 328(7) of the Constitution. There can be no doubt that the judgment of the court *a quo* made, in effect, a finding of constitutional invalidity of the conduct of Parliament in enacting s 186 in violation of s 328(7). By doing so, it also rendered otiose the provisions and purpose of s 186(4).

The substance and effect of the orders *in casu* are unquestionably tantamount to orders of constitutional invalidity within the contemplation of s 175(1) of the Constitution. As was spelt out in *S v Chokuramba* CCZ 10/19, only the Constitutional Court has the final say concerning the constitutionality or otherwise of any law or conduct of the President or Parliament. To the extent that the court *a quo* effectively invalidated s 186(4) as well as the conduct of the President and Parliament, the final authority to confirm or vary the orders of that court rests with this Court. Moreover, the involvement of the Court in the process of determining the constitutionality of any law or conduct of the President or Parliament through confirmation proceedings is mandatory.

There can therefore be no doubt that this Court is properly seized with the matter insofar as it pertains to questions of constitutional invalidity. Inasmuch as the matter is within its exclusive jurisdiction, the Court cannot renounce or abdicate its constitutional duty. To sum up, the impugned orders of the court *a quo* constitute orders concerning constitutional invalidity as contemplated in s 175(1) and they are therefore subject to confirmation or variation in accordance with s 175(3) of the Constitution.

Correctness of judgment of court *a quo*

The determination of this matter on its merits hinges upon the correctness of the judgment *a quo*, firstly, in its interpretation of s 186 and s 328 of the Constitution and, secondly, in its findings on the alleged violation of the right to equal protection of the law and the right of access to the courts.

As regards the first aspect, the court *a quo* found that ss 186 and 328 were not in conflict but must be read together and with the Constitution as a whole. The court concluded that s 186 was a term limit provision and that it had the effect of extending the length of time that a person may hold office as a judge of the Constitutional Court and the Supreme Court. The court reasoned that tenure has to do with term of office and term of office has to do with time. Both fixed term and age-based term have to do with time and, therefore, the inescapable conclusion is that varying retirement age amounts to varying a term limit. With reference to s 186(4), the court found that its explicit reference to s 328(7) would be rendered superfluous or nugatory if it is found that s 186 is not a term limit provision. The court also relied on the decision in *Justice Alliance of South Africa v President of the Republic of South Africa & Others* 2011 (5) SA 388 (CC) (the *JASA*

case), at para 91, as confirming that age is an indifferent criterion which can and does define and can be used to extend a term of office, as was the case with s 186. In reading s 186(4) together with s 328(7), the court concluded that the former does not apply to judges of the Constitutional Court and Supreme Court who held office before the amendment of s 186. Section 186(4) must therefore be understood as being applicable to persons who are appointed to those judicial offices subsequent to the amendment.

As regards the right to equal protection of the law, the court held that the continued occupation of office by the incumbent Chief Justice after he had turned 70 years old violated the applicants' right as enshrined in s 56(1) of the Constitution. The applicants were entitled to the protection and benefit of the law in the sense of having public office occupied in accordance with and not in violation of the provisions of the Constitution. As for the right of access to the courts, it was observed that the rule of law affords the right to litigate before an impartial and independent court. If judicial officers have their age limit extended contrary to the express provisions of the Constitution which prevent incumbents from having their terms of office extended for them while they are in office, questions will reasonably abound as to the extent to which the courts can be independent. Additionally, the election of a judge to continue in office is subject to acceptance by the President and this has the effect of subjecting the term of office or its extension to the control of the Executive. Consequently, the court held that if any extension of office is afforded to the judges in question, then there would be a violation of the applicants' right as protected by s 69(3) of the Constitution.

The current s 186, which replaced its precursor in its entirety, was introduced by s 13 of the Constitution of Zimbabwe Amendment (No. 2) Act (No. 2 of 2021) promulgated in May 2021. Subsections (1), (2) and (3) provide that the Chief Justice, Deputy Chief Justice, and judges of the Constitutional Court and Supreme Court hold office until they reach the age of 70 years when they must retire unless, before they attain that age, they elect to continue in office for an additional 5 years. Subsection (2), which deals with judges of the Constitutional Court, is somewhat different in that those judges are appointed for a non-renewable term of not more than 15 years, but they must retire earlier if they reach the age of 70 years, unless they elect to continue in office for a further 5 years. Under all three subsections, the election to continue in office is subject to the acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judges concerned to continue in office.

Subsection (4), the seemingly controversial provision, stipulates that subs (1), (2) and (3) shall apply to the continuation in office of the judges referred to in those subsections, notwithstanding the provisions of subs (7) of s 328. Subsection (5) provides that judges of the High Court and all other judges hold office until they reach the age of 70 years, when they must retire. Subsection (6) enables the appointment of judges for a fixed term, but stipulates that such judges cease to hold office upon reaching the age of retirement, even if their term of appointment has not expired. Subsection (7) provides for a judge to continue in office, even though he or she has reached the age of retirement or reached the end of his or her term of office, for the purpose of dealing with any proceedings commenced while he or she was a judge. Subsection (8) enables a

judge to resign from office at any time. Lastly, subs (9) declares that the office of a judge must not be abolished during his or her tenure of office.

Section 328 of the Constitution governs the manner in and conditions under which the Constitution may be amended. By virtue of s 328(6), where a Constitutional Bill seeks to amend any provision of Chapter 4 or Chapter 16, it must be submitted to a national referendum for approval. Section 328(7) stipulates that “an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment”. The phrase “term-limit provision” is defined in s 328(1) to mean “a provision of this Constitution which limits the length of time that a person may hold or occupy a public office”. Section 328(8) states that subss (6) and (7) must not be amended in the same Bill and that amendments to both those subsections may not be subjected to the same referendum. Lastly, s 328(9) provides that s 328 may be amended only by following the procedures set out in subss (3), (4), (5) and (6), as if s 328 were contained in Chapter 4. The critical question that arises for determination *in casu* is whether the court *a quo* correctly analysed the provisions of s 186 (as amended) and s 328 in arriving at the conclusion that there is no meaningful legal difference between age limits and term limits.

Mr *Uriri* submits that subss (1), (2) and (3) of s 186 extend the age limit of retirement to 75 years but do not extend any term limit as envisaged in s 328(7). Thus, the term of 15 years prescribed in s 186(2) is a term limit but is subject to the age limit of 70 or 75 years. Parliament

did not extend any term limit but only amended the age limit. A term of office is different from the conditions to which it is subjected.

Mr *Dracos* accepts that there is a difference between an age limit and a term limit. However, he relies upon the *JASA* case, *supra*, to support the judgment of the court *a quo*. As regards s 186(4), he submits that it attempts to amend s 328(7) and refers to s 332 of the Constitution which defines the word “amend” very broadly to include “vary, alter, modify, add to, delete or adapt”. Section 186(4) modifies and amends s 328(7) and is therefore subject to approval by a referendum in accordance with s 328(6).

Mr *Uriri* counters that s 186(4) creates a *non obstante* clause and, if there is any inconsistency between s 186(4) and s 328(7), then it is s 186(4) that prevails. In any event, so he submits, s 186(4) does not amend s 328(7) but operates to supersede its provisions in relation to the application and effect of s 186.

In arriving at its decision, the court *a quo* appears to have relied fairly heavily on the judgment in the *JASA* case, *supra*. In particular, it cited the following passages, at paras 75 and 91 respectively:

“..... it must be borne in mind that the extension a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in s 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could

be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.” [para 75] (my emphasis)

“It follows that in exercising the power to extend the term of office of a Constitutional Court judge, Parliament may not single out the Chief Justice. The provision does not allow any member of the category of Constitutional Court judge to be singled out, whether on the basis of individual characteristic, idiosyncratic feature or the incumbency of office. Age is an indifferent criterion that may be applied in extending the term of office of a Constitutional Court judge. Age is an attribute that everyone attains. Previous judicial service is another criterion that may be indifferently applied to all the judges of this Court. The Act provides that a Constitutional Court judge whose 12-year term of office expires before he or she has completed 15 years’ active service as a judge must, subject to attaining the age of 75 years, serve for 15 years in this Court.” [para 91] (my emphasis)

In order to assess the relevance and import of these passages, it is necessary to contextualise the decision of the Constitutional Court of South Africa. The application before the court arose from a decision by the President of that country to extend the term of office of the Chief Justice for 5 years. The three applicants in the matter challenged the constitutionality of the law that authorised the process by which the term of office of the Chief Justice was extended and, if the law was found to be valid, they put in issue the constitutional validity of the conduct of the President in the process of extending that term of office. The governing constitutional provision, s 176(1), stipulated as follows:

“A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.” (my emphasis)

Section 4 of the relevant Act, the Judges’ Remuneration and Conditions of Employment Act 2001, provided that a Constitutional Court judge, whose 12 year term of office expired or who reached the age of 70 years before completing 15 years’ active service, must continue in office until the completion of 15 years’ active service or until that judge attained the age of 75 years, whichever occurred the sooner. Section 8(a) of the Act permitted the further

extension of the term of office of the Chief Justice exclusively. It allowed a Chief Justice, whose 12 year term of office was to expire and who would have completed 15 years' active service, to remain as the Chief Justice at the request of and for a period determined by the President.

The court noted, at para 92, that s 4 of the Act entailed that to receive a full judicial pension on retirement a judge must have completed at least 15 years' active service, subject to attaining the age of 75 and to a minimum 12 year term in the Constitutional Court. However, it was unanimously found that s 8(a) of the Act was inconsistent with s 176(1) of the Constitution and was therefore invalid. The court opined as follows, at paras 93 to 94:

“Unlike the criteria of age and service, the offices of Chief Justice and Deputy Chief Justice are by definition singular and person-specific. They can at any one time be filled respectively by only one incumbent. Section 176(1) does not permit the holders of these offices to be singled out individually for extension by virtue of their incumbency of office. For this purpose, the holders of these offices are merely judges of this Court. Their terms, if they are to be extended, must be extended uniformly with those of the other members of the Court.”
[para 93] (my emphasis)

“To create a special category for the extension of the term of office of the Chief Justice or Deputy Chief Justice would be in each case to single out one judge. It would be to single out a member of this Court on the basis of incumbency of an office that is irrelevant to the delineation of the members of this Court in s 176(1). This s 176(1) does not license.”
[para 94] (my emphasis)

In the event, the court declared s 8(a) of the Act and the decision of the President to be inconsistent with the Constitution and therefore invalid. The court further held the consequent extension of the term of office of the Chief Justice to be of no force and effect.

As is evident from the above-cited passages, which I have deliberately quoted *in extenso*, the principal issue for determination in the *JASA* case was markedly different from the

issue that this Court is called upon to adjudicate. In that case, the question to be decided was whether the statutory provision under scrutiny could validly single out the Chief Justice for extension of office at the behest of the President. The court found that the Constitution did not allow Parliament to single out the Chief Justice or the Deputy Chief Justice and that their terms of office, if they were to be extended, had to be extended uniformly with those of the other judges of the court. What was found to be objectionable was the unconstitutional differentiation for the purpose of extension of office. While age and length of service were indifferent criteria that could validly be applied in extending the term of office of judges, incumbency of a particular office was not a constitutionally permissible attribute for that purpose.

My reading of the *JASA* case evinces nothing to support the conclusion arrived at by the court *a quo*, to wit, that there is no critical difference between age limits and term limits in evaluating the proper interrelationship between s 186 and s 328 of the Constitution. The court appears to have selectively decontextualized and misapplied the passages that it cited from the *JASA* case in order to bolster its own conclusion.

In interpreting the Constitution, as is the case with any other legislative enactment, it is necessary to have regard to the words used and to deduce from them what the particular word, phrase or section to be deciphered means. In doing so, one must take into account the overall context in which it appears. Moreover, all relevant provisions that bear on the subject for interpretation must be considered together and as a whole, so as to give effect to the objective of the Constitution, having regard to the nature and scope of the rights, interests and duties that form

the subject matter of the provisions to be construed. See *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 (S); *Tsvangirai v Mugabe & Ors* CCZ 24/17.

Turning to s 328(7) of the Constitution, the language used in that subsection is relatively unambiguous as to the objective that it seeks to achieve. It precludes the application of any amendment to a term-limit provision, “the effect of which is to extend the length of time that a person may hold or occupy any public office”, in relation to any person who held or occupied that office at any time before the amendment came into effect. A “term-limit provision”, as defined in s 328(1), as one which “limits the length of time that a person may hold or occupy a public office”.

As regards s 186 of the Constitution, a detailed analysis of that section reveals the recognition, throughout its provisions, of a specific distinction between various ages of retirement on the one hand and non-renewable or fixed terms of office on the other. Thus, subs (1), (2), (3) and (5) prescribe “the age of seventy years” as being the standard age of retirement for the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court, Supreme Court and High Court and any other judges. In contrast, subs (2) specifically provides for the appointment of judges of the Constitutional Court “for a non-renewable term of not more than fifteen years”. It also provides for the option of their appointment to the Supreme Court or the High Court “after the completion of their term”. Subsection (6) enables the appointment of judges of the Supreme Court, High Court or any other court “for a fixed term”, subject to the cessation of their office upon reaching “the age of seventy-five years or seventy years” even if “the term of [their] appointment has not expired”. Finally, subs (7) stipulates that, even though a judge “has resigned or reached the age of

retirement” or “reached the end of his or her term of office”, he or she may continue to sit as a judge for the purpose of dealing with any prior uncompleted proceedings.

As I understand the foregoing provisions, taken in their plain and grammatical sense, they draw a clear distinction between tenure of judicial office as delineated by specific ages of retirement and tenure as defined by fixed or non-renewable terms of office. In certain instances, *viz.* in subss (2) and (6), the two forms of tenure are combined so as to give precedence to the prescribed age of retirement over the fixed term of office. In any event, the intention underlying all of these provisions, as I perceive it, is to differentiate rather than assimilate the criteria to be applied in determining judicial tenure of office.

The crisp question to be determined is this: What is the meaning to be ascribed to a “term-limit provision” in the context of s 328(7) *vis-à-vis* the provisions of s 186 as amended? The definition of that phrase, in s 328(1), would suggest that it refers to the limitation of a specific “length of time” as opposed to the non-specific effluxion of time. If that is correct, it would follow that age, as a variable criterion, does not fix any specific length of time for holding or occupying public office, but determines tenure by reference to the varying ages of the incumbents concerned. This would lead to the conclusion, which I take to be correct, that term limits, as envisaged in s 328, are specifically provided for in s 186 in only two distinct instances. The first is s 186(2) which stipulates that judges of the Constitutional Court are appointed “for a non-renewable term of not more than fifteen years”. And the second is s 186(6) which enables the appointment of a judge of the Supreme Court, High Court or any other court “for a fixed term”. In these two

instances, the prescribed term limits cannot be extended so as to apply to sitting incumbents without contravening the provisions of s 328(7).

Conversely, the option to continue in office for an additional 5 years after reaching the mandated retirement age of 70 years, as contemplated in subss (1), (2) and (3) of s 186, does not constitute the extension of any term limit. The court *a quo* did not differentiate between age limits and term limits and conflated them by ascribing a generalised meaning to term limit provisions. Consequently, it misinterpreted and misapplied the concept of a term limit in the context of judicial tenure under the provisions of s 186. The new s 186, in subss (1), (2) and (3), operated to amend only the previously stipulated age limit for retirement, from 70 to 75 years. It did not have the effect of amending or extending the non-renewable term limit of 15 years specified in s 186(2) or the fixed term limits envisaged in s 186(6).

I am fortified in this conclusion by having regard to the dictionary definitions of the words “term” and “period”. A “term” is defined as “a fixed or limited period for which something, for example, office, imprisonment or investment, lasts or is intended to last”, while a “period” is defined to mean “a particular length or portion of time”. In the light of these definitions, a term is a period of time, which is ordinarily measured by using a particular unit of time, and which has a known beginning and a determinable end. Age, being a variable attribute depending upon the age of a person at any given time, does not and cannot denote any particular length or portion of time.

To illustrate this point, in a situation where two individuals, one aged 60 and the other aged 65, both enter into the same public office at the same time and are required to retire upon

attaining the age of 70, the latter would be obliged to retire 5 years earlier than the former. This clearly negates the concept that an age limit constitutes a specific and determinate length of time or term limit for measuring tenure of office. Thus, a provision that prescribes an age limit for the holding or occupation of a particular office is not a “term-limit provision” within the meaning of subss (1) and (7) of s 328 of the Constitution. Any other interpretation would be contrary to the ordinary and grammatical meaning of the phrase “term-limit”.

By way of contrast, the Constitution abounds with a myriad of provisions that unquestionably constitute specific term limit provisions within the parameters of s 328. First and foremost, there is s 95(2) which expressly stipulates that the term of office of the President is 5 years and coterminous with the life of Parliament. Then there is s 197 which provides that an Act of Parliament may limit the terms of office of chief executive officers or heads of government-controlled entities and public enterprises owned or wholly controlled by the State. Again, in terms of s 205(2), the term of office of a Permanent Secretary is a period of up to 5 years and is renewable once only. As regards the Defence Forces, s 216(3) states that the Commanders of the Defence Forces and their services are appointed for a term of not more than 5 years, up to a maximum of two terms. With reference to the Police Service, the intelligence services and the Prisons and Correctional Service, s 221(2), s 226(2) and s 229(2) provide that the respective heads of these services are appointed for a 5-year term which may be renewed once only. Next there is s 238(5), which stipulates that members of the Zimbabwe Electoral Commission are appointed for a 6-year term and may be re-appointed for one such further term. Similarly, by virtue of s 259(4), the term of office of the Prosecutor-General is a period of 6 years and is renewable for one further such

term. Finally, s 310(3) provides that the term of office of the Auditor-General is a period of not more than 6 years, up to one or more periods not exceeding 12 years.

As is self-evident, the tenure of all of the aforementioned public offices is undoubtedly subject to a specific “term-limit provision” within the meaning of s 328(1). Consequently, an amendment to any such provision, the effect of which is to extend the length of time that a person may hold or occupy the public office in question, falls squarely within the ambit of s 328(7). Therefore, by dint of the restriction imposed by s 328(7), such amendment does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment came into force and effect.

I now turn to consider the apparently problematic provisions of s 186(4) of the Constitution. In its consideration of this subsection and its relationship with s 328(7), the court *a quo* quite correctly found that the former was not superfluous, particularly in the light of the presumption against superfluity in the interpretation of statutes. It also correctly opted to apply the hallowed principle of interpretation which avoids any conflict in constitutional provisions. It accordingly read s 186(4) and s 328(7) together to arrive at the conclusion that s 186(4) did not apply to sitting incumbents of the judicial offices referred to in subss (1), (2), and (3) of s 186 and that it must be understood as being applicable only to persons who are appointed to those judicial offices subsequent to the amendment of s 186.

With great respect, I am constrained by fundamental principles of legislative interpretation to reject the conclusion arrived at by the court *a quo*. I fully agree that different parts

of the Constitution should, to the extent that it is possible to do so, be harmoniously construed so as to avoid any conflict between them. However, it is also an established canon of construction that every legislative enactment must be construed, unless otherwise expressed or necessarily implied, as one that is “always speaking”. In other words, the enactment must be construed and applied to all persons and circumstances that it governs, whether past, present or future, in order to give effect to the enactment according to its true spirit, intent and meaning. This time-honoured common law rule of interpretation is firmly codified in s 11 of the Interpretation Act [Chapter 1:01].

What this means in the context of subs (4) of s 186 is that the provisions of subss (1), (2) and (3) apply to the continuation in office of all the judicial officers referred to in those subsections, including those judges who were incumbents of their respective offices before s 186 was amended. The plain wording of s 186(4) makes it unambiguously clear that its scope of coverage cannot be confined to apply to only those judges who assume the offices in question after the amendment. This interpretation of s 186(4) does not, in my view, give rise to any inconsistency, absurdity or superfluity.

The only possible interpretive difficulty that might arise relates to the application of the *non obstante* clause in s 186(4), *i.e.* “notwithstanding subs (7) of s 328”. In this regard, I do not agree with the submission by Mr *Dracos* that this clause modifies and amends s 328(7). Nor do I accept the contention by Mr *Uriri* that it operates to supersede s 328(7), for that would result in a glaring conflict between the provisions of s 186 and those of s 328. Rather, I am inclined to construe subs (4) of s 186 as having been inserted in order to clarify and reinforce the position that

subss (1), (2) and (3), in their amended form, do not constitute amendments to any term-limit provision. And that being the case, they remain applicable to the continuation in office of the incumbent judges identified in subs (4). This harmonised interpretation gives full meaning and substance to s 186(4), without occasioning any infringement of s 328(7) and the restrictions on continuation in public office that its provisions are designed to impose. I accordingly conclude that the provisions of s 186, taken in their totality, do not operate to amend any term-limit provision as contemplated by s 328. The reasoning and judgment of the court *a quo* to the contrary are insupportable and must therefore be vacated.

I now turn to deal with the alleged violation of the right to equal protection of the law and the right of access to the courts. The court *a quo* upheld the contentions of the third respondent in this regard and consequently found that s 186 of the Constitution, as amended, had the effect of violating the fundamental rights in question.

Section 56(1) of the Constitution declares that “All persons are equal before the law and have the right to equal protection and benefit of the law.” Section 69(3) provides that “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.”

As regards s 56(1), the court *a quo* opined that this section is wider in its scope than the equivalent s 18 in the former Constitution. This, so it reasoned, is because it qualifies the protection and benefit of the law by the use of the word “equal”. Again with the greatest of respect, this reasoning is fatally flawed. The use of the word “equal” does indeed qualify the protection

and benefit of the law, but it does so by restricting rather than broadening the scope of s 56(1). What this provision means is that all persons in a similar position must be afforded equality before the law and the same protection and benefit of the law. As was lucidly enunciated in *Nkomo v Minister of Local Government, Rural and Urban Development & Ors* 2016 (1) ZLR 113 (CC), at 118-119:

“The right guaranteed under s 56(1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection, that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.”

In essence, s 56(1) is a non-discrimination clause that guarantees equality under the law. The applicant *a quo* (the third respondent *in casu*) did not make any allegation of unequal treatment or differentiation. He did not demonstrate that he was denied the protection of the law, while others similarly positioned were afforded such protection. He failed to show that the enactment or amendment of s 186 of the Constitution operated to discriminate against him in favour of others in the same or similar position. He thereby failed to establish that he had been denied equal protection and benefit of the law. In the event, he entirely failed to establish any infringement of the rights guaranteed by s 56(1).

It follows that the court *a quo* misdirected itself in disregarding the third respondent's failure to demonstrate any unequal treatment or differentiation between him and other similarly positioned persons. Consequently, the court erred in holding that the continued occupation of

office by the incumbent Chief Justice after he had turned 70 years old violated the third respondent's rights as enshrined in s 56(1) of the Constitution.

As regards the right of access to the courts, it was found *a quo* that the right to litigate before an impartial and independent court would be questioned if judicial officers were to have their age limit extended contrary to the express provisions of the Constitution. It was further observed that the acceptance by the President of the election by judges to continue in office had the effect of subjecting the process to the control of the Executive. It was accordingly found that there was a violation of the third respondent's right as protected by s 69(3) of the Constitution.

I have already concluded that the election availed to sitting judges by s 186 of the Constitution to extend their retirement age from 70 to 75 years does not involve the contravention of any express or implied provision of the Constitution. In any event, and once again with all due respect, I am quite unable to perceive how this extension of the prescribed retirement age, *per se*, could conceivably impinge upon the right to litigate before an independent and impartial court. On the contrary, I would surmise that allowing presumably experienced and seasoned judges of the superior courts to remain in office for a longer period should, all other things being equal, serve to enhance and optimise, rather than diminish or compromise, the delivery of independent and impartial justice across the entire legal system.

As for the supposed control of the Executive over the process of extension of office, I fully endorse the *dictum* in the *JASA* case, *supra*, which cautions against the risk of the power of extension of judicial office being “seen as impairing the precious-won institutional attribute of

impartiality and the public confidence that goes with it". However, it must be borne in mind that this salutary warning was delivered in a situation where the impugned statutory power entitled the South African President, on his own initiative and at his own option, to request the incumbent Chief Justice to remain in office for such indefinite period as the President himself might determine. Given these characteristics, the unfettered power conferred upon the President to extend the tenure of the Chief Justice might well be perceived by the public as being akin to enabling the grant of a sovereign boon specially bestowed upon a privileged subject, in return for some unspecified favour or favours to be performed at some stage in the foreseeable future.

In the Zimbabwean situation, I do not think that the same criticism can properly be levelled against the process of extension of judicial office envisaged by s 186 of the Constitution. The process is subject to several crucial criteria. First and foremost, it is the judge concerned who must elect to continue in office for an additional 5 years, and it cannot possibly be presumed that every judge would invariably elect to do so. Secondly, the judge is obliged to furnish a medical report as to his or her mental and physical fitness to continue in office. Thirdly, the medical report so furnished must be accepted by the President. And lastly, the entire process is subject to consultation with the Judicial Service Commission, an independent body established under the Constitution and specifically mandated to secure and safeguard the integrity of the judiciary. (I should note in passing that what must be accepted by the President is the medical report as to the judge's mental and physical fitness as opposed to his or her election to continue in office). To my mind, all of these requirements reflect what must be seen as a measured and qualified process rather than one that is left to the unbridled caprice of Executive whim.

For all of the foregoing reasons, I am satisfied that the court *a quo* misconceived the provisions of s 186, as amended, and their impact on the independence and impartiality of the judges concerned. The court consequently erred in finding that s 186 violated the third respondent's right of access to the courts as guaranteed by s 69(3) of the Constitution.

To conclude on the merits of this matter, it must be held, as I do, that the court *a quo* fell into fundamental error concerning the interpretation and constitutionality of s 186 of the Constitution. Accordingly, the judgment of the court and the declaratory orders made pursuant to that judgment cannot be confirmed and must therefore be set aside.

Disposition

The order sought by the applicant has three components. The first is a declaration that the operative orders made by the court *a quo* are orders of constitutional invalidity. The second is a declaration that these orders have no force unless confirmed by this Court. The third is an order not confirming the orders *a quo* and setting them aside. In the latter respect, the applicant, in his heads of argument, submits that an application under s 175(3) to vary an order necessarily includes an application not to confirm an order of constitutional invalidity. He relies upon the case of *Mfundo Mlilo v President of the Republic of Zimbabwe* SC 179/20 as authority for that proposition.

Section 175(1) of the Constitution provides that an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament has no force unless it is confirmed by this Court. Section 175(3) enables any person with a sufficient interest to apply to

this Court to confirm or vary an order of constitutional invalidity made by any court in terms of s 175(1).

As was made clear in *S v Chokuramba* CCZ 10/19, at p 3, in proceedings pertaining to constitutional invalidity, this Court is not bound by the subordinate court's order of invalidity. Pursuant to a full review as to the correctness of that decision, the Court may either confirm or vary it, taking into account all the relevant facts and the applicable law. Having regard to the provisions of s 175 taken as a whole, what is necessarily incidental to this review is the power to refuse to confirm the order *a quo* and, where it is appropriate to do so, to set it aside.

As has been concluded earlier, the orders made by the court *a quo* constitute orders of constitutional invalidity concerning the validity of s 186 of the Constitution, as amended, the conduct of Parliament in enacting that law, as well as the conduct of the President relating to the extension of office of the incumbent Chief Justice pursuant to that law. I have also concluded that the judgment of the court *a quo* is misdirected and erroneous in all three respects. Consequently, it cannot be confirmed and must be set aside. The applicant, being a person with sufficient interest, is therefore entitled to the order that he seeks, albeit with appropriate modifications.

As regards costs, I see no reason to deviate from the general norm applied in constitutional matters. This is that no party should be penalised with an order of costs, save in exceptional circumstances. I note as well that the applicant does not seek any costs in this matter.

It is accordingly ordered as follows:

1. It is declared that paras 1 and 2 of the operative part of the judgment of the High Court (No. HH 264-21) are orders of constitutional invalidity within the contemplation of s 175(1) of the Constitution and have no force or effect unless confirmed by this Court in terms of s 175(3) of the Constitution.
2. It is hereby ordered that the aforesaid orders of the High Court, being orders of constitutional invalidity, are not confirmed and are hereby set aside.
3. There shall be no order as to costs.

GWAUNZA ACJ: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA AJCC: I agree

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