

REPORTABLE (3)

(1) ZIMBABWE DEVELOPMENT PARTY
(2) VOICE OF THE PEOPLE

v

(1) PRESIDENT OF THE REPUBLIC OF ZIMBABWE
(2) SPEAKER OF PARLIAMENT
(3) CHAIRPERSON – ZIMBABWE ELECTORAL COMMISSION

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, MARCH 20 & MAY 28, 2018

K Mukwazhe, leader of the first applicant (a political party)

M Chimombe, for the first respondent

A Demo, for the second respondent

T M Kanengoni, for the third respondent

Before: MALABA CJ, In Chambers

This is an urgent chamber application for an order directing the Registrar to set down for hearing on an urgent basis the main application the applicants purported to file on 1 March 2018. The applicants are political parties represented by Mr Mukwazhe, who is the leader of the first applicant. In the application purportedly filed on 1 March 2018, under case no. CCZ 11/18 (the main application), the applicants did not seek leave to file the application. An endorsement was made on the application to the effect that leave to apply for direct access to the Constitutional Court (“the Court”) was not necessary. The parties in that application are the same as those in the present application.

BACKGROUND FACTS

The applicants participated in the 2013 harmonised general elections. They are eager to participate in the 2018 harmonised elections. The relief sought in the main application is an order barring the President of Zimbabwe from proclaiming the call and the setting of the dates for the forthcoming harmonised general elections until the Political Parties (Finance) Act [*Chapter 2:11*] (“the Act”) is repealed.

The applicants take the view that the Act is *ultra vires* the Constitution. The reason given for the alleged invalidity is that the Act does not protect small political parties. From the papers, it appears that the applicants are unhappy with s 3(3) of the Act. The papers do not specifically say so. The applicants allege in a vague manner that the Act is in contravention of s 67(4) of the Constitution. The section provides:

“For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.”

The applicants contend that they have not been allocated funding in terms of the Act, despite having participated in the 2013 harmonised general elections. They interpret the provisions of s 67(4) of the Constitution to mean that an Act of Parliament referred to must ensure that funding is made available to every political party registered to participate in a general election.

In addition, the applicants contend that the President has an obligation to uphold the Constitution. In their view, the obligation entails the President using his influence over the ruling party, which has the majority of seats in Parliament, to ensure that legislation providing for the funding of every political party participating in a general election is enacted. The

applicants allege that if the harmonised general elections were to be held under the prevailing conditions, the political playing field would be in favour of the political parties receiving funding in terms of s 3(3) of the Act.

The main application is intended to achieve the following ends, by way of the orders sought as gleaned from the founding and supporting affidavits -

- Recommendation to Parliament by the third respondent of what is called laws which ensure free, fair and credible elections, as provided for by the Constitution;
- The use by the first respondent of his influence over the ruling party and its majority in Parliament to have the Act realigned “to the Constitution”;
- The putting on hold of the forthcoming harmonised general elections until the Act is realigned with the Constitution”; and
- The barring of the first respondent from proclaiming the dates for harmonised general elections until the Act is repealed.

The draft order sought is expressed in the following terms:

“WHEREUPON after reading documents filed of record and hearing parties:

IT IS ORDERED THAT:

1. The first respondent be and is hereby ordered not to proclaim the General Elections date until the Political Parties Finances Act of 2001 is repealed.
2. The second respondent be and is hereby ordered to facilitate the repealing of the Political Parties Finance Act.
3. The third respondent be and is hereby ordered not to conduct any elections under the current Political Parties Finance Act.

4. Parties that participated in 2008 and 2013 elections to get US\$420 000.00 before any elections are held.
5. Costs be in the cause.”

The first respondent opposed the application for an order that the main application be set down for hearing on an urgent basis. He took as a point *in limine* that, in terms of rule 21 of the Constitutional Court Rules, SI 61 of 2016 (“the Rules”), the applicants ought to have applied for direct access before they filed the main application. He contended that the main application filed by the applicants is not one that falls within the matters which do not require leave to approach the Court directly. There cannot be a case for an urgent hearing of a matter that is not properly before the Court. The first respondent also opposed the application on the basis that the applicants merely assert that the Act is unconstitutional without indicating the specific provisions of the Act said to be invalid.

The second respondent opposed the application on the basis that he is incorrectly cited. He averred that the Constitution creates the office of the Speaker of the National Assembly and not the “Speaker of Parliament”. On this ground, the second respondent contended that the applicants were non-suited. The second respondent also raised a point relating to the non-joinder of the Minister of Justice, Legal and Parliamentary Affairs, the President of the Senate and the Minister of Finance and Economic Development. He alleged that the Minister of Justice, Legal and Parliamentary Affairs should have been cited as a party because he is the one who administers the Act. The second respondent also contended that the Minister of Finance and Economic Development was a necessary party, for the reason that he administers the Treasury from which the claimed US\$420 000 would be paid. With regards to the non-joinder of the President of the Senate, the second respondent contends that both the National

Assembly and the Senate make laws and the law-making function is not restricted to the National Assembly.

The third respondent contended that the main application was not properly before the Court for the reason of non-compliance with r 21(1) of the Rules, which required the applicants to seek authority to access the Court directly before filing the application. The third respondent also contended that the application did not comply with r 16 of the Rules, for the reason that it was not in Form CCZ 1.

The third respondent also raised the special plea of *res judicata* against the applicants. She alleged that in 2013 the first applicant filed an application under case no. CCZ 25/13 seeking funding in terms of the Act. The application was dismissed by the Court on 26 June 2013.

On the merits, the third respondent averred that the relief sought in the main application was incompetent, as the proclamation of dates of a general election is not an act of exercise of discretion by the President. It is a constitutional requirement. She averred that no court has the power to bar the President from proclaiming the dates of a general election in terms of the Constitution. The third respondent also said that the relief sought by the applicants is not competent, for the reason that they have not sought a declaration of constitutional invalidity of the Act.

The third respondent further contended that s 67(4) of the Constitution does to require the enactment of legislation that provides for funding of every political party formed. The essence of the third respondent's case was that the threshold prescribed under s 3(3) of the Act

to be reached by political parties to secure entitlement to payment of moneys from the funds appropriated for the purpose of reimbursement of campaign costs is a mechanism that has the effect of promoting multi-party democracy.

The third respondent prayed for costs on a legal practitioner and client scale against the applicants. The reason given for the order sought was that the application sought to be heard on an urgent basis sought substantially the same relief as was sought in the application that was dismissed by the Court on 26 June 2013.

At the hearing of the application, the Court intimated to the parties that, as the dates for the harmonised general elections could be set by proclamation in terms of s 144(1) of the Constitution any time soon and the applicants were not legally represented, it was prudent to deal with the application as one for direct access. Authority for the approach is found in r 5 of the Rules. The respondents agreed. The applicants conceded that they ought to have sought and obtained leave to file the main application. They also agreed that the application be treated as one for direct access.

Mr *Chimombe*, for the first respondent, argued that the main application had no prospects of success. He said the application was frivolous and vexatious. He argued that the applicants did not indicate the specific provisions of the Act which they alleged violated the provisions of s 67(4) of the Constitution. As a result of lack of reference to specific provisions of the Act alleged to be invalid, the relief sought was vague. He took the point that there was no constitutional matter for determination by the Court.

Mr Demo agreed with *Mr Chimombe* that the applicants had no prospects of success in the main application. The reasons given were firstly that the President cannot be barred by a court from complying with a constitutional obligation. Secondly, the applicants could not expect to be granted an order directing that they be paid money which is payable in terms of a statute they claimed is invalid.

Mr Kanengoni argued that it was not in the interests of justice for the applicants to be granted direct access to the Court. He argued that s 67(4) of the Constitution does not guarantee to a political party a right to funding based on its mere formation and participation in a general election. He said the applicants failed to show that the Constitution requires that the legislative measures put in place must ensure the availability of funding to every political party formed.

Mr Kanengoni took issue with the applicants' draft order. As the applicants would be approaching the Court in terms of s 85(1)(a) of the Constitution, they had to allege that their fundamental rights as political parties had been or were being infringed by specific provisions of the Act. None of the applicants' rights had been violated. With regards to para 2 of the draft order, he argued that the Court has no mandate to order the second respondent to facilitate the repeal of a statute. Whilst the Court has power to declare legislation unconstitutional, the applicants did not seek a declaration of invalidity in respect of any provision of the Act. He contended that the President cannot be stopped from performing a constitutional obligation. He prayed that the application be dismissed with costs on an attorney and client scale on the basis that the first applicant had approached the Court with the same issues in 2013 and failed.

DETERMINATION OF THE ISSUES

**WHETHER THE APPLICANTS COULD FILE THEIR MAIN APPLICATION
WITHOUT FIRST OBTAINING DIRECT ACCESS**

Mr Mukwazhe had argued that s 167(5) of the Constitution allowed the applicants to file the main application “with or without leave”. The applicants’ understanding of s 167(5) of the Constitution was that a litigant had an option to either seek leave or approach the Court directly without first seeking and obtaining leave to do so.

Section 167(5) of the Constitution provides as follows:

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

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

Section 167 of the Constitution prescribes the jurisdiction of the Court. The Court has original, concurrent, exclusive and appellate jurisdiction on constitutional matters only. As a result, it decides only constitutional matters and issues connected with decisions on constitutional matters. The Court makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Constitutional matters over which the Court has original and exclusive jurisdiction are specifically set out in s 167(2) of the Constitution. The other provisions of the Constitution on constitutional matters or issues in connection with a decision on a constitutional matter for the hearing and determination of which direct access to the Court is guaranteed are found in ss 113(7), 131(8)(b), 175(3), 175(4) and para 9(2) of the Fifth Schedule.

In respect of all the constitutional matters over which the Court has concurrent or appellate jurisdiction the provisions of s 167(5) (a) and (b) of the Constitution make it clear that the question whether direct access to the Court is to be had with leave or without such leave is to be determined by the Rules. The purpose of requiring the Rules to prescribe the circumstances in which an application for leave for direct access to the Court is necessary is to ensure that the Court plays its role of supervising the maintenance of the constitutional order.

The Constitution delegated the power of setting the conditions for direct access to the Court (in matters over which the Court does not have exclusive jurisdiction) to the makers of the Rules. A litigant cannot rely on s 167(5) of the Constitution and ignore the Rules which give effect to the Constitution. It is the provisions of the Rules that litigants have to comply with. It was not for the officials of the applicants to decide whether or not to seek leave for direct access to the Court. There is no rule that authorises a litigant seeking the kind of relief sought by the applicants on the grounds stated to approach the Court directly without leave.

The Rules set out the objective factors a litigant has to state in a chamber application for direct access for consideration by the Court or Judge in the determination of the question whether it is in the interests of justice to grant direct access. There must be filed with the registrar, and served on all parties with direct or substantial interest in the relief claimed, an application setting out the grounds on which it is claimed it is in the interests of justice that direct access be granted.

Absent the grounds on which it is claimed that it is in the interests of justice that direct access be granted, the Court or Judge has no basis on which to decide whether or not to grant direct access. A finding has to be made by the Court or Judge of the existence of the interests of justice requiring that a decision that direct access be granted be made. Direct access to the

Court in matters over which other courts have jurisdiction is a discretionary procedure, which is granted only in exceptional cases - see *Betlane v Shelley* Court CC 2011 (1) SA 388 (CC), 2011 (3) BCLR 264 [22]; *A Party and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another* 2009 (3) SA 649 (CC), 2009 (6) BCLR 611 (CC) [70].

Currie and De Waal, in “*The Bill of Rights Handbook*”, 6 ed (2013) at pp 127-128 have the following to say on the subject:

“Direct access means that a matter is heard by the Constitutional Court at first instance. ... The Rules provide for direct access to the Constitutional Court in matters over which concurrent jurisdiction is exercised, where the matter is of sufficient public importance or urgency that direct access will be in the interests of justice. Direct access is an extraordinary procedure that has been granted by the Constitutional Court only in a handful of cases.”

The applicants were required by law to seek leave to approach the Court directly with their main application. They did not attempt to argue that theirs is a matter over which leave to approach the Court directly is not required.

WHETHER IT IS IN THE INTERESTS OF JUSTICE TO GRANT THE APPLICANTS

DIRECT ACCESS

The Court has analysed the matter and has come to the conclusion that it would not be in the interests of justice to grant the applicants direct access. Pursuit of justice must be shown to be at the heart of every legal remedy sought to be granted by a court of law.

The requirements for an application for direct access are set out in r 21(3) of the Rules as follows:

“(3) An application in terms of subrule (2) shall be filed with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out –

- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted; and
- (b) the nature of the relief sought and the grounds upon which such relief is based; and
- (c) whether the matter can be dealt with by the Court without the hearing of oral evidence or, if it cannot, how such evidence should be adduced and any conflict of facts resolved.”

Further, in elaborating r 21(3)(a), r 21(8) of the Rules provides as follows:

“(8) In determining whether or not it is in the interest of justice for a matter to be brought directly to the Court, the Court or Judge may, in addition to any other relevant consideration, take the following into account -

- (a) the prospects of success if direct access is granted;
- (b) whether the applicant has any other remedy available to him or her; and
- (c) whether there are disputes of fact in the matter.”

All these requirements are punctuated by s 167(5) of the Constitution, which requires that the Rules must provide that direct access to the Court ought to be availed where it is in the interests of justice to do so. What must always be borne in mind by the Court or Judge deciding the issue of direct access is the fact that the Court occupies a special position in the scheme for the protection of the constitutional order. It is the only court whose jurisdiction is specifically limited to hearing and determining constitutional matters only or issues connected with decisions on constitutional matters. These are ordinarily matters that require consideration of issues of law relating to the interpretation, protection or enforcement of constitutional provisions. The interests of justice are the overriding consideration.

In order for direct access to be granted, the applicants had to show that they had prospects of success in the main matter. In *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (12) BCLR 1573, 1997 (2) SA 621 (CC) at para [46], the Constitutional Court of South Africa said in part:

“[46] The applicant has failed to establish that this is a case in which the ordinary procedures ought not to have been followed. There are important issues which are within the jurisdiction of the Supreme Court and which need to be resolved by it before this Court is approached for relief. As far as the other issues are concerned there is neither the urgency *nor the prospects of success necessary to justify direct access to this Court*. The application for direct access must therefore be dismissed. (my emphasis)

In *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para [7], CHASKALSON P remarked:

“[7] *Whilst the prospects of success are clearly relevant to applications for direct access to this Court, there are other considerations which are at least of equal importance*. This Court is the highest Court on all constitutional matters.” (my emphasis)

The correct approach in dealing with an application for an order of direct access to the Court is one that accepts the principle that all relevant factors required to be taken into account must be made available for consideration. The Court or Judge must consider all the relevant factors in deciding the question whether the interests of justice would be served by an order granting direct access to the Court. The weight placed on the different factors in the process of decision making will depend on the circumstances of each case and the broader interests of a society governed by the rule of law.

In *De Lacy and Another v South African Post Office* 2011 (9) BCLR 905 (CC) at para [50] the Court of South Africa, whilst considering the approach in the application of the provisions of s 167(6) of the Constitution of South Africa, remarked:

“[50] Section 167(6) of the Constitution requires this Court to allow a person to bring a matter directly should it be in the interests of justice to do so. Where the interests of justice lie depends on the outcome of a meticulous weighing-up of relevant considerations. *Chief of these, but not solely decisive, would be whether there are prospects of success.* For instance, the public importance of the issue raised or its impact on the administration of justice may well favour granting direct access in a matter in which prospects of success may be open to some doubt.” (my emphasis)

See also *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC).

The applicants seek in the main application an order interdicting the President from proclaiming the dates for the harmonised general elections. Paragraph 12 of the founding affidavit states:

“12. This is an application wherein the applicants are seeking an order to have the first respondent hold the pronouncement of election dates until the Political Parties Finance Act is repealed since it is *ultra vires* the Constitution as it does not protect the other political parties, especially section 3 that says ‘... each political party whose candidates received at least five *per centum* of the total number of votes cast in the most recent general election’ ...”.

Paragraph 1 of the draft order relates to the same relief.

Section 144(1) of the Constitution, in terms of which the President is to act in setting the dates for the harmonised general elections, is mandatory. It provides:

“144 General election resulting from dissolution of Parliament

(1) Where Parliament has not earlier passed resolutions to dissolve in terms of section 143(2), the President must by proclamation call and set dates for a general election to be held within the period prescribed in section 158.”

The timing of the elections is governed by s 158(1)(a) of the Constitution, which provides as follows:

“158 Timing of elections

- (1) A general election must be held so that polling takes place not more than —
- (a) thirty days before the expiry of the five-year period specified in section 143; ...”.

The President is obliged under s 144(1), as read with s 158(1)(a), of the Constitution to set dates by proclamation for the holding of harmonised general elections within the period prescribed. The use of the word “must” in both ss 144(1) and 158(1) of the Constitution underscores the fact that the obligation imposed on the President to do what is specified for the specific purpose stated and in the manner prescribed is a mandatory obligation. The immutable requirement is that when the time comes for him to do so, the President has no option but to do what he is specifically bound by the Constitution to do. Section 90(1) of the Constitution imposes on the President the duty to obey the Constitution. Once the President has called and set the dates for the harmonised general elections in terms of s 144(1) of the Constitution, s 158(1)(a) makes it clear that those elections must be held on the dates set.

No-one, including the courts, has power to alter what is mandated by the Constitution in clear, unambiguous and mandatory terms. It would be unconstitutional for a Court or Judge to order the President not to call and set dates for the holding of the harmonised general elections as prayed for by the applicants. The mandatory obligation is imposed on the President by the Constitution for the benefit of all the people of Zimbabwe.

It is the Constitution itself which dictates what the President must do. The proclamation is directly demanded by the Constitution. The Constitution is the supreme law of the land and the courts cannot abrogate it. Their duty is to enforce what the Constitution demands.

The applicants have no right which may conceivably be injured by the lawful performance by the President of the constitutional obligation. From the nature of the relief sought, it is clear that the applicants have no right, let alone a *prima facie* right, to payment of the money payable under the Act to any political party whose candidates received at least five *per centum* of the total number of votes cast in the most recent general election.

The principle that an interdict cannot be granted to prevent the occurrence of a lawful act has become part of our law. In other words, a court of law has no competence to make such an order which is by nature and effect contrary to the rule of law.

In *Minister of Lands v Paliouras; Minister of Lands v Wiggill* 2001 (2) ZLR 22 (S), CHIDYAUSIKU ACJ (as he then was) at 28G-29A stated as follows:

“The respondents’ contention that the appellant is prohibited from exercising any of the above powers which he is expressly authorised by Parliament to exercise raises the fundamental issue of jurisdictional competence. Can a court interdict the appellant from acquiring land for redistribution in accordance with explicit provisions of an Act of Parliament? Not only is this a debatable point, but the wisdom of such an interdict is questionable. The interdiction of patently lawful conduct can hardly further the rule of law. That issue however is not before the court and will have to await determination another day.”

The determination of the issue came in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement and Others* 2004 (1) ZLR 511 (S). The Court said at 518B-E:

“When the appellant lodged the application for the interim relief before the court *a quo* the acquisition of the land by the State was a *fait accompli*, all rights of ownership having been extinguished on its part. The acquiring authority having done everything it was obliged by the law to do to acquire the land for resettlement purposes, there was no outstanding act against the performance of which the acquiring authority could be temporarily interdicted. An interim interdict is not a remedy for prohibiting lawful conduct. At the time the first respondent made the order by which the appellant was deprived of ownership of the land, he acted lawfully in the exercise of the power conferred upon him. Subsection (1) of s 8 of the Act gave him the power to make the order and its effect reflected the legal consequences of that lawful act.

To suspend the effects of the order of acquisition lawfully made and intended by the legislature would amount to striking down the Act of Parliament or rendering it completely ineffective, thereby creating a vacuum pending determination of the constitutionality of the impugned sections of the Act. That would be improper for the court to do because the clear intention of the legislature was that an order of acquisition, properly made in terms of subs (1) of s 8 of the Act, should have the effect of depriving the owner or occupier of the rights of ownership in the land and vesting them in the acquiring authority.”

GOWORA JA weighed in on this principle in *Zimbabwe Revenue Authority v Packers International (Private) Limited* SC 28/16 where, at pp 16-17 of the cyclostyled judgment, she held:

“An interdict serves to protect a right not an obligation. The papers filed on behalf of Packers did not identify any right that ZIMRA had threatened. The court *a quo* found as a matter of fact that ZIMRA had acted in terms of the law in assessing VAT which remained unpaid. Once this finding was made including the further finding that the agent had been appointed lawfully, there was no lawful justification at law for suspending payment for a week.

I am fortified in this view by the remarks of the learned DEPUTY CHIEF JUSTICE MALABA in the *Mayor Logistics* case *supra* to the following effect:

‘The subject of the application is not the kind of subject matter an interdict, as a remedy, was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right.

It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct. *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S); *Stauffer Chemicals v Monsato Company* 1988 (1) SA 895; *Rudolph & Another v Commissioner for Inland Revenue & Others* 1994 (3) SA 771.’

The applicant accepted in the founding affidavit that the respondent acted lawfully in enforcing the obligation to pay the tax notwithstanding the noting by it of the appeal to the Fiscal Appeal Court against the correctness of the assessment. It did not allege any unlawful conduct on the part of the respondent which would justify the granting of an interdict. It also accepted that at the time the respondent put in place measures to collect the tax, the provisions of ss 36 of the VAT Act and 69(1) of the Income Tax Act were binding on it. That means that the applicant had no *prima facie* right in existence at the time not to pay the amount of tax it was liable to pay to the *fiscus*. Sections 36 of the VAT Act and 69(1) of the Income Tax Act protect a duty, not a right.”

See also *Judicial Service Commission v Zibani and Others* SC 68/17.

As correctly submitted by *Mr Kanengoni*, the proclamation can only be challenged after it is made and the challenge can only be on the ground that it has not complied with the relevant provisions of the Constitution.

The applicants also allege as follows:

- “13. In terms of the Constitution of Zimbabwe, Chapter 4, Part 2, section 67(4) states that ‘... for the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties’ meaning all political parties administered by the Zimbabwe Electoral Commission and this includes the applicants.
14. The applicants have never been allocated such funding to promote multi-party democracy to enable them to prepare and effectively participate in the forthcoming General Elections, as is enshrined in the esteemed Constitution of the land, despite having participated in several elections.

15. To this end, the parties which are getting such funding are thus having an unfair advantage over the applicants since they are not getting the funds. This is infringing on the Constitutional rights of the applicants.”

There is no merit in this argument. The Legislature complied with the obligation to enact an Act of Parliament. Section 3 of the Act provides:

“3 Financing of political parties

(1) Subject to this Act, every political party shall be entitled in each Parliamentary year to receive from the State the sums of money that are payable to it in terms of this Act.

(2) The Minister shall, as soon as is practicable, and in any case no later than thirty days after the beginning of the financial year, publish, with the approval of the Minister responsible for finance, a notice in the *Gazette* specifying the total amount of moneys appropriated for all political parties and the amount that shall be paid to each individual political party in terms of this Act.

(3) For the purpose of subsection (2), each political party whose candidates received at least five *per centum* of the total number of votes cast in the most recent general election shall be entitled to the same proportion of the total moneys appropriated as the total number of votes cast for its candidates in the election bears to the aggregate of votes cast for all political parties that qualify to be paid moneys in terms of this subsection:

Provided that, where a candidate is declared elected in terms of section 46 or 49 of the Electoral Act [*Chapter 2:01*] without a poll having taken place, he shall be deemed to have received the votes of all the voters registered in the constituency concerned.

(4) Whenever a by-election to fill a vacancy in Parliament is held after a general election, the Minister shall adjust the amounts payable to political parties in respect of the Parliamentary year following that in which the by-election was held, having regard to any changes in the total number of votes cast consequent on such by-election:

Provided that, where a candidate is declared (elected) in terms of section 46 or 49 of the Electoral Act [*Chapter 2:01*] without a poll having taken place, he shall be deemed to have received the votes of all the voters registered in the constituency concerned.”

Zimbabwe has adopted a system of representative government delivered through multi-party democracy. Section 67(4) of the Constitution does not require the enactment of an Act of

Parliament which makes provision for the funding of every political party formed as the means of ensuring the achievement of the constitutional purpose of promoting multi-party democracy. Section 67(4) of the Constitution uses the words “political parties” and not “all political parties”.

A multi-party democracy is a political system in which multiple political parties across the political spectrum participate in national elections and all have a chance to gain control of government offices separately or in coalition. (*Wikipedia* <https://en.wikipedia.org/wiki/multi-party>). It “contemplates a political order in which it is permissible for different groups to organise, promote their views through public debate and participate in free and fair elections”. *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) at para [26]. What this means is that upon making the Constitution the people of Zimbabwe chose a political system that allows citizens to express their consent to be governed in free, fair and regular elections, participated in by multiple political parties.

Whilst s 67(4) of the Constitution prescribes the “promotion of multi-party democracy” as the legitimate objective to be pursued by the Act of Parliament enacted, it leaves the choice of the best means for the achievement of that objective to the Legislature. If the means chosen by the Legislature is rationally related to the objective of promoting multi-party democracy through the funding of political parties, s 3(3) of the Act would not be held unconstitutional.

Section 3(3) of the Act makes it a requirement that for a political party to qualify for financing, its candidates should have obtained at least five per cent of the total number of votes cast in the most recent general election. The amount payable to a political party is calculated on the basis of what is the proportion of the total number of votes cast for its candidates in the

general election to the aggregate of the votes cast for all political parties. Democracy is demonstrably achievable when people who are registered voters choose candidates in a free, fair and peaceful general election by casting their votes.

It is out of the results of votes cast in a general election that a government of the people, by the people and for the people emerges. Political parties play an important rôle in the democratic process because they are the bodies that organise the people who vote in the general election for candidates sponsored by them. In other words, in the system of multi-party democracy established by the Constitution, political parties occupy central stage and play a vital part in facilitating the exercise of political rights. *Ramakatsa v Magashute* 2013 (2) BCLR 202 (CC) at para [65]. The political parties take part in the exercise of legislative authority as the ruling party or opposition parties.

What is clear from s 3(3) of the Act is that all political parties are subjected to the same standard of having to aim at their candidates receiving at least five percent of the total number of votes cast in the general election immediately before the next general election. In other words, the requirement applies to every political party. The formation of a political party is not an income generating project. The taxpayer's money cannot be used to fund any upstart political party which may not be *bona fide*. Placement of a reasonable limitation upon the payment of public funds to political parties is beyond controversy. A situation where political parties are formed and registered to participate in a general election simply to secure funding by the State cannot have the effect of promoting multi-party democracy.

The applicants have not shown that they are eligible to get the financial support on the basis of s 3(3) of the Act. In terms of the section, entitlement only accrues after an election and

not before an election. The applicants are interpreting s 67(4) of the Constitution to mean that the Act of Parliament should make provision for the funding of any entity that has been registered as a political party without regard to votes received by candidates sponsored by political parties in a general election. The approach urged upon the Court that funding should solely depend on the mere existence of a political party without reference to numbers of votes received by candidates sponsored by the political parties in the most recent general election ignores the fact that multi-party democracy recognises the voter as the decision-maker.

The Act applies to all the political parties. Contrary to what the applicants allege, the mechanism adopted by the Legislature ensures that there is a level playing field for all political parties registered to take part in a general election. Entitlement to receive the money payable accrues to every political party whose candidates have reached the prescribed threshold of having received at least five *per centum* of the total votes cast in the most recent general election.

The entitlement to funding accrues to as many political parties as have managed out of their own efforts to reach the minimum threshold. There can be no doubt that the purpose of the standard prescribed is to ensure funding for the successful political parties consistent with the provisions of s 67(4) of the Constitution. The fact that some political parties end up not being funded does not mean that no political parties are funded. Entitlement to payment of the money from the public funds appropriated for the purpose of funding political parties is not a fundamental right of a political party. It is a statutory right claimable after a political party has met the minimum requirements for entitlement to payment.

A political party should have the support of the people and this is shown by votes received. There has to be a criterion for political parties' financing. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 (2) ZLR 254 (S) the Supreme Court determined the question of the constitutionality of s 3(3) of the repealed Political Parties (Finance) Act [*Chapter 2:04*]. The applicant in that case argued that s 3(3) of the repealed Political Parties (Finance) Act [*Chapter 2:04*] inhibited the exercise of its rights guaranteed under s 20(1), s 21(1) or s 23 of the old Constitution.

In determining the question of the constitutionality of s 3(3) of the repealed statute in *United Parties* case *supra* GUBBAY CJ, at 261A-262B, said:

“THE POLITICAL PARTIES (FINANCE) ACT

(1) THE NATURE AND STRUCTURE OF THE ACT

The preamble to the Act states that its purpose is:

‘... to provide for the financing of political parties by the State and for matters connected therewith or incidental thereto’.

In order to qualify for financial support, a political party must apply to the Minister of Justice, Legal and Parliamentary Affairs for registration in terms of s 4. Any such application must identify each of its candidates for election in the general election. Further information prescribed by the Minister may also be required. If the Minister is satisfied that the candidates identified are members of the political party concerned, he must register it. An appeal lies to the High Court against the Minister's refusal to entertain an application by a political party.

Section 3 deals with the actual financing of political parties. Subsection (1) stipulates that every registered political party shall be entitled to receive from the State the sums of money payable to it under the Act. Subsection (2) obliges the Minister, with the approval of the Minister of Finance, to specify annually by notice in the Gazette (a) the total amount of moneys payable to all registered political parties; and (b) the moneys paid to each individual registered political party. Subsection (3) reads:

‘For the purpose of paragraph (b) of subsection (2), each registered political party shall be entitled to the same proportion of the total moneys

specified in terms of paragraph (a) of that subsection as the number of elected members of Parliament who are members of that political party bears to one hundred and twenty:

Provided that, where fewer than fifteen elected members of Parliament are members of a particular registered political party, that political party shall not be entitled to any moneys in terms of this Act.' ...

What is most significant about this Act is that no registered political party with less than fifteen elected members of Parliament will be entitled to be paid any moneys by the State. Parties with the requisite number of elected members will receive funding every year and not only after a general election has taken place. The amount of such funding is calculable on the basis of the number of their members as a percentage of the one hundred and twenty common roll constituencies. Plainly the funding is designed to subsidise permanently the political parties that qualify and not merely to reimburse their election expenses.”

The learned CHIEF JUSTICE continued at 266E-267D:

“(4) THE THRESHOLD OF FIFTEEN ELECTED MEMBERS OF A PARTICULAR REGISTERED POLITICAL PARTY AS THE ENTITLEMENT TO RECEIVE FUNDING FROM THE STATE

The justification for placing a reasonable limitation upon the payment of State funds to political parties admits of no controversy. Its purpose is understandable. It is to encourage serious political parties or candidates to contest an election and thereby strive to obtain representation in Parliament. Yet, on the other hand, it is to discourage inability to attract an important following - to command a significant proportion of the votes cast. Put differently, the aim is to inhibit the proliferation of trifling parties; to prevent them from participating in the election simply in order to secure public moneys.

Jensen *op cit* at 113-114 points out that the regulation of public funding for elections has been identified with the following five goals:

- (i) to ensure equality of opportunity in a liberal democracy characterised by inequities in the distribution of wealth;
- (ii) to make enough money available that competitive campaigns can exist;
- (iii) to allow new entrants, while not encouraging frivolous candidates or propping up decaying political organisations;
- (iv) to reduce the opportunity for undue influence; and

(v) to prevent corruption.

In the Zimbabwean setting, the first three of these goals are particularly apposite, but are not achieved by s 3(3) of the Political Parties (Finance) Act. Obviously, the mere presence of public funds is not sufficient. It must be provided in a manner that is non-exclusionary and tolerant of political pluralism and electoral competition. Otherwise it will do no more than entrench and reinforce the regime of the major political parties, and treat far less fairly their minor or new opponents. Thus a high threshold for entitlement to receive State funding makes it extremely unlikely that small but meaningful voices will be heard. In a relatively non-affluent society, where nothing like adequate funding from private sources is available, such a threshold renders it virtually impossible for other political parties to gain any real margin of success.”

Finally, at 272C-G GUBBAY CJ held:

“It is my view that the whole of s 3(3) of the Political Parties (Finance) Act, and not merely its proviso, should be declared inconsistent with s 20(1) of the Constitution. This is because, as mentioned earlier, it is, in essence, the scheme upon which State funding is paid that abridges the protection of freedom of expression. Even if the threshold of the number of elected members were set far below fifteen, the requirement of there having to be representation by a registered political party in Parliament, in order to qualify for annual funding, would still put aspiring opposition political parties at a severe monetary disadvantage in mounting an electoral campaign; and, thereafter, in maintaining potent political survival. It seems probable that an appreciation of this factor was the motivation for other countries passing legislation which makes the entitlement to funding dependent upon the attainment of a fairly low percentage of the overall number of votes cast at a general election (if the funding is to be provided annually, which is the policy in Zimbabwe).

It may be true to say that at the next general election the hurdle for smaller or emerging political parties will remain fairly formidable. Yet, assuming a reasonable threshold is fixed by Parliament on the basis of a percentage of the total number of votes cast, it should be reached with less difficulty than under a regulatory system that effectively entrenches the *status quo*.

As the striking down of subs (3) renders the allied provisions contextually inappropriate, it will be incumbent upon the Legislature to replace the whole of s 3 of the Political Parties (Finance) Act in conformity with this judgment.” (The underlining is mine for emphasis)

The current s 3(3) of the Act is a direct result of the judgment in the *United Parties* case *supra*. The applicants have not asked the Court to revisit that judgment. The judgment states that a scheme of entitlement to State funding based on a reasonable threshold of votes received by candidates of political parties, being a fairly low percentage of the total votes cast in the most recent general election, would be constitutional.

There is no doubt that setting the minimum threshold for entitlement to State funding for a political party as the votes received by its candidates which should be at least five percent of the total votes cast in the most recent general election promotes multi-party democracy. Political parties do not have to secure representation in Parliament. Under the current legislative scheme for entitlement to payment of State funding, small political parties that fail to win a seat in Parliament but have candidates who manage to receive the five percent of the total votes cast in the most recent general election are entitled to receive payment.

Multi-party democracy is not defined in terms of seats political parties have in Parliament. Multi-party democracy is promoted by encouraging political parties to compete for funding by seeking to reach the minimum threshold for entitlement to payment of monies appropriated for funding political parties. The political parties are encouraged to use freedom of speech during campaigns in the general election to persuade voters to vote for their candidates so that they meet the minimum threshold and get funding. The voter becomes the decision-maker. The requirements for entitlement to payment of monies from the public funds appropriated in terms of the Act for funding political parties ensure the effectiveness of the funding as a means of promoting multi-party democracy as required by the Constitution.

The applicants contended that the Act should be repealed. The Court has no power to order the repeal of any legislation. Repeal of legislation is a legislative act and not a judicial act. The declaration of constitutional invalidity of legislation is the judicial act. It was not sought by the applicants. The applicants cannot seek to have the validity of the Act impugned whilst also asking for an order that they be paid US\$420 000 payable only in terms of the Act. As such, the main application has no prospects of success because what the applicants seek is not grantable.

The third respondent took the point that the dispute in question is *res judicata*. An examination of the founding affidavit on which the application in CCZ 25/13 was based shows that there are material differences in the nature of the causes of action pleaded. Although vaguely pleaded, the applicants' cause of action in CCZ 11/18 was that s 3(3) of the Act contravenes the provisions of s 67(4) of the Constitution. They did not, of course, say which of their fundamental rights were infringed by the alleged invalidity of s 3(3) of the Act. On that assumed invalidity, the applicants went on to pray for non-grantable reliefs. In respect of CCZ 25/13 the first applicant did not plead a cause of action. All he did was to state the provisions of the Act and the Constitution before praying for an order that it be paid the money payable to political parties that met the qualification requirements prescribed by s 3(3) of the Act for entitlement to payment. The plea of *res judicata* raised by the third respondent and *ipso facto* the prayer for costs against the applicants on the scale of legal practitioner and own client scale cannot succeed.

COSTS

The first and second respondents prayed that the application for direct access be dismissed with no order as to costs. The third respondent had adopted a different position on costs because of the plea of *res judicata* raised against the applicants.

Now that the special plea has not been upheld, there is no good reason for treating the third respondent differently from the other respondents on the question of costs. The order given is consistent with the general principle on the question of the award of costs in constitutional litigation where the State is the successful party.

DISPOSITION

In the result the following order is made:

“The application for direct access to the Court is dismissed with no order as to costs.”

Civil Division of the Attorney General’s Office, first respondent’s legal practitioners

Chihambakwe Mutizwa and Partners, second respondent’s legal practitioners

Nyika, Kanengoni and Partners, third respondent’s legal practitioners