CONCILIA CHINANZVAVANA
versus
MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
and
PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
VICE-PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE NATIONAL PEACE & RECONCILIATION COMMISSION
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 31 January 2019 & 15 February 2019

Date of judgment: 13 March 2019

Opposed application

Mr *T. Biti*, for the applicant
Mr *K. Chimiti*, for the respondents

MAFUSIRE J

[1] Section 251(1) of the Constitution of Zimbabwe says:

> "For a period of ten years after the effective date, there is a commission to be known as the National Peace and Reconciliation Commission consisting of –"

The rest is not immediately relevant.

[2] Mrs Chinanzvavana, the applicant, is a Member of Parliament for the House of Assembly on the ticket of the Movement for Democratic Change – Alliance party (MDC-A), the largest opposition political party in Zimbabwe by number of followers, at least from the results of the last general election on 30 July 2018. She wants the court to pronounce that the intention of the framers of the Constitution, as expressed in s 251(1) above, was that the life of the National Peace and Reconciliation Commission

("***the NPRC***" or simply "***the Commission***") once established "... after the effective date ..." would be, at the very least, ten years. Otherwise, she says, there is nothing in that section limiting the existence of the Commission to just ten years.

[3] For her cause, the applicant has brought to court the top echelons of the Executive arm of the Government of Zimbabwe comprising the President; his Vice to whom the administration of the Commission is assigned; the Minister of Justice who, among other roles, doubles up as leader of Government business in Parliament, and the Attorney General of Zimbabwe, who, among other things, is the chief legal adviser. It being the subject of the suit, the NPRC is also a party.

[4] At first brush, there can be nothing awkward or problematic with what s 251(1) of the Constitution is saying. The provision is recognizing that there is an effective date, for this is clearly defined in s 332 of the Constitution. It is naming a certain commission that should be there for a fixed period after the effective date. It names that commission as being the NPRC. It defines that period as ten years. In other words, and looking at it superficially, the Commission exists for ten years after the effective date.

[5] But apparently the position is not altogether that obvious. To begin with, the section does not expressly tell when exactly the Commission is established. It starts by simply recognising it as a *fait accompli,* a thing that has already happened after the effective date. The hidden problem comes out more in the open when one considers the exact nature of the relief sought by the applicant. According to her draft order:

> 1 The National Peace and Reconciliation Commission established in terms of Section 251 of the Constitution shall have tenure of life of ten years which are deemed to have commenced on the 5th of January 2018 when the National Peace and Reconciliation Act became law.
>
> 2 It is declared that the ten year life and tenure of the National Peace and Reconciliation Commission shall deem to run from the 5th of January 2018.
>
> 3 The 1st Respondent pays costs of suit"

[6] Thus, to the applicant, the ten year period should be counted from 5 January 2018. That should be deemed the effective date because, she says, that is when the operation of the

Commission became effective when the enabling legislation, the National Peace and Reconciliation Act, *Cap 10 32* ("***the enabling Act***"), was gazetted. That is when, according to her, the Commission became operational when, among other things, the commissioners were sworn in; the secretariat appointed; the funding for the Commission's operations provided for; the manner of its operations spelt out; and so on.

[7] The respondents have opposed the application on one single ground that they have stuck to from beginning to end. At the beginning they took the point as a preliminary objection, or point *in limine*, and filed no further defence on the merits. According to them, the Commission automatically ceases to exist ten years after the effective date.

[8] Section 332 of the Constitution defines "effective date" as the date when the Constitution came wholly into operation as contemplated by s 3(2) of the Sixth Schedule to the Constitution. In terms of s 3(2) of this Schedule, the rest of the Constitution came wholly into operation on the day on which the President elected in the first election (after the promulgation of the Constitution) assumed office. The former President, Mr Robert Gabriel Mugabe, assumed office after that election in August 2013. On all this the parties are *ad idem*, save for a minor discrepancy on the exact date former President Mugabe assumed office in August 2013: the applicant saying 18 August, and the respondents saying 22 August. In fact, it was 22 August.

[9] The respondents' argument is that the court cannot do what the applicant wants it to do. What the applicant wants done is to have the court declare that the effective date referred to by s 251(1) of the Constitution is 5 January 2018, and that therefore the Commission lasts until 4 January 2028. The respondents say that that will amount to the court amending the Constitution "*by the back door*". It is unheard of. Only Parliament, not the court, gets to amend the Constitution in terms of the procedure set out in s 328 of the Constitution.

[10] In the answering affidavit the applicant denounces the respondents' conduct of just raising the point *in limine* and refraining from pleading to the merits altogether. To her

that is arrogance. I was persuaded. The point *in limine* was the entire case before me. I considered that it was bogus. By avoiding the merits altogether the respondents were in effect pleading in instalments. In terms of r 232 and r 233 of the High Court Rules, respondents have ten days from the date an application is served upon them, to file their notice of opposition together with one or more opposition affidavits. They are barred if they fail to comply. So I took the respondents to task on why they had pleaded that way.

[11] Mr *Chimiti*, for the respondents, argued that pleading in the manner the respondents had done was permissible. He referred to a case the name and citation of which he said he could not remember. He said the respondents in that case had pleaded in exactly the same way the respondents herein had done, avoiding the merits altogether and only taking a point *in limine* which they argued all the way on appeal to the Supreme Court, and succeeding for that matter.

[12] I deprecated the respondents' conduct. The objection to pleading in instalments had been raised as early as the applicant's answering affidavit. The respondents had not replied. On his part, Mr *Chimiti* seemed ill-prepared. He was relying on an indeterminate case authority. The matter had to be postponed.

[13] I dismissed the respondents' preliminary objection on the ground that the issue they were raising was in fact the substance of the whole case before me. The applicant was not asking the court to *amend* the Constitution. She was asking the court to *interpret* s 251(1). Courts do this all the time. From time to time they are called upon to interpret pieces of legislation which someone may consider vague, meaningless, or the like. *In casu*, the applicant was asking for nothing unusual. So to mark my displeasure for the way the respondents had pleaded, I ordered them to pay the wasted costs on an attorney and client scale. I gave them leave to file their notice of opposition in terms of the time frame Counsel had mutually agreed upon.

[14] Pleading 'in instalments' as it were, that is, only taking a preliminary objection or point *in limine* and refraining from pleading to the merits unless the objection is dismissed, is not provided for in the Rules of Court. The Rules of Court contemplate a situation

where the respondents have one bite of the cherry. They plead all their defences and technical objections within the prescribed ten days. Only in exceptional circumstances may they do what the respondents *in casu* have done.

[15] In the case of *Zimbabwe Lawyers for Human Rights & Anor v President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (S), in which exactly the same situation happened, GUBBAY CJ said[1]:

> "It is true that such cases as *Bader & Anor v Weston & Anor* 1967 (1) SA 134 (C) at 136E – G; *Governing Body of the Winterberg Agricultural High School v President of the Eastern Cape & Ors* [1996] 3 All SA 71E at 77e – i; and *Valentino Globe BV v Phillips & Anor* 1998 (3) SA 775 (SCA) at 779I – 780B, lay down, as a general rule of procedure, that a respondent who wishes to raise a preliminary issue against an application should file an affidavit on the merits of the matter within the normal time limits prescribed by the rules of court. **In other words, a respondent is at risk in relying solely upon a preliminary point**. But the rule is not rigid or inflexible. See *Standard Bank of South Africa Ltd v RTS Technique and Planning (Pty) Ltd & Ors* 1992 (1) SA 432 (T) at 442A – E. Situations may arise where the procedure of merely taking a preliminary point is unexceptionable. To my mind, the present is just such a situation" (*my emphasis*).

[16] It turned out that the case authority Mr *Chimiti* had wanted to rely on was that of *The President of Zimbabwe, Robert Gabriel Mugabe & Ors v Tsvangirai* SC 21-17. He was right to say that in that case the respondents only took a preliminary objection and refrained from dealing with the merits. In the High Court the preliminary point was dismissed. The respondents were given leave to file their response on the merits. However, they appealed to the Supreme Court against the dismissal of their point *in limine*. The appeal succeeded. The preliminary objection was upheld. However, the Supreme Court did not deal with the question whether or not the respondents had been right to simply take a technical objection and leave the merits for another day. Even the High Court had not dealt with the point either, only noting in passing that the respondents had yet to file their papers on the merits[2].

[17] Therefore, the correct position on whether a respondent can take a preliminary objection and refrain from dealing with the merits until the preliminary point has been determined

[1] At p 279D – F
[2] At p 3 of the cyclostyled judgment

is as set out in Paragraphs [14] and [15] above. *In casu*, there was nothing "unexceptionable" in the preliminary point that the respondents were raising. Raising it to block the consideration of the case on the merits was vexatious.

[18] Every case depends on its own facts. In the present case, it was very clear that all that was sought by the applicant was a judicial pronouncement of the meaning of s 251(1) of the Constitution in relation to the tenure of the NPRC. In reality, what the respondents sought to do by mounting the preliminary objection in the form they did was to impugn the *consequences* of the court's pronouncement, if it were to agree with the applicant, rather than its inherent power to interpret legislative provisions. Viewed from this angle the objection became even more absurd. As SACHS J of the South African Constitutional Court would put it[3], the rights and values promoted by a constitution are fundamental to the judges' role as defenders of the constitution. They link up directly with the oath the judges take, which is to uphold and protect the constitution and the fundamental rights entrenched therein. "Only the most compelling language would justify a departure from such a clear responsibility."[4]

[19] The respondents eventually filed their affidavit on the merits. Little or nothing of the extensive allegations in the applicant's founding and answering affidavits was challenged. In summary, the applicant's case was that the Constitution was a negotiated document during that period in history from 2008 when government power in Zimbabwe was shared among the then leaders of the then three dominant political parties: the Zimbabwe African National Union – Patriotic Front (ZANU-PF), then led by Mr Mugabe; and the two MDC formations, one led by Mr Morgan Richard Tsvangirai and the other by Professor Arthur Mutambara. It was called a Government of National Unity (GNU) whose mid-wife was the then South African President, Mr Thabo Mbeki, through some framework called the Global Political Agreement (GPA).

[20] The applicant explains that the constitutional making process was an extensive and protracted effort which involved several other abortive initiatives, including the one led

[3] In *S v Mhlungu & Ors* 1995 (3) SA 867 (CC)
[4] At p 912

by the then Chief Justice of Zimbabwe, the late Mr Godfrey Chidyausiku, and the other led by representatives from ZANU-PF and the MDC, Messrs Patrick Chinamasa and Welshman Ncube respectively. Procedures set out in the GPA involved outreach programmes to all parts of the country to gather the views of the populace on the various thematic areas. The setting up of some kind of commission or body to investigate certain conflicts like the disturbances that rocked Matabeleland and Midlands Provinces from about 1982 to 1987, commonly referred to as "*Gukurahundi*" – much along the lines of the South African Truth and Reconciliation Commission chaired by the Anglican Archbishop Desmond Tutu – was one such thematic chapter.

[21] The applicant alleges that, among other issues, the setting up of a peace and reconciliation commission became so emotive and contentious that it threatened to derail the whole constitutional making process. At the core was the unflinching objection by ZANU-PF for its setting up, which was equally matched by the resolute determination by the MDC formations for its establishment. The applicant says that from the outreach programmes, the idea of setting up such a body garnered 51% support, and sat at number six in terms of popularity after issues of electoral reform; human rights; anti-corruption; media, and land.

[22] To break the deadlock, the applicant says a compromise was reached. Among other things, the NPRC would be set up with some kind of truncated mandate in terms of time frames. It would only have a life span of ten years and would only investigate post 2013 conflicts. She says that that explains why s 251(1) of the Constitution is worded the way it is.

[23] In her narrative, the applicant adverts to the violence that flared up in this country in 2008 following a general election the first results of which produced no outright presidential winner between Mr Mugabe and Mr Tsvangirai, leading to a re-run that was eventually won by Mr Mugabe amid bitter contest when Mr Tsvangirai had pulled out of the race citing excessive violence against members of his party. She says she and her entire family suffered severely in that violence. She was abducted by State agents together with several other members of her party. She was detained for fifty-five days

during which she and her fellow abductees were kept blindfolded for most of the time and were subjected to severe torture, and to inhuman and degrading treatment.

[24] The applicant says several members of her party were brutally murdered or they simply disappeared. They remain unaccounted for to this day. She and her colleagues were eventually handed over to the police. However, plans to prosecute them for subversion collapsed after one of the abductees, Ms Jestina Mukoko, won a permanent reprieve from the Supreme Court given the illegal pre-prosecution conduct of the State: see *Mukoko v Attorney General* 2012 (1) ZLR 321 (S).

[25] Mr *Biti*, for the applicant, argues that the NPRC is such an important constitutional body whose functions should not be restricted beyond what the Constitution already does. He argues that the respondents have by design rendered the Commission impotent and have purported to proscribe its operations by severely limiting its life span. They waited a staggering five years before giving the Commission its wings. It was only made operational on 5 January 2018 when the enabling Act became law. Yet post conflict investigation is so critical to heal wounds, given the history of violence in Zimbabwe which is traced from the first war of liberation in the 1890s, called the First Chimurenga; the second war of liberation in the 1970s, called the Second Chimurenga; *Gukurahundi*, and all the other subsequent periods of violence, particularly at general election times.

[26] The only serious contest to the applicant's factual averments on the history and birth of the NPRC, something said "from the Bar" by Mr *Chimiti*, is that the respondents did not exactly wait five years before setting up the Commission. He says by 17 July 2016 the first chairperson of the Commission had already been appointed. His name was Mr Cyril Ndebele. Unfortunately he died seven months after appointment.

[27] Mr *Chimiti* agrees that the current NPRC, led by Mr Selo Nare, a retired Judge of the Labour Court, only became operational after 5 January 2018 following the promulgation of the enabling Act. Mr *Chimiti's* basic argument is that whatever might have happened, under no circumstances can the life of the NPRC extend beyond ten

years after the effective date. To do so will be to do violence to a clear constitutional provision. He further argues that the respondents did comply with their obligations in terms of s 251(1) of the Constitution in that within a period of ten years from the effective date they manhged to incept the NPRC. He says all that the section implores the respondents to do is to ensure that the NPRC is set up within the ten year period.

[28] So the issue before me, putting it simply, is what is the meaning of s 251(1) in relation to the life of the NPRC? Can this commission exist after 21 August 2023, being the ten years after the effective date? Or can it exist up to 21 August 2028 being the ten years after the enabling Act was gazetted? Can it not even exist in perpetuity after 22 August 2013, the effective date? What exactly did the framers of the Constitution mean?

[29] To answer the above questions I have invoked the relevant techniques of statutory interpretation as they apply to constitutional provisions. Ideally the various canons of construction should return the same result. But invariably they return conflicting answers. When that happens the court does not throw its hands in the air in despair. It gets down to work. It sets out to unravel the hidden meaning. DENNING LJ (as he then was) said in *Seaford Court Estates Ltd v Asher* [1949] 2 All ER 155 (CA) at 164 E – H[5]:

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from

[5] Quoted with approval in *S v Aitken* 1992 (2) ZLR 84 (S), at 89A – D

the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature."

[30] A constitutional instrument is *sui generis*. It calls for principles of interpretation of its own and suitable to its character (see *Minister of Home Affairs (Bermuda) & Anor v Fisher & Anor* [1980] AC 319, at 328 – 329; [1979] 3 All ER 21 (PC) at 25 – 26). But in general, the principles governing the interpretation of a constitution are basically no different from those governing the interpretation of any other legislation: see *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 (S), at 580F.

[31] There are a number of guides to statutory interpretation, or 'canons of construction'. The law has not yet authoritatively established any complete hierarchy among them: see *Tzu-Tsai Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, at 212h. However, the 'golden rule' of statutory interpretation is universally the first and most elementary rule of construction.

i/ *The 'golden rule' of construction*

[32] According to this technique, except in technical legislation, it is to be assumed that the words in a statute are used in their ordinary and natural meaning. Nothing is to be added unless the words are at variance with the clear intention of the legislature as gathered from the statute itself, or they render a manifest absurdity or some repugnance. If that be the case, the language may be varied or modified. Otherwise it is a *strong* thing to read into a piece of legislation words which are not there, and in the absence of clear necessity it is a *wrong* thing to do: see *Thompson v Goold & CO* [1910] AC 409, at 420.

[33] Of the golden rule of statutory interpretation, McNally JA put it this way in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S):

"There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, … 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case

the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."[6]

[34] Applying the golden rule to s 251 (1) of the Constitution, I do not find it saying the life of the NPRC is ten years from the effective date. Mr *Biti* emphasises that the preposition used in that section is "***after***", not "*from*". The section says, "*For a period of ten years **after** the effective date …*" It does not say "*For a period of ten years from the effective date ...*" I agree. Mr *Chimiti's* argument that the Commission can only exist for ten years after the effective date would probably make sense if it was "*from*", not "***after***" that the section uses. With "*from*" the clock would have started to tick from 22 August 2013. "*From*" is a preposition depicting, among other things, the point in time at which a particular process, event or activity starts. That point in time is determinate. It is definite. It is fixed. But "***after***" is not. It is indeterminate. It is unfixed.

[35] If the Commission was effectively established five years, or even three years after the effective date, and if Mr *Chimiti* insists that there was nothing wrong with that, then the respondents' argument, taken to its logical conclusion, could mean that they could well have waited nine years and eleven months. They could simply incept the Commission on the eve of the expiry of the ten year period. They would still have complied. That brings me to the second canon of construction relevant to this case. It is the presumption against anomaly or absurdity.

ii/ *Presumption against anomaly or absurdity*

[36] By this technique the courts adopt a construction agreeable to justice and reason. There is a presumption that in enacting a law, no unreasonable result is intended. If there is some construction available other than that leading to an unreasonable result, it is the one to be preferred. The reason, as GUBBAY CJ put it in *S v Aitken* 1992 (2) ZLR 84 (S)[7], is:

[6] See also *Zimbabwe Revenue Authority & Anor v Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (S), at 217H – 218A
[7] At p 88G – H

"For to stand aside where the object and intention of the enactment are clear would be to allow it, contrary to good sense, to be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law."

[37] So if the date the Commission was effectively established is 5 January 2018 or, according to Mr *Chimiti*, 7 July 2016, and if, according to the respondents, the Commission must not exist beyond ten years after the effective date, the result could be a monstrous absurdity. As noted above, the respondents could wait nine years and eleven months before incepting the Commission and still claim to have complied. Plainly that is wrong. Plainly the reference to ten years in s 251(1) of the Constitution is to the life of the Commission rather than the length of time given the respondents to establish it.

[38] That the reference to ten years is in regards to the life of the Commission rather than the time given for its establishment becomes clearer if regard is had to the other provisions of the Constitution. When interpreting an unclear provision it is permissible for a court to go outside it and consider the entire document: see *Chegutu Municipality v Manyora (supra)*. In this regard, s 324 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. Mr *Chimiti* had no choice but to concede that for the Government to have waited five years, or on his construction, three years, before incepting the Commission, cannot pass the diligence and without delay test.

[39] Furthermore, by s 252 of the Constitution, a whole range of daunting responsibilities are fostered upon the NPRC. They include:

- ensuring post conflict justice, healing and reconciliation;
- developing and implementing programmes to promote national healing, unity and cohesion in the country; and
- bringing about national reconciliation.

[40] Zimbabwe has been blighted by conflict before and after independence. Its peoples are severely polarised. In a nutshell, the mandate of the NPRC is to inculcate and nurture a

culture of tolerance, peace, love and harmony. Each of the functions assigned to it by the Constitution requires lots of time to accomplish. It is even doubtful whether ten years are enough. But to put the issue beyond doubt I go on to consider the next canon of construction.

iii/ *Purposive and generous construction*

[41] This canon of construction calls for a broad and generous approach. The aim is to identify the core values underpinning the rights enshrined in a constitution and promote its whole purpose. It avoids a narrow, artificial, rigid and pedantic interpretation. It eschews the "austerity of tabulated legalism": see *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S).

[42] Of the purposive and generous approach to constitutional interpretation SACHS J, in the *Mhlungu* case above, and quoting LORD DENNING, said[8]:

> "All it means is that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect" (*my emphasis*).

[43] Unlike the old Constitution which was negotiated in Britain at Lancaster House in 1979 to stop the war of liberation and grant Zimbabwe independence, the current Constitution is home grown. Quite regrettably, since 1982 Zimbabwe has suffered, and continues to suffer, conflict, especially at election time.

[44] The current Constitution came into force in 2013. It was an attempt to break with the past which was characterized by intense violence and suffering. Its aim and aspiration is to establish an egalitarian society. It is laden with the values of equality, peace, unity, democracy and justice. These are summarised in the preamble. Of a preamble to a constitution, SACHS J says[9] it should not be dismissed as "a mere aspirational and throat-

[8] At p 916D – E
[9] In *S v Mhlungu, supra,* at p 913

clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. **It helps to establish the basic design of the Constitution and indicate its fundamental purpose**" (*my emphasis*).

[45] The establishment of the NPRC and the mandate given it in s 252 of the Constitution should be viewed from this angle. It is undoubtedly one of the most important independent commissions established under Chapter 12. There are four others, namely the Zimbabwe Electoral Commission; the Zimbabwe Human Rights Commission; the Zimbabwe Gender Commission and the Zimbabwe Media Commission.

[46] Yet unlike its siblings, the NPRC is the only one with some proscription as to time. But its mandate in s 252 is so broad in terms of time and scope. The first of these functions is to ensure post-conflict justice, healing and reconciliation. Conflict happens all the time. It can happen anytime and anywhere. It needs to be investigated and remedial measures taken to avoid recurrence. This judgment is written against a background of deplorable violence on 1 August 2018, a day after the general election on 30 July 2018 in which six people died. This tragic event led to the establishment by the second respondent herein of a Commission of Enquiry, chaired by the South African ex-President, Mr Kgalema Petrus Motlanthe.

[47] As if that was not enough, the hearing of this case is happening against a background of further violence that flared up from 15 January 2019 and in which an unknown number of people died. All this is massive work for the NPRC, not to mention the other episodes of violence in the past.

[48] The considerable foresight of the framers of our Constitution in setting up the NPRC and bestowing upon it broad based functions so as to safeguard our nascent democracy and, *inter alia*, develop strategies to bring about national unity, healing, peace, justice, reconciliation and facilitate dialogue among political parties as provided for in s 252, should not unnecessarily be impeded by the 'austerity of tabulated legalism' in constitutional interpretation or the need to accommodate parochial sectarian interests. On the contrary, the interpretation of s 251 of the Constitution, should unapologetically

be so wide as to give maximum support to the values and ethos of the Constitution such that, among other things, the reference to ten years must be read so as to mean the minimum period of life of the NPRC rather than the end of it from the effective date. The same result flows from a consideration of the next canon of construction.

[iv] *Construction according to historical setting and the 'mischief' rule*

[49] According to this canon of construction, first is ascertained the general situation, or rather the historical setting against which the constitution was framed. Secondly, is ascertained the 'mischief' or the particular situation for which a remedy was being provided.

[50] *In casu*, the historical setting against which, and the mischief for which, the current Constitution was promulgated and the NPRC was set up, are self-evident from the applicant's affidavit which the respondents have not contested in any material respect. It is a historical fact that since independence Zimbabwe has lurched from one episode of violence and conflict to another. Some of these episodes stick out quite notoriously, like *Gukurahundi* from 1982 to 1987. It only ended with the Unity Accord between the then two dominant political parties, ZANU-PF, then led by Mr Mugabe, and the Patriotic Front – Zimbabwe African People's Union (PF-ZAPU), then led by the former Vice-President of Zimbabwe, the late Mr Joshua Mqabuko Nyongolo Nkomo.

[51] The other notorious episode of violence was immediately after the presidential election in March 2008 as already explained above. The applicant says she and her family were some of the victims of that violence. Mr Mugabe's installation as President of the Republic was bitterly contested. This led to the GNU, one of whose task was to motivate, sponsor and craft a broad based constitution to foster peace, unity, justice, reconciliation and democracy, among other values. The result was the current Constitution that gave birth to, among others, the NPRC.

[52] The Preamble to the Constitution crisply captures the 'mischief' for which the framers were providing a solution. It says in part:

"We the people of Zimbabwe,
United by our common desire for freedom, justice and equality …,
…….,
Recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law,
Reaffirming our commitment to upholding and defending fundamental human rights and freedoms,
…….,
Cherishing freedom, equality, peace, justice, tolerance, …,
…….,
Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work,
……..."

[53] The Chapter 12 independent Commissions of which the NPRC is one, are demonstrably some of the strategies to attain and protect the rich values espoused by the Constitution. This is unambiguously spelt out in s 233. On the list of objectives of those Commissions are the following:

- to support and entrench human rights and democracy;
- to protect the sovereignty and interests of the people;
- to promote transparency and accountability in public institutions;
- to ensure the observance of democratic values and principles
- to ensure that injustices are remedied

[54] Among other obligations, Government must provide adequate funding for these Commissions [s 325(1)(*a*)]. It and all its institutions and agencies at every level must assist them through <u>legislative and other measures</u> [s 235(2)] (*my emphasis*). Therefore, given that the respondents gazetted the enabling Act for the NPRC and appointed its staff only midway through the ten year period after the effective date, it cannot be argued rationally that s 324 of the Constitution was complied with. This is the provision that requires diligent and timeous performance of constitutional obligations. In short, there was a serious breach of a constitutional obligation by the respondents.

[v] *Conclusion*

[55] The application of all the canons of construction considered above returns the same result. It is my conclusion that the reference to ten years in s 251(1) of the Constitution is in relation to the life of the NPRC after its establishment after the effective date, and not the period within which it must be established. Unquestionably, it must have been established immediately after, or as soon as practicable, after the effective date in line with s 324 of the Constitution.

[56] In the result, except for the prayer for costs, there is nothing wrong or irregular in the nature, form or substance of the relief sought by the applicant. But with costs, it is now established practice to make no award in public interest litigation, which this case by all means is. Accordingly the following order is hereby granted:

1 The National Peace and Reconciliation Commission that is established in terms of s 251 of the Constitution shall have tenure of life of ten years deemed to have commenced on 5 January 2018 with the gazetting as law of the National Peace and Reconciliation Act, *Cap 10:32*.

2 There shall be no order as to costs

13 March 2019

Tendai Biti Law, applicant's legal practitioners
Civil Division of the Attorney-General's Office, first and second's legal practitioners