

REPORTABLE (01)

(1) THE PRESIDENT OF THE SENATE (2) PARLIAMENT OF
ZIMBABWE (3) THE SPEAKER OF THE NATIONAL
ASSEMBLY

v

(1) INNOCENT GONESE (2) JESSIE MAJOME (3) THE MINISTER
OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS (4) THE
PRESIDENT OF THE REPUBLIC OF ZIMBABWE

**CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU AJCC, GOWORA AJCC & PATEL AJCC
HARARE: NOVEMBER 10, 2020 & FEBRUARY 25, 2021**

A. Demo with *K. Tundu* for applicants

T. Biti for first respondent

No appearance for second respondent

No appearances for third and fourth respondents

MAKARAU AJCC:

Introduction

On 31 March 2020, this Court handed down judgment number CCZ 4/2020, disposing of two applications made by the first and second respondents against the applicants and the third and fourth respondents under cases number CCZ 57/2017 and 58/2017 respectively. The two applications, filed separately and on different dates, were brought in terms of s 167 (2)(d) of the Constitution as read with r 27 of the Constitutional Court Rules 2016, alleging that the second applicant had failed to fulfil the obligation to pass Constitutional Bill (No 1) of 2017 in accordance with the Constitution.

The first application was filed in September 2017, before Constitutional Amendment Bill (No 1) of 2017 was presented to the President for assent whilst the second application was filed in December 2017, after the Bill had been assented to and had been gazetted as an Act of Parliament. In view of the fact that the allegations made in the two applications were the same and raised the same issues for determination, the applications were consolidated and heard as one.

No import was attached to the different legislative stages through which the amendment Bill passed as the singular order that was issued by the Court under judgment number CCZ 4/2020 in respect of both applications reads:

- “(a) The proceedings in the Senate on 01 August 2017 when Constitutional Amendment Bill (No 1) of 2017 was passed be and are hereby set aside, for the reason that a two-thirds majority vote was not reached in that House.
- (b) The Senate is directed to conduct a vote in accordance with the procedure for amending the Constitution prescribed by s 328 (5) of the Constitution within one hundred and eighty days of this order, failing which the declaration of invalidity of Constitutional Amendment Bill (No 1) of 2017 in para 1 (a) shall become final.
- 2. The applicant’s allegations that there was no vote in the National Assembly on 25 July 2017 when Constitutional Amendment Bill (No1) of 2017 was passed be and is hereby dismissed for lack of merit.
- 3. The applicant’s allegation that a two thirds majority was not reached in the National Assembly on 25 July 2017 when Constitutional Amendment Bill (No 1) of 2017 was passed be and is hereby dismissed for lack of merit.
- 4. There is no order as to costs.”

The one hundred and eighty days stipulated in para (b) of the order commenced to run on 1 April 2020 and expired on or about 28 September 2020. The directive in that order was not complied with for reasons that are set out in the applicants’ founding affidavit.

On 25 September 2020, upon realising that the one hundred and eighty days would expire shortly thereafter, the applicants filed an urgent *ex parte* chamber application in this Court securing, on 28 September 2020, a provisional order extending the period and

concomitantly further suspending the coming into effect of the order of invalidity of the amendment to a date following the determination of this application. On 6 October 2020, the provisional order was confirmed with the consent of the parties.

Simultaneously with the urgent *ex parte* application referred to above, the applicants filed this application, seeking an order for the extension of the 180 days within which the second applicant had to comply with the directive of the court. The draft order did not seek an extension of the suspension of the order of invalidity of Constitutional Amendment Bill (No 1) of 2017.

The application was set down before us for determination.

The jurisdiction of this Court

Whilst the issue of the jurisdiction of this Court did not arise, I wish to explain in passing that notwithstanding that this application relates to an order that was issued by the full bench of this Court, this Court, as presently constituted, has jurisdiction in the matter.

Prior to 22 May 2020, the Constitution required the full bench of this Court to sit in all constitutional cases. Paragraph 18 (2) of the 6th schedule to the Constitution, which was the governing provision then and which provided for the transition between the repealed constitution and the current Constitution, provided that:

“Notwithstanding section 166, for seven years after the publication date, the Constitutional Court consists of the Chief Justice and the Deputy Chief Justice; and seven other judges of the Supreme Court; **who must sit together as a bench to hear any constitutional case.**”(The emphasis is mine)

The above provision gave way to s 166 of the Constitution, temporarily held in abeyance by the transitional provisions of the Constitution cited above, which in subs (3) grants this Court the requisite jurisdiction by providing as follows:

“Cases before the Constitutional Court-

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

It is further common cause that s 176 of the Constitution, grants inherent jurisdiction to this Court to protect and regulate its own processes in addition to developing the law in the interests of justice and in accordance with the Constitution.

This application, being an application to extend the lifespan of an order given earlier by the Court, is an incident of the exercise of the inherent jurisdiction of this Court to control and regulate its own processes.

I return to the application.

The application

In the founding affidavit, the applicants made one material averment. They averred that the judgment of the court number CCZ 4/2020 was handed down one day before a national lock-down was imposed in response to the threat of and to contain the spread of the corona virus. They further averred that the regulations that were enacted to enforce the lock-down initially banned the sittings of the Senate totally as the second respondent was not classified as an essential service provider. It was barred from convening at all for any business. Later, the regulations were relaxed to allow the second applicant to convene for

business but restricted the number who could lawfully attend any one sitting to less than 50 Senators, a number below the requisite quorum for the passing of a constitutional amendment Bill. As a result, the applicants averred that the Senate could not sit to comply with the directive of the court within the period stipulated in the order.

Only the first respondent opposed the application. On 20 October 2020, counsel for the third and fourth respondents wrote to the Registrar of this Court advising that he did not file opposing papers for the third and fourth respondents as they did not intend to oppose the order sought by the applicants. The letter was a courtesy to the Court.

In addition to opposing the application on its merits, the first respondent raised two preliminary issues.

It was contended firstly that the applicants had *no locus standi* to procure the relief sought. It was argued, both in the opposing affidavit and in the oral submissions by counsel, that the passage of constitutional bills in the Senate is, in accordance with the principles of the separation of powers among the three arms of state, the prerogative of the executive which is given the function to prepare, initiate and to implement national legislation by s 110 of the Constitution. The argument proceeded to urge us to hold that the applicants, representing the legislative organ of state, could not procure the relief sought as they lacked the mandate to initiate national legislation.

Secondly, it was argued again *in limine* that the order sought in this application is unconstitutional, as it will offend against the provisions of s 147 of the Constitution.

Section 147 of the Constitution provides that upon the dissolution of Parliament, all proceedings pending at the time of dissolution are terminated and every Bill, motion, petition or other business lapses. It was thus pressed upon us that Constitutional Amendment Bill (No 1) of 2017 lapsed when the 8th Parliament was dissolved to make way for the general elections of 2018. The argument concluded by urging us to find that the Bill cannot be legitimately voted into an Act of Parliament by the 9th Parliament which is currently in session.

Regarding the merits of the application, the first respondent argued that the Senate had more than twenty sittings between the date of the judgment and the expiry of the stipulated one hundred and eighty days and could have, had it so desired, complied with the order of the Court during any one of these sittings. The dates of such sittings and the number of Senators in attendance at each sitting were given. It was thus argued that the restrictions imposed by the lock-down regulations on the business of the Senate were but an excuse for the indifference of the Senate to the court order.

The issues

The issues that arise for determination in this application are clear cut. Two arise *in limine*. These are firstly, whether the applicants have *locus standi* to bring this application, and secondly, whether the order of extension sought in this application is unconstitutional. On the merits, there is only one issue. This is whether the applicants have made out a case for the extension of paragraph (b) of the order.

I now turn to discuss the issues *in seriatim*.

Whether the applicants have *locus standi*

The first respondent invoked the application of the principle of separation of powers as the sole basis upon which to challenge the standing of the applicants to bring this application. He correctly observed that the Constitution recognises and provides for the separation of powers among the organs of state. He further drew the Court's attention to the provision of the Constitution which reposes in the executive the function to prepare, initiate and implement national legislation. He argued that the applicants, representing the legislature, had no such function and therefore did not have the necessary mandate to enable them to comply with the court order.

It was the essence of the first respondent's argument that Parliament, particularly the Senate as a chamber of Parliament, could not be foisted with the power of piloting a Bill through the house as that would blur the lines demarcating the mandate of the legislature from that of the executive in violation of the doctrine of the separation of powers. To complete the argument, it was pressed upon us that the third respondent, who was a party to the proceedings under cases number CCZ 57/17 and 58/17 respectively, ought to have filed the application seeking to extend the period within which to cure the defect attendant upon the passing of Constitutional Amendment Bill (No 1) of 2017 as the executive, not Parliament, was in charge of the constitutional amendment agenda. In the words of counsel, the applicants could not be *dominus litis* in this application but the third respondent could and ought to have been.

It presents itself clearly to me that had this application been an application to this Court at first instance, without any background to it, wherein the applicants were seeking an order granting them leave or power to pass Constitutional Amendment No 1 Bill, or any

other legislation for that matter through the Senate, the first respondent's argument might have detained us.

It is common cause that this application is not an application at first instance. It is not laying out a new cause for our determination. It is based on the two applications that I referred to above. It is seeking to extend the lifespan of part of the order that was given in those earlier proceedings. In a very broad sense, it can and ought to be regarded as a *continuum* of the earlier proceedings.

As indicated above, the background and context to this application are common cause. The applicants, together with the third and fourth respondents, were respondents before this Court under cases number CCZ57/2018 and CCZ58/2018 respectively. Their participation in those proceedings was not and could not have been doubted or challenged as they had been called upon to defend the allegation that the second applicant had failed to fulfil a constitutional obligation. They had the right to be heard in defence of the second applicant in fulfilment of the demands of the *audi alteram partem* rule, an integral principle of natural justice. They partially lost the case but by no means did they lose their standing as parties in the suit. Their status as parties in those proceedings and in proceedings ancillary and connected thereto did not terminate at any stage during or after the proceedings. Once clothed with standing as respondents in the earlier suit, the applicants retained such standing for the present application, which as I have stated above, is a continuation of the cause between the parties.

The doctrine of separation of powers, solely raised in the first respondent's opposing affidavit as the basis of the first point *in limine*, cannot operate to rob the applicants of standing in the circumstances of this matter.

In his written submissions and in oral argument before us, counsel for the first respondent further challenged the *locus standi* of the applicants on the basis that there is no resolution of the second applicant to bring this application on its behalf. Whilst the absence of a resolution to bring the application on behalf of the second applicant would go towards the authority of the persons purporting to represent it rather than the *locus standi of the second applicant*, I dismiss this contention on the basis that the absence of a resolution authorising the bringing of the application on behalf of the second applicant was not raised in the first respondent's opposing affidavit. It was only raised, and belatedly so, in the heads of argument. It is the time-honoured rule of procedure in our courts that to guarantee a fair trial, the court shall not allow any party to take the other by surprise by raising issues for determination other than in the first appropriate proceeding filed in the suit. For the first respondent, such appropriate proceeding was the opposing affidavit.

It is therefore my conclusion and finding on the first point *in limine* that the applicants have the *locus standi* to bring this application.

I turn to the next issue.

Whether the order sought in this application is unconstitutional

It was contended, and spiritedly so, that this Court is hamstrung from issuing the order sought as such an order would be unconstitutional in that it would offend against the provisions of s 147 of the Constitution.

Quite clearly, the argument attacked the alleged constitutionality of the extension sought. It correctly did not seek to attack the constitutionality of the order made on 31 March 2020. This is because the order of the Court given on 31 March 2020 is final, being a decision of an apex court on constitutional matters. It is not subject to any further review or appeal.

The law protecting the integrity of decisions of apex courts is settled. It is an integral principle of the rule of law and is manifest in the doctrine of judicial precedent or *stare decisis*. The rationale of the doctrine is basically the need to ensure certainty in the law and finality in litigation.

In s 167 (1), the Constitution provides that this Court is the apex court in all constitutional matters, while in s 169 (1) it provides that the Supreme Court is the final court of appeal save in matters over which the Constitutional Court has jurisdiction. I digress briefly and for comparative purposes to note that the provisions of 169 (1) in turn form the basis of s 26 of the Supreme Court Act which provides that:

“26 Finality of decisions of Supreme Court

- (1) There shall be no appeal from any judgment or order of the Supreme Court.
- (2) The supreme court shall not be bound by any of its judgments, rulings or opinions nor by those of any of its predecessors.”

Discussing the principles that emerge from the above provision, the Chief Justice in *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited and Another* SC CCZ 11/18 had this to say at p 22 of the judgement:

“A decision of the Supreme Court on any non-constitutional matter in an appeal is final. No court has power to alter the decision of the Supreme Court on a non-constitutional matter. Only the Supreme Court can depart from or overrule its previous decisions, ruling or opinion on a non- constitutional matter.”

Whilst the Constitutional Court Act is yet to be promulgated, the absence of the equivalent of s 26 of the Supreme Court Act for the Constitutional Court is of no import. The words of the Chief Justice in the *Lytton Investments* case (*supra*) on the finality of decisions of the Supreme Court on non-constitutional matters apply with equal force to the finality of the decisions of this Court on all constitutional matters. A decision of the Constitutional Court on a constitutional matter is final. No court has power to alter the decision of the Court. Only this Court can depart from its previous decisions rulings or opinions. I venture to add for emphasis that only this Court, **in a future and appropriate constitutional matter**, may overrule or depart from its previous order. This application is not such a case where the court can overrule or depart from its previous order.

Accepting as we must, that the constitutionality or otherwise of the order made by this Court on 31 March 2020 does not arise for debate and cannot be debated by this Court in this application, the issue that then exercises the mind is how to debate the constitutionality of the order sought in this application without by implication reviewing and debating the constitutionality of the order of 31 March 2020.

I have not been able to find a legal principle by which this can be achieved. This is so because the application before us is not for the issuance of a new or fresh order. It is an application to extend the lifespan of part of the order given on 31 March 2020.

Having failed to find any principle in the circumstances of this application that I can invoke to separate the order sought in this application from the order that was made on 31 March 2020, I am constrained to rule against the second point *in limine*, because it is incompetently raised. Any finding by this Court that the order sought in this application violates the Constitution is by implication a finding that the order of the Court as handed down on 31 March 2020 was unconstitutional. I refrain from making such a finding in deference to the principle protecting the finality of the decisions of the Constitutional Court. The integrity of the decisions of this Court on constitutional matters must be preserved at all times and against all other considerations.

I come to the above conclusion notwithstanding the fact that this Court, like the other organs of state, has an obligation to ensure that the provisions of the Constitution are always venerated. This Court is the guardian of the Constitution. Its role in upholding the rule of law must never be doubted. In this regard I have again been guided by the remarks by the Chief Justice in *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited and Another* (supra) where he had this to say about the Constitutional Court:

“The court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.”

Whilst being keenly aware of the challenges facing the order of this Court as granted on 31 March 2020, the principle preserving the integrity of the decisions of this Court and protecting the finality of decisions of this Court as the apex court on constitutional matters, itself a constitutional precept, must hold sway against all other considerations in this matter. In adopting the stance that I have, I take solace from the fact that the constitutionality of the order of 31 March 2020, whilst not debatable in this application, may be debated in an appropriate matter in the future, where the interpretation of s 147 of the Constitution is the cause of action. The order of 31 March 2020, whilst final, is not binding on this Court.

It is therefore my conclusion in relation to the second preliminary issue that the constitutionality of the order sought in this application does not arise for determination in this matter as any such determination will entail revisiting and reviewing the earlier decision of this Court made in the same matter.

I now proceed to determine the last issue.

Whether the applicants have made out a case for the extension of time within which the Senate is to vote Constitutional Amendment Bill (No 1) in accordance with the Constitution

The applicants' case is simple. It is based on facts that are largely common cause.

The order of this Court was handed down on 31 March 2020. A national lockdown in response to the corona virus pandemic took effect on 1 April 2020. The Senate commenced sitting on 5 May 2020 after the second applicant was declared to be an essential service. The regulations in force then did not allow gatherings of more than 50 persons. On

the basis of these facts, the applicants seek for more time within which to comply with the directive.

An application for time within which to comply with an order of court is akin to an application for extension of time within which to comply with a rule of court. The factors that a court takes into consideration are well known. They include the length of the delay and the reasonableness of the explanation for the delay.

The argument by the first respondent that the Senate did meet with the requisite quorum on a number of days loses sight of the fact that the relevant regulations did not permit such meetings and any business transacted at such meetings risked being challenged as being in violation of the law. This court cannot recognise that Parliament could have met in violation of the law.

In my view, the delay by the applicants was not inordinate and the explanation for the delay is reasonable.

The extension must be granted.

Regarding costs, there appears to be no justification for departing from the general rule against making an order of costs in constitutional matters. None has been pressed upon us by the applicants.

Disposition

In view of the delay that has already ensued in deciding the fate of Constitutional Amendment Bill No. 1 of 2017, it is not desirable that the uncertainty in the supreme law remains for much longer. A period of ninety days will be sufficient to enable the second applicant to put its house in order regarding the proper constitutional procedures to adopt in the circumstances of this matter.

Accordingly, I make the following order:

1. The application is granted.
2. The period referred to in paragraph (b) of the order handed down on 31 March 2020 is extended by a further ninety days from the date of this order.
3. Each party shall bear its own costs.

GOWORA AJCC :

I have perused the judgment of my learned sister MAKARAU AJCC. I do not intend to set out the facts pertaining to the application before the court as she has set those facts out succinctly. I am constrained to disagree with my learned sister judge on certain aspects of the application and the conclusions she has reached in respect of the same.

I agree with her conclusions as to the jurisdiction of the court as constituted to hear the matter. In my view, her conclusions as to the jurisdiction of the court as constituted is in accordance with the provisions of s 166 of the Constitution.

I turn to the substance of the matter.

The first respondent raised two points *in limine*, the first being that the applicants herein lack the requisite the *locus standi* to bring the application. The second point *in limine* raised was to the effect that the application is itself unconstitutional.

MAKARAU AJCC found that the applicants do in fact have the necessary locus standi to bring the application and I have no further comments to make on that issue.

As to the second point, my learned sister dismissed the challenge to the constitutionality of the application and went on to find that the applicants had made out a case for the grant of the application. It is the finding of the constitutionality of the application and the consequential grant of the order sought that I respectfully disagree with. In my respectful view, the application is unconstitutional as argued and the grant of the application consequent thereto cannot be sustained.

My reasons for dissenting with my learned sister are the following.

It is not in dispute that on 31 March 2020 the Constitutional Court sitting as a full bench declared that the passing of Constitutional Amendment Bill No 1 of 2017 by the Senate on 1 August 2017 was inconsistent with the provisions of the Constitution. The proceedings by the Senate of the day in question were set aside. The Senate was directed **to conduct a vote** in accordance with the procedure for amending the Constitution within one hundred and eighty days from the date of the order. This was not done which is the reason for the application to court for an extension of time **to conduct the vote**. (the emphasis is mine)

In my view the order of 31 March 2020 is not an issue for determination before the court. What is critical is the effect that section 147 of the Constitution has on the application before us.

In its judgment of 21 March 2020 the full bench found as a fact that Amendment Bill Number 1 had not been passed in accordance with the requirements of the Constitution. The required number of votes to pass the bill were short resulting in the bill failing to pass the test. As a result the bill did not become law.

The first respondent has raised as a point in limine the application of s 147 to this application. He contended that as the bill never became law, in essence it must be considered as a pending bill under s 147. On a proper construction of the section, once it is accepted that it was pending, did not pass into law, it therefore stands to reason, so the argument goes, that the must have lapsed when Parliament was dissolved in July 2018.

It is common cause that Parliament was dissolved in July 2018 to make way for general elections which took place on 31 July 2018. Section 147 which the first respondent relies on the argument that the order sought is unconstitutional reads as follows:

“147 Lapsing of Bills, motions, petitions and other business on dissolution of Parliament

On the dissolution of Parliament, all proceedings pending at the time are terminated, and every Bill, motion, petition and other business lapses.”

As a result of the declaration of invalidity by this Court, Constitutional Amendment Bill No 1 never became law. By parity of reasoning it would then revert to a bill pending before the Senate for the conduct of a proper vote as directed by this court. It was inevitably affected by the dissolution of Parliament in that it automatically lapsed. I am not dwelling on when the

order was granted. It was invalid by process of law from not having been passed in accordance with the Constitution. Thus, there is no bill to debate and vote on. The Senate would have to commence the process afresh following the setting aside of the proceedings by which the invalid votes were garnered.

Section 147 must be given effect to. There is no bill left to debate. Any attempt by the Senate to debate and vote a bill that has lapsed by operation of law is in violation of the Constitution itself. The Constitution protects itself. Section 2 tells us so in clear and unequivocal terms. It provides:

“2 Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(3) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

On a proper construction of the above section, if Senate is availed the opportunity to sit, debate and vote on a bill that is no longer in existence would be to violate the Constitution itself. A vote on a bill that has been declared by s 147 as having lapsed by virtue of the dissolution of Parliament would in my view be inconsistent with s 147. I wish to quote with respect the view expressed by PATEL JA, in *Judicial Services Commission v Zibani & Ors* SC 68/17 to the following effect:

“Supremacy of the Constitution

It is axiomatic that Zimbabwe is a constitutional in contradistinction to a parliamentary democracy. See *Biti & Anor v Minister of Justice Legal and Parliamentary Affairs & Anor* 2002 (1) ZLR 177 (S) at 190A-B. This fundamental principle and its concomitant legal ramifications and obligations are codified in s 2 of the Constitution as follows:

‘(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.’

Section 3 of the Constitution enshrines the founding values and principles of Zimbabwe. In its relevant parts it provides that:

‘(1) Zimbabwe is founded on respect for the following values and principles—

- (a) supremacy of the Constitution;
- (b) the rule of law;
- (c) fundamental human rights and freedoms;
- (d) ...;
- (e) ...;
- (f) ...;
- (g) ...;
- (h) good governance; and
- (i)

(2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include—

- (a) ...;
- (b) ...;
- (c) ...;
- (d) ...;
- (e) observance of the principle of separation of powers;
- (f) respect for the people of Zimbabwe, from whom the authority to govern is derived;
- (g) transparency, justice, accountability and responsiveness;
- (h) ...;
- (i) ...;
- (j) ...;
- (k) ...; and
- (l)’

By virtue of the foregoing principles, the Constitution demands strict compliance with its substantive provisions and all laws enacted under its aegis. It also demands meticulous adherence to the procedures and processes prescribed under the Constitution. These principles bind everyone, including the appellant which, as an executive institution, is expressly bound to comply with the substantive and procedural requirements of the Constitution.”

When one has regard to the comments of PATEL JA above, it becomes obvious that the Constitution demands strict compliance with all its provisions and one such provision

is s 147. It impacts on procedures in Parliament. Where processes demanded of Parliament are found not to be in strict adherence with the requirements of the Constitution then those processes must be adjudged as having been inconsistent with the Constitution.

Currie & De Waal,¹ in discussing s 2 of the South African Constitution, an exact replica of section 2 of our own Constitution, make the observation that:

“The first principle, constitutional supremacy, dictates that the rules and principles of the Constitution are binding on all branches of the state and have priority over any other rules made by government, the legislature or the courts. Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law. Section 2 of the Constitution gives expression to the principle of Constitutional supremacy. It states that the ‘Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.”

The process by which the Senate passed Amendment Bill No 1 of 2017 was found by the Court as having been in violation of the strict requirements of the Constitution. In this instance, to order the Senate to conduct “a vote on Bill No 1 of 2017” would be to order as a court the doing of conduct which the Constitution itself has proscribed as being inconsistent with its own provisions. In effect it would be a negation of the principle of constitutional supremacy. There is no Bill to debate or conduct a vote on. S 2 (2) requires that all persons including judicial institutions observe and abide by the obligations set out in the Constitution. Therefore to the extent that the court would be inclined to grant an order extending the time frame in which the Senate is given leave to debate a bill that is no longer in existence by virtue of s 147 would be to give effect to an order that is inconsistent with s 147. This in my view, is impermissible.

¹ The Bill of Rights Handbook 6ed, p9

Turning to the issue of the finality of orders of the court, I would not disagree with my learned sister on her conclusions. The orders of the court are final. However, in this instance the order of 31 March 2020 by this court is not an issue for debate. Neither party sought to depart from the order. The applicants approached the court seeking an indulgence for the due performance by them of certain directions emanating from the order in question. The contention on the part of the first respondent, as I understand it, is that the direction can no longer be given effect to by virtue of the lapse of the bill by operation of law. The order is not being interfered with in any manner. It is extant. The time frame within which the applicants could have availed themselves of the lifeline given to them under the order having elapsed, and the bill itself having lapsed the direction cannot be given effect to. This application cannot resuscitate something that has expired.

The first respondent has not touched on the order itself. All that has been argued is that the indulgence sought can no longer be granted due to the provisions of s 147. Therefore the contention made is that the grant of the indulgence is itself inconsistent with the Constitution.

I must agree with the first respondent. The order of invalidity as regards the bill cannot be ignored. This is the first premise in the consideration of the application. It was adjudged as being invalid. That said the bill cannot be resuscitated through this application. It lapsed by operation of law. The grant of the application in these circumstances would be inconsistent with the Constitution. A refusal to grant the application has no impact on the order of 31 March 2020.

For the above reasons, it is my view that the application should be dismissed with no order as to costs.

PATEL AJCC: I have read and carefully considered the lead judgment and dissenting opinion of my learned sisters, Makarau AJCC and Gowora AJCC, respectively. I find myself in the invidious position of having to agree with both, substantially in respect of the former and partially as regards the latter.

The critical issue in contention concerns the second point *in limine* taken by the first respondent, to the effect that the order sought in this application is unconstitutional as it will offend the provisions of s 147 of the Constitution. Section 147 stipulates that:

“On the dissolution of Parliament, all proceedings pending at the time are terminated, and every Bill, motion, petition and other business lapses.”

In dismissing the second point *in limine*, Makarau AJCC concludes that “the constitutionality of the order sought in this application does not arise for determination in this matter as any such determination will entail revisiting and reviewing the earlier decision of this Court made in the same matter”. On the other hand, Gowora AJCC takes the position that the Constitution Amendment Bill (No. 1) of 2017 “was inevitably affected by the dissolution of Parliament in that it automatically lapsed” and that “there is no bill to debate and vote on”. The learned judge accordingly concludes that “the bill cannot be resuscitated through this application. It lapsed by operation of law. The grant of the application in these circumstances would be inconsistent with the Constitution”.

I cannot but agree with Gowora AJCC that the supremacy of the Constitution, as enshrined in s 2 of the Constitution, dictates that any law, practice, custom or conduct that is inconsistent with the supreme law is invalid to the extent of the inconsistency. The ineluctable consequence of this principle is that anything done by Parliament that is contrary to the provisions of the Constitution, including s 147, would be invalid and unconstitutional to the extent of such inconsistency. Nonetheless, in the particular circumstances of this matter, despite the clear substantive implications of s 2 of the Constitution, I am inclined to concur with the predominantly procedural stance adopted by Makarau AJCC in the determination of this application. I do so for the following reasons and in accordance with the principles that she has fully and ably expounded.

It must be emphasised that the order granted by this Court on 31 March 2020 is nothing less than a final order. As such, it may only be reviewed or overruled by this Court in a separate and distinct matter that might arise for determination in the future, where such departure is appropriate and justified. It cannot be departed from in the same matter, as is the case with the application before us, wherein the original cause of action has remained unaltered. In my view, the same considerations must also apply to any extension of the original order, founded on the same cause of action and granting essentially the same relief. It follows that the constitutionality of the order sought by the applicants *in casu* cannot be challenged or debated in this particular application. It also follows that there is nothing to preclude the grant of the indulgence and relief sought by the applicants, which relief is apparently unassailable on the merits.

Having taken the position that I have, I am nevertheless constrained to caution that their success in this application does not constitute any licence for the applicants to violate the

requirements of the Constitution or to disregard any of its provisions. This point was aptly underscored in the case of *Nkomo & Ors v T M Supermarkets (Private) Limited* CCZ 4/19, where this Court held that anything done in contravention of the Constitution is a nullity. Therefore, any act or conduct by the applicants in direct violation of the Constitution will remain a nullity, even if carried out purportedly in compliance with the order of this Court. Consequently, in the event that they decide to proceed with the Constitution Amendment Bill (No. 1), they would be obligated to do so, not only in accordance with the voting requirements prescribed in s 328 of the Constitution but also in conformity with any other relevant and applicable constitutional injunction, including the legal ramifications of s 147 of the Constitution.

Finally, although this aspect is not directly pertinent *in casu*, I should point out for the sake of completeness that certain provisions in the Constitution Amendment Bill (No. 2) of 2019, relating to judicial appointments under s 180 of the Constitution, are predicated on the provisions of the earlier Constitution Amendment Bill (No. 1) having been duly enacted in their present form. This is an aspect that the applicants would need to consider and take into account in proceeding with either or both of the Bills concerned.

To conclude, I would for the aforestated reasons grant the present application in accordance with the order made by Makarau AJCC as set out above.

Chihambakwe Mutizwa & Partners, applicants' legal practitioners.

Tendai Biti Law, 1st respondent's legal practitioners