ZIMBABWE LAWYERS FOR HUMAN RIGHTS

Fostering a culture of human rights

PUBLIC INTEREST LITIGATION AND SOCIAL CHANGE IN ZIMBABWE



Published with the support of

Norwegian Embassy
Pretoria

PUBLIC INTEREST LITIGATION AND SOCIAL CHANGE IN ZIMBABWE

© Zimbabwe Lawyers for Human Rights 2021

ISBN - 978-1-77921-966-4

EAN - 9781779219664

Edited by Jason Brickhill

Co-edited and Project Coordination by Fiona Iliff

Copy-edited by Beverley Hargrove

Designed by Pascal Madiri and Kumbirai Mafunda

ABOUT ZLHR

Zimbabwe Lawyers for Human Rights (ZLHR) is a non-profit law-based human rights organisation that was established in 1996. Its core objective is to foster a culture of human rights in Zimbabwe and encourage the growth and strengthening of human rights at all levels of Zimbabwean society through observance of the rule of law. ZLHR is committed to upholding respect for the rule of law and the unimpeded administration of justice, free and fair elections, the free flow of information and the protection of constitutional rights and freedoms in Zimbabwe and the surrounding region. It keeps these values central to its programming activities.

ZLHR holds observer status with the African Commission on Human and Peoples' Rights. It participates actively in the work of committees of SADC Lawyers' Association and has affiliate status with the International Commission of Jurists.

THE MEMBERSHIP

ZLHR is a membership organisation comprising of more than 170 lawyers with a proven track record in, and affinity for human rights protection and promotion. Members are drawn from all provinces of Zimbabwe, and its numbers are steadily increasing. ZLHR members involve themselves in activities of the organisation on the basis of their interest in human rights litigation, legal and rights-based education, research and advocacy. They donate part of their time and services pro-bono to the organisation's activities and programmes, and reinforce the work of ZLHR secretariat to expand its reach throughout the country.

THE SECRETARIAT

The organisation's secretariat operates from three offices located in Bulawayo, Harare and Mutare. ZLHR's legal support extends to all ten provinces through the services of full time lawyers and the support of its member lawyers in private practice. The secretariat is responsible for planning and implementing the core activities of the organisation.

GOVERNANCE

ZLHR's board comprises of 11 members (10 senior lawyers in private practice and an Executive Director in her ex- officio capacity). Members elect a board at the Annual General Meeting. The board comprises of national representatives and regional representatives for Manicaland, Midlands and Matabeleland.

VISION

A sustainable culture of equality, respect for human rights, constitutionalism and the rule of law for a just and democratic society.

MISSION

To protect and promote human rights through litigation, education and advocacy.

VALUES

Professionalism, Independence, Integrity, Inclusivity

AIMS AND OBJECTIVES

- To strive to protect, promote, deepen and broaden the human rights provisions in the Constitution of Zimbabwe.
- To strive for the implementation and protection in Zimbabwe of international human rights norms as contained in sub-regional and international human rights instruments.
- To endeavour to find common ground with and work alongside other Zimbabwean groups, organisations, activists and persons who share a broadly similar concern for, and interest in human rights.
- To liaise and work with other human rights groups wherever situated particularly in Southern Africa, and especially those closely linked to the legal profession.
- To do all other things necessary to promote and protect human rights, the rule of law and separation of powers in Zimbabwe and the region.

PROGRAMMES

Research and Advocacy

Constitutional and Human Rights Litigation

Institutional Strengthening, Capacity Building and Rights literacy

CONTACT DETAILS

Harare Office (National coverage) Kodzero-Amalungelo House, 103 Sam Nujoma Street, Harare Phone: (+263 242) 705370/708118/764085 Fax: (+263 242) 705641

Mutare Office (Covering Manicaland and Masvingo) Winston House, Ground Floor, Cnr 1st Avenue / 2nd Street, Mutare. Phone: (+263 20) 60660

Bulawayo Office (Covering Matabeleland, Midlands and Bulawayo) 3rd Floor Barclays Building, 8th Avenue & JNM Nkomo Street, Bulawayo. Phone: (+263 29) 722014

24-Hour Hotlines National: (+263) 772 257 247 Matabeleland/Midlands: (+263) 773 855 635 Manicaland/ Masvingo: (+263) 773 855 718 Email: info@zlhr.org.zw Website: www.zlhr.org.zw Facebook: Zimbabwe Lawyers for Human Rights Twitter: @ZLHRLawyers

CONTRIBUTORS

Advocate Jason Brickhill

Advocate Tererai Mafukidze

Mr Doug Coltart

Advocate Fadzayi Mahere

Dr Justice Mavedzenge

Mr Tendai Biti

Advocate Choice Damiso

Dr Godfrey Mupanga

Mr Blessing Mushohwe

Ms Memory Mafo

Mr McDonald Moyo

Ms Fiona Iliff

Table of Contents

1. INTRODUCTION - *Jason Brickhill* 1

2. THE HISTORY OF PUBLIC INTEREST LAWYERING IN ZIMBABWE AND CURRENT TRENDS – *Tererai R Mafukidze* 6
2.1.Introduction 7
2.2.Conquest 7
2.3.The Early Colonial Legal System 8
2.4.The Greatest Land Case in Britain 10
2.5.The Anti-Slavery and Aborigines' Protection Society and the *Africans'* Case 11
2.6.The Role of Black South African Religious Leaders and Lawyers 13
2.7.The Land is Theirs 16
2.8.The 1960s 17
2.9.Tangwena People and Struggle for Land 21
2.10.The 1970s 25
2.10.1. The Catholic Commission For Justice And Peace 25
2.11.The 1980s 29
2.11.1. *Katekwe* v *Muchabaiwa* 29
2.12.The 1990s 30
2.12.1. CCJP and the Death Penalty Again. 30
2.13.The 2000s 31
2.14.Emerging Trends 32

3. LEGAL STRATEGIES FOR SOCIAL CHANGE - *Doug Coltart* 34
3.1.Introduction 35
3.2.Civic education campaigns 36
3.3.Advice centres and mobile clinics 37
3.4.Engaging Chapter 12 Commissions 40
3.5.Research and advocacy 43
3.6.Social mobilisation and collective action 46
3.7.Conclusion 49

4. PROCEDURAL RULES AND PUBLIC INTEREST LITIGATION IN ZIMBABWE – *Fadzayi Mahere* 51
4.1.Introduction 52
4.2.Procedural rules and public interest litigation 52
4.3.Jurisdiction — constitutional avoidance, subsidiarity and ripeness 53
4.4.Standing in public interest litigation. 55
4.5.Orders of constitutional validity 57
4.6.Costs 58
4.7.Challenges and Opportunities 58

5. A BRIEF REVIEW OF THE JURISPRUDENCE AND LITIGATION FOR THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN ZIMBABWE SINCE 2013 - *Justice Alfred Mavedzenge* 60
5.1.Introduction 61
5.2.Constitutional framework on socio-economic rights 61
5.3.Nature of obligations 61
5.4.Trends in the enforcement of socio-economic rights since 2013 63

5.4.1. Right to shelter . . . 63
5.4.2. The right to water. . . . 66
5.4.3. Right to education . . . 67
5.4.4. Right to social security . . . 68
5.4.5. Right to health . . . 69
5.5.Conclusion and recommendations . . . 70

6. LITIGATION ON FREEDOM OF EXPRESSION, ASSEMBLY, PROTEST AND ASSOCIATION - *Tendai Biti 73*
6.1.Introduction . . . 74
6.2.Lawfare and the defence of human rights in post-independent Zimbabwe . . . 74
6.3.Eclectic and Inconsistent: The Court's Treatment of the Right to Freedom of Expression, Freedom of Movement and Freedom of Association . . . 75
6.3.1. Freedom of Expression . . . 75
6.3.1.1. The Gubbay Era . . . 76
6.3.1.2. The Chidyausiku Era . . . 78
6.3.2. The Right to Freedom of Association and Assembly . . . 82
6.4.Challenges in Constitutional Litigation . . . 84
6.5.Conclusion . . . 85

7. ANTI-IMPUNITY LITIGATION - *Fiona Iliff and McDonald Moyo . . . 86*
7.1.Introduction . . . 87
7.2.What is Impunity? . . . 87
7.3.Impunity in Zimbabwe . . . 88
7.4.International law and impunity . . . 89
7.5.The Zimbabwean Constitution and impunity . . . 90
7.6.Anti-impunity litigation in Zimbabwe . . . 91
7.6.1. The framework for litigation . . . 91
7.6.1.1. Criminal prosecution . . . 91
7.6.1.2. Civil litigation . . . 93
7.6.1.3. Judicial review and *habeas corpus* applications . . . 93
7.6.2. Snapshot of anti-impunity cases . . . 94
7.7.Challenges to successful anti-impunity litigation in the legal framework: Key issues . . . 97
7.7.1. Time limits . . . 97
7.7.2. State Liabilities Act: Execution or attachment of state property in satisfying debts . . . 98
7.7.3. Identification of perpetrators and suing in individual capacity . . . 98
7.7.4. Devaluation of judgment debts . . . 99
7.8.Conclusion . . . 99

8. LITIGATING FOR WOMEN'S RIGHTS IN ZIMBABWE - *Choice Damiso . . . 101*
8.1.Introduction . . . 102
8.2.Background . . . 102
8.3.Opportunities for Litigating Women's Rights in the New Constitution of 2013 . . . 105
8.4.The Actors . . . 107
8.4.1. Zimbabwe Lawyers for Human Rights (ZLHR) . . . 107
8.4.2. Zimbabwe Women Lawyers' Association (ZWLA) . . . 108
8.4.3. Women and Law in Southern Africa (WLSA) . . . 108
8.4.4. Veritas . . . 109
8.5.A Tale of Two Cases . . . 109
8.5.1. *Mudzuru & Tsopodzi* . . . 109
8.5.2. *Ishemunyoro* . . . 110

8.6.Factors Critical for Success in Litigating Women's Rights . . . 112
8.6.1. Research on discriminatory laws and its impact, followed by periodic updates . . . 112
8.6.2. Communication and partnerships with stakeholders at all levels before the filing of proceedings, and after judgment, for advocacy and implementation purposes . . . 112
8.6.3. Making use of the recommendations of international law and the treaty monitoring bodies to support relief sought in litigation . . . 113
8.6.4. Sensitisation of judiciary through capacity building . . . 113
8.6.5. Empowerment of legal defenders . . . 113
8.7.Conclusion . . . 114

9. ELECTORAL LITIGATION IN ZIMBABWE - *Godfrey Mupanga* . . . *115*
9.1.Introduction . . . 116
9.2.Establishment of the Electoral Court . . . 119
9.3.Litigating During the Pre-Election Period . . . 120
9.4.Campaign financing and disclosure requirements . . . 120
9.5.Some proposals for amendment of the laws on election expenses . . . 122
9.6.Voter education . . . 123
9.7.Post-Election Litigation and Matters Arising . . . 126
9.8.A history of election petitions in Zimbabwe . . . 127
9.9.Presidential election petition . . . 128
9.10.Evidence produced to prove electoral malpractices . . . 129
9.11.Interpretation of section 177 of the Electoral Act. . . . 131
9.12.*Locus Standi:* who may be parties in an election petition? . . . 132
9.13.An election petition is a private legal action . . . 133
9.14.Form over substance. . . . 134
9.15.Need for a Comprehensive Review of the Electoral Act . . . 136

10. PUBLIC INTEREST LITIGATION OF CHILDREN'S RIGHTS IN ZIMBABWE - *Blessing Mushohwe. . . 138*
10.1.Introduction . . . 139
10.2.The *Mudzuru* case on child marriages . . . 139
10.2.1. *Locus standi* in *Mudzuru* . . . 140
10.2.2. Reliance on international law . . . 142
10.2.3. Generous, purposive interpretation of constitutional provisions . . . 143
10.3.The *Chokuramba* case on corporal punishment . . . 143
10.3.1. Reliance on international law . . . 144
10.3.2. "Constitutional avoidance": Retrogressive hesitancy by the court . . . 144
10.4.PIL of child rights in others courts . . . 146
10.5.Key players and strategies . . . 147
10.5.1. Use of the same lawyers . . . 147
10.5.2. Appearance as *amicus curiae* . . . *148*
10.5.3. Timing . . . 148
10.6.Challenges . . . 149
10.6.1. Protracted delays . . . 149
10.6.2. Delayed enforcement of Constitutional Court judgments . . . 149
10.6.3. Tactics of "Constitutional avoidance". . . . 149
10.7.Opportunities for further development of PIL of children's rights . . . 150
10.8.Conclusion . . . 150

11. AN OVERVIEW OF ENVIRONMENTAL RIGHTS LITIGATION IN ZIMBABWE -
Memory Mafo and Fiona Iliff . . . *152*

11.1.Introduction . . . 153
11.2.Environmental rights under Zimbabwean Law . . . 153
11.3.Environmental Rights Jurisprudence . . . 158
11.3.1. Wetlands protection . . . 158
11.3.2. Mining challenges . . . 161
11.3.3. Pollution . . . 162
11.3.4. Access to Information . . . 162
11.4.Challenges . . . 163
11.5.Conclusion and Recommendations . . . 164

12. CONCLUSION – *Jason Brickhill* . . . *165*
12.1.Introduction . . . 166
12.2.The Zimbabwean context . . . 166
12.3.Litigation resources . . . 167
12.3.1. Suitable litigants . . . 167
12.3.2. Lawyers . . . 167
12.3.3. Funding . . . 168
12.4.Strategic and tactical lessons . . . 168
12.4.1. Use of multiple strategies alongside litigation . . . 168
12.4.2. Selecting litigants . . . 168
12.4.3. Framing or characterising the case . . . 168
12.4.4. Timing . . . 169
12.4.5. Use of *amici curiae* . . . 169
12.4.6. Persistent enforcement and resisting backlash . . . 169
12.5.The future . . . 169

TABLES OF AUTHORITIES . . . 171

CHAPTER 1

1. INTRODUCTION - *Jason Brickhill*



Advocate Jason Brickhill

Advocate Jason Brickhill is a constitutional law expert, in practice and academia. He is the Director of Litigation at the Socio-Economic Rights Institute of South Africa (SERI) and a practising advocate at the Johannesburg Bar. He has appeared in a wide range of matters in the South African courts, including the Constitutional Court, in particular in the areas of constitutional, human rights, administrative and labour law. He teaches in human rights law at the University of Oxford and is an Honorary Research Associate at the University of Cape Town. He has published widely on constitutional and human rights law.

The use of law to pursue social change is a global phenomenon. The fundamental role of the legal system in society has received significant attention across academic disciplines and from civil society actors that have adopted legal strategies to pursue their objectives. There is rich global literature on the particular role of litigation as a strategy for social change.[1] Although dominated for some time by contributions from the United States, recent comparative works,[2] as well as valuable studies from the Global South,[3] have increasingly emerged. In addition to scholarly works, civil society organisations around the world have conducted important studies on the role of strategic litigation in various global and local contexts.[4] This study seeks to bring the Zimbabwean experience into an increasingly global conversation. It was organised and produced by Zimbabwe Lawyers for Human Rights (ZLHR), which has been responsible for much – though not all – of the most significant public interest litigation conducted in Zimbabwe since independence.

In this work, we understand public interest litigation to refer to "the use of litigation to pursue objectives that extend beyond the interests of individual litigants in a case and that are normatively justifiable".[5] In Zimbabwe, public interest litigation has long been deployed, both to resist colonial oppression and to advance social justice and the rule of law in post-independence Zimbabwe. Although **Tererai Mafukidze's** contribution in **Chapter 2** traces the history of public interest litigation in Zimbabwe to the time of colonial conquest, providing the vital context for current events, this volume focuses on developments following the adoption of the current Constitution of Zimbabwe in 2013.[6]

The Constitution was the product of the brief Government of National Unity from 2009, formed in the aftermath of the 2008 elections. It was drafted by the Constitution Parliamentary Select Committee (COPAC), received the backing of the major political formations, and was approved by 94.5% of the people who voted in a 2013 national referendum. The Zimbabwean Constitution is a modern and progressive text, though it does contain several idiosyncrasies designed to deal with specifically Zimbabwean conditions (such as the provisions on land and the recognition of war veterans). As with all modern constitutions, it drew inspiration from other constitutional texts and international instruments. The final product is most similar to the South African Constitution of 1996 and the Kenyan Constitution of 2010. These three African constitutions may now be seen as cousins within a legal family, and it is likely that courts in these countries will increasingly look to each other for comparative resources. This resource on Zimbabwean public interest lawyering should accordingly be of particular interest in those jurisdictions, but also in other constitutional democracies around the world. Zimbabwe is a constitutional democracy in the broad sense, but subject to significant constraints and threats. In a recent comparative study

1 Michael Ramsden and Kris Gledhill "Defining Strategic Litigation" (2019) 38 *Civil Justice Quarterly* 407.

2 Helen Duffy *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018) Hart; Lisa Vanhala *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (2011) CUP; Lisa Vanhala and Jacqui Kinghan "Literature Review on the Use and Impact of Litigation" (2018) Public Law Project.

3 Octávio Ferraz *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (2020) CUP; Jason Brickhill *Public Interest Litigation in South Africa* (2018) Juta; Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (2017) CUP.

4 Open Society Justice Initative "Strategic Litigation Impacts: Insights from Global Experience" (2018) Open Society Foundations; Steven Budlender, Gilbert Marcus and Nick Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) Atlantic Philanthropies; Socio-Economic Rights Institute of South Africa, "Public Interest Legal Services in South Africa: Project Report" (2015) RAITH Foundation, Ford Foundation.

5 Jason Brickhill (ed) *Public Interest Litigation in South Africa* (2018) Juta 6.

6 Constitution of Zimbabwe Amendment (No. 20) Act 2013, hereafter "the Constitution".

of contemporary constitutional democracies, including an in-depth case study of Zimbabwe, Roux develops a typology of four "ideal types" of judicial review regime, through which to better understand jurisdictions across the world.

The four types are democratic legalism, democratic instrumentalism, authoritarian legalism and authoritarian instrumentalism.[7] Roux characterises Zimbabwe as a regime of "authoritarian legalism".[8] This type of regime has two main features. First, political authority is based on an asserted need to subordinate the democratic system to some overarching and democratically non-negotiable conception of the public interest. Secondly, despite the democratic nature of the system being compromised, the law's authority is based on a public commitment to separability of law and politics. Put simply, a jurisdiction of this type is a qualified democracy but, at least in public, the government must appear to take the law's authority seriously.

Roux goes on to argue that under authoritarian legalism "judicial review continues to operate, and may, in fact, flourish in certain areas, but is ineffective in the crucial sense that it provides few resources for proponents of a more open and competitive democratic system to challenge authoritarian power holders".[9] The pages of this volume reflect, time and again, how this accurately describes Zimbabwean experiences across diverse areas of life and legal practice. As will appear from the chapters in this volume, the current trends are mixed, with important victories alongside heavy setbacks.

Chapter 2 on the **history of public interest lawyering in Zimbabwe** by **Tererai Mafukidze** traces the use of law from conquest, explaining in compelling detail how the law was imposed on black people living in modern-day Zimbabwe, and how skewed the law and the courts were against them. He recounts the rare but important efforts to resist colonial repression by approaching the courts, including important cases concerning claims to the land itself. Moving through the decades, Mafukidze covers the changing constitutional terrain following the Unilateral Declaration of Independence by Southern Rhodesia in 1965 and those aspects of the struggle against white minority rule that reached the courts. He identifies important resistance actors, such as the Tangwena people and later the Catholic Commission for Justice and Peace. Moving into the 21st century, Mafukidze identifies the weakening of the independence of the courts in the 2000s and the challenge that this has presented. His chapter ends at the current moment, in 2021, setting the scene for the remaining contributions in the volume.

In **Chapter 3** on **legal strategies for social change**, **Doug Coltart** situates his contribution in the contemporary terrain in which Zimbabwe's public interest lawyers and civil society operate. He identifies several strategies for social change that involve law, including civic education campaigns, advice centres and mobile clinics, engaging commissions under Chapter 12 of the Constitution, research and advocacy, and social mobilisation and collective action. In each case, Coltart provides examples of what has been attempted and what seems to have worked, drawing lessons for the future. The chapter provides a crucial strategic and tactical dimension to the area-specific chapters in the rest of the volume, offering valuable insights from theory and practice.

Fadzayi Mahere, a leading constitutional law advocate, offers insight into the impact of **procedural rules** on

7 Theunis Roux *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (2018) CUP 79.

8 *Ibid* 193–241.

9 *Ibid* 81.

public interest litigation in Zimbabwe in **Chapter 4**. She covers the general effect of procedural rules on either facilitating or impeding public interest lawyering. She begins with the issue of jurisdiction, noting the worrying tendency of the Constitutional Court to use doctrines of constitutional avoidance, subsidiarity and ripeness to avoid deciding important constitutional issues. She then considers the issues of standing, orders of constitutional invalidity, and costs, noting similar unfortunate judicial trends in relation to each of these issues. Ultimately, Mahere offers important thoughts on the challenges and opportunities faced by public interest lawyers in seeking to establish procedural rules in the courts that will facilitate constitutional justice.

Each of the remaining chapters in this volume then focuses on a particular area of the law. We begin in **Chapter 5** with **Justice Mavedzenge's** contribution on the early **socio-economic rights** jurisprudence of the courts under the new Constitution. Having discussed in general terms the nature of the obligations imposed by the Constitution in respect of socio-economic rights, he turns to the developments in relation to specific rights. Mavedzenge discusses important recent jurisprudence on the rights to shelter, water, education and social security. Ultimately, he notes that the early jurisprudence (along with the many unreported orders and decisions of lower courts) represents important progress, but that more is needed to enforce the positive obligations of the state actually to provide socio-economic goods.

Chapter 6 discusses civil and political rights. In particular, **Tendai Biti** writes on the litigation on the rights to **freedom of expression, assembly, protest and association**. He notes that these rights have tended to come under assault in Zimbabwe in the contemporary moment. In early post-independence decisions, the Supreme Court stepped in to protect these rights in some important early cases. However, since the early 2000s the courts, especially the apex court, have generally neglected to build on those early foundations and have failed to step in on several occasions where these rights were infringed by laws or executive action.

Relatedly, **in Chapter 7**, **Fiona Iliff** and **McDonald Moyo** pivot to the associated area of **anti-impunity litigation**, which has been an important aspect of ZLHR's work. Having conceptualised impunity, the authors explain the context of pervasive impunity in Zimbabwe. They then analyse Zimbabwe's international legal obligations in respect of impunity, binding Zimbabwe at international law. At the domestic level, the Constitution also sets itself against impunity. Important anti-impunity litigation has been attempted, notably by ZLHR, with mixed results. This has included criminal prosecution, civil damages claims and judicial review and *habeas corpus* applications. Iliff and Moyo trace the case law to date. They identify a number of key challenges that impede anti-impunity litigation, including statutory time limits, the limitations of the State Liabilities Act in respect of the execution or attachment of state property to satisfy government debts, the challenge of identifying perpetrators and suing in one's individual capacity, and the problem of the devaluation of judgment debts even when successful.

Choice Damiso, writing **Chapter 8** on litigating **women's rights**, captures the enduring impact of patriarchal practices and laws in Zimbabwe. Noting that the Constitution marks an important repudiation of patriarchy and entrenches important new protections for women's rights, Damiso analyses what has been achieved and sets out opportunities for future progress. She identifies, as key role players in this field, ZLHR itself, the Zimbabwe Women Lawyers Association (ZWLA), Women and Law in Southern Africa (WLSA) and Veritas, describing briefly the role that each has played. She then turns the focus to the two landmark cases so far decided by the apex court, the first, a successful case tackling child marriage and the second an unsuccessful matter relating to matrimonial property. Damiso argues that the Zimbabwean experience to date demonstrates that crucial factors for successful

litigation on women's rights include research on discriminatory laws and their impact, communication and partnerships with stakeholders before launching cases, using international human rights law to bolster claims, judicial education and empowerment of legal defenders.

Chapter 9 on **electoral litigation** by **Godfrey Mupanga** generally reflects the failings in this area of practice to date, an overtly political area in which judicial independence has been most directly challenged. Mupanga notes the establishment of the Electoral Court and describes litigation during pre-election periods, touching on campaign finance and disclosure requirements. He identifies some important proposals for change relating to the laws on election expenses and addresses voter education. Mupanga then turns to the particularly fraught area of post-election litigation, sharing a brief history of election petitions in Zimbabwe to date. He focuses particularly on the unsuccessful presidential election petitions, honing in on the barriers of the judicial approach to evidence, process and standing in election petitions. The courts' approach has tended to impede successful challenges to flawed electoral processes, often placing form over substance and avoiding the actual issues. He concludes that a comprehensive constitutional review of electoral legislation is required.

Blessing Mushohwe addresses litigation on **children's rights** in **Chapter 10**. He acknowledges the new Constitution's safeguards for children's rights and traces how key cases have played out so far. In particular, he discusses an important, and successful, case concerning child marriage, which is contrasted with a retrogressive decision on corporal punishment. Mushohwe distils important strategic factors that increase prospects of success including using the same lawyers so that there is expertise and continuity of strategy, using *amicus curiae* interventions and timing of litigating. He also identifies as key challenges the issue of protracted litigation delays, delayed enforcement of judgments, and – as in other chapters – the judicial tactic of constitutional avoidance that prevents the determination of key issues.

Finally, **Chapter 11** on **environmental rights litigation** by **Memory Mafo** and **Fiona Iliff** covers a fast-developing area of public interest law that carries pressing contemporary relevance. Mafo and Iliff set out the legal framework for environmental rights in Zimbabwe. Focusing on environmental rights litigation conducted so far, the authors discuss significant cases brought to protect wetlands, to challenge mining activities, to prevent or remedy pollution, and to secure access to information regarding developments affecting the environment. Although the legal framework is now fairly strong on paper, Mafo and Iliff identify as key challenges the patchy compliance with environmental laws, lack of consolidation of relevant laws, limited number of organisations able to tackle these matters, general disrespect for the rule of law (especially by political elites) and the still limited environmental rights jurisprudence. Despite these challenges, several successful outcomes have been achieved, laying a foundation for future efforts.

This volume thus offers insights into the underexplored Zimbabwean experience of public interest litigation under the new Constitution. In doing so, it provides opportunities for reflection, application, and directions for future research on harnessing the law as a tool to pursue social change in Zimbabwe, the region and the world.

CHAPTER 2

2. THE HISTORY OF PUBLIC INTEREST LAWYERING IN ZIMBABWE AND CURRENT TRENDS – *Tererai R Mafukidze*



Advocate Tererai Mafukidze

Advocate Tererai Mafukidze has over 25 years' experience in the legal profession. He is an advocate in Zimbabwe and South Africa, and a member of Zimbabwe Lawyers for Human Rights, with expert knowledge and expertise of public interest litigation in the higher courts. In addition to his work at the bar, he has worked as the Director of the Southern African Legal Information Institute (SAFLII) & Co-ordinator of the Southern African Chief Justice Forum. He has worked as a researcher and written papers and speeches for retired Chief Justices Sandile S. Ngcobo and Mogoeng Mogoeng. He also teaches part-time at the University of Zimbabwe.

2.1. Introduction

In this chapter, I take a long view of the history of public interest litigation in Zimbabwe beginning with litigation challenging the conquest of local peoples by force and subterfuge. I trace this history from the early conquest period to the decades of the 1960s, 1970s and 1980s, ending at the contemporary period. In pre-independence public interest litigation, the majority of black people were strangers in white courts. They did not enjoy many rights. They had little protection. They suffered numerous injustices. They did not have many lawyers of their kind to stand up for them. As a result, most black people did not see courts of law as places that dispensed justice without fear, favour or prejudice. Indeed, numerous cases bear testimony to the injustices meted out by courts to black accused persons and litigants and to anyone opposing the racist regime. This trend is evident from the beginning of occupation to independence in April 1980. The courts and the judges were not independent and impartial dispensers of justice. As a result, limited public interest litigation initiated by black Zimbabweans happened during the period. In independent Zimbabwe, constitutional reforms and more independent courts (at least initially) increased the prospects of successful public interest litigation but new challenges have emerged, some with echoes of the past.

2.2. Conquest

On 12 September 1890, the Pioneer Column raised the Union Jack on what was to become Fort Salisbury (present-day Harare), marking the colonisation of Mashonaland by the British South Africa Company ("BSAC") on behalf of the British Crown. The Pioneer Column was a conquest force created by Cecil John Rhodes who controlled the BSAC. The BSAC had been granted a Royal Charter by the Queen on 29 October 1889. The Royal Charter gave Rhodes the right to commence colonisation of present-day Zimbabwe. The use of a chartered company was justified on the basis that it was inexpensive and relieved the British Crown and the British taxpaying public from huge expenditure. The Empire could be expanded at the expense of the private shareholders of the chartered company.[10]

For the occupation to happen, Rhodes knew that it was necessary to have some kind of agreement with the local sovereign, Lobengula. Lobengula ruled Matabeleland and was considered to hold the Mashona and "Makalaka" (MaKaranga) tributaries.[11] Queen Victoria had in 1888 recognised Lobengula as the Sovereign of both Matabeleland and Mashonaland.[12] Rhodes sent his emissaries, Charles Dunnell Rudd, Rochfort Maguire and Francis Robert "Matabele" Thompson, to negotiate a concession.[13] Rhodes enjoyed the support of John Moffat, the son of Rev Robert Moffat of Kuruman Mission, who was friends with Lobengula's father, Mzilikazi. On 30 October 1888, Lobengula assented to the Rudd Concession. It was on the back of this concession that Rhodes sought the Royal Charter and permission to enter Mashonaland. The actual text of the Rudd Concession granted Rhodes.

10 C Palley *The Constitutional History and Law of Southern Rhodesia 1888-1965* (1966) Clarendon Press, Oxford 16, 24.

11 *Ibid* 26.

12 *Ibid* 28.

13 Matabele Thompson has written fascinating memoirs published posthumously which contain details of the negotiations. *Matabele Thompson: An autobiography* (1977) ed Nancy Rouillard, Rhodesiana Reprint Library, Books of Rhodesia.

> "… the exclusive charge over all metals and minerals situated and contained in my Kingdoms, principalities and dominions together with full power to do all things they may deem necessary to win and procure the same."[14]

Lobengula soon realised that the concession did not just grant Rhodes power over minerals but was to be used to enter and occupy Mashonaland. A Boer delegation visited Lobengula and informed him that he had sold his country. This caused Lobengula great consternation.[15] Lobengula dispatched two of his *indunas*, Bhabhanyana Masuku and Mtshede Ndiweni, accompanied by EA Maund, with Rev Johan Colenbrander as interpreter, to England to inform the Queen that he had repudiated the Rudd Concession.[16] Their efforts were unsuccessful. The Queen went ahead and issued the Royal Charter and ignored Lobengula's protestations. Rhodes paid off some of his most vocal opponents, including Maund who had accompanied the two indunas. One of the most vocal opponents of Rhodes was the Anti-Slavery and Aborigines' Protection Society ("APS"), an organisation that would become very important when the biggest public interest litigation over Southern Rhodesia came before the Privy Council. According to Samkange, its chief spokesman, Rev John MacKenzie, was

> "pacified by the disclosure of the details regarding atrocities perpetrated by Lobengula. They were led to expect that the impending Chartered Company rule would be the dawn of civilization in the dark continent and they were given assurances that the Chartered Company would not permit Africans to drink European liquor and would suppress the slave trade, which did not exist in Lobengula's country anyway."[17]

After Lobengula had failed to stop Rhodes and the occupation of Mashonaland in 1890, the BSAC instigated an invasion of Matabeleland in 1893 and occupied Bulawayo on 4 November 1893. Lobengula fled his capital during the attack. The occupation of Matabeleland meant the entire present-day Zimbabwe was now under British rule. In 1895, the Mashonaland and Matabeleland territories were named Southern Rhodesia.Conquest, loss of land and subjugation of black people was the basis for the biggest ever public interest case in the then Southern Rhodesia.

2.3. The Early Colonial Legal System

On conquest, the local peoples were governed by customary law systems while Europeans in Southern Rhodesia were yet to establish a European-style judicial system. Upon occupation of Mashonaland, Rhodes' best friend, the medical doctor Leander Starr Jameson, assumed the position of Chief Magistrate. Under him were a dozen ex-Pioneer Column police officers, appointed magistrates across the territory. As soon as the BSAC established a rudimentary administration, its first Administrator of Mashonaland, AR Colquhoun, decreed by Administrator's Proclamation No. 1 of 28 September 1890 that the laws of the Cape Colony (South Africa) were to be applicable in the new territory. The inappropriately named South Africa Order-in-Council of 1891 authorised the High

14 The full text of the Rudd Concession is reproduced in Stanlake Samkange's book *Origins of Rhodesia* Frederick A Praeger 78-79.

15 Stanlake Samkange *Origins of Rhodesia* Frederick A Praeger 88.

16 *Ibid* at 89; MF Clarke with Pathisa Nyathi *Lozikeyi Dlodlo: Queen of the Ndebele* (2010) Amagugu Publishers 73.

17 Samkange (n 15 above) 125.

Commissioner for South Africa to establish by proclamation a legal system in the new territory of present-day Zimbabwe. Acting in terms of this power the High Commissioner, by Proclamation of 10 June 1891, established a system of magistrates' courts in Mashonaland.[18] From 1890 to 1894 there was no High Court in Southern Rhodesia. As Chief Magistrate, Jameson adopted the powers of a High Court judge. He had no legal training. Jameson, as the Administrator and also Chief Magistrate, possessed the jurisdiction of a superior court of record with full jurisdiction in all cases, both civil and criminal, and was also empowered to hear appeals from Magistrate's Courts and to review their proceedings. He was effectively the highest local court. The early cases involved serious murders that happened in the territory, like the cases of Louw Andries and "Zulu Jim".

After the 1893 war, the BSAC's administration was extended to Matabeleland and, on 18 July 1894, a Matabeleland Order-in-Council was formally issued. This applied to all territories which were later to comprise Southern Rhodesia, namely Matabeleland, Mashonaland, and Manicaland. Under the Order-in-Council, a High Court manned by one judge was created. It had civil and criminal original and appellate jurisdiction. It was to apply Cape substantive and procedural law as at the commencement of the Order, except in civil cases concerning Africans[19] (customary law). An appeal from the High Court was to lie in the Cape Supreme Court in South Africa in civil cases where the disputed amount was in excess of £100.

The Rhodesian judiciary was small, conservative and heavily allied with the BSAC. The first High Court judge was Joseph Vintcent. On 5 November 1894, Vintcent took his oath of office at the official opening of the High Court. His only case on the roll that day was the admission of Thomas Scanlen as a legal practitioner. The law firm Scanlen founded was to become one of the most prolific in defending nationalists. On 30 July 1896, Watermeyer was appointed by the BSAC to be the second High Court judge. Vintcent was based in Bulawayo while Watermeyer was based in Harare.

In 1898 the Southern Rhodesia Order in Council was passed. It provided for, among other things, a High Court with appeals to, and reservation of points of law for, the Cape Supreme Court in South Africa, and ultimately an appeal to the Judicial Committee of the Privy Council in the United Kingdom.[20] The early work of the two judges was not without controversy. Much of the controversy involved the unjust manner in which Africans were tried and punished while whites virtually went scot-free for crimes committed against Africans.[21] In 1910 the Union of South Africa was created and the Appellate Division set up in South Africa. Appeals from the Southern Rhodesia High Court then went up to the Appellate Division in South Africa, with further appeal, by leave, to the Privy Council in the United Kingdom. Appellants were entitled to choose between the Appellate Division and

18 The Proclamation declared that the law to be administered shall as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope provided no Act passed after this time by the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.

19 "Africans" was the term used at the time. Today we would refer to black Zimbabweans.

20 All the courts were required, so far as not inapplicable, to apply the law of the Cape Colony as at 10 June 1890, with a special provision providing for the application of native customary law. No subsequent statute of the Cape Colony was to be of effect unless specifically applied to Southern Rhodesia.

21 Their decisions reflected the interests of the Pioneer community. One of the early legal complications arose from cases that involved natives. The British colonial policy on paper required that justice be dispensed according to law. Until 1899, Rhodesian High Court trials were heard by one of the two judges and three assessors. However, the European public pushed for trial by jury, which they said they were accustomed to. As a result, trial by jury was introduced for both black and white. For one to serve as a juror, one had to have, among other things, a certain level of education, private ownership of property, and be a voter. This obviously excluded all black people from consideration.

the Cape Provincial Division until 1931. In 1938, the Rhodesia Court of Appeal was created. It heard criminal appeals if the appellant elected not to appeal to the Appellate Division in South Africa. Civil appeals remained the exclusive domain of the Appellate Division until the Federal Supreme Court was created in 1953. Southern Rhodesia finally got its own final Appellate Division of the High Court of Southern Rhodesia (renamed Rhodesia in 1965) after the break-up of the Federation of Rhodesia and Nyasaland at the end of 1963. Throughout this period a final appeal lay to the Privy Council in London until it was abolished during the mid-60s constitutional upheavals.

2.4. The Greatest Land Case in Britain

The BSAC, in terms of the Royal Charter, administered the territory on behalf of the British Crown, initially for a period of 25 years, expiring in 1914. The company had its own commercial interests. The settlers who came into Southern Rhodesia also had their own interests as settlers. They wanted to live in a prosperous territory and enrich themselves. The Crown at this point maintained its control over certain administrative and legislative issues. The conquered Africans were virtually powerless, especially after being crushed during the 1896-7 *Chimurenga* Rebellion. Tensions between the BSAC and the settlers were inevitable from the beginning. The grievances grew as the expected gold fields proved illusory. The company's failure to protect settlers who were killed and injured during the *Chimurenga* did not help. To try and smooth over differences, the Crown introduced legislative measures in 1898 to create a body that contained representatives of the settlers, the Crown and the BSAC. However, tensions continued to grow.

The bitterest point of contention was what was called "unalienated land". The BSAC claimed that it owned the land. As at 1914, land in Southern Rhodesia was divided into three categories: (a) land alienated to white men; (b) land unalienated to white men but occupied by Africans; and (c) the Native (African) Reserves, which were also called "unalienated" land. The white men occupied 21,000,000 acres, while Africans occupied 70,000,000 acres. The BSAC laid claim to the 70,000,000 acres occupied by Africans.[22] The BSAC claimed this land occupied by Africans belonged to it as a commercial asset, rather than an administrative one. As JH Harris of the Anti-Slavery and Aborigines' Protection Society (APS) explained:

> "This claim was advanced to the exclusion of the British Crown, whose forces were called to the aid of the Chartered Company on at least two occasions, to the exclusion of the settlers, who had expended vastly more time and money in developing the country than the Chartered Company, and to the exclusion of the pre-existing and well-defined native laws and customs, which by its Charter the Company was, and is, bound to observe."[23]

This simmering dispute came to a head at the Bulawayo Conference of 1907. Sir Charles Coghlan, a Bulawayo lawyer, member of the Legislative Council and future Premier of Southern Rhodesia, raised this matter with the directors of the BSAC and its attorney. At the meeting Dr Starr Jameson maintained that the unalienated land belonged to the BSAC as a commercial asset.

22 JH Harris *Chartered Millions* APS 133.

23 *Ibid* 134.

Aggrieved, the Legislative Council of Southern Rhodesia passed a resolution on 17 April 1914 challenging the claims of the BSAC to the land.[24] As a result of this resolution, the Queen passed an Order-in-Council dated 16 July 1914 referring the resolutions to the Privy Council. The preliminary hearing was then held by the Privy Council on 4 August 1914. The First World War had just started. The Privy Council finally held formal hearings from 16 April 1918 until 2 May 1918. The Privy Council delivered its Report to the Queen (technically not a judgment) on 29 July 1918. It had held that the unalienated land belonged to the Crown.[25] Leslie Scott KC, MP and Stuart Bevan, KC instructed by Messrs Morgan, Price & Co represented the Africans before the Privy Council.

2.5. The Anti-Slavery and Aborigines' Protection Society and the *Africans'* Case

This case was described as "The Greatest Land Case in British History: The Struggle for Native Rights in Rhodesia before the Judicial Committee of His Majesty's Privy Council". This description is the title of a booklet issued by John H Harris, the leader of the Anti-Slavery and Aborigines' Protection Society in London. On the face of the booklet is an extract from the report of the Privy Council which describes the position of the Africans before the Privy Council as follows:

> "*By the disinterested liberality of persons in this country their Lordships had the advantage of hearing the case for the natives who were themselves incapable of urging, and perhaps unconscious of possessing, any case at all*. Undoubtedly this enquiry has thereby been rendered more complete." (Emphasis added)

The "disinterested liberality of persons in this country" meant organisations like APS. In his booklet, Harris describes why the APS took up the case. He states that it was because the Committee of APS had been warned that the issues arising out of the Rhodesian Reference before the Privy Council "included a threat to native races in the British Commonwealth more grave than anything within living memory".[26] Harris states further that after taking legal advice, the Committee had come to the "unanimous conclusion that the Society had no alternative: the case for the natives, no matter at what cost, must be taken up by the Society".[27] The preparation for the *Africans'* case took nearly four years and it meant a journey to Matabeleland, Mashonaland, and the South African territories, to which this chapter will revert. The gathering of evidence to support the *Africans'* case was so dangerous that John Moffat warned JH Harris that if Dr Jameson knew about Harris's visit to Southern Rhodesia for this purpose he may well murder him.[28]

24 *Ibid* 138.

25 The Privy Council that heard the matter consisted of Earl Loreburn, Lords Dunedin, Atkinson, Sumner and Scott Dickson. The BSAC was represented by The Lord Advocate (The Rt Hon JA Clyde KC), Sir Erle Richards KC, Mr CH Tredgold KC, and Sir Hamar Greenwood, instructed by Messrs Coward & Hawksley, Sons & Chance. The Crown was represented by The Attorney General (The Rt Hon Sir Frederick Smith, Bart, KC, MP (later on became Lord Birkenhead), The Solicitor General (The Rt Hon Sir Gordon Hewart, KC MP), Mr JH Cuncliffe KC, Mr GAH Branson, instructed by the Treasury Solicitor (Law Courts Branch). The Rhodesian Legislative Assembly (White Settlers) were represented by Mr PO Lawrence KC, The Hon Frank Russell KC, Mr JWM Holmes and Mr HH Phear, instructed by Messrs Charles Russell & Co.

26 JH Harris *The Greatest Land Case in British History* APS 2.

27 *Ibid* 2.

28 Correspondence quoted by Clarke & Nyathi in *Lozikheyi* 259.

Harris also addressed the issue of legal costs incurred in bringing the *Africans'* case before the Privy Council. He disclosed that the APS had incurred legal costs liabilities of £6,000 to £7,000. He noted that the costs of the BSAC were paid from Company funds and that of the Crown from Treasury, while the costs of white settlers of Rhodesia were paid from the Administration funds as a result of a resolution of the Legislative Council. Harris underlines the inequity of the situation of the Africans thus:

> "No provision has been made for the natives from the above fund, nor at any time has any offer been made either by the Crown, the settlers or the Company to assist in defraying the costs. The revenue from which the case of the white settlers is defrayed averages about £750, 000 per annum. Towards this revenue the natives provide all the direct taxation and an appreciable share of the indirect taxation, making together nearly £300, 000."

In his view, it was unfair that Africans were placed in this position. He went on to note that if the Crown or the Africans in the case only succeeded in establishing a right to lands the Africans in fact occupied, there was reason to believe that there would be a sum of not less than £100,000 due to be refunded for "rent" etc, irregularly levied since 1914. The APS held the view that once the Privy Council agreed to accept a statement of the Africans' Case the costs should be regarded as a legitimate charge upon public funds.

This was because: (a) it would only be right that native taxpayers should in the matter of costs be placed on the same footing as the white taxpayers; (b) a decision of the UK Secretary of State to exclude Africans from the resolution of the Rhodesian Legislative Council would be to declare in effect that the 750,000 Africans are not a part of the "inhabitants and people" of Rhodesia—which would be unjust and absurd; and (c) that if it were held that for any reason, the black and indigenous people did not possess an equal claim to that of the immigrant white settlers to charge their costs to the revenue, of which each provided roughly equal shares, then it was urged that costs should be regarded as a legitimate charge upon the "rents" irregularly levied since 1914 and now believed to be in a suspense account.[29] Harris also disclosed that the Secretary of State, Lord Harcourt, had forbidden any appeal to African chiefs to pay all or any of the costs of their case.

That the costs of the case should be reconsidered emerged from the following facts now established: "(a) that the natives had a case, (b) that they had been forbidden the opportunity to pay costs, and (c) the costs of the 26,000 white settlers only [were] a charge upon the revenues of Rhodesia to which Africans contributed nearly half".[30] The APS undertook to take up the question of African legal costs which, in the opinion of the Committee and its advisers, were to be treated as a Public Charge.[31] This fight continued on the floor of the British Parliament in 1920, as legislators challenged the decision of the British Government to treat Africans unfairly as regards the costs. The support for the African Case was much wider than has often been stated. It was also unique for the period.

29 Harris (n 26 above) 4-5.

30 *Ibid* 5.

31 *Ibid* 8.

2.6. The Role of Black South African Religious Leaders and Lawyers

The loss of land by Africans was the defining moment of colonial rule. With it came the collapse of the Ndebele Kingdom. The loss of land did not go uncontested, with litigation deployed to resist. The land question in Southern Rhodesia in the early 1900s attracted the attention of leading black South African lawyers.[32] One of the first to be involved in the matter was Alfred Mangena, trained as a barrister at London's Lincoln's Inn. While in England, Mangena had been involved in bringing cases from South Africa before the Privy Council.[33] On 1 July 1908, Mangena was called to the English Bar. He was the first African born in South Africa admitted as a barrister.[34] In 1910, Mangena returned to South Africa and settled in the Transvaal where he sought admission as an attorney. The Law Society of the Transvaal opposed his application. One of the grounds of opposition was the undesirability of creating a "class of native practitioners". The court dismissed the opposition and admitted Mangena.[35] Mangena established his own law firms in Johannesburg and Pretoria. His services were much sought after.

The coalition of forces formed around the land issue was an impressive attempt to influence events. Land was the central grievance. Nyamande (who laid claim to the Ndebele throne) was able to draw on a range of sophisticated allies.[36] He had managed to draw in Zulu politicians, South African Native National Congress (SANNC) lawyers and Ethiopian church leaders like Rev DP Makgatho. He had also drawn in Ndebele teachers, ministers, migrants and South African settlers in Rhodesia who wanted to acquire land and were prepared to attach themselves to the idea of a Ndebele state. He adds:

> "In this way the grievances of the Ndebele nation were expressed in petitions of startling modernity and even represented at the Versailles Conference by the Ethiopian church chaplain to the South African National Congress, Reverend Ngcayiya".[37]

Ranger notes that the recruitment of South African politicians to further the Southern Rhodesian cause was not started by Nyamande but by European missionaries.[38] When the 1914 Privy Council hearings into the Southern Rhodesian land question started, Rev AS Cripps and other missionaries working with the APS were anxious to have Africans represented by lawyers at the hearings. They turned to the South African delegation that was in Britain to protest against the Native Land Act of 1913 which had been passed in South Africa. As Ranger notes:

> "In April 1914, these South African leaders joined with the missionaries in a petition to the Privy Council setting out the claim of Rhodesian Africans to ownership of the land."[39]

32 T Ngcukaitobi *The Land Is Ours* (2018) Penguin Books.

33 *Ibid* 87-89.

34 *Ibid* 97.

35 *Ibid* 99-101.

36 TO Ranger *Revolt in Southern Rhodesia 1896-97* Northwestern University Press 372-3.

37 *Ibid* 373.

38 TO Ranger "The Rise of Modern Politics in Southern Rhodesia" in E Stokes and R Brown (eds) *The Zambesian Past: Studies in Central African History* Manchester University Press 185.

39 *Ibid* 185.

The signatories of the petition included Rev John Langalibalele Dube, the President of the SANNC, Rev Walter Rabusana and Sol Plaatje. Rev Dube intended to travel to Southern Rhodesia thereafter and make enquiries amongst the Africans on whether any of them wanted to claim the unalienated land on behalf of the African population, in their collective or tribal capacity, "or even ascertain whether any of the natives, who from their position as indunas of the late Lobengula or otherwise can be regarded as representative of the natives of the territories can be persuaded to take such action".[40] Dube was not allowed to enter Southern Rhodesia. Rev Bowen Rees of Inyathi Mission near Bulawayo, who was an ally of the Queen Lozikeyi, was one of the very few missionaries who supported the African cause.

In 1914, he submitted an affidavit before the Privy Council arguing that the BSAC had no title to Ndebele land.[41] As Ngcukaitobi records, the BSAC awarded land in present day Mbembesi to black South African immigrants who had co-operated with his occupation of Southern Rhodesia. These recipients were mostly Xhosa-speaking Mfengu (also called "Fingos"). Rhodes had enticed several groups of Mfengu to move to Southern Rhodesia in search of new pastures.

These were led by their chiefs, including Sojini and Hlazo. The Mfengu became domestic and manual labourers for Rhodes and his BSAC. They requested land to be allocated as individual title.[42] They presented a petition seeking exemptions from pass and gun laws and other privileges. This was ignored by the British. The Hlazo and Sojini families then sought assistance from Alfred Mangena.[43] Mangena subsequently met with the Lobengula family and Nyamande. Nyamande had been advised in 1918 to contact Mangena by the Mfengu families that had moved from South Africa to Rhodesia.[44] He met with Mangena and undertook to follow his advice. As Ngcukaitobi records:

> "What happened next was unexpected. The colonial authorities became aware of Mangena's presence, and owing to his connections with the SANNC, he was suspected of being in the country for political reasons. He was deported from Rhodesia at once. Upon his return to South Africa, Mangena alerted Richard Msimang to the case and together they discussed a strategy. It was decided that, because Msimang did not hold high political office, he would travel to Rhodesia and consult with King Nyamanda.

40 *Ibid* 185.

41 Clarke & Nyathi *Lozikeyi* 258-259.

42 Ngcukaitobi (n 32 above) 110.

43 *Ibid* 111. The Fingo Location (Distribution of Land) Act [*Chapter 20:07*] was passed in 1940. It dealt with the "Fingo Location", that is the area of land situated east of the Ntabazinduna Reserve. The land was to be granted to migrants. The migrants were defined as a male African of the Fingo tribe who—(a) entered Southern Rhodesia from the Colony of the Cape of Good Hope between the 1st January, 1898, and the 31st December, 1902, on the understanding that he was to receive a grant of land in Southern Rhodesia from the British South Africa Company; and (b) had attained the age of fourteen years at the date of such entry; and (c) was not an owner. The persons entitled to the award of land in the Fingo Location were: Any person who—(a) was the owner of an original holding prior to the 1st August, 1940, and is ordinarily resident in Southern Rhodesia on that date; or (b) is a migrant and is ordinarily resident in Southern Rhodesia on the 1st August, 1940; or (c) is the heir at customary law of a deceased owner and is ordinarily resident in Southern Rhodesia on the 1st August, 1940; or (d) is the heir at customary law of a deceased migrant and is ordinarily resident in Southern Rhodesia on the 1st August, 1940; or (e) having made a claim to a plot of land in the Location at an inquiry held by the Land Board at the Location on the 14th, 15th and 16th September, 1938, or subsequently, has been informed by the Land Board that his claim to a plot of land has been approved by the Government; or (f) is the heir at customary law of any person referred to in paragraph (e) who has died prior to the issue of a grant in terms of section twenty-two; or (g) is recommended by the commission for the award of a plot of land in the Location by reason of long residence in the Location or for any other reason deemed sufficient by the commission. They would be entitled to the award of one plot of land, four comma nought four six eight hectares in extent, situated in the Location.

44 Ngcukaitobi (n 32 above) 143.

> Subsequently, in 1919, a petition was drawn up. Mangena was involved in the process, and when it was finalised the petition was taken to Rhodesia in draft form."[45]

Richard Msimang had qualified as a solicitor of England and Wales in 1912. He was the first black South African to achieve this. Msimang spent much of his professional life fighting the effects of the Natives Land Act of 1913 and its discriminatory effects.[46] Msimang took up the land matter and assisted Mangena in drafting the petition.[47] On 10 March 1919, a meeting was held at the house of a Ndebele Wesleyan catechist in Bulawayo. Present were Nyamande and his Ndebele allies, Joyi and Madhloli, John Hlazo (Fingo) and Rev HC Ngcayaya. Rev Ngcayaya was the chaplain of the SANNC and also the leader of the Ethiopian Church of South Africa. Rev Ngcayaya presented the draft petition which was approved and signed by Nyamande and his associates. Rev Ngcayaya took the petition to England via South Africa. The petition referred to the White Agitation for Responsible Government and asked that instead there be direct imperial control of African affairs. It asked, in the light of the Privy Council decision on the ownership of land, that Britain use the newly acquired powers for the benefit of African people.[48] In essence, it demanded that the unalienated land that the Privy Council found to belong to the Crown in its 1918 Report be handed back to the family of the late King Lobengula "in trust for the tribe, according to Bantu custom, and the right of chieftainship therein to be restored and acknowledged".[49]

Mangena and Msimang's involvement in the land question continued beyond the petition: "For years afterwards, the petitioners and their lawyers went back and forth, making representations to the British government. By 1923 it had become clear that the campaign was a failure. The British were not going to accede to the requests relating to fair government and the land. Instead, the powers of chiefs were drastically curtailed. So, too, were their resources. Mangena himself was never paid for his services. And though his legal expertise was very much in demand, it was precisely this that led to his eventual demise".[50] Mangena's practice went into decline due to great personal and professional strain.[51] The BSAC had in 1908 stopped Nyamande's brother, Nguboyenja, from pursuing his legal studies. He wanted to qualify as a barrister.[52] Had he completed them Nyamande may well have been represented by a member of the Kumalo royal family.

The campaign against deprivation of land failed both for Africans in South Africa and in Southern Rhodesia. If there are any lessons to be learnt, they relate to the securing of funding for public interest litigation. Msimang's bill was never paid.[53] Rev Ngcayaya was stranded in England without money and had to rely on the charity of

45 *Ibid* 112.

46 *Ibid* 116.

47 *Ibid* 143.

48 Ranger (n 38 above) 187.

49 Ngcukaitobi (n 32 above) 112.

50 *Ibid* 112.

51 *Ibid* 113. He had earlier created a law firm with Seme.

52 Clarke & Nyathi (n 41 above) 225.

53 Ngcukaitobi (n 32 above) 143-144. Ngcukaitobi writes: "Msimang's clients ran out of funds, and his bill was not paid. Several letters demanding payment were ignored. He had covered some of his expenses from his own personal funds, but this was never refunded. Thus, the relationship with Lobengula ended in disappointment."

the BSAC to return home to South Africa. The *indunas* who supported Nyamande were punished by the BSAC.[54] The decision of the Privy Council in *In re Southern Rhodesia*[55] had confirmed that Africans had lost their land by conquest. The BSAC exercised executive authority with some restrictions until 1923, when the first Southern Rhodesian constitution was promulgated. The 1923 Constitution followed a referendum on whether Southern Rhodesia should become a province of South Africa. The majority of the voting Europeans elected to remain a separate country. The 1923 Constitution effectively created a Responsible Government. The British Parliament had the responsibility to promulgate constitutions on behalf of Southern Rhodesia. Importantly, the 1923 Constitution specifically retained for the British Crown certain controls, including over any law, except in respect of the supply of arms, ammunition or liquor to Africans, which subjected Africans to conditions or restrictions which did not apply to Europeans.[56]

2.7. The Land is Theirs

In 1925, a land commission called the Morris Carter Commission was appointed to investigate land. Morris Carter had been Chief Justice of Tanzania. The Commission recommended segregation in land ownership. The 1923 Constitution gave the Crown the power to intervene in any matter that discriminated against Africans. The Land Apportionment Act followed in 1930 and decimated any hopes of equitable land ownership for Africans. It expressly discriminated between Africans and Europeans. It became the most important legislation governing land in Southern Rhodesia. The British Government elected not to intervene.

Henry Vusso Moyana argues that the Land Apportionment Act not only kept Africans in perpetual serfdom but also retarded the economic development of the country by keeping its majority from actively participating in exploiting its resources. It then reduced the African to an inexhaustible supply of labour to whites as the Africans were moved to arid and uncultivable areas.[57] The Native Land Husbandry Act was introduced in the 1950s and exacerbated African suffering and economic amputation. The two pieces of legislation brought more Africans to the urban centres by the thousands as they sought work. The urban situation itself resulted in low wages, bad conditions of service and caused a massive strike in 1948.[58] The Land Question became a unifying grievance that generated political consciousness amongst the African masses across class. From the late 50s to independence in 1980, the major public interest litigation revolved around land, minority repression and the call for majority rule.

2.8. The 1960s

With the growing clamour for independence after World War II had ended in 1945, the government turned to more repressive legislation to contain discontent. Thousands of Africans were detained. What emerges from the

54 Ranger (n 38 above) 189.

55 In re *Southern Rhodesia* [1919] AC 211.

56 The 1923 Constitution, the Federal Constitution of Rhodesia and Nyasaland of 1953 and the 1961 Constitution were promulgated in terms of Acts of Parliament passed by the United Kingdom legislature.

57 HV Moyana "Land and Race in Rhodesia" at https://journals.co.za/doi/pdf/10.10520/AJA00020117_192 [accessed on 6/11/2021].

58 Moyana (n 57 above) 35: "The 1948 strikes heralded a new era in the annals of Rhodesian race relations. Within the space of ten years following these strikes, industrial protest crystallized into political action, and for the first time in the country's history mass political parties emerged and dominated the national arena. The tensions of the decade could have been averted … or at least reduced, had those who held the reins of power been prudent enough to introduce at least land reform. But they continued to bury their heads in the sand."

1950s and 1960s are political cases in which serious criminal charges were being brought against the supposed majority "trouble causers". The detainees and accused persons were represented by some of the leading lawyers imported from South Africa. Many of the criminal trials were a product of the Law and Order (Maintenance) Act — a vicious piece of legislation specifically passed to suppress African dissent (many of the provisions of which were maintained after independence in the Public Order and Security Act and have now been maintained in the Maintenance of Peace and Order Act). After the requests by the Southern Rhodesian government in 1959 seeking revision of the 1923 Constitution, the British Government agreed to give up some of its constitutional powers.

The 1961 Constitution conferred on Southern Rhodesia the power to amend its own constitution and also contained a Declaration of Rights. It also created a Constitutional Council with the ostensible intention of safeguarding human rights. However, the Council could only make recommendations in relation to any new piece of legislation that was regarded as being contrary to the Declaration of Rights. It had no power with regards to legislation passed before the Constitution was promulgated. As a result, Africans continued to be detained without trial and denied basic human rights.

A surprising provision concerned funding of legal fees. The Constitutional Council could give financial assistance to any person who wanted to challenge legislation that offended the Declaration of Rights. Numerous pieces of legislation were reported to the Constitutional Council as being racially discriminatory and yet they all remained in force. A complicated electoral system was added into the mix. It reserved only 15 of the 65 seats for Africans, who numbered about 4.5 million: 50 were reserved for the 223 000 whites. The Constitution could be amended by a vote of 44 members. Parliament did not have the power to abolish appeals to the Judicial Committee of the Privy Council (Privy Council), but it had the power to change the legal substance of its subordination to Britain.

The British had started to relent and were granting independence to several other colonies in the 1960s. The 1961 Constitution was targeted at granting majority rule in Rhodesia gradually. Ian Smith and his Rhodesian Front were against this. They decided to perform a coup on the Crown and establish an "independent" country run by the minority whites. On 11 November 1965, Ian Smith's government declared unilateral independence from the British ("UDI"). The UN Security Council immediately imposed sanctions.

The British government declared UDI illegal. Only South Africa and Portugal recognised the new "independent" Rhodesia. On 16 November 1965, the United Kingdom Parliament promulgated the Southern Rhodesia Act, 1965. The statute reaffirmed the 1961 Constitution and denounced the rebellion. The UK Government then issued the Southern Rhodesia Constitution Order 1965, which categorically stated that any purported change of Government other than by means prescribed by the 1961 Constitution would be void and of no effect. The Order had retrospective effect to the day of UDI, that is, 11 November 1965.

The Southern Rhodesia Act of 1965 declared the regime illegal and made UDI treasonable. However, Smith and his cohorts remained in effective control. The 1961 and 1965 British Acts of Parliament stipulated that the Southern Rhodesian Constitution could only be amended by Acts of the British Parliament. On being challenged by a Member of Parliament during a sitting, the Speaker of Parliament ruled that the 1965 Constitution was now binding on Parliament. The Rhodesian Government promulgated the Constitution (Ratification) Act No.1 of 1966. It ratified and confirmed the 1965 Constitution. The 1965 Constitution provided that:

> "No United Kingdom Act of Parliament shall extend to Rhodesia unless extended thereto by

> an Act of the Rhodesian Legislature; the Colonial Laws (Validity) Act 1865 shall not apply to its law, and the right of appeal to the Judicial Committee of the Privy Council is abolished."

The 1965 Constitution sought to legalise the seizure of power. It purportedly removed the United Kingdom's power over Rhodesia. The Governor, who represented the Queen, was no longer recognised as head of state. A constitutional crisis had thus arisen. The *Madzimbamuto* case (described below) brought this constitutional crisis to the fore. On 2 March 1970, the Rhodesian government, via a new 1969 Constitution, proclaimed Rhodesia a "republic". The British government maintained that, like the 1965 UDI, this was illegal.

The 1969 Constitution was meant to entrench white minority rule. It was deeply discriminatory. It was also very restrictive on land apportionment. Because land was being apportioned, many African families were moved from their land. In the leading cases of *Madzimbamuto* and *Baron* (heard together), the legality of UDI was challenged all the way to the Privy Council. Daniel Nyamayaro Madzimbamuto had been in detention for several periods since 1958. On 19 June 1965, he was restricted under the Law and Order (Maintenance) Act, 1960. On 6 November 1965, he was detained under the Emergency Powers Act in terms of the declaration of state of emergency that had been made on that day. Before UDI, the detention would have been lawful. Under the 1961 laws, the state of emergency would expire after three months. What changed now was that Parliament in Rhodesia, sitting under the new 1965 Constitution, authorised the extension of the state of emergency and the extension of detention of persons who had been detained under the preceding emergency.

His wife, Mrs Stella Madzimbamuto, secured legal assistance from Nicholas McNally and the famous South African born advocate Sydney Kentridge to challenge the continued detention of her husband. The matter came before two High Court judges appointed under the 1961 Constitution.[59] They had taken oaths under that Constitution. The 1965 Constitution sought to provide for the continuation in office of the judges appointed under the 1961 Constitution. However, the Prime Minister was given the power to require "a judge to state forthwith whether he accepts this Constitution". If the judge refused, then the judge's post would be deemed vacant. The Prime Minister had not required any of the judges to do this, though it is said his minister, Lardner-Burke, had attempted to have Beadle CJ take the new oath. The two judges who heard the matter avowed that they would only sit as judges under the 1961 Constitution.[60]

The High Court held that even though the Smith regime had effective and total control of Rhodesia, it could not be said that there had been a successful revolution, as Britain had not abandoned sovereignty over Rhodesia. The court recognised that the British government was taking action to reverse the revolution and that the efforts could not be said to have failed. The High Court, however, held that the declaration of the state of emergency and the detention of Madzimbamuto, although unlawful, should be recognised as valid measures for the maintenance of peace and order by the *de facto* government. The challenge failed. Mrs Madzimbamuto and Leo Baron appealed to the Appellate Division.[61] Madzimbamuto scored a technical success and got costs. There was a flaw in the

59 *Madzimbamuto & Anor v Lardner-Burke NO & Anor* 1966 (4) SA 462 (R).

60 Sir Sydney Kentridge QC "A Judge's Duty In A Revolution—The Case of *Madzimbamuto v Lardner-Burke*" *Commonwealth Magistrates & Judges Association Journal* 34-35.

61 *Madzimbamuto v Lardner-Burke NO & Anor NO; Baron v Ayre NO & Ors* NNO 1968 (2) SA 284 (RA).

detention order, which allowed momentary success. This was corrected within 24 hours and Madzimbamuto remained in detention. Mrs Madzimbamuto's application for leave to appeal to the Privy Council was denied by the Appellate Division on the basis that the 1965 Constitution had removed appeals to the Privy Council. She then applied to the Privy Council[62] which gave her leave to appeal notwithstanding the Smith government's statement that it would not recognise its decision.[63] In the Privy Council, Lord Reid for the majority held that the acts of the Smith government and the Rhodesian Parliament lacked legal validity.

The Queen remained Sovereign in Southern Rhodesia. The court held that concepts of *de jure* and *de facto* were inappropriate when one is dealing with the legal position of a usurper within a territory in which the Sovereign's judges sat.[64] He further held that the judges could not disregard the legislation passed or authorised by the Queen's Parliament. The Queen's Order-in-Council of 1965 had declared every act done under the purported 1965 Constitution to be null and void. No doctrine of necessity could override the Sovereign's law. Soon thereafter, Justices Fieldsend and Dendy Young resigned in protest when the Smith Government stated that it would not recognise the decision of the Privy Council.

Immediately following the Privy Council judgment, the Rhodesia High Court was confronted with *R v Archion Ndhlovu and 31 Others*,[65] in which thirty-two Africans were on trial on charges under an amendment to the Law and Order (Maintenance) Act (Cap 39 of the Laws of Southern Rhodesia) passed by the usurping Smith regime. The argument by the accused was that the indictment disclosed no offence since the Rhodesian legislature could not make valid laws, based on the Privy Council decision in *Madzimbamuto*. The court rejected the Privy Council decision, overruled the objections and recognised the government as *de jure.* The appeal gave the Appellate Division a chance to reply to the Privy Council. The court unanimously recognised that the revolution had succeeded and the government and its Constitution of 1965 were *de jure*.

Arising from the UDI imbroglio, several important cases were brought before Rhodesian and British courts. Soon after the *Madzimbamuto* battles, McNally and Kentridge SC were briefed to save liberation fighters from becoming the first political prisoners in Rhodesia to be executed. Two Zanu activists, James Dhlamini and Victor Mlambo, had been tried and convicted of petrol bombing a car driven by Pieter Oberholzer, a white reservist who later on died from the burns. Together with Duly Shadreck, who was convicted of killing a chief, the three were sentenced to death. Appeals against the conviction and death sentence had failed. A request to the Rhodesian Government to commute the death penalty had failed. The Appellate Division refused to grant a stay of execution of their death sentences pending an appeal to the Privy Council because it considered any order of the Judicial Committee of the Privy Council would be a *brutum fulmen* (of no use).[66]

The government announced that it would not recognise a stay of execution notwithstanding that they had received a Royal Pardon from the Queen. The Rhodesian appellate court refused to recognise the British pardon.

62 *Madzimbamuto v Lardner-Burke* [1968] 3 All ER 561.

63 Kentridge QC (n 60 above) 40.

64 *Ibid* 40.

65 *R v Archion Ndhlovu & 31 Ors* 1968 (4) SA 515 (RAD).

66 *Dhlamini & Ors v Carter NO & Anor NO (2)* 1968 (2) SA 464.

True to form two days later, on 6 March 1968, the two ZANU activists, James Dlamini and Victor Mlambo, and Duly Shadreck were hanged. They became the first political prisoners to be executed in this period.[67]

Maluleke was another significant case in this period.[68] He sought an order declaring a certain statutory enactment to be *ultra vires* the Constitution and invalid. He had obtained from the Constitutional Council a certificate that the application constituted a proper and suitable test case for determining the validity of the enactment. However, Maluleke fled the jurisdiction before his case was heard. The court accordingly held that he had no *locus standi* and struck the application off the roll with costs. His lawyers then applied to court for an order that the taxed costs incurred by Maluleke up to December 1966 had been reasonably incurred in connection with the application.

The court decided that Maluleke's taxed costs up to and including the date upon which he lost his *locus standi* should be certified for the purposes of section 71(6)(c) of the Constitution as having been reasonably incurred by the applicant. The costs were recoverable from the government.[69] This constitutional provision permitting any person challenging a law, and certified by the Constitutional Council, to be funded was unique. There were in the 1960s numerous other legal challenges to the Law and Order (Maintenance) Act, 1960 and the charges under it.[70] Some cases also challenged the constitutionality of the Unlawful Organisations Act, which was used to ban nationalist political parties.[71]

Other cases worth mentioning concerned challenges to death penalty sentences for attempts to petrol-bomb houses or buildings. The Law and Order (Maintenance) Act provided for the mandatory death sentence to be imposed.[72] These cases went on appeal to the Federal Supreme Court of Rhodesia and Nyasaland and all the way to the Privy Council. These are cases such as that of *Richard Mapolisa v The Queen*;[73] *Simon Runyowa v The Queen*;[74] and *Gundu v Sheriff of Southern Rhodesia*.[75] The Privy Council reversed its position in 2002 regarding the lawfulness of mandatory death sentences in *Runyowa* in a series of later Caribbean challenges.[76]

In order to end any potential new constitutional challenges, the 1969 Rhodesian Constitution specifically took away the power of any court to inquire into or pronounce upon the validity of any new law on the ground

67 GH Karekwaivenane *The Struggle Over State Power in Zimbabwe: Law and Politics since 1950* (2017) Cambridge University Press 119.

68 *Maluleke v Dupont NO & Anor* 1967 (4) SA 31 (RA).

69 The court was mindful of the impact of costs on the legal practitioners who acted for him.

70 *Minister of Justice and Law and Order & Attorney-General v Musarurwa & Ors and Nkomo &Ors* 1964 RLR 298 (A); 1964 (4) SA 209 (SRA); *R v Musarurwa* 1964 (4) SA 36 (SRA).

71 *Nkomo v Lardner-Burke NO & Anor* 1965 RLR 557 (AD); 1966 (1) SA 357 (SRA).

72 See the detailed discussion in Andrew Novak's article "Abuse of State Power: The Mandatory Death Penalty for Political Crimes in Southern Rhodesia, 1963-1970" (2013) vol 19 n 1 *Fundamina* 28-47. Available at http://www.scielo.org.za/pdf/funda/v19n1/03.pdf

73 Privy Council Appeal No. 19 of 1964; *Regina v Mapolisa* 1964 RLR 591 (PC).

74 Privy Council Appeal No. 1 of 1965; *Regina v Runyowa* 1966 RLR 42 (PC).

75 *Gundu v Sheriff of Southern Rhodesia* 1965 RLR 301 (AD).

76 See *Reyes v Queen* [2002] 2 AC 235 (PC) (Belize); *Queen v Hughes* [2002] 2 AC 259 (PC) (St Lucia/St Vincent and the Grenadines); *Fox v Queen* [2002] 2 AC 284 (PC) (St Kitts and Nevis).

that it was inconsistent with the Declaration of Rights.[77] In 1967 the Rhodesian government had introduced a mandatory death penalty for possession of arms of war with intent to endanger the maintenance of law and order. In 1968, the mandatory death penalty for both petrol bombing and possession of arms of war was removed.[78] The death sentence became a weapon of choice for the Smith regime with the result that by 1972, 225 people had been sentenced to death since UDI in 1965. Between 1968 and 1976 there were more than 60 executions. Between 1975 and 1979 at least 152 executions for political crimes took place. The numbers do not include secret executions which the government carried out from 1975.[79] Special Courts were also created to try civilians and impose death penalties without the right of appeal. These were held *in camera*.

2.9. Tangwena People and Struggle for Land

The 1969 Constitution entrenched the Land Tenure Act, which resulted in the forced removal of many Africans. The most famous example was the Tangwena people who were moved from Gaeresi between 25 and 27 July 1972. The land had been classified as "European". The Tangwena people lived on the land along the Mozambique border, east of the then Rhodes Inyanga National Park. Their ancestors had lived on the land for generations and their chiefs had been buried on the land at Machena, which they considered holy ground. In 1905, the BSAC sold 250,000 acres of land, which included a large part of the Tangwena land, to the Anglo-French Matabeleland Company. The Tangwena people were not told. In 1930, when the Land Apportionment Act was passed, the land was designated as "European" land. The owners took no steps to remove the Tangwena people. In 1944, the Anglo-French Matabeleland Company ceded 58,000 acres of the Tangwena land to a company called Gaeresi Ranch Company for £8,400.

Under the Land Apportionment Act,[80] a European could sign labour agreements with Africans which required them to work for him to remain on the land. Some of the Tangwena people signed these agreements. When the Rhodesian Front Party came to power it encouraged farmers to evict Africans on the farms who did not work for them. They were defined under the Land Apportionment Act as "squatters". The general manager of the Gaeresi Ranch Company ordered the Tangwena people who were not working for the company to leave the farm.[81] This prompted litigation against Chief Tangwena and his people. Chief Tangwena's father, Kinga, died in 1965. Rekayi Tangwena became his successor. However, the District Commissioner of Inyanga, at the instance of the managing director of Gaeresi Ranch Hanmer, deferred the election of the new Chief. Hanmer wanted to first decide how many farm labourers he needed on the land, and then to evict the rest. The new chief would then be the chief over those remaining. Rekayi Tangwena protested this delay caused by the labour agreements all the way to the Provincial Commissioner and the Secretary for Internal Affairs, Hostes Nicholle, but to no avail.[82] In February 1966, the District Commissioner at Inyanga recovered the chief's insignia. He insisted that the Tangwena people must either sign the labour agreements or leave the ranch. He presented two choices: Rekayi Tangwena could

77 Section 84 of the 1969 Constitution of Rhodesia.

78 See Novak (n 73 above) 43.

79 *Ibid* 45.

80 Section 43.

81 See *Rhodesia: The Ousting Of the Tangwena* (January 1972) The International Defence and Aid Fund.

82 *Ibid* 4.

either settle his people at Gokwe, or move into Mozambique across the international border. Tangwena refused both.[83] In August 1966, the Minister of Lands, Philip van Heerden, visited the ranch and offered the Gokwe alternative.

On return to Harare, the Minister told Parliament that the government was assisting the landowner who wanted to get rid of the unwanted people, and was not responsible for the eviction. As chief, Rekayi Tangwena had six headman and 298 families living under him at Gaeresi Ranch.[84] When Tangwena received the notice to quit Gaeresi from Hanmer, he had already been warned by the spirit-medium to expect trouble.[85] Tangwena cleverly drafted a letter to the international press which was translated for him by his friend Stanley Keeble. This letter was published in several British newspapers and brought attention to the plight of the Tangwena people.[86] As most of the Tangwena people were Anglicans, their plight also attracted the attention of Archdeacon Arthur Lewis who tried to speak to government officials about the plight of the Tangwena people. But Lewis was unhappy with Tangwena's international press campaign.[87] One hundred and five delegates of the American Methodist church who were attending a conference in the Eastern Highlands resolved to collect money to help pay Tangwena's legal fees. Tangwena was to stand trial two days later for refusing to leave Gaeresi.[88]

The first case was brought by Hanmer against Tangwena and heard in the Inyanga Magistrate Court between 5 May and 2 June 1967. He was charged with wrongfully and unlawfully occupying land in a European area in contravention of section 42(1)(a) of the Land Apportionment Act. The court had to first resolve whether or not the land occupied by Tangwena was in a European or African area. Tangwena did not hire a lawyer but conducted his own defence. Tangwena argued: "I will not leave this land because it was left for me by my father before he died … I merely want to live in the land of my ancestors … If I were to leave this land, my heart would break and I would die. I want the government to listen to me. I want bread, not stones".[89] While Tangwena had pleaded not guilty, he was convicted by the magistrate of occupying European land. He sentenced Tangwena to a fine of £30 or three months' imprisonment with hard labour. A fine of £20 was suspended until 31 July, 1967 on condition that Tangwena left the ranch by that date. True to form, Tangwena paid the fine but remained in situ.[90]

The second trial on the same charges commenced on 3 November 1967. This time Tangwena was represented by counsel, RHB Pringle. Tangwena persisted in his claim for their ancestral lands. His lawyer raised a legal issue. He argued that Gaeresi was in fact Crown land. Section 93 of the Land Apportionment Act permitted Africans living on Crown land, which was in European areas before it was alienated, to continue living there. Before judgment Tangwena stated, among other things, that: "I still have no intention to move, and if I am found guilty

83 *Ibid* 4-5.

84 *Ibid* 6-7.

85 *Ibid* 8: The Rhodesian Front government had rejected the report of the Select Committee on the Resettlement of Natives under the chairmanship of HJ Quinton. The Committee had been put in place in 1960. Its report was against the removal of Africans and the racialisation of land ownership. It warned the government that it would incur great displeasure if it moved people for no apparent reason.

86 *Ibid* 9.

87 *Ibid* 9.

88 *Ibid* 9.

89 *Ibid* 10.

90 *Ibid* 11.

again I intend to appeal against the judgment. I have 250 families living with me and if we are forced to move they will suffer hardship. They are willing to die rather than leave their land".[91] On 1 March, 1968 Tangwena was convicted again and sentenced to £30 fine or three months' imprisonment with hard labour. He was granted bail of £5 after his counsel gave notice of appeal. It is stated that:

> "The second case had spread over eight sessions. On each occasion Rekayi had walked with his followers some 40 miles over the hills and valleys to Inyanga to defend himself, accompanied at times by a handful of followers, at others by almost a hundred, although only a few could fit into the tiny courtroom: the others sat outside, listening through the window and waiting for news. When they heard of Rekayi's second conviction, they offered to go to prison with him. But Rekayi appealed."

The appeal case was heard by the Appellate Division on 13 and 14 June 1968.[92] In a judgment penned by ACJ Quenet, the court upheld the appeal holding that the Tangwena occupation of the land went back to the days before the alienation in 1905 and that Gaeresi Ranch had originally been Crown land. He went on to hold that until a Proclamation was made under section 86 of the Land Apportionment Act, the Tangwena people were lawfully living on Gaeresi Ranch.[93]

On 31 October, 1968, Justice Lewis reviewed Tangwena's conviction and set aside the £30 fine in line with the judgment of the Appellate Division on the lawfulness of Tangwena's occupation. But it was not the end of the matter. Land was too precious. The government became directly involved.[94] If any justification was needed to show why the Tangwena case is an important public interest litigation, this is it. On 19 February 1969, Clifford Dupont, who had replaced the Governor-General after UDI, issued a Proclamation under section 86 of the Land Apportionment Act. It was signed by Ian Smith, the Prime Minister. Surprisingly, it was issued in the name of the Queen whom Rhodesia no longer recognised as its Sovereign. The Proclamation ordered 36 "squatters" and their families to leave Gaeresi permanently by 31 August 1969 and move to Machena in the Holdenby Tribal Trust Lands where Tangwena's father, the last chief, had lived.[95] As these developments were happening on 19 February 1969, Tangwena was at the District Commissioner's Office to ascertain his people's tax. In his discussion with the new District Commissioner, who suggested that Tangwena should move to Mozambique, Tangwena, among other things, responded about UDI and his predicament:

> "It looks to me as if this government was trying to eliminate us, its children. It is now impossible for me to obey this government as my father. The High Court has ruled that I live here lawfully. But government has broken the law of our mother-government in England when it declared Rhodesia independent. It got away with it. If I now disobey

91 *Ibid* 11-12.

92 ACJ Quenet, Macdonald AJP and Lewis AJA heard the matter.

93 *Rhodesia: The Ousting of the Tangwena* (n 82) 12-13.

94 *Ibid* 14. As the Defence Fund noted: "However, it soon became clear that if Tangwena land was redesignated as African area, a precedent might be created for other African squatters ordered to vacate European farms. This began a new phase: the dispute ceased to be one between an individual white landowner and a group of Africans. It grew into a national issue between the white government and African people. Hanmer replaced by government officials as the leading protagonist."

95 *Ibid.*

> government orders I am just following the example government set me. I have not provoked this struggle. I do not want a fight. But I shall under no circumstances co-operate. I wish I could speak to the British Prime Minister, for here in Rhodesia the government does not listen to me. Rather they provoke my people day after day."[96]

In April 1969, the District Commissioner sent his assistant to offer the Tangwena something in return for co-operation in their own eviction. He said that: the Government had decided to recognise the Tangwena chieftainship; they would build a road at a cost of £3,000; the government would upon its completion teach Rekayi Tangwena all he had to know about being a chief; he would be paid £25 a month; the government would build him an office and erect a beer-hall and new huts for the community so that they could be as well off as other Rhodesian Africans. Tangwena was not impressed.[97] Tangwena was offered resettlement in Bende area, which he refused. The Tangwena issue continued to gather more supporters and publicity for the Africans. Two African university students managed to collect 501 signatures from the staff and students at the University of Rhodesia supporting the Tangwena people. As the eviction day, 31 August 1969, approached, the District Commissioner visited the area and tried to persuade the Tangwena to move. They remained unmoved. The police and government spent time trying to explain the move. The Chief instructed his people not to resort to violence if forcibly moved.[98] The government did nothing on 31 August 1969, the date of the eviction.

On 18 September 1969, Tangwena and his people were violently removed. Tangwena was under police guard for three days separated from his people. One hundred and sixty men and women then marched to Inyanga to demand his release. They were in turn detained for a couple of days before they were released. When the police left Machena, Tangwena walked back to Gaeresi.[99] There he found his followers rebuilding their huts which had been destroyed by bulldozers. Tangwena maintained that he would not be moved. The government sent in 30 trucks on 2 October 1969, with helicopters and dogs. They destroyed more property and forcibly moved the returnees. There was more outpouring of support for Tangwena, even from unexpected right wing supporters of the government. Tangwena addressed a meeting at the University of Rhodesia. He explained that his struggle was on behalf of the children of the country, as he was old. The audience collected £34 towards the losses the Tangwena people had suffered. Tangwena also turned to the Catholic Church, the Methodist Church and spoke to members of the Christian Council of Churches. Meanwhile his people had scattered all over with some hiding in the mountains.

One of the persons whose property was destroyed, Noah Wonesayi, and others decided to sue the government for the destruction of his property.[100] In March 1970, the 27 claimants launched an action against the government for compensation. Wonesayi had not been named in the Proclamation and so should not have been

96 *Ibid* 14-15.

97 *Ibid* 16. He replied: "I cannot talk to you as long as I am a chained dog, as long as you come to define the boundary between me and the Europeans. I can only talk to you when this chain has been taken from my neck and I can speak to you as a free man and equal. When this has happened, then we can talk about salary and buildings. The road you are building is your road. We do not want to be moved out on it. Do not try and bribe." That retort made the District Officer end the meeting.

98 *Ibid* 21-22.

99 *Ibid* 22.

100 *Smith NO & Lardner-Burke NO v Wonesayi* 1972 (1) RLR 262 (A); 1972 (3) SA 289 (RA).

evicted. His property, including huts and granaries, had been destroyed during the eviction. He had also been unlawfully detained. The government in its defence denied that their officers had acted wrongfully, negligently or intentionally. They had acted in the bona fide and reasonable belief that Wonesayi was a squatter on Gaeresi, and that his eviction and the removal of his property was lawful. This was dismissed by the court. Wonesayi was awarded 80% of what he claimed, for loss and destruction of his property. He was not compensated for personal injuries or assault.[101] There were further evictions of the Tangwena and court appearances. The Tangwena remained defiant. The government tried to dislodge them from the mountains by impounding their cattle in 1970, and desperately abducting 115 of their children who were at a nearby Nyafaru Development farm. These ranged from 4 to 13 years in age. The Rhodesian army patrols of the mountains resulted in more violence, some of it fatal, being visited upon the Tangwena. On the land question, Chief Rekayi Tangwena became the icon of black resistance. His numerous court battles against the Rhodesian government brought the land question back to the courts. The land question was at the heart of the nationalist cause.

2.10. The 1970s

2.10.1. The Catholic Commission For Justice And Peace

During the 1970s, repression increased as the nationalists intensified the armed struggle. The Catholic Commission for Justice and Peace ("CCJP") became one of the most important public interest litigation bodies. The Bishop's Conference resolved to form the CCJP in line with Pope Paul's exhortation: *If you want justice, work for peace*. The CCJP, though part of the Catholic Church, had its own constitution and significant autonomy. Part of its earliest focus were the atrocities committed by the Rhodesian security forces against civilians while fighting the freedom fighters. The vocal CCJP soon earned enemy status with the Smith government. While the CCJP was under Bishop Alois Haene of Gweru, Bishop Lamont of Mutare became its critical supporter. In 20 May 1974, Bishop Lamont addressed the UN Committee on Human Rights testifying about the violation of human rights.[102] Later that year Bishop Lamont became the president of CCJP.

The CCJP in 1975 produced a detailed report *The Man in the Middle*. It followed this up with *Civil War in Rhodesia*. These reports were very unpopular with the Smith Regime. The first focused on the treatment of civilians by security forces, while the second focused on lots of special court trials and injustices. It also dealt with the impunity granted to the security forces and government officials by the Indemnity and Compensation Act of 1975.

The Act had retrospective effect to 1 December 1972. In effect, it gave the State, its employees, and its appointees immunity from criminal and civil court action for harm done "in good faith" to suppress "terrorism" or maintain public order.[103] The Act was passed despite the Senate Legal Committee reporting that it would violate the Declaration of Rights. Some of the criticisms of the Act were that it permitted the Minister to simply issue a

101 *Rhodesia: The Ousting of the Tangwena* (n 82) 30: As the Defend Fund recorded: "As his was a test case, subsequently most of the other claimants received some compensation, on average about 68 per cent of their claims, for the loss or destruction of their property. In only one case was the estimated damage upgraded … Not all the money was distributed to the claimants. After the meeting with their Chief the people decided to pay a percentage into a common fund to assist those who had been inadequately compensated, thus sharing the little they had. Whatever happened to the Tangwena, everything contributed to their greater unity and strength."

102 Ian Linden *Church and State in Rhodesia 1959-1979* (1979) Kaiser,Grüewald 195.

103 CCJP *Civil War in Rhodesia* (1976) Catholic Commission for Justice and Peace 83.

certificate to the effect that the action was done in good faith to suppress terrorism or to maintain public order and this would terminate a case pending. The Minister could also issue a certificate in a matter in which he was the defendant. No court could question the validity of certificates issued by the Minister. The court itself was required to terminate proceedings in the absence of the Minister's certificate should it form the opinion that the action was done in good faith to suppress terrorism or maintain public order.[104]

Despite serious opposition, the Emergency Powers (Criminal Trials) Regulations, 1976 were promulgated to create Special Courts that had the same criminal jurisdiction as the General Division of the High Court. The excuse for their creation was that there was a large backlog of terrorism cases. They dealt exclusively with offences directly or indirectly connected to terrorism. The accused was entitled to representation by an advocate or an attorney. A *pro Deo* counsel could be appointed. The CCJP noted the haste with which many of the trials were conducted.

It did not take long before Bishop Lamont, a fierce critic of the Rhodesian government, became the subject of criminal prosecution. First, the security forces tried to assassinate Bishop Lamont. He was saved by children on the roadside. A landmine had been planted ahead on the road on which he was driving. He stopped a short distance from the spot to greet children on the roadside. A military truck went past him and it was hit by the landmine intended for him.

Bishop Lamont was charged with failure to report the presence of terrorists under the Law and Order (Maintenance) Act, 1970. The offences normally carried life imprisonment or death. However, the trial was brought before a regional magistrate. The regional magistrate could only sentence the Bishop to a fine not exceeding $2,000 or imprisonment not exceeding 15 years. The trial was held in Mutare before regional magistrate WR Henning.[105] Seamus Henchy, Judge of the Supreme Court of Ireland, attended the trial as an observer on behalf of the International Commission of Jurists. American Judge Bruce W Sumner was also in attendance after being appointed an observer by Amnesty International.[106] Bishop Lamont pleaded guilty to all the four counts. The essential facts were agreed by both the prosecution and the defence.[107] Bishop Lamont made his famous statement from the dock before calling two witnesses, the Anglican Bishop of Mashonaland Rt Rev Paul Burrough, and the Anglican Bishop of Matabeleland Rt Rev Mark Wood. The two prelates testified on the dilemma faced by mission authorities when mission workers are approached by freedom fighters. In his unsworn statement from the dock, Bishop Lamont made a lengthy speech about why he instructed his church staff not to report the presence of freedom fighters and why he instructed them to help both sides with medical supplies when requested.

Mr Henning convicted Bishop Lamont and sentenced him to 10 years' imprisonment with hard labour. Bishop

104 *Ibid* 83-84

105 Bishop Lamont was represented by Lionel Weinstock SC of the South African Bar, Anthony Roy Gubbay SC of the Rhodesian Bar and future Chief Justice of Zimbabwe, and Mr C Jordaan. They were instructed by M Muller of Scanlen and Holderness. JAR Giles and I Donovan prosecuted.

106 Amnesty International Report (1977) 91.

107 The prosecution called Detective Officer Williams of the Rhodesian Special Branch to testify on the geographical and locational matters "including the nature and disposition of Security Forces in the relevant area at the time of the charges". Bishop Donal Lamont "Speech from the Dock", "Independent Report" of Seamus Henchy, Judge of the Supreme Court of Ireland who attended the trial on behalf of the International Commission of Jurists, (1977) Kevin Mayhew Publishers in association with Catholic Institute for International Relations 138-139.

Lamont appealed against sentence to the Appellate Division. Macdonald JA wrote the judgment which is full of his own political views. Macdonald JA even introduced "evidence" which had not been led at trial or on appeal. In assessing whether the regional magistrate's 10 year imprisonment was justified, Macdonald was perturbed by the possibility of a prison sentence making Bishop a martyr.[108] The sentence was reduced to an effective term of one year imprisonment. On cue, upon pronouncement of the appeal judgment by Macdonald JA, the Rhodesian Government on 23 March 1977 stripped Bishop Lamont of citizenship and deported him. He did not serve a day of his reduced sentence. Macdonald JA's concerns about martyrdom resonated with the official view. After Bishop Lamont's deportation, more religious leaders were prosecuted for failing to report the presence of terrorists, including Fr Paul Egli, who was sentenced to 5 years' imprisonment which was reduced to one year on appeal.[109] Organisations like Amnesty International pleaded for clemency for nationalists sentenced to death including Robert Mangaliso Bhebe who was executed on 13 July 1977. By end of May 1977, Amnesty International groups were working on behalf of 460 adopted prisoners, the largest prisoner adoption scheme operated by the organisation anywhere in the world. Amnesty International groups provided substantial relief assistance to prisoners, former prisoners and their family through the Bulawayo and Harare based organisation Christian Care. Amnesty International also made substantial grants to various relief, rehabilitation and legal assistance projects in the country.[110]

The case of *Deary NO*[111] in the late 1970s, brought by the CCJP chairperson, is a leading example of public interest law during the struggle years. John Deary was the chairperson of CCJP. On 28 February 1979, acting on behalf of one martial law prisoner, Peter Chitsote, Bryant Elliot addressed a letter to the Executive enquiring about the exercise of clemency in favour of his condemned client. Chitsote had submitted a plea for clemency on 9 February 1979. The injustice of his conviction by a court martial based on a confession procured by torture has been written on by Munyaradzi Bryn Munochiveyi.[112] On 15 March 1979, the Secretary to the Prime Minister and Cabinet replied stating that the Acting President, on the advice of the Executive Council, had decided that petitions seeking relief from the verdicts or sentences of special courts martial will not be dealt with by the Executive Council, but will be forwarded to the (army) Commander, Combined Operations, for consideration by the review authority established pursuant to the proclamation of martial law, whose decision will be final. In terms of the Rhodesian Constitution at the time, the President had the right to exercise the prerogative of mercy. Aggrieved, the CCJP, through its chairman, launched a legal challenge.

As part of the Smith government's drive to fight the escalating war, it passed regulations creating martial law. In terms of section 3(2) of the Emergency Powers (Special Courts Martial: Martial Law) Regulations,[113] persons

108 He stated: "We entertain no doubt that the appellant would enjoy the notoriety of serving a prison sentence. From a purely subjective point of view, therefore, a prison sentence will serve no purpose but such a sentence is necessary to mark the seriousness of the offence and to deter others from behaving in the same way".

109 Amnesty International 1977 Report 92.

110 Amnesty International 1977 Report 93.

111 *Deary NO v Acting President, Rhodesia, & Ors* 1979 (4) SA 43 (R): NJ McNally for the applicant; AR McMillan (with him BC Brown) for the respondents.

112 MB Munochiveyi *"It Was Difficult In Zimbabwe": A History Of Imprisonment, Detention And Confinement During Zimbabwe's Liberation Struggle, 1960-1980* A Dissertation Submitted To The Faculty Of The Graduate School Of The University Of Minnesota.

113 Rhodesian Government Notice 733C of 1978.

sentenced to death by a special court martial could be hanged outside a martial law area on the authority of a warrant signed by three or more members of a review authority. Section 7(a) and (b) of the regulations prohibited any court from inquiring into the validity of any such warrant, or of the proceedings of a special court martial or a review authority conducted outside a martial law area. Deary argued that persons liable to be executed pursuant to the provisions of section 3(2) of the regulations had a right to require the President, acting on the advice of the Executive Council, to address his mind to petitions for the exercise of the prerogative of mercy that was conferred on the President by section 60 of the Constitution.[114] What was in issue was the refusal even to entertain a petition for clemency. The respondents challenged the right of John Deary to bring this application on behalf of condemned prisoners. It was initially contended that the application was brought merely for political purposes and was vexatious. Beck J dismissed the objection, holding that the timing of the institution of these proceedings was not actuated by extraneous and unworthy considerations. Beck J was very liberal with the issue of *locus standi*.[115] He noted that the CCJP was a constituent body of the principal ecclesiastical authority of the Roman Catholic Church in Rhodesia. It was likely in the highest degree that members of that church would be included among those affected by death sentences imposed by special courts martial. This decision on *locus standi* would be the anchor for future CCJP litigation on the death penalty.

The judge, however, held that Regulations made under the Emergency Powers Act (Chapter 83) (R) were not justiciable in terms of section 84 of the Constitution which provided that: "No court shall inquire into or pronounce upon the validity of any law on the ground that it is inconsistent with the Declaration of Rights". The regulations were accordingly not *ultra vires* the powers conferred under the Emergency Powers Act. On the prerogative of mercy, he held that section 60 of the Constitution should be understood as recognising the right of the subject to petition the President for the exercise of his prerogative of mercy, and there was nothing to indicate that section 60 of the Constitution was not intended to apply to the carrying out of death sentences legalised by section 3(2) of the Regulations. If section 7 of the regulations purported to prohibit the court from declaring that the President would be acting unconstitutionally by declining even to consider a petition for clemency under section 60 of the Constitution, then section 7 was, to that extent, *ultra vires* the powers under which it was made.

Accordingly the court declared that persons in respect of whom a warrant of execution may be issued in terms of section 3(2) of the Emergency Powers (Special Courts Martial: Martial Law) Regulations, 1978, may seek from the President, before such warrant is put into effect, the prerogative of mercy for which section 60 of the Constitution of Rhodesia provided.[116] On appeal, the Appellate Division held that the Acting President was entitled to delegate the exercise of his prerogative of mercy to the review authority, which was not obliged to

114 NJ McNally for the applicant; AR McMillan (with him BC Brown) for the respondents.

115 He stated that the court would be slow indeed to deny *locus standi* to an applicant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, whereunder people have been, are about to be, and will continue to be unlawfully killed. The court would not fetter itself by pedantically circumscribing the class of persons who may request the relief in circumstances where the right to life was under threat. He stated that the applicant may be representing impecunious and unsophisticated tribespeople, with equally impecunious and unsophisticated relatives and friends, who all live in isolated areas far from the seat of the court and whose freedom of action and movement may be, or may be thought by them to be, severely circumscribed by the application of martial law to the areas in which they reside.

116 The application to declare section 3(2) and, consequentially, section 7(a) and (b) of the aforementioned regulations null and void as being *ultra vires* is dismissed.

refer the refusal of a petition to the Acting President for even formal ratification.[117] Therefore the refusal to consider clemency was ruled lawful. For their work at CCJP, several officers were routinely arrested. Deary's wife Patricia survived an assassination attempt orchestrated by some members of the Security Forces. The main culprit courted his daughter as a way to get close to his targets. When he was caught after the grenade attack, he confessed and took his own life.[118] CCJP leaders were, sadly, also arrested in post-independence Zimbabwe for doing their work.

2.11. The 1980s

2.11.1. *Katekwe* v *Muchabaiwa*

At independence in 1980, the justiciable Declaration of Rights in the independence constitution increased room for public interest lawyering. The earliest ground-breaking post-independence case was however litigated outside the Constitution. It was the 1982 case of *Katekwe v Muchabaiwa.*[119] The case determined that a woman of 18 and above could now sue without the assistance of her father or husband. It was a case brought by the Law Clinic at the University of Zimbabwe Law School. It laid ground for more cases that developed a commendable jurisprudence on women's rights. The legal saga started at the Community Court held at Chivhu on 5 January 1984. Katekwe had made Muchabaiwa's daughter pregnant. Muchabaiwa had sued Katekwe for seduction damages on behalf of his daughter who was a major (over 18). He lost in Chivhu and was ordered to pay damages. He appealed to the District Court and again lost. He then appealed to the Supreme Court. It was argued on his behalf that since the lady was 20 years of age the father had no right to sue on her behalf. The law had changed in 1982 by making all women of 18 and above majors (Legal Age of Majority Act). Before that, African women were virtually perpetual minors. The Supreme Court agreed with Katekwe that only the daughter could sue for her own seduction. Turning to the issue of *roora* which was not really necessary to be decided by the court, Dumbutshena CJ stated:

> "In this appeal we are not concerned with *roora* but counsel have made submissions on it. I intend in passing to suggest guidelines which may be useful in future when the question of *roora* arises before a daughter with majority status decides to contract a marriage … As I see it what the Legal Age of Majority Act has done with regard to roora is this: The major daughter will say to her father *"Father I want to get married. You have no right to stop me. I do not require your consent because I have majority status. But if you want roora you are free to negotiate with my prospective husband. If he agrees to pay roora that is a contract, an agreement between you and my prospective husband. If he refuses to pay roora I shall go ahead with my marriage."* (Emphasis added)

The *obiter* remarks regarding *roora* made headlines and attracted criticisms that they were destroying

117 *Acting President, Rhodesia, & Others v Deary NO* 1979 (4) SA 39 (ZRA). It was heard by Macdonald CJ, Lewis JP and Davies JA on 22 May 1979, and judgment delivered on 13 June 1979 AR McMillan (with him BC Brown) for the appellants; A Maisels QC (with him NJ McNally) for the respondent.

118 For a detailed discussion of this see, Fr Fidelis Mukonori's memoirs *Man in the Middle* (2017) House of Books Harare 124-128.

119 *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S).

traditional culture, as well as praise for promoting women's equality.[120] The decision became the bedrock for several decisions which supported the emancipation of women and extended their rights in law. Dumbutshena's frustration with the oppression of women seemed to have been instigated by the reversal of his decision in *Katsidzira v Chiromo*[121] by the Supreme Court on appeal in *Chiromo v Katsidzira*.[122] In that case a woman lost all her contributions to matrimonial property on divorce.[123] Public interest litigation on women's rights is discussed in detail in a separate chapter by Advocate Choice Damiso.

2.12. The 1990s

2.12.1. CCJP and the Death Penalty Again

In the 1990s, the CCJP became a litigating force again. It brought a ground-breaking case challenging the delay in executing condemned prisoners, in 1993. On 13 March 1993 it was reported in *The Herald* newspaper, which circulates throughout Zimbabwe, that the Minister of Justice, Legal and Parliamentary Affairs had announced that four men, Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi, who had been convicted of the crime of murder and sentenced to death, were to be hanged within the next few days. The four prisoners had been sentenced to death in February 1987 and November 1988. Reacting to this information the CCJP launched an urgent chamber application in respect of the four condemned prisoners.

It sought, and obtained, a provisional order interdicting the Attorney-General, the Sheriff of Zimbabwe and the Director of Prisons, from carrying out the sentences, pending the decision of the court whether to: (i) declare that the delay in carrying out the sentences of death constituted a contravention of section 15(1) of the Constitution of Zimbabwe; and (ii) order that such sentences be permanently stayed. The CCJP argued that the executions had been rendered unconstitutional due to the dehumanising factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners were confined in the condemned section at Harare Central Prison. It was not sought to overturn the death sentences on the ground that they were unlawfully imposed.[124]

The case was heard on 20 and 21 May 1993. Judgment was delivered on 24 June 1993. The court held that the delayed execution rendered the punishment inhuman and degrading punishment. It also reversed the decision in *Dhlamini and Others v Carter NO and Another (1)* .[125] It was a ground-breaking decision which led an angry government to amend the Constitution, via the Constitution of Zimbabwe Amendment (No. 13) Act 1993, which came into effect on 5 November 1993, to undermine the gains of the decision by stating that delayed execution

120 Welshman Ncube "The Decision in *Katekwe v Muchabaiwa*: A Critique" (1983-84) vol 1 & 2 *Zimbabwe Law Review*. Ncube cites several examples of government statements to the effect that the law would be amended.

121 *Katsidzira v Chiromo* 1981 ZLR 87.

122 *Chiromo v Katsidzira* 1981 ZLR 418 (C).

123 For Dumbutshena's views on the matter, see his paper: Justice E Dumbutshena "Judicial Activism in the Quest for Justice and Equity" in Bola Ajobola & Deon van Zyl (eds) *The Judiciary in Africa* (1998) Juta 186-187. See also *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC); 1991 (2) SA 825 (SC); *Nyemba v Jena* 1984 (2) ZLR 169 (H); *Chawanda v Zimnat Insurance Co Ltd* 1989 (2) ZLR 352 (H); *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S).

124 *Catholic Commission for Justice and Peace, Zimbabwe v Attorney-General, Zimbabwe* 1993 (4) SA 239 (ZS).

125 *Dhlamini & Ors v Carter NO & Anor (1)* 1968 (1) RLR 136 (A).

is not inhuman and degrading punishment. On the back of the *CCJP* case came the case of *Nkomo*,[126] heard on 10 November 1993 and decided on 10 December 1993. It concerned two applicants who in November 1988 were convicted of murder and sentenced to death.

In August 1993 their appeal against the conviction was dismissed and the appeal against sentence of death was postponed to allow arguments to be addressed to the court on the question of whether the sentence should not be altered to life imprisonment. The applicants then applied for an order declaring that execution of the death sentence would constitute inhuman or degrading punishment in contravention of section 15(1) of the Declaration of Rights in the Constitution as they had been incarcerated on death row for 57 months. After the lodging of the application, but before it was heard by the court, the Constitution of Zimbabwe Amendment (No. 13) Act 1993 was passed and came into effect on 5 November 1993. The majority of the Supreme Court[127] said that the *CCJP* decision still applied to the applicants.

Another matter from the 1990s which ought to be recognised is the decision in *Nyambirai.*[128] Nyambirai was a young lawyer who objected to being forced to contribute to the NSSA scheme for pension and other benefits, arguing that his property or rights were being compulsorily acquired contrary to section 16 of the Constitution. The Supreme Court held that section 16 of the Constitution allowed the acquisition in satisfaction of any tax, except if that tax is not reasonably justifiable in a democratic society. The court held that the NSSA scheme was a necessary tax and was justifiable in a democratic society. It was a case that also indirectly implicated the socio-economic right to social security which was not yet protected by the Constitution.

2.13. The 2000s

On 7 February 2000, argument was heard in a case filed by the Zimbabwe Lawyers for Human Rights and the Legal Resources Foundation against the President of the Republic of Zimbabwe[129] in the Supreme Court. Judgment was delivered on 21 February 2000.[130] The two organisations sought an order that the President make public the findings of two commissions of inquiry relating to the 1980s Matebeleland massacres (*Gukurahundi*). The President had appointed a Commission of Inquiry into Disturbances at Armed Encampments in Zimbabwe.[131] The Commission of seven members, chaired by Mr Justice Dumbutshena, is referred to as "the Dumbutshena Commission". The terms of reference for the Commission were (a) to inquire into the mutinous disturbances which took place during February 1981 at Glenville Military Camp, Ntabazinduna Military Camp, and Entumbane ZANLA and ZIPRA Camps to determine the underlying causes which led to the mutinous behaviour, and to identify, if possible, the persons and organisations responsible for planning or promoting the disturbances, and (b) to make recommendations for the resolution of the problems identified. Subsequently, in 1984, Mr Chihambakwe, a legal practitioner, was appointed to head a Committee of Inquiry ("the Chihambakwe Committee"). No instrument

126 *Nkomo & Anor v Attorney-General & Ors* 1993 (2) ZLR 422 (S); 1994 (3) SA 34 (ZS).

127 Gubbay CJ, McNally JA, Korsah JA and Ebrahim JA, Muchechetere JA dissented.

128 *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S).

129 *Zimbabwe Lawyers for Human Rights & Anor v President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (S).

130 AP de Bourbon SC, for the applicants; Miss C Machaka (with her Mrs LR Goredema) for the respondent.

131 Statutory Instrument 204A of 1981.

could be found to show if this Committee was appointed in terms of the Commissions of Inquiry Act or not.

There was no report from the Chihambakwe Committee and it remains unclear what this Committee was appointed to do. As for the Dumbutshena Commission, the Report was never published. The organisations challenged the failure of the President to publish the findings of these inquiries. The President raised a preliminary procedural objection, arguing that the applicants were not entitled to proceed against the President without first obtaining the leave of the court to do so. The court dismissed the objection. The President had not filed an answer to the merits. In the second case on the merits, *Zimbabwe Lawyers for Human Rights & Another v President of Zimbabwe & Another*,[132] following fundamental changes in the composition of the Supreme Court bench,[133] the court held that as long as the President declined to publish the reports on the basis of the interests of the state and safety of other persons, he could not be compelled to publish them.

Much of the public interest litigation between 2000 and 2010 dealt with two main themes: elections (and opposition politics) and land. The Commercial Farmers Union in particular and white farmers were frequently in court challenging the chaotic land reform programme and the deterioration of the rule of law. Some of the land cases went as far as the SADC Tribunal and also to South African courts. The 2013 Constitution has widened the requirements for legal standing. As a result, there have been numerous cases filed in courts to enforce the Declaration of Rights. Regrettably, in some of the cases, the decisions have remained deeply retrogressive.

2.14. Emerging Trends

ZLHR emerged in 1996. It became a partner of the Legal Resources Foundation (LRF) in developing test cases. During the period from 1996 to 2002, ZLHR operated on an *ad hoc* basis responding to significant rule of law related human rights violations as and when they took place. Due to increasing demand for its services, a secretariat was established in 2002. Today, ZLHR is the most visible human rights litigation organisation in Zimbabwe, with offices in three regions, able to respond to violations and to litigate across the country.

One of its earliest cases involved the application demanding disclosure of the *Gukurahundi* Reports, discussed above. It was unsuccessful in court, but the case played an important advocacy role in raising public awareness around the issue. ZLHR has since been involved in numerous public interest litigation cases, both directly as an applicant, and also assisting individuals to bring their own public interest cases. One of the most recent cases is one against the Minister of Transport.[134] ZLHR wanted the decision of the Minister to increase toll fees across the board, in some cases by 100 percent, set aside. The High Court dismissed the application. Its intervention in another case brought by the then Prosecutor General, Tomana, led to a ground-breaking conviction for contempt by the Constitutional Court.[135]

The Law Society of Zimbabwe also has a long history of bringing public interest cases based on the interest of its

132 *Zimbabwe Lawyers for Human Rights & Another v President of Zimbabwe & Another* 2003 (2) ZLR 444 (H): Chidyausiku CJ, Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA.

133 Chidyausiku CJ, Ziyambi JA, Malaba JA & Gwaunza JA concurred.

134 *Zimbabwe Lawyers for Human Rights v Minister of Transport & Others* 2014 (2) ZLR 44 (H).

135 In re *Prosecutor-General* CC-13-17.

membership. The passing of the 2013 Constitution has provided more grounds for organisations and individuals to bring public interest cases, owing to the expanded standing requirements under section 85, in cases where human rights are implicated. There are numerous organisations and individuals who are now undertaking public interest litigation seriously. More and more civil society organisations like the Zimbabwe Human Rights NGO Forum, Zimbabwe Environmental Lawyers Association (ZELA), Young Lawyers Association of Zimbabwe (YLAZ), Women of Zimbabwe Arise (WOZA), Women and Law in Southern Africa (WLSA), and Veritas, are bringing public interest cases to courts on behalf of applicants, and in their own names. The only drawback remains the lack of co-ordination and strategic planning between these public interest law-based organisations. This results in litigation without sufficient long-term strategy. There is also a dearth of funding.

Despite some gains, there has also been a disappointing level of jurisprudence emerging from the Constitutional Court, as will be highlighted in the chapters below. The history of public interest cases in Zimbabwe moves from conquest, powerlessness, repression, resistance, and independence, to repression and resistance again. The remaining contributions in this volume focus on contemporary developments, especially under the 2013 Constitution. Those developments are best understood in light of the history of law and resistance in Zimbabwe, from conquest to constitutionalism.

CHAPTER 3

3. LEGAL STRATEGIES FOR SOCIAL CHANGE - *Doug Coltart*



Mr Doug Coltart

Doug Coltart is a legal practitioner, and member of Zimbabwe Lawyers for Human Rights, whose practice focuses primarily on constitutional law and the protection of human rights through both civil and criminal litigation. He presents regularly on public interest litigation. He is an active human rights defender promoting social change through a variety of different strategies.

3.1. Introduction

The Constitution of Zimbabwe envisages the establishment of a "sustainable, just, free and democratic society". Yet the reality on the ground shows that we are far from achieving that vision. The stark contrast between the vision set out in the Constitution and the lived reality of millions of Zimbabweans cries out for social change. By social change we mean a situation where "rights have been used to produce a tangible and sustainable impact on the ground for those who ought to benefit from them".[136] Public interest litigation is one of the strategies that can be, and has been, used to breathe life into the Constitution by giving practical effect to the rights enshrined in it. However, litigation can never be a substitute for the hard work that needs to be done on the ground by citizens to keep fighting for the realisation of that vision. This was recognised by former Chief Justice PN Bhagwati of the Supreme Court of India, who stated:

> "We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements."[137]

This is especially important in authoritarian contexts like Zimbabwe where political pressure is often brought to bear on the judiciary by the executive. Therefore, in order for the judiciary to assert its independence and give effect to rights through public interest litigation, that pressure "from above" must be counter-weighted by pressure "from below". Similarly, relying too heavily on litigation to achieve social change places the judiciary in a position where it may be vulnerable and over-exposed to attacks from interested parties opposed to social change or the realisation of constitutional rights.[138] Therefore, public interest litigation will be more effective at achieving its goals when used in combination with the wide array of other strategies for achieving social change. Some of these other strategies include:

- Civic education;
- Advice and assistance;
- Engaging Chapter 12 Commissions;
- Research and advocacy;
- Social mobilisation and collective action.

This chapter will discuss these strategies and how they have been used in Zimbabwe. The examples used are not intended to be an exhaustive study but are simply to provide a flavour of the work that has been done by many different groups and individuals who have deployed a wide range of strategies, alongside public interest litigation, to claim rights and advance social change. The chapter will also consider the impact and limitations of the various strategies and the challenges faced by those seeking to use them in Zimbabwe.

136 This definition of social change is drawn from Steven Budlender, Gilbert Marcus SC and Nick Ferreira *Public interest litigation and social change in South Africa* (2015) The Atlantic Philanthropies.

137 Quoted in Jeremy Cooper "Public interest law revisited" (1999) vol 25(1) *Commonwealth Law Bulletin* 140.

138 Nic Cheeseman "Can the courts protect democracy in Africa?" *The Africa Report* 21 May 2021 available at: https://www.theafricareport.com/90612/can-the-courts-protect-democracy-in-africa/ .

3.2. Civic education campaigns

Civic education about rights is a critical part of creating a broader ecosystem in which the Constitution and rights can be used to foster social change. People need to have information about what their rights are, to be empowered to claim and enforce those rights. People having access to information is often a precursor to successful public interest litigation. This is because, without access to information, many would-be litigants with strong cases for enforcing their rights through the courts might never come forward and seek legal representation. Additionally, and as we shall see later on in this chapter, the general public's response to public interest litigation can play an important role in influencing outcomes. Therefore, public interest litigation conducted in a society that broadly knows and understands its rights will look different than in a society where people generally do not know and understand rights, and where those who take public interest issues to courts are considered "busybodies". The framers of the Constitution understood the need for there to be public awareness of the Constitution. Section 7 provides:

> "The State must promote public awareness of this Constitution, in particular by:
>
> a. translating it into all officially recognised languages and disseminating it as widely as possible;
>
> b. requiring this Constitution to be taught in schools and as part of the curricula for the training of members of the security services, the Public Service and members and employees of public institutions; and
>
> c. encouraging all persons and organisations, including civic organisations, to disseminate awareness and knowledge of this Constitution throughout society."

Thus, the obligation to promote public awareness of the Constitution falls, first and foremost, on the state. The state has done some things to comply with the provision, such as translating the Constitution into official languages, but in large part, it has been left to civil society to disseminate awareness and knowledge of the Constitution.

Inspired by section 7 of the Constitution, a group of students founded an organisation named Section 7, to contribute towards fulfilling its mandate to raise awareness and knowledge of the Constitution. One way they have sought to do this is by hosting weekly Twitter Spaces – an audio-based social media platform – in which portions of the Constitution are read out and then discussed by members of the public who tune in. Section 7 has drawn on the influence of well-known Zimbabweans, such as award-winning novelist and activist Tsitsi Dangarembga, to host these discussions which are then dubbed, for example, "Reading Our Constitution with Tsitsi Dangarembga" depending on who the host is for that week. In a context where radio is still tightly controlled by the state, the advent of Twitter Spaces presents an alternative platform for citizens to have critical discussions about the Constitution and what it means for ordinary citizens in a talk-radio type style.

The #KnowYourConstitution campaign, co-ordinated by a civic organisation called Kubatana, has sought to popularise specific provisions of the Constitution and draw them into public discourse. Kubatana put out a call to the public, and its 85,000-strong WhatsApp and email subscriber network, to make submissions on which

provision of the Constitution is their favourite and how they could use that provision to address an issue in their community. By posing the question in this way, the campaign encouraged introspection and sparked some remarkable responses and ideas from citizens about how they could use the Constitution at a grassroots level. To generate energy and enthusiasm around the campaign, all those who contributed were mailed a "Constitution starter-pack" that included t-shirts and bumper stickers with bright and beautiful graphic designs illustrating various rights protected by the Constitution and summarised versions of the Constitution for adults and children. While the submissions rolled in and the starter-packs rolled out, the campaign leveraged a wide network of other civic organisations and activists to act as ambassadors for specific rights by doing videos, dances, photoshoots and interviews wearing the various different t-shirts bearing the graphic designs of rights that those groups primarily work to defend.

To also reach rural populations where access to social media is less prevalent, Zimbabwe Lawyers for Human Rights (ZLHR) hosts radio programmes that provide citizens with critical information about the rights guaranteed in the Constitution of Zimbabwe. ZLHR also produces simplified fact sheets about topical human rights issues which are translated into different languages and distributed at mobile legal clinics (see next section). ZLHR publishes a monthly newsletter called *The Legal Monitor* which is distributed free of charge through law firms, newspaper vendors, civil society organisations, and mobile legal clinics. The newsletter provides updates to the general public on the work of the organisation, major developments in the human rights field, and simplified information explaining constitutional rights.[139] It also has the organisation's contact details so that anyone who reads the newsletter and wants to get in touch with ZLHR to get legal advice on human rights issues, or to bring a legal claim, can easily do so.

These types of public information campaigns lay critical groundwork for public interest litigation and, arguably, increase the chances of success. For it is only when citizens know and understand their Constitution that they are likely to come forward with the information needed to conduct effective public interest litigation. It is only when people understand their rights that they are aware that they have a potential claim to take to court. Similarly, if there is widespread appreciation for why defending the Constitution is important, such litigation will more likely receive public support which "in turn plays an important role in perceptions of the litigation by courts, the public and government".[140]

3.3. Advice centres and mobile clinics

Linked to public information is the need to establish and sustain advice centres and mobile clinics to ensure that legal advice gets to communities and vulnerable groups that have limited access to justice. Many people who interact with the court system do not have the benefit of legal representation. To address this, a consortium of non-governmental organisations (NGOs) have established Help Desks at many Magistrate's Courts and other strategic locations across the country. The consortium includes Zimbabwe Lawyers for Human Rights (ZLHR), Zimbabwe Women Lawyers Association (ZWLA), Justice for Children Trust (JCT), Christian Legal Society of

139 A recent example of *The Legal Monitor* published on 30 June 2021 is available here https://kubatana.net/wp-content/uploads/2021/07/LM-Child-Rights-Literacy-Edition.pdf.

140 Steven Budlender, Gilbert Marcus SC and Nick Ferreira *Public interest litigation and social change in South Africa* (2015) The Atlantic Philanthropies 99.

Zimbabwe (CLZ), Women and Law in Southern Africa (WLSA), and Care at the Core of Humanity (CATCH). These Help Desks provide citizens with advice on how to engage the court system, particularly for vulnerable people, such as women in abusive relationships, or children who have come into contact or conflict with the law, as well as connecting them to psychosocial support where that is necessary.

For many people, particularly in remote rural areas, the nearest Magistrate's Court is a long way away, not to mention the nearest High Court or the Supreme Court and Constitutional Court where high-profile public interest litigation battles are usually fought out. They may never come into contact with the formal court system due to the prohibitive costs and the long distances involved and will most likely have their disputes resolved through traditional justice systems which function in rural communities. Furthermore, many of the legal and human rights issues these communities face do not necessarily require litigation. The provision of advice and assistance can often be sufficient for resolving issues, or sometimes even a simple referral to the right governmental department. It would require huge resources to establish fixed advice centres in enough locations to serve all communities, and so it is in this context that mobile legal clinics have become an important strategy to complement other efforts to bring the rights enshrined in the Constitution to bear across the length and breadth of the country.

ZLHR operates a programme of mobile clinics which travel to remote areas to provide communities with advice and assistance. Typically, ZLHR partners with a local community-based organisation (CBO) that is active in the area in question as well as relevant government departments and constitutional bodies such as the Zimbabwe Human Rights Commission (ZHRC), the Ministry of Women's Affairs, Gender and Community Development, the Department of Social Welfare, the Registrar General's Office, and the Victim Friendly Unit (VFU) section of the Zimbabwe Republic Police. Partnering with local organisations and governmental departments helps to ensure the sustainability of the interventions, as communities are directly connected to the governmental authorities at the local level who can assist with the challenges that they face, and there are local organisations that can follow up and advise ZLHR if community members are facing further challenges. Typically, the types of issues that come up in these mobile clinics are issues that may not require a lawyer to be involved, but can be competently dealt with by a trained paralegal. These include family disputes, deceased estates, land disputes particularly around the distribution of communal land, access to birth certificates, and access to identity documents, especially for displaced former farm workers with roots in neighbouring countries.

Issues of human rights violations within more remote communities are also picked up from these mobile clinics, which form the basis of significant court challenges. For example, through a mobile clinic in Mazowe in 2015, ZLHR received instructions from villagers who were being violently evicted from their homes by then First Lady Grace Mugabe. Represented by ZLHR, the villagers successfully sued the state and the head of the police who were responsible for their violent eviction and were awarded damages for their wrongful eviction.[141]

Additionally, advice centres or mobile clinics play a crucial role in "ensuring that a substantial victory in a landmark case actually translates into tangible benefits far beyond those directly involved in the case".[142] This

141 Columbus Mahvunga "Zimbabwe court orders payment to farmers evicted by Grace Mugabe" *Deutsche Welle* 2 March 2018 available at https://www.dw.com/en/zimbabwe-court-orders-payment-to-farmers-evicted-by-grace-mugabe/a-42806037.

142 Budlender, Marcus and Ferreira (n 141) 100.

is illustrated by the case of *Mudzuru*, discussed in the chapters below.[143] In 2016, the Constitutional Court handed down a landmark ruling in a case brought by Veritas declaring the practice of child marriage, and the legal provisions underpinning it, to be unconstitutional. In the years that followed the landmark ruling, ZLHR's mobile clinics have been a critical forum for raising awareness of the ruling, and slowly but surely changing attitudes in communities where deeply entrenched traditional views are contrary to the outlawing of child marriage. ZLHR and the Platform for Youth and Community Development Trust (PYCD) also recently conducted a school essay competition on child marriages, awarding a year's school fees to the girls who won the competition, raising awareness of the issue among school children.[144] By providing communities with information, those change agents within communities—particularly women—who want to see an end to child marriage, feel more empowered to push back against the harmful practice. This dynamic was described in a May 2021 edition of *The Legal Monitor,* a ZLHR publication, as follows:

> "At one such gathering in Insiza, in Matabeleland South province, community members in the resettlement area of Matshologwane, who usually keep such matters a secret, opened up as it emerged that child marriages are happening in large numbers in the community, although people were reluctant to admit it at first because the church leadership was present in numbers. Women, who formed the majority of participants, were at first reluctant to speak as they felt they needed the permission of their husbands or other male elders. However, as representatives from ZLHR, ZHRC, the Registrar-General's Office and the Ministries of Women Affairs, Community, Small and Medium Enterprises and Ministry of Youth, Sport, Arts and Recreation shared more information, they began to warm up to the discussions on how best community members can play a role in changing attitudes about child marriages."[145]

In the wake of the tragic death of Anna Machaya, a fifteen-year-old girl who died in childbirth at a shrine of a religious sect after being married off to a 26-year-old man, the issue of child marriages has been placed firmly at the centre of public discourse.[146] Further litigation is afoot. In October 2021, Ms Sharon Moffat and two civic organisations the Legal Resource Foundation (LRF) and Women's Coalition in Zimbabwe (WICOZ), represented by ZLHR, filed an application asking the High Court to order a group of churches that are accused of facilitating child marriages, but who deny the allegation, to publish at every place of worship a message stating that child marriage should not be committed in the name of their religion.[147] While the litigation is still pending, there can be no doubt that the years of civic education and mobile clinics on this issue, held between the period when the Constitutional Court handed down its ruling in *Mudzuru* and today, have shifted the public narrative in such a way that may embolden the courts to start giving more specific directives on the issue.

143 *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs NO & Ors* [2016] ZWCC 12.

144 "ZLHR And PYCD Unite In Fight Against Child Marriage In Chipinge District" *Zimeye* 30 October 2021 available at <https://www.zimeye.net/2021/10/30/zlhr-and-pycd-unite-in-fight-against-child-marriage-in-chipinge-district/>.

145 "Child marriages: turning communities into change agents" *The Legal Monitor* 10 May 2021 at 1, available at <https://kubatana.net/wp-content/uploads/2021/06/LM-Child-Marriages-Edition.pdf>.

146 See the chapter by Choice Damiso on women's rights litigation in this volume.

147 Elia Ntali "Masvingo resident seeks court order on child marriages" *263Chat* 4 October 2021 available at https://allafrica.com/stories/202110040712.html.

3.4. Engaging Chapter 12 Commissions

Another constitutional mechanism available for Zimbabweans to claim their rights and advance social change is through engaging the so-called Chapter 12 Commissions. Established in terms of Chapter 12 of the Constitution of Zimbabwe, these "independent commissions for supporting democracy," as they are collectively called, include the following:

- the Zimbabwe Electoral Commission;
- the Zimbabwe Human Rights Commission;
- the Zimbabwe Gender Commission;
- the Zimbabwe Media Commission; and
- the National Peace and Reconciliation Commission.

Of particular importance for buttressing public interest litigation is the Zimbabwe Human Rights Commission (ZHRC) whose mandate includes *inter alia* the following functions:

- to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;
- to protect the public against abuse of power and maladministration by state and public institutions and by officers of those institutions;
- to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;
- to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated.

The case of *Amalgamated Rural Teachers Union* illustrates how engaging independent commissions can be an effective strategy for supporting public interest litigation.[148] Prior to launching litigation, a teachers' union had filed a complaint with the ZHRC about the abuse of school children, teachers and public school facilities by the ruling party which was forcing children and teachers to attend its political rallies, including during learning time, and commandeering public school facilities such as buses, furniture and classrooms for its rallies. ZHRC conducted a detailed investigation into the matter and made factual findings that indeed the abuses were taking place. ZHRC made recommendations in an effort to put a stop to the abuses, but these were ignored.

The teachers' union, supported by Veritas, then launched an urgent court application against the ruling party as well as the Minister of Education, who was facilitating the abuse. In granting the relief sought, the High Court had the following to say about the significance of the ZHRC report for the success of the litigation:

> "The core of the applicant's evidence was a report by the Zimbabwe Human Rights

148 *Amalgamated Rural Teachers Union of Zimbabwe & Anor v Zimbabwe African National Union (Patriotic Front) & Anor* Masvingo High Court unreported judgment HMA 36/18.

> Commission, a body established in terms of s 242 of the Constitution with wide-ranging functions that include the promotion of awareness; respect; protection; attainment and observance of human rights at all levels of society, and the protection of the public against abuse of power and any maladministration by the State, public institutions and their officers. … I found the report by the Zimbabwe Human Rights Commission most credible. It was balanced. Among other things, it made comparisons of rallies by [ZANU PF] and those by one of the main opposition parties. No children were being compelled to attend rallies of opposition political parties. I also found that before it published its report, the Commission had invited [ZANU PF] to comment, but nobody did."[149]

The High Court decision was welcomed by beleaguered parents, teachers and even the United Nations,[150] but came short of effecting social change. ZANU PF immediately appealed the decision and continued with its abusive practices. The Supreme Court overturned the decision the day before ZANU PF's final rally, at which public school buses were used to ferry people to and from the venue. The Supreme Court never delivered a judgment giving its reasons. Still, the damning factual findings of both the High Court and the ZHRC thrust a deep-rooted social issue into the public discourse and raised the political cost of continuing with the abuse. It remains to be seen whether the practice will rear its ugly head again as elections approach.

The ZHRC also played a critical role in investigating the violent crackdown by the state in the wake of a stay-away protest against a fuel price hike in January 2019. The ZHRC made a staggering finding that "armed and uniformed members of the Zimbabwe National Army and the Zimbabwe Republic Police instigated *systematic torture"* and detailed how the torture was conducted, the civilian populations which were targeted, and how it was systematically organised.[151] Thus, a constitutionally-established body effectively made a factual finding that the state had committed crimes against humanity—if torture is committed "as part of a widespread or *systematic attack* directed against any civilian population, with knowledge of the attack" it meets the definitional requirements of crimes against humanity.[152] Significantly, for our purposes, the report made *inter alia* the following recommendation:

> "Parliament must ensure the implementation of Section 210 of the Constitution by enacting a law for an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct."[153]

At the time that the ZHRC released its report in February 2019, a Constitutional Court application seeking virtually the identical relief to the ZHRC's recommendation to Parliament had been pending for more than three years. Mr Hilton Chironga, a victim of horrific violence by security services, and Mr Rashid Mahiya, the director of

149 *Ibid* 2,14.

150 https://www.263chat.com/un-welcomes-high-court-decision-to-protect-children/ .

151 ZHRC *Monitoring and Investigative Report in the Aftermath of the 14 January to 16 January 2019 Stay Away* (2019) at 62.

152 Article 7 (1) (f) of Rome Statute of the International Criminal Court.

153 ZHRC (n 151) 67.

a civic organisation called Heal Zimbabwe that supports victims of political violence, had filed the application on 15 October 2015 supported by Veritas. The litigants argued that Parliament had unduly and unconstitutionally delayed enacting legislation provided for by section 210 of the Constitution to establish an independent mechanism for complaints against the security services. When the matter was heard by the Constitutional Court on 13 January 2016, legal counsel for Parliament conceded that indeed Parliament had a duty to enact the legislation. Essentially, all that was in issue was the timeframe for doing so. Inexplicably, the Constitutional Court reserved judgment and proceeded to sit on the case for years without handing down judgment while Parliament took no action to enact the legislation.

Into that context came ZHRC's hard-hitting report and directive to Parliament which prefigured what the Constitutional Court would ultimately order, and should really have ordered years earlier. Eventually, on 23 September 2020, the Constitutional Court handed down judgment in *Chironga*, directing Parliament to gazette the Bill within 45 days of the order—an order handed down almost five years after the application was filed.[154] A Bill to establish the Commission has currently stalled in Parliament, with ZLHR and other CSOs conducting extensive advocacy to ensure that the Commission is not rendered ineffective by the legislation. We may never know whether the ZHRC played a role in influencing the Constitutional Court to ultimately discharge its constitutional duty and deliver judgment. What it certainly did was provide citizens with a glimpse of how a constitutional body can and should function.

The above examples demonstrate how, if allowed to exercise their independence, Chapter 12 Commissions can provide a powerful alternative avenue for citizens to claim their rights and press for social change. Sadly, however, within two weeks of the publication of ZHRC's investigative report on the aftermath of the January 2019 protests, its executive secretary, Dr Makanatsa Makonese, resigned amidst speculation that she had been pushed out. The ZHRC has not published any investigative reports since. While ZHRC continues to play a constructive role on less politicised human rights issues, such as participating in ZLHR's mobile clinics as outlined above, it generally appears to have had its wings clipped.

Other Chapter 12 Commissions have been severely compromised by the appointment of partisan commissioners, or by the involvement of the military in the functioning of the Commissions in direct contravention of sections 235 and 236 of the Constitution, which are meant to guarantee Chapter 12 Commissions' independence. Attempts to address this through the courts have so far not borne fruit. In 2018, Veritas brought a challenge against the involvement of the military in the functioning of the Zimbabwe Electoral Commission (ZEC). Astoundingly, the court ruled that it would amount to interference in the independence of the Commission to declare that ZEC should be independent of the control of the military![155]

The National Peace and Reconciliation Commission (NPRC) has shown glimmers of being an institution that could buttress the exercise of fundamental rights. In September 2018, a documentary about the massacre of tens of thousands of civilians during 1980s called *"Gukurahundi Genocide: 36 years later"* was only allowed to be

154 *Chironga & Anor v Minister of Justice, Legal & Parliamentary Affairs* [2020] ZWCC 14.

155 *Valerie Ingham-Thorpe & Others v Zimbabwe Electoral Commission & Anor* Harare High Court unreported case HC 3584/18. For more information on the military's influence over ZEC see "Election Watch 36/2018 – Will the Elections be Free and Fair" available at http://www.veritaszim.net/node/2512 and "The ZEC/ZANU PF symbiotic relationship, military factor and post-July 30 2018 election violence" *Zimbabwe Political Economy Review* (14 September 2018) available at https://kubatana.net/wp-content/uploads/2018/09/ZDI-Post-Election-Review-2018.pdf.

screened after the intervention of the chairperson of the NPRC, Retired Justice Selo Masole Nare.[156] In March 2019, ZLHR obtained an important ruling in *Chinanzvavana*[157] which effectively extended the lifespan of the NPRC due to its complete incapacitation during the first five years after it was created by the Constitution of Zimbabwe. The Minister appealed against the order, suggesting the State wished to curtail its lifespan, perhaps due to fears that it may exercise its independence. However, the NPRC has become bogged down by the appointment of partisan commissioners who have embroiled the Commission in controversy.[158] In July 2021, the Zimbabwe Human Rights Association (ZimRights) brought a court challenge against the appointment of a former opposition politician who had publicly joined ZANU PF just prior to his appointment as a commissioner to the NPRC.[159]

Whether Chapter 12 Commissions might still play the transformative role envisioned for them by the Constitution remains to be seen. Citizens can but continue to push on the door and resist efforts to strip Chapter 12 Commissions of their legitimacy and independence.

3.5. Research and advocacy

Gathering data, conducting in-depth research, and engaging in advocacy with institutions such as Parliament on rights issues, are other key strategies that can be used to claim rights and advance social change. Thorough research almost always forms a key part of successful public interest litigation and sometimes pre-litigation advocacy around that research, particularly targeted at the legislative branch of government, can win legal reforms without ever going to court, or can tee-up subsequent litigation for success if advocacy for reform is ignored. Additionally, post-litigation advocacy is often critical for securing broader structural changes, and ensuring that court victories translate into change on the ground.

Research conducted over an extended period of time on media bias by a civic organisation called Media Monitors Zimbabwe proved pivotal in the *Firinne Trust* case.[160] Veritas brought a public interest case against two state-owned media houses challenging their bias in favour of the ruling party in the lead up to the 2018 elections in breach of their constitutional duty to be impartial in terms of section 61 of the Constitution.

Media Monitors' research had clinically documented and analysed hundreds of hours of television footage and months of newspaper coverage during the electoral period, scientifically recording the amount of airtime given to each political party and classifying the tone of the coverage into three categories: positive, negative and neutral. Their research demonstrated a systematic bias of the state-owned media in favour of the ruling party and against the main opposition party both in terms of the amount of coverage and the tone of coverage.

The Zimbabwe Broadcasting Corporation (ZBC) had sought to resist the application arguing that it was balanced.

156 Jason Burke "Zimbabwe's new artistic freedoms are tested by film on Matabeleland violence" *The Guardian* (30 September 2018) available at https://www.theguardian.com/world/2018/sep/30/documentary-1980s-massacre-director-threatened.

157 *Chinanzvavana v Minister of Justice, Legal & Parliamentary Affairs & Ors* Masvingo High Court unreported case HMA 13/19.

158 "Fury as Obert Gutu calls *Gukurahundi* massacres 'a small tiny fraction'" *ZimLive* (23 June 2021) available at https://www.zimlive.com/2021/06/23/fury-as-obert-gutu-calls-gukurahundi-massacres-a-small-tiny-fraction/.

159 ZimRights Press Release "ZimRights challenges Obert Gutu's continued stay as NPRC Comissioner" (16 July 2021) available at https://kubatana.net/2021/07/16/zimrights-challenges-obert-gutus-continued-stay-as-nprc-commissioner/. The matter was still pending at the time of publication.

160 *Firinne Trust & Ors v Zimbabwe Broadcasting Corporation & Ors*, Masvingo High Court unreported case HMA 23/19.

In finding for the applicants, Mafusire J had this to say, comparing the research done by Media Monitors with the evidence tendered by the ZBC in its defence:

> "Among other things, the analysis by Media Monitors is quite scientific. They compared like with like. It has balance. It is objective. The Electoral Act, in s 160K(3), permits anyone other than the [Zimbabwe Media Commission] to monitor news media and to report on their conduct during an election period. On the other hand the ZBC's [evidence] is largely meaningless. It conceals more than it reveals. It does not compare anything with anything. All it does is to list the names of some opposition political parties and the dates on which something said by their spokespersons was aired. This does not prove anything, especially when compared to the applicants' data that analyses, under different subjects, the coverage of all political parties and the editorial slant of the public media."[161]

The campaign to decriminalise HIV transmission also demonstrates how research and advocacy around a human rights issue can sustain pressure for social change even after public interest litigation on the issue does not, on the face of it, succeed. When transmission of HIV was first criminalised two decades ago, it was supported by women's groups as a means to address violence against women. However, research has demonstrated that the vaguely-worded law does very little to deter HIV transmission and only serves to stigmatise HIV-positive people. The application of the law has resulted in grave injustices on numerous occasions.[162] The case of Ms Samukelisiwe Mlilo epitomises how the law has achieved the opposite of what was envisioned by the women's groups who championed it with the best of intentions two decades ago. In 2012, Ms Mlilo was convicted of "deliberate transmission of HIV" in circumstances where there was no proof that she had infected her husband as he could just have easily infected her. She says she had disclosed her status to her husband who only laid the complaint against her in revenge after she laid a complaint of gender-based violence against him following the breakdown of the marriage.[163]

ZLHR brought a constitutional challenge on behalf of Ms Mlilo and another similarly placed person seeking to have the criminal offence declared unconstitutional. There was a spirited public campaign in the lead up to the case, including a documentary telling Ms Mlilo's story, but ultimately the Constitutional Court declined to strike down the legislation.[164] But that did not stop the campaign. If anything, it galvanised it. In 2018, a group of global experts published an "Expert Consensus Statement on HIV on the Science of HIV in the Context of Criminal Law".[165] Further research and advocacy was conducted, demonstrating that the manner in which the law criminalising transmission was being applied was unscientific and at odds with the Expert Consensus Statement.[166]

161 *Ibid* at 16 and 17.

162 Zimbabwe country profile, *HIV Justice Network* available at https://www.hivjustice.net/country/zw/.

163 "HIV-specific criminal law on trial; ZLHR launches campaign highlighting impact of overly broad HIV criminalisation on women" *HIV Justice Network* (17 February 2015) available at https://www.hivjustice.net/news/zimbabwe-hiv-specific-criminal-law-on-trial-zlhr-launches-campaign-highlighting-impact-of-overly-broad-hiv-criminalisation-on-women/.

164 *S v Mpofu & Another* [2016] ZWCC 5.

165 Françoise Barré-Sinnoussi et al "Expert Consensus Statement on the Science of HIV in the Context of Criminal Law" (2018) 21(7) *Journal of the International AIDS Society*.

166 Annabel Raw et al "Using Science for Justice: The Implications of the Expert Consensus Statement on Zimbabwe's HIV Criminalisation Law" (2020) vol 1 *University of Oxford Human Rights Hub Journal* available at https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-HIV-Criminalisation-Zimbabwe.pdf.

ZLHR also conducted extensive parliamentary engagements in a sustained campaign to shift the attitudes of legislators on the issue, and to push for legislative reform. Then, in March 2019, there was a major breakthrough. In response to a question from an opposition legislator pressing for the decriminalisation of HIV transmission, the Minister of Justice conceded that there was a need to repeal the law. He explained the impact that research and advocacy had had on the shift in government's thinking:

> "… Indeed, when the legislation came into effect, the thinking there was that we need to control the spread of HIV by criminalising those who transmit it to partners willingly. But global thinking is that the law stigmatises people living with HIV and AIDS. Studies have shown that it does not produce the intended results that it is intended to achieve and so what the Ministry is going to do is repeal that section of the law."[167]

A bill was subsequently introduced to Parliament which sought to decriminalise HIV transmission, but two years later it still has not been passed into law. The bill is being held up on issues unrelated to the decriminalisation of HIV transmission as the repeal clause was bundled into the Marriage Amendment Bill—a broad marriage law reform bill that includes a range of other contentious issues. The lesson, perhaps, for future advocacy is that after achieving a dramatic shift in attitude towards a human rights issue such as that seen with the decriminalisation of HIV transmission, that issue should be decoupled from other issues, which remain contentious, in order to ensure that the reform sails through without further delay.

Another example of how litigation and advocacy can be used effectively in combination with one another is the campaign to protect Harare's wetlands. The constant threat to wetlands posed by land developers presents an almost existential threat to the city which is heavily dependent on wetlands for replenishing groundwater supplies, holding floodwaters, and mitigating the effects of climate change, among a range of other functions. ZLHR, working closely with the Harare Wetlands Trust (HWT) and other environmental organisations, have conducted extensive litigation to protect wetlands. But these court cases are almost always defensive: responding to a never-ending barrage of attempts to develop on wetlands. The organisations recognised there needed to be a change in the legal environment through having wetlands gazetted — a legal notice issued by the Minister of Environment that an area is ecologically sensitive and restricting development in and around such area.

In pursuit of this goal, ZLHR and HWT have held numerous parliamentary meetings resulting in two reports from the Parliamentary Portfolio Committee on Environment, Water and Tourism which called for the mapping and gazetting of wetlands. In February 2021, ZLHR and HWT published a position paper on the protection of Harare's wetlands which reiterated the call.[168] These efforts have started to bear fruit. In June 2021, Cabinet announced that the mapping of wetlands had been completed after HWT worked closely with the Environmental Management Agency (EMA) to assist with the mapping process.[169] In October 2021, the Minister of Environment, Climate, Tourism and Hospitality published a notice of intention to declare identified wetlands as ecologically

167 "Zimbabwe: Government plans to repeal overly broad, vague HIV-specific criminal law" *HIV Justice Network* (21 March 2019) available at https://www.hivjustice.net/news-from-other-sources/zimbabwe-government-to-decriminalise-hiv-transmission/.

168 "Position Paper on Protection of Harare's Wetlands: World Wetlands Day" *Zimbabwe Lawyers for Human Rights and Harare Wetlands Trust* (2 February 2021) available at https://kubatana.net/2021/02/02/position-paper-on-protection-of-harares-wetlands-world-wetlands-day/.

169 Ivan Zhakata "National wetlands masterplan complete" The Herald (24 June 2021) available at https://www.herald.co.zw/national-wetlands-master-plan-complete/.

sensitive areas in terms of section 133 of the Environmental Management Act [*Chapter* 20:27].[170] Although the extent of the mapping and the restrictions that will be imposed on those areas is yet to be made public, it appears to be a positive step.

3.6. Social mobilisation and collective action

There is growing recognition globally that social change is most effectively achieved through social movements.[171] Social movements can be broadly defined as "purposeful, organized groups striving to work toward a common goal".[172] They are typically diffuse groups of ordinary citizens and organisations who use informal channels to press for social change, especially through community organising and collective action such as strikes, marches, sit-ins, protest art, stay-aways etc. Social movements have been used to powerful effect to buttress public interest litigation as demonstrated, perhaps most strikingly, by the Treatment Action Campaign cases in South Africa.[173]

Several social movements have emerged in Zimbabwe over the past decades, including the labour movement of the 1990s which gave birth to Zimbabwe's main opposition party the Movement for Democratic Change (MDC), the women's movement including, notably, Women of Zimbabwe Arise (WOZA), and recently the #ThisFlag Citizens Movement. Many of these movements have been crushed or dissipated through a combination of brutal repression, a stifling legal and political environment, co-option, or through a decision by movement leaders to turn to formal politics. Nevertheless, the key building blocks of social movements — chiefly, community organising and collective action — remain present in Zimbabwe and must be examined as key strategies that have been used alongside litigation in an effort to achieve social change.

The #ThisFlag Citizens Movement, which emerged in April 2016, drawing inspiration from the symbolism behind Zimbabwe's flag to denounce "poverty, corruption and injustice"[174] presents an instructive example. When the movement's leader, Pastor Evan Mawarire, was arrested in July 2016 and was arraigned before the courts on subversion charges, something unprecedented happened: thousands of people gathered outside the courtroom in solidarity with the movement leader, and over fifty lawyers showed up to offer *pro bono* legal services.

The sound of hymns — sung in protest against the unjust persecution of the Christian leader who had spoken out against corruption — rang out through the court corridors. And in a remarkable turn of events, the magistrate

170 Arnold Fandiso "Govt lists Greater Harare wetlands" *NewsDay* (12 October 2021) available at https://www.newsday.co.zw/2021/10/govt-lists-greater-harare-wetlands/.

171 Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa* The Atlantic Philanthropies (2015) 101; Mitra Das "Social movements, social change and mass communications" (1981) vol 11 no. 1/2 *International Review of Modern Sociology* 127-143 available at https://www.jstor.org/stable/41420783; J Craig Jenkins and William Form "Social Movements and Social Change" in Thomas Janoski et al *The Handbook of Political Sociology: States, Civil Societies, and Globalization* (2003) Cambridge University Press 331–349 available at https://www.cambridge.org/core/books/abs/handbook-of-political-sociology/social-movements-and-social-change/B907064608B63DE861542965571F356D; Joseph E Luders "The Logic of Social Movement Outcomes" in *The Civil Rights Movement and the Logic of Social Change* (2010) Cambridge University Press 1–19 available at https://www.cambridge.org/core/books/abs/civil-rights-movement-and-the-logic-of-social-change/logic-of-social-movement-outcomes/CBDF6D61C4E6A3EE01BF8E422CF5219F#.

172 "Social Movements and Social Change" *Introduction to Sociology – 1st Canadian Edition* available at https://opentextbc.ca/introductiontosociology/chapter/chapter21-social-movements-and-social-change/.

173 Steven Budlender, Gilbert Marcus SC and Nick Ferreira *Public interest litigation and social change in South Africa* (2015) The Atlantic Philanthropies 48-57.

174 The slogan against these three social ills, which was used widely by the movement, appears here in this tweet from the movement's official Twitter handle on 13 July 2021: https://twitter.com/ThisFlag1980/status/753223153736945664.

courageously quashed the charges and released Mr Mawarire, much to the jubilation of the thronging crowd. The *Mawarire* case provides an insight into how collective action can provide an effective counterweight to the political pressure that is often brought to bear on judicial officers by the executive. It is a lesson the state clearly understood — immediately after Mawarire's release a fence was erected around the court grounds. Two years later, in August 2018, when a court case with a similar level of national interest took centre stage, the *Chamisa* presidential election petition, the state cordoned off the entire section of the city in which the court was situated and declared it a protected zone. Included in the no-go area was a church where citizens had organised to gather and pray over the case. Simultaneously, top-down pressure was maximised.

The Zimbabwe Defence Forces released a statement on the eve of the court case, pre-empting the outcome by congratulating Emmerson Mnangagwa for "resoundingly winning" the election (the very issue the court was being called upon to determine). The statement threatened that they stand "resolute in defence of the country's sovereignty" under the "able leadership of His Excellency the President and Commander-in-Chief of the ZDF, Cde ED Mnangagwa". And this, just weeks after protestors had been shot and killed by the ZDF on the streets of Harare on 1 August 2018. Legal practitioners are among the only groups in Zimbabwean society that have been able to successfully hold marches in recent years without there being mass arrests. Some recent lawyers' collective actions include the following:

- The January 2019 lawyers' march against the widespread miscarriage of justice in courts throughout the country in the aftermath of the #ThisFlag and Zimbabwe Congress of Trade Unions (ZCTU) organised stay away;[175]
- The November 2019 lawyers' march against police brutality, which saw lawyers creatively donning "blood"-stained bandages over their black robes to protest against a series of horrific instances of police brutality and the failure of Parliament to establish an independent complaints mechanism required by section 210 of the Constitution;[176]
- A "flash" protest in September 2020 against the various violations of the Constitution which involved lawyers laying flowers at the base of a sign written "Respect our Constitution" with a list of provisions of the Constitution which had been violated by the Government and by the courts in the preceding weeks.[177]

Other citizens have continued to engage in collective action despite the grave risks. Some have been abducted and tortured for participating in marches, such as Terrence Guta and Loveridge Chinzvende who were abducted on 31 July 2020 after staging a two-person demonstration against abductions and corruption, and pro-democracy activist Itai Dzamara, the president of Occupy Africa Unity Square, who was forcibly disappeared in 2015.[178] Others

175 Charles Laiton "Lawyers march against 'miscarriage of justice'" *NewsDay* (30 January 2019) available at https://www.newsday.co.zw/2019/01/lawyers-march-against-miscarriage-of-justice/.

176 John Cassim "Lawyers march against police brutality in Zimbabwe" *Anadolu Agency* (30 November 2019) available at: https://www.aa.com.tr/en/africa/lawyers-march-against-police-brutality-in-zimbabwe/1659655.

177 Mary Taruvinga "Zim lawyers stage protest against rights abuses by govt, courts" *NewZimbabwe* (3 September 2020).

178 "Zimbabwe: Five years on whereabouts of journalist and pro-democracy activist still a mystery" *Amnesty International,* (9 March 2020) at <https://www.amnesty.org/en/latest/news/2020/03/zimbabwe-five-years-on-whereabouts-of-journalist-and-pro-democracy-activist-still-a-mystery/> .

have been incarcerated for extensive periods of time for exercising their rights, such as activists Makomborero Haruzivishe (who has been detained since 17 February 2021)[179] and Last Maengahama and Tungamirai Madzokere who were detained for a decade before the Supreme Court finally overturned their conviction.[180] A major theme of the collective action that citizens engage in is the defence of the Constitution itself.

In June and July 2020, the director of We Lead Trust, Namatai Kwekweza, was twice arrested, each time with a group of other young persons, for peacefully protesting against Constitutional Amendment Bill No. 2—which serves to consolidate executive power — as well as the façade of a public consultation process being conducted in the middle of a lockdown when most citizens were unable to attend.[181] In July 2020, a young man named Paul Besa was arrested for carrying a sign saying "Respect our Constitution". He was convicted of incitement to public violence and given a suspended 18-month prison sentence. After the constitutional amendments were passed in controversial circumstances, the Zimbabwe Human Rights Association (ZimRights), We Lead Trust, Zimbabwe Human Rights NGO Forum and the Zimbabwe Peace Project (ZPP) hosted an e-rally calling on citizens to #ResistDictatorship which garnered massive attention. The hashtag became a rallying cry on social media for the most immediate issue that arose after the amendments were passed: the attempt to extend the term of office of Chief Justice Luke Malaba beyond his 70th birthday in terms of the new amendments, notwithstanding a provision of the Constitution stating that incumbents at the time of an amendment cannot benefit from an amendment extending their term of office.

Civic organisations such as Magamba Network, ZimRights and We Lead Trust popularised a countdown to the Chief Justice's 70th birthday on 15 May 2021 when he was expected to retire, which kept the hashtag #ResistDicatorship trending on social media for weeks. A plethora of litigation also ensued challenging the constitutional amendments directly, and the effects of the amendments. The Zimbabwe Human Rights NGO Forum representing its director, Musa Kika, and ZLHR, representing the Young Lawyers Association of Zimbabwe (YLAZ), challenged the extension of the Chief Justice's term.[182] The litigation was successful in the High Court which declared that Chief Justice Luke Malaba could not benefit from the amendments and therefore was no longer Chief Justice.

However, the aftermath of the *Musa Kika/YLAZ* High Court ruling illustrates the challenges faced by those seeking to engage in collective action as well as the limitations of public interest litigation in a context like Zimbabwe in general. The High Court ruling was met with a vitriolic response from the executive. The Minister of Justice accused the judiciary of being captured, threatened to "poke the enemy in the eye" and called for the "transformation" of the judiciary to deal with judges who "make decisions that are against the Government".[183] The statement

179 Makomborero Haruzivishe "Letter from a Zimbabwe prison: Justice is the first condition of humanity and we deserve it pure and undiluted" *Daily Maverick* (29 September 2021) available at: https://www.dailymaverick.co.za/article/2021-09-29-letter-from-a-zimbabwe-prison-justice-is-the-first-condition-of-humanity-and-we-deserve-it-pure-and-undiluted/.

180 "Supreme Court Frees 2 MDC Activists Jailed for 'Killing' Zimbabwe Policeman" *VOA Zimbabwe* (4 June 2021) available at: https://www.voazimbabwe.com/a/supreme-court-frees-2-mdc-activist-convicted-of-killing-zimbabwe-policeman/5916558.html.

181 "Police Target Namatai Again as High Court Ends Detention of Opposition Councillor" ZLHR Statement (16 July 2020) available at https://kubatana.net/2020/07/16/police-target-namatai-again-as-high-court-ends-detention-of-opposition-councillor/.

182 *Kika v Minister of Justice and Others; YLAZ v JSC and Others* High Court Harare unreported case HH 264-21.

183 "Minister Ziyambi attacks judiciary over Malaba ouster" *Pindula News* (16 May 2021) available at: https://news.pindula.co.zw/2021/05/16/minister-ziyambi-attacks-judiciary-over-malaba-ouster/.

presented an extraordinary attack on the independence of the judiciary and there was a strong feeling among the legal profession that there needed to be a robust response. But there was one major obstacle: fear. In a survey of lawyers, 50 per cent of respondents were reluctant to engage in civic action against the Minister's attack on the judiciary due to fear of arrest, fear it may prejudice their career, or fear of being sold out by fellow lawyers. Other respondents gave other reasons for their reluctance and only 12 per cent were ready to take action. In the end, there was a muted response.

The Chief Justice continued to go to work. A ZANU PF activist Marx Mupunga filed an application to have the High Court order set aside by the Constitutional Court. A bench of Constitutional Court judges who were parties to the proceedings in the High Court, who stood to directly benefit from the impugned amendments, and who still had a pending appeal before the Supreme Court (that they themselves had filed), sat as judges in their own cause and set aside the High Court order.[184]

The lawyers' fear about taking action was not irrational. A recent study by ZLHR and Lawyers for Lawyers documents the systematic attacks on lawyers in Zimbabwe.[185] Every one of the surveyed lawyers had participated in at least one of the previous lawyers' collective actions. The sad reality is that Zimbabwe is a society in which the exercise of the rights of freedom of assembly and association can carry serious consequences. And so, naturally, people think twice before engaging in such action. In the period from August 2018 to 2021, civic space has been shrinking at a rapid pace. Civic space — the environment within which civil society operates — is a common good for all civil society organisations and, indeed, all citizens. Therefore, when civic space is threatened, co-ordination and collaboration between civil society organisations is key.

3.7. Conclusion

A new threat to civic space has emerged in November 2021: the Public Voluntary Organisations (PVO) Amendment Bill.[186] A similar bill was defeated in 2004 due to the co-ordinated advocacy around it by a coalition of civil society organisations. Such co-ordinated efforts will be gravely needed again this time around to keep what remains of Zimbabwe's civic space open. Since 2019, the state has been threatening to bring in a PVO Amendment Bill and civil society organisations have been campaigning against it.

These advocacy campaigns have been combined with litigation strategies. For example, ZLHR represented the Zimbabwe Human Rights NGO Forum and Crisis in Zimbabwe Coalition to challenge the recent provincial development coordinator (PDC) directive that all NGOs must submit extensive work plans, budgets, reports, and obtain Memorandums of Understandings with government and councils. The court case was successful.[187] But it is likely just a forewarning of the onslaught that awaits.

To successfully defend civic space and fight for social change, a wide range of tactics and strategies will need

184 *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & 6 Ors* [2021] ZWCC 7.

185 "Attacks on Human Rights Lawyers in Zimbabwe" *ZLHR & L4L* (21 September 2021) available at: https://lawyersforlawyers.org/en/report-attacks-on-human-rights-lawyers-in-zimbabwe/.

186 Private Voluntary Organizations Amendment Bill HB 10 (2021) <http://www.veritaszim.net/node/5325>.

187 Moses Matanga "NGOs win court challenge" *NewsDay* (18 September 2021) available at: https://www.newsday.co.zw/2021/09/ngos-win-court-challenge/.

to be engaged. Public interest litigation is certainly among them. But in order to be effective, it should be used in combination with civic education campaigns, advice and assistance centres, research and advocacy, social mobilisation and collective action. Only then will citizens give themselves a fighting chance against those who wish to maintain the status quo or, worse still, snuff out what yet exists of the open and democratic society envisioned by the Constitution.



Lawyers protesting in Harare

CHAPTER 4

4. PROCEDURAL RULES AND PUBLIC INTEREST LITIGATION IN ZIMBABWE – *Fadzayi Mahere*



Advocate Fadzayi Mahere

Advocate Fadzayi Mahere practices as an advocate at the Harare Bar. She has extensive experience in public interest litigation in the superior courts and her main fields of practice include constitutional law, human rights law and administrative law. She has also worked at international tribunals in The Hague and Arusha. She is a law lecturer in the fields of Property Law and Administrative Law at the University of Zimbabwe.

4.1. Introduction



In light of the increasing need for public interest litigation to seek compliance with the Constitution and protect fundamental rights in Zimbabwe, this chapter reviews the key procedural rules that facilitate public interest litigation and those that impede it, including: jurisdiction, confirmation proceedings, constitutional interpretation, standing, remedies and costs. The chapter highlights the restrictions placed by the procedural rules and the manner in which they are being applied, and analyse these in view of international best practice and human rights standards.

The chapter provides an overview of how the criminal procedure laws, High Court Rules, Supreme Court Rules and Constitutional Court rules impact public interest litigation, highlighting the challenges and opportunities for litigants who aim to invoke the law to safeguard their rights and secure redress for perceived violations. It further provides recommendations for legislative reform and provides practical guidance and recommendations to legal practitioners for strategic litigation. The chapter draws from Zimbabwean cases as well as international jurisprudence.

4.2. Procedural rules and public interest litigation

In emerging democracies, public interest litigation can be an effective tool through which the law can be invoked to advance human rights or to draw attention to issues of broad public concern. Public interest litigation advances the causes of minorities or disadvantaged groups, ensures accountability from public actors, and provides redress to victims of constitutional and human rights violations. Public interest litigation assists in clarifying the legal position on complex matters of public interest, and developing the law by giving judges the opportunity to interpret legislation. In Zimbabwe, public interest litigation has been central in highlighting important issues of public concern, encouraging public debate on important issues, giving vulnerable people a voice on issues of concern to them, and providing them with a platform to advocate for their rights.

As highlighted by James Fowkes,[188] procedure was traditionally the device that regulated the role played by individuals in their legal systems. When litigation is used as a tool for social change, procedural rules have the potential to facilitate or impede public interest litigation. Broadly speaking, procedural law is the body of law that sets out the rules that courts follow when adjudicating over disputes including the rules relating to how the courts must function, jurisdiction, standing, available remedies and constitutional and statutory interpretation. There are instances where procedural rules are invoked to avoid granting redress in the face of violations of the law and to avoid the adjudication of litigation on the merits.

188 James Fowkes "Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge" (2012) *Cambridge Journal of International and Comparative Law* 235.

4.3. Jurisdiction — constitutional avoidance, subsidiarity and ripeness

In Zimbabwe, the Constitutional Court has declined to exercise jurisdiction over constitutional matters using the related doctrines of constitutional avoidance, subsidiarity and ripeness. In the case of *Chawira*,[189] the court defined the doctrines of ripeness and constitutional avoidance in the following terms:

> "The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies, the preferred route is to apply such remedies before resorting to the Constitution. That conceptualisation of the law as previously stated finds recognition in the leading case of Catholic Commission of Justice and Peace in Zimbabwe (supra) heavily relied upon by the applicants. In that case the applicants waited until they had exhausted their alternative remedies before approaching the Constitutional Court for relief."

The rationale underlying the doctrine of constitutional avoidance has been considered by Currie and De Waal who say the following:

> "When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so." [190]

Scholars have highlighted that the application of the principle of constitutional avoidance has three legal implications. These are as follows. First, even where the Bill of Rights is directly applicable, there is still a need to apply the ordinary law as it is intended to give effect to the Bill of Rights. Second, there is need to challenge conduct before attacking legislation where statute is applicable. Third is the fact that the doctrine of constitutional avoidance is not an absolute rule.

This third dimension is critical because, as highlighted by several commentators, it recognises that the elevation of such a doctrine into an absolute rule undermines the duty on the courts to interpret and develop the common law, customary law and enactment to promote the objectives and spirit of the Declaration of Rights. It has been argued in this regard that constitutional avoidance should not be applied as a rule which disposes of constitutional issues. In effect, the doctrine of constitutional avoidance should not be resorted to where the constitutional violation is so clear and of direct relevance to the matter, in the absence of an apparent alternative form of ordinary relief, and where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.[191]

189 *Chawira & 13 Ors v Minister, Justice Legal & Parliamentary Affairs & Ors* Constitutional Court unreported case CCZ 3/2017.

190 I Currie & J De Waal *The Bill of Rights Handbook* (2013).

191 *Ibid* 72.

Similarly, in *Majome v ZBC & Others*,[192] it was held that, according to the principle of subsidiarity, litigants who aver that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing an action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation itself.

In *Moyo v Chacha*,[193] it was held that the principle of subsidiarity seeks to prevent the Constitutional Court from having to decide on an *ad hoc* basis whether or not to exercise its jurisdiction. That method would make the law uncertain and open the Constitutional Court to the criticism of handpicking certain cases over others, as opposed to applying a general principle to all cases. The purpose of subsidiarity, according to the court, is the prevention of a claimant from precipitating a full-dress adjudication of a constitutional issue when the legislature has given effect to a constitutional right. Subsidiarity is therefore seen as performing a gatekeeping function. It precludes litigants, whose rights are protected under a statute enacted to give effect to constitutional rights, from relying on such constitutional rights before the Constitutional Court for redress, as opposed to first seeking redress under the statute. The matter may end up at the Constitutional Court, but it must do so through the correct process provided for in the wholesome and hierarchical legal system.

Unfortunately, the practice of the Constitutional Court in Zimbabwe suggests that these doctrines have been applied in an absolute manner, and even in instances where there is a clear violation of the Constitution. This near-absolute avoidance by the Constitutional Court of the exercise of its constitutional jurisdiction using the related doctrines of constitutional avoidance, ripeness and subsidiarity could be argued to be a violation of section 44 of the Constitution, which requires *inter alia* the judiciary to respect, protect, promote and fulfil the rights and freedoms set out in the Bill of Rights.

The approach of our courts before the adoption of the 2013 Constitution was less strict. The courts would take the position that they would not normally consider a constitutional question unless the existence of a remedy depended upon it. If a remedy was available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court would usually decline to determine whether there had been, in addition, a breach of the Declaration of Rights.[194] This principle was, however, not applied with the strictness later adopted by the Constitutional Court.

For practitioners, the impact of these doctrines has been the resort to commencing litigation in the High Court, which has original jurisdiction in all civil and criminal matters. The doctrines have had a negative effect on the number of cases that are brought on constitutional matters due to the apparent reluctance by the courts to interpret the provisions of the Constitution. The workload of the Constitutional Court has been reduced to a point of near redundancy.

192 *Majome v ZBC & Others* 2016 (2) eZLR 747 (CC); CCZ 14/2016.

193 *Moyo v Chacha* Constitutional Court unreported judgment CCZ 19/2017.

194 See the remarks of Baron JA in *Mandirwhe v Minister of State* 1981 (1) SA 759 (ZAD) at 764H; (1) *Bickle & Ors v Minister of Home Affairs*; (2) *Minister of Home Affairs v Bickle & Ors* 1983 (2) ZLR 400 (H).

4.4. Standing in public interest litigation

Standing or *locus standi in judicio* is a rule of procedure that concerns whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue.[195] Simply stated, standing means the right: to bring an action, to be heard in court, or to address the court on a matter before it. It is the ability of a party to demonstrate to the court sufficient connection to, and harm from, the law or action challenged, to support that party's participation in the case.

Under Zimbabwean law, there are two approaches to standing, namely the narrow approach, applicable to ordinary civil litigation, and the wide approach, that applies to constitutional litigation. The test for standing in ordinary civil litigation is settled under our law. To demonstrate that he has *locus standi*, a litigant must show he has a direct and substantial interest in the relief sought.[196] However, in matters that concern violations of the Bill of Rights, the test is a wide one.[197] Under section 85 of the Constitution, any person acting in their own interests, any person acting on behalf of another person who cannot act for themselves, any person acting as a member or in the interests of a group or class of persons, any person acting in the public interest, or any association acting in the interests of its members, may approach a court alleging that a fundamental right or freedom protected in the Constitution has been, is being, or is likely to be, infringed by the impugned law or conduct.

This broad approach to *locus standi* in the 2013 Constitution marks a significant departure from the approach under the former Lancaster House Constitution where the test for *locus standi*, even in matters of public interest, was extremely narrow and often invoked to non-suit litigants who were seeking redress in the face of violations of fundamental rights. Scholars have noted that the narrow interpretation of the rules of standing adopted by the judiciary prior to the enactment of the 2013 Constitution became an impediment to human rights litigation in Zimbabwe because it limited litigants' right to access courts for the protection of their fundamental rights and freedoms.[198]

Possibly the most remarkable case that illustrates this restrictive approach was the case of *Tsvangirai v Registrar-General of Elections*,[199] where the court adopted a restrictive application of the *locus standi* test and prevented the leading opposition candidate from mounting constitutional challenges against laws governing presidential elections. Sandura JA (as he then was) handed down a dissenting opinion where he stated that he would have accorded the litigant standing to promote human rights, access to justice and the rule of law. He said:

> "Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Lancaster House Constitution, embraces the right to require the legislature … to pass laws, which are consistent with the Constitution. If, therefore, the legislature passes a law, which is inconsistent with the Declaration

195 Cheryl Loots "*Locus Standi* to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1989) *SALJ* 131-148.

196 *ZIMTA & Ors v Minister of Education* 1990 (2) ZLR 48 (H).

197 *CCJP v Attorney-General & Ors* 1993 (1) ZLR 242 (S) ; 1993 (4) SA 239 (ZS).

198 L Chiudza & P Makiwane "Strengthening *locus standi* in human rights litigation in the new Zimbabwean Constitution" (2016) *Potchefstroom Electronic Law Journal* 19.

199 *Tsvangirai v Registrar-General of Elections* 2002 (1) ZLR 20.

> of Rights, any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this Court in terms of section 24(1) of the Constitution. Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by Parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the *locus standi* to file the application."

Similarly, in *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe*,[200] the court denied the applicant access to court on the ground that it was not licensed in terms of the relevant Act. The court refused to exercise its powers to protect the applicant's rights which were allegedly being violated by the Broadcasting Services Act. In the view of the court, the applicant had to submit to the impugned legislation before challenging its unconstitutionality. There can be no doubt that this restrictive approach to standing impeded the public interest and general principles of the rule of law and access to justice in that, if the legislation were to be found to be unconstitutional, the court would have denied the litigant a remedy where one existed. Zimbabwe's current Constitution follows the South African model and broadens the number of persons who are entitled to bring rights or interests-based claims for determination by our courts.

To this end, in *Mawarire v Mugabe NO & Others*[201] Chidyausiku CJ held that the court did not expect to appear before it only those "dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of impending threat". The court embraced the wide approach to standing, establishing that it would entertain even those who calmly perceived a looming infringement, and would issue an appropriate order to save the threat.

In *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs*,[202] the Constitutional Court held that section 85(1) of the Constitution embodies the common law rule that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interests adversely affected by an infringement of a fundamental right or freedom. The court went on to state that section 85(1) is a product of the liberalisation of the narrow traditional conception of *locus standi*. The object of section 85(1) is to ensure that cases of infringement of fundamental rights that adversely affect different interests covered by each rule of standing are brought to the attention of a court for redress.

The object is to overcome the formal defects in the legal system to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society. The liberalisation of the narrow traditional conception of standing, and the provision of the fundamental right of access to justice, compel a court exercising jurisdiction under section 85(1) to adopt a broad and generous approach to standing.

The court went on to say that the approach must avoid over-reliance on procedural technicalities, to afford full protection to the fundamental human rights and freedoms enshrined in Chapter IV, and to ensure that the

200 *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (S).

201 *Mawarire v Mugabe NO & Others* Constitutional Court unreported case CCZ 1/13.

202 *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs* Constitutional Court unreported case CCZ 12/15.

exercise of the right of access to judicial remedies is not hindered, provided the substantive requirements of the rule under which standing is claimed are satisfied. It must be noted that the court did, however, indicate that a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding. This approach, while not going as far as the erstwhile narrow regime, does make inroads into the wide approach. Although there is no Constitutional provision or express rule of court that precludes litigants from pleading more than one ground for *locus standi*, the court imposed this requirement. Litigators ought to bear in mind that this could open litigants up to a challenge.

There have been instances, however, where the Constitutional Court has reverted to a restrictive interpretation of the *locus standi* requirements to the detriment of litigants pursuing relief in the public interest. For example, in the case of *Mpofu v ZERA & 2 Others*,[203] the Constitutional Court interpreted section 85 of the Constitution and highlighted that all *locus standi* situations envisaged in section 85(1) are in relation to the infringement of fundamental rights and freedoms in Chapter 4 of the Constitution. The court made a finding that the applicant did not have *locus standi* because he had failed to prove that section 56 of the Constitution had been breached as alleged. With respect, this authority marks a return to a narrower approach to *locus standi* reminiscent of the approach taken by the courts prior to the enactment of the 2013 Constitution.

Once a litigant alleges that a fundamental right has been breached and that he approaches the court in the public interest, he ought to be heard and a finding substantively made on the merits, as opposed to striking the matter off on a technical *locus standi* basis when the Constitution allows such a litigant to access the court. This return to the restrictive approach sets a high threshold for accessing the courts on a constitutional basis and does not bode well for public interest litigation cases. It cannot be justified under the provisions of the 2013 Constitution and is entirely at odds with the approach of courts in other jurisdictions with virtually identical provisions, such as in South Africa.[204]

4.5. Orders of constitutional validity

In terms of the jurisdictional provisions set out in section 175(1) of the Constitution, the High Court has the power to make an order of constitutional invalidity. However, such an order will have no force or effect unless it is confirmed by the Constitutional Court. This is because section 167(3) and section 175(1) explicitly declare that an order of constitutional invalidity made by another court has no force before and unless that order is confirmed by the Constitutional Court.

Section 167(3) also makes it clear that the Constitutional Court makes the final decision as to whether an Act of Parliament or conduct of the President or Parliament is constitutional. To this end, in the case of *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & 6 Others*,[205] it was held that sections 175(1) and 167(3) of the Constitution serve distinct yet harmonious purposes, including the express oversight of the Constitutional Court over orders of constitutional invalidity made by subordinate courts. A similar position was adopted by the court

203 *Mpofu v ZERA & 2 Ors* Constitutional Court unreported case CCZ 13/20.

204 See, eg, *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 13; 1996 (1) SA 984 (CC). On standing in constitutional matters in South Africa, see Max Du Plessis, Glenn Penfold and Jason Brickhill, *Constitutional Litigation* (2013) Juta 43-48.

205 *Mupungu v Minr of Justice, Legal and Parliamentary Affairs & 6 Ors* Constitutional Court unreported case CCZ 7/21.

in *Makamure* v *Minister of Public Service, Labour and Social Welfare & Another*.[206] Thus, section 175(3) vests in the Constitutional Court the exclusive competence to preside over confirmation proceedings, in which proceedings the court makes the final determination as to whether any law or conduct of the President or Parliament is consistent or inconsistent with the Constitution. Although the power to confirm orders of invalidity vests in the Constitutional Court, there have been instances where this power has been invoked to reverse successful public interest litigation. For example, in the case of *Mangwiro v Minister, Justice & Legal Affairs NO & Others*[207] the High Court declared that section 5(2) of the State Liabilities Act [*Chapter 8:14*] was inconsistent with the Constitution and therefore invalid. When the matter was first referred to the Constitutional Court, the court struck it off the roll on the basis that the High Court judge had referred the matter in terms of the wrong provision.

After a variation in the High Court order, the matter was referred back to the Constitutional Court. However, prior to the hearing on constitutional validity, the State paid off the applicant. The Constitutional Court declined to hear the matter in the public interest, on the grounds that there was no competent cause of action before it. Matters referred to the Constitutional Court for confirmation have also faced extensive delays.

4.6. Costs

The general approach that has been taken in public interest and constitutional matters by the courts has been to not order costs against an unsuccessful litigant.[208] This has in some ways promoted public interest litigation. It is generally accepted that *bona fide* constitutional litigation between individuals and organs of state should be encouraged without the fear of punitive legal costs where the individuals lose the case against an organ of state.

Similarly, as highlighted in *In Re: Prosecutor General on his Constitutional Independence and Protection from Direction and Control,*[209] costs are generally not awarded for or against *amici curiae*, to avoid deterring their participation in constitutional matters. Fortunately, the Constitutional Court has to date not followed the decision in *Chinamora* **v** *Angwa Furnishers (Pvt) Ltd & Others*,[210] in which the Supreme Court decided that, despite the application being in the nature of a test case concerning an important constitutional issue, because it involved a private *persona* as one of respondents, costs had to be paid by the unsuccessful party to the successful private respondent. Chinamora was, however, saved from paying the costs of the Minister and the Attorney-General. This case has rightly not been followed by the Constitutional Court.

4.7. Challenges and Opportunities

From the foregoing, it is evident that one of the larger opportunities for public interest litigators and litigants is invoking the jurisdiction of the High Court to seek declarations of rights, interdicts and other remedies based on constitutional causes of action. This means that constitutional violations will be heard and determined by a

206 *Makamure* v *Minr of Public Service, Labour and Social Welfare & Another* Constitutional Court unreported case CCZ 1/20.

207 *Mangwiro v Min, Justice & Legal Affairs NO & Ors* Harare High Court unreported case HH 172/17.

208 *Mpofu v ZERA* (n 203 above).

209 In Re: *Prosecutor General on his Constitutional Independence and Protection from Direction and Control* Constitutional Court unreported case CCZ 13/17.

210 *Chinamora v Angwa Furnishers (Pvt) Ltd & Others* 1996 (2) ZLR 664 (S); 1998 (2) SA 432 (ZS).

court with the option of a second (sometimes third) bite of the cherry on appeal. It also enables litigants in the public interest to proceed by way of action where such a route is expedient. This opportunity is made easier by the fact that the general approach of the courts is to avoid awarding costs in public interest matters where such proceedings are underpinned by *bonafide* public-spiritedness.

That said, the reluctance of the Constitutional Court to hear constitutional cases on the merits, through its near-absolute application of the constitutional avoidance, subsidiarity and ripeness doctrines, and the restrictive application of procedural rules, is a clear impediment to access to justice, public accountability and promotion of the rule of law. A preferable approach is one that sets out accepted exceptions to these doctrines for deserving cases. This will ensure that the Constitutional Court is not unduly flooded with undeserving cases, but also balances this out by giving appropriate cases, particularly those that have a bearing on the public interest, a hearing by the highest court in the land on constitutional matters.



The late former Chief Justice Godfrey Chidyausiku

CHAPTER 5

5. A BRIEF REVIEW OF THE JURISPRUDENCE AND LITIGATION FOR THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN ZIMBABWE SINCE 2013 - *Justice Alfred Mavedzenge*



Dr Justice Mavedzenge

Dr Justice Mavedzenge is a constitutional and human rights law expert, who has conducted extensive legislative and policy research to promote rights and democracy across the continent. He has published extensively on constitutional and socio-economic rights litigation in Zimbabwe.

5.1. Introduction

One of the progressive elements of the 2013 Constitution is that it guarantees a range of socio-economic rights.[211] The full implementation of these rights is critical for the protection of human dignity and the achievement of substantive equality, especially for the benefit of economically vulnerable groups. Several cases have been brought before the courts to protect and push for the implementation of these rights. For instance, in addition to many orders granted without reasons, more than five judgments have been secured on the right to housing, at least two cases have been decided on the right of access to water and the right to social security, while there are more than four cases that have been decided by the courts on the right to education. Thus, there is a body of jurisprudence emerging on the implementation and enforcement of socio-economic rights. This contribution provides a brief review of this jurisprudence, and litigation experiences and challenges, with the aim to identify and discuss emerging trends. Due to space constraints, the review does not seek to be wholly comprehensive, but to provide an overview. Based on the identified trends, the chapter provides recommendations on how best these rights can be enforced through public interest litigation.

5.2. Constitutional framework on socio-economic rights

The Constitution of Zimbabwe guarantees a set of socio-economic rights. These include the right to health care,[212] the right to shelter,[213] the right to food and water,[214] the right to social security,[215] freedom from arbitrary eviction,[216] and the right to education.[217] Some of these rights are guaranteed for everyone, while others are guaranteed for specific groups. For instance, the right to a basic state-funded education and adult education, and the right of access to basic health care services, are guaranteed for every citizen and permanent resident of Zimbabwe, while the right to shelter is expressly guaranteed for children. Amongst the rights that are guaranteed for everyone are the right to adequate food, the right to safe, clean and potable water, the right to emergency medical treatment and freedom from arbitrary eviction. These rights create obligations on the state and every person.[218] However, in this paper, the focus is on upholding the duties of the state.

5.3. Nature of obligations

As is the case with all other rights guaranteed in the Constitution, socio-economic rights are fully justiciable. The state has duties to respect, protect, promote and fulfil these rights.[219] The duty to respect entails the obligation

211 For a full discussion of these rights, see Sandra Ratjen and Justice Mavedzenge *A Guide for the Litigation of Economic, Social and Cultural Rights in Zimbabwe* (2014) International Commission of Jurists. Also see Justice Mavedzenge and Doug Coltart *A Constitutional Guide Towards Understanding Zimbabwe's Socio-economic Human Rights* (2014) International Commission of Jurists.

212 See s 76 of the Constitution.

213 See s 81(1)(f) of the Constitution.

214 See s 77 of the Constitution.

215 See s 82 of the Constitution.

216 See s 74 of the Constitution.

217 See s 75 of the Constitution.

218 See s 44 of the Constitution.

219 *Ibid.*

to refrain from interfering with the existing access to these rights.[220] The duty to protect entails the obligation to implement legislative, policy and other related measures to protect existing access from arbitrary interference.[221] The duty to promote entails the obligation to create conditions which enable or empower those who currently do not have access to these rights to gain access,[222] while the duty to fulfil entails the obligation to provide goods and services to enable those who lack access to gain access to the rights.[223] The duties to protect, promote and fulfil are referred to as "positive obligations" while the duty to respect is referred to as a "negative obligation". Thus, socio-economic rights create both negative and positive obligations which are to be fulfilled by the state.

Negative duties must be fulfilled immediately upon the adoption of the Constitution. For instance, the duty to refrain from interfering with existing access to water through arbitrary water disconnections or water pollution is an immediately enforceable obligation. The same is true about the duty to refrain from conducting evictions which leave persons homeless or which leave them living under much worse housing conditions than before the evictions.

Generally, positive obligations must be fulfilled on a progressive basis. The amount of time taken to fulfil these obligations, and the progress achieved, must be proportional to the resources available to the state.[224] Therefore, certain obligations (especially under the duty to fulfil these rights) are to be performed over a reasonable period of time determined by the resources available. For example, the provision of land for housing for underprivileged groups, the provision of tuition for state-funded education for underprivileged learners, or the establishment of healthcare facilities in areas where such facilities do not exist, is to be achieved over a period of time determined by resources available to the government. However, although these goods and services are to be provided on a progressive basis, the state has a duty to immediately undertake reasonable measures to ensure that these rights can be realised expeditiously.[225] Such measures include the enactment of the necessary legislation and the adoption of the necessary policies. For example, as part of the duty to protect the right to shelter, the government must immediately enact legislation to confer adequate security of tenure for those who already enjoy access to housing. As part of the duty to promote these rights, the government must, within a reasonable period of time after the adoption of the Constitution, enact clear policies which outline how it intends to promote the realisation of access to housing by those who currently do not enjoy adequate housing. The same is true of the other socio-economic rights such as education, health care, water, food and social security.

220 See De Vos, P "The Economic and Social Rights of Children and South Africa's Transitional Constitution" (1995) *South African Public Law* 246.

221 See Craig Scott and Patrick Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social rights in a new South African Constitution." (1992) *University of Pennsylvania Law Review* 74.

222 Eide, A "Economic, Social and Cultural Rights as Human Rights" In Eide, A et al (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) Martinus Nijhoff 38.

223 *Ibid.*

224 See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*(14 December 1990) para 9; Also see Liebenberg, S and Pillay, K (eds) *Socio-Economic Rights in South Africa* (2000) Community Law Centre: University of the Western Cape 192-194.

225 See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*(14 December 1990) para 9.

5.4. Trends in the enforcement of socio-economic rights since 2013

Since the adoption of the Constitution in 2013, there have been efforts to enforce socio-economic rights through public interest litigation by ZLHR and other organisations and individuals. How have the courts dealt with the enforcement of the duties of the state on the implementation of socio-economic rights? Are there areas where progress has been achieved and are there some where there is a need to improve? These questions can be addressed through a review of certain landmark cases which have been decided by the courts since 2013. Importantly, only a small portion of socio-economic rights cases result in court decisions, and many of those result in court orders only, and no judgment. The focus of this chapter will be mostly on the body of judgments.

5.4.1. Right to shelter

Certain elements of the right to shelter are guaranteed through sections 74 and 81 (1)(f) of the Constitution. Section 74 protects persons against arbitrary evictions. It states that "No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances". There are negative and positive obligations which arise from this right. Negative obligations include the duty of the state to refrain from conducting arbitrary or forced evictions. Forced evictions are the

> "permanent or temporary removal against their will of individuals, families and or communities from the homes and or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[226]

Such evictions are arbitrary because the people are forcibly removed from their homes, without recourse to the law and without providing them with suitable alternative accommodation. In a landmark case litigated by ZLHR in *Mukungurutse*, the High Court and later the Supreme Court confirmed that the section 74 requirement of a court order before any eviction or demolition of a home is peremptory, and struck down a law purporting to authorise this to happen without a court order.[227]

In addition to these negative obligations are positive obligations which include the duty of the state to implement reasonable legislative, policy and other measures to ensure that certain procedural requirements are adhered to when evictions are being conducted,[228] the duty to confer adequate security of tenure to all people who are lacking security of tenure[229], and the duty to ensure the provision of alternative suitable housing prior to the evictions.[230] Since 2013, there have been more than five cases decided under section 74 of the Constitution. Amongst the earliest are ZLHR's cases of *Peter Makani v Epworth Local Board HH 550–14* and *Dusabe v Harare City* [2016] ZWHHC 116. The *Makani* case concerned evictions of families from an informal settlement in

226 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions* (20 May 1997) is the most comprehensive, para 3. Also see *Basic Principles and Guidelines on Development-based Evictions and Displacement* [A/HRC/4/18] para 4.

227 *Mukungurutse & Others v City of Harare & Anor* Harare High Court unreported case 16-HH-558; *City of Harare v Mukungurutse T & 3 Ors* Supreme Court unreported case 18-SC-046.

228 CESCR *General Comment No. 7* (n 224) para 15.

229 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art 11 (1) of the Covenant)* (13 December 1991) para 8(a) and supra note 3, para 9.

230 CESCR *General Comment No. 7* (n 224) para 16.

Epworth. The applicants sought an interdict prohibiting the municipal authorities from conducting demolitions without a court order. The court granted the relief sought on the grounds that the municipal authority was in violation of section 74 of the Constitution by conducting evictions without an appropriate order of the court. In *Dusabe*, the applicants challenged the decision by the City of Harare to demolish their homes without a court order. In addition, the applicants sought an order compelling the City to urgently provide alternative suitable accommodation to those whose homes had already been destroyed. They also requested the court to make an order of compensation for damages suffered as a result of the violation of their freedom from arbitrary evictions. Thus, unlike in the *Makani* case, the applicants in *Dusabe* attempted to enforce not only the negative obligations but also the positive obligations arising from section 74, in particular the obligation to provide alternative suitable housing and the obligation to provide compensation for violations suffered. The court granted a *declarator* that the demolitions were in violation of the freedom from arbitrary evictions because they were being conducted without a court order.

However, the court rejected the claim for alternative housing and compensation to be provided for those whose homes had already been demolished and harassed by the respondents. It reasoned that the applicants could not seek such relief in urgent application proceedings because "[t]he application procedure is not suited to such a claim which involves the quantification of damages and the placing of evidence before the court as to the value of their properties and their entitlement to other damages such as compensation for pain and suffering".[231] The court's position regarding a claim for constitutional damages on motion was probably correct. Such a claim would have to be brought by action proceedings or at see the issue of damages referred to oral evidence. However, the positive duty of the state to provide alternative suitable housing could still have been enforced immediately, given the overwhelming evidence that the respondent had been responsible for conducting evictions without a court order, and considering that the court had agreed that by so doing the respondent had conducted arbitrary evictions.

Section 81(1)(f) of the Constitution guarantees the right to shelter for children. It states that "Every child, that is to say every boy and girl under the age of eighteen years, has the right—(f) to … shelter". This right creates the negative obligation of the state to refrain from interfering with existing access to housing by children. It also creates a range of other positive obligations including providing security of tenure, and providing goods and services (such as land) to enable children from economically disadvantaged families to gain access to housing.

In 2019, the Supreme Court was seized with a petition to enforce some of these obligations in the case of *Homeless People's Federation and Others v Minister of Local Government and National Housing & Others* ("*Homeless Federation 2019*").[232] The case concerned the eviction of families who had settled and established permanent homes in an informal settlement. They had occupied the land since 2000. The government served them with eviction notices which they did not comply with, after which the authorities began to conduct evictions. The residents challenged the evictions in the High Court where the court ruled against them. They appealed to the Supreme Court seeking an interdict against the evictions. In addition, they sought a *declarator* to the effect that

231 See *Dusabe & Mutokambali v City of Harare, Minister of Local Government Public Works and National Housing & Minister Of Lands and Rural Resettlement* [2016] ZWHHC 116 13. https://old.zimlii.org/node/7053.

232 *Homeless People's Federation & Ors v Minister of Local Government and National Housing & Ors* Supreme Court unreported case Civil Appeal No. SC 541/2019.

the right of children to housing is justiciable and enforceable as an independent right not dependent upon the general right to housing or shelter. Finally, they sought an order directing the government to provide them with serviced residential stands and to construct minimum core houses on the informal settlement presently occupied by the appellants, or any suitable alternative housing.

The court granted the interdict against the evictions, on the basis that the evictions violated section 81(1)(f) of the Constitution on the right to shelter for children. In addition, the court issued a *declarator* to the effect that the right of children to housing is justiciable and enforceable as an independent right not dependent upon the general right to housing or shelter. The court went on to clarify that the state owes a duty to provide reasonable housing assistance even for children who are under parental care, in circumstances where the parents are unable to adequately provide for the children. However, the court did not pronounce itself on whether the state could be compelled to provide alternative suitable housing. It chose to remit the determination of that question to the High Court for reconsideration. Thus again, similar to the approach taken in the earlier cases, the court enforced the negative obligations to refrain from interfering with existing access to housing but avoided enforcing the positive obligations arising from the right to shelter, particularly the duty to provide alternative housing before evictions could be conducted, or for those whose homes had been illegally demolished.

In 2021, the Supreme Court handed down a decision in another groundbreaking case of *Zimbabwe Homeless Peoples Federation and Another v Minister of Local Government and National Housing and 3 Others* ("*Homeless Federation 2021*").[233] On appeal, the residents asked the Supreme Court to issue a *declarator* to the effect that although the Constitution does not expressly provide for the right to adequate housing for everyone other than children, every person can claim access to housing as a right implied under the right to human dignity, which is provided under section 48 of the Constitution. The court dismissed this argument and it reasoned that:

> "The right to shelter is not provided for anywhere in the Declaration of Rights. Parliament, in its wisdom, merely made provision for the State and all institutions of government to take reasonable steps and measures, within the limits of the resources available, to actualise access to adequate shelter. That provision is essentially exhortatory but is one that the State and all institutions of government must bear in mind when formulating or implementing laws and policy decisions of government."[234]

Thus, the court essentially rejected the claim that access to housing is implied under the right to life and human dignity and the basis for the court's decision is essentially that it could not create a right which the legislators appear to have deliberately left out when crafting the law. This judgment, which is difficult to defend on this point, stands as a serious impediment to any possible judicial enforcement of positive obligations of the state to promote and fulfil the right of every person to adequate housing — a right which Zimbabwe is internationally bound to fulfil.[235] A petition to the Constitutional Court ought to be considered, at the appropriate time.

233 *Zimbabwe Homeless Peoples Federation & Anor v Minister of Local Government and National Housing & Ors* Supreme Court unreported case Civil Appeal No. SC 118/19.

234 See para 39-41.

235 By virtue of being party to the International Covenant on Economic Social and Cultural Rights.

There are numerous other cases on rights to housing and freedom from arbitrary evictions, not discussed in this paper, where the courts have enforced the negative obligation of the state to refrain from conducting arbitrary evictions. These cases include ZLHR's cases of *Clifford Charera v University of Zimbabwe & 2 Others*[236] and *Nyatsambo Katsamudanga & Arnold Farm & 8 Others v Minister of Land and Rural Settlement NO & 2 others.*[237] However, the enforcement of positive obligations of the right to housing remains elusive.

5.4.2. The right to water

Section 77 the Constitution guarantees for everyone the right to safe, clean and potable water, and it obliges the state to take reasonable legislative and other measures, within the limits of the available resources, to achieve the progressive realisation of this right. This right creates the negative obligation for the state to refrain from interfering with existing access to water.[238] It also creates a range of positive obligations including the duty to provide adequate clean, safe and potable water to those who may not afford to access water on their own.

One of the early cases which sought to enforce the right to water is *Mushoriwa v City of Harare*.[239] The background was that the City of Harare ("the City") had sent the applicant a bill of US$1,700 claiming payment for water services rendered. The applicant disputed the bill, and the City went ahead to disconnect water supplies. The applicant challenged the decision to disconnect water supplies, arguing that it was arbitrary and was in violation of his right to water enshrined in section 77(a). He sought an order interdicting the City and all its employees from interfering with, disrupting or terminating his water supply without the authority of a court order. The court granted the relief sought, holding that the City has a duty to respect the right to water and, in particular, to refrain from interfering with existing access to water supplies without a court order. The court held that the City's by-laws which empowered it to disconnect water supplies without a court order were *ultra vires* the Constitution. It seems that this judgment by the High Court has inspired other courts to issue orders (although not fully written judgments) interdicting authorities against disconnecting water supplies without authorisation by a court of law. Such cases, litigated by the ZLHR, include *Chipo Chitowa v Zimbabwe National Water Authority;*[240] *Dharmesh Pitamber v City of Harare* and *Ephraim Matanda & United Mutare Residents and Ratepayers Trust v City of Mutare*.[241]

However, on appeal the Supreme Court reversed the position in *City of Harare v Mushoriwa.*[242] The Supreme Court held that the impugned by-laws are compliant with the Constitution. It reasoned that the by-laws are reasonable and *intra vires* the enabling provisions of the Urban Councils Act, concluding that "the appellant's power to disconnect water supplies for non-payment of water accounts, provided it is reasonably applied and

236 *Clifford Charera v University of Zimbabwe & Ors* HH 419-17 http://www.jsc.org.zw/jscbackend/upload/Judgements/High%20Court/Harare/2017/HH%20419-17.pdf.

237 *Nyatsambo Katsamudanga & Arnold Farm & Ors v Minister of Land and Rural Settlement NO & 2 others* (unreported). The court did not issue a written judgment but handed down an order. See https://www.newsday.co.zw/2017/04/first-family-owns-arnold-farm/.

238 See the judgments on the protection of wetlands in the chapter on environmental rights by Mafo and Iliff.

239 *Mushoriwa v City of Harare* HC 4266 of 2013; [2014] ZWHHC 195 (29 April 2014).

240 *Chipo Chitowa v Zimbabwe National Water Authority* (unreported). Court order accessible from https://www.zlhr.org.zw/?p=2515.

241 *Dharmesh Pitamber v City of Harare* and *Ephraim Matanda & United Mutare Residents and Ratepayers Trust v City of Mutare* (unreported).

242 *City of Harare v Mushoriwa* [2018] ZWSC 54.

enforced, and exercised in strict compliance with the conditions prescribed in the by-laws, is both statutorily and constitutionally unimpeachable". The major basis for the court's finding was that the right to water is not an absolute right and is subject to limitations, including to allow disconnection of water supplies on the basis of non-payment of water bills. The impugned by-laws empower the municipal authorities to disconnect water supplies in case of non-payment, and provided the affected person is given a minimum of 24-hour notice of the intention to disconnect the supplies. ZLHR has secured a number of orders against municipalities ordering them to re-establish water supplies, including in a case against the City of Harare Municipality, another matter in which residents had gone for 15 years without receiving water from the City of Mutare, and a water reconnection case in Chitungwiza. These matters were successful but are unreported.

5.4.3. Right to education



WOZA members protesting in Harare

In section 75, the Constitution guarantees every citizen and permanent resident the right to a basic state-funded education. The same is guaranteed in section 81(1)(f) for children. Similar to other rights, this right creates the negative obligation of the state to refrain from interfering with existing access to education facilities and services. In addition, it creates a range of positive obligations, including the duty of the state to establish and provide education services and facilities to those who currently lack access, as well as the duty to adopt the necessary protective measures to ensure that those who currently access these services and facilities will not be arbitrarily deprived of their access.

There have been several cases litigated to enforce the right to education, especially for the benefit of children. Several cases litigated by ZLHR concern how far school authorities can go to regulate certain conduct amongst learners including dress code, hair style and religious conduct,[243] without interfering with the learner's right to education as well as other rights such as freedom of religion and freedom of conscience.

However, more recently in 2018, the High Court was seized with a matter which had the potential to address the enforcement of both the negative and positive duties of the state under the right to education. *Amalgamated Rural Teachers Union of Zimbabwe & Another v ZANU PF & Minister of Primary and Secondary Education*, litigated by Veritas, arose as a result of an investigation and a report published by the Zimbabwe Human Rights Commission, which found that the governing party (ZANU PF) had forced certain schools to close in order for the learners and

243 See for example, *Makhiwa v Minister of Education & Others* (HC 51 of 2013) [2013] ZWBHC 6 and *Makani & Others v Arundel School & Others* (CCZ 7 of 2016, Constitutional Application CCZ 17 of 2015) [2016] ZWCC. Also see *Mathew Sogolani v Minister of Primary and Secondary Education & 3 Others* (28 December 2020) (CCZ 20 of 2020, Constitutional Application CCZ 31 of 2016) [2020] ZWCC 20.

teachers to participate in the party's political rallies.[244] The party had also compelled certain schools to allow their properties and furniture (including buses and chairs) to be used at its political rallies. The court found that these activities and decisions by the governing party violated the learners' right to education, amongst many other rights. The court granted an interdict ordering the governing party to stop forcing learners to attend its rallies, as well as to stop using school properties and furniture for its rallies. The court also interdicted the Minister of Primary and Secondary Education (who was the second respondent in the case) "from assisting the first respondent (governing party) to do any of the restrained activities above or allowing the first respondent to use schools for political purposes".

Unfortunately, this High Court decision was set aside on appeal by the Supreme Court in an order without reasons. The issue may have to be revisited if these practices are repeated. One option (as had been recommended by the Zimbabwe Human Rights Commission) would be to seek an order directing the Minister to ensure that all political parties develop codes of conduct on the involvement of children and use of school premises and properties in their political party activities. Such a code of conduct is necessary given the rampant abuse of learners and school properties by political leaders during election campaign seasons, which interfere with the children's right to education. The Minister, on behalf of the state, has a positive obligation to implement such policy measures to protect the right to education.

5.4.4. Right to social security

The right to social security is expressly guaranteed in section 82 of the Constitution for elderly persons i.e. persons over the age of seventy.[245] The right to social security may also be implied under the right to life and human dignity which are guaranteed for everyone in ss 48 and 51 of the Constitution. In terms of section 82, elderly persons have the right to receive reasonable social care and assistance from their families and the state, as well as the right to receive the financial support necessary for their social welfare.[246] As is the case with other socio-economic rights, these rights are to be realised progressively, subject to the resources available to the state. The right to social security also creates both negative and positive obligations for the state. The negative obligations include the duty to refrain from depriving persons of their existing access to social care and security. The positive obligations include the duty of the state to undertake and implement reasonable measures to provide goods and services to elderly persons who are in need and have no other means of adequately providing for their own welfare.

In *Makoka v Minister of Health and Child Care & 4 Others,*[247] the High Court was petitioned to compel the state to undertake positive measures to give effect to the right to social security in the face of the COVID-19 pandemic national lockdown. The applicants also invoked other rights, including the right to life. They sought an order directing the state to provide safety nets in the form of cash handouts, food and potable water during the period

244 *Amalgamated Rural Teachers Union of Zimbabwe & Another v ZANU PF & Minister of Primary and Secondary Education* (28 June 2018) High Court Masvingo unreported case 36 of 2018, HC 263 of 2018); [2018] ZWMSVHC 36.

245 See section 82 of the Constitution.

246 *Ibid*, section 82 (a) and (c).

247 *Makoka v Minister of Health and Child Care & 4 Others* (19 June 2020) High Court Harare unreported case 414/2020, HC 3003 of 2020; [2020] ZWHHC 414.

of the COVID-19 national lockdown, as well as to publish regulations in terms of section 13 of the Social Welfare Assistance Act to define the eligibility of beneficiaries. The court rejected the claim on the basis that there was already a sufficient legislative framework that enables persons in need to request and access social security. The court noted that persons in need of social support or relief could submit an application for assistance to the Director of Social Welfare in terms of section 3 of the Social Welfare Assistance Act. In future litigation, it could be more effective to direct the challenge at the adequacy of the existing legislative framework, including by demonstrating that the Social Welfare Assistance Act is inadequate for the protection of the right to social security under the circumstances of a national disaster.

Further, the court noted that it was unable to make an order compelling the state to provide social safety nets to unnamed persons, implying that the correct procedure would have been to petition the court to review a decision to deny social assistance to specific persons or groups of persons. Persons with proof that they had been prevented from applying for social security, or that they had been denied the assistance, would have made stronger applicants. Prior to *Makoka*, a similar petition had been filed in *Markham & Anor v Minister of Health and Child Care & 3 Others*.[248] Similarly, the court dismissed the application on the basis that the relief being sought (the provision of social safety nets) was already being provided by the government. In future litigation, applicants will need to try different approaches, such as directly challenging the adequacy of the measures undertaken by the state, demonstrating that the assistance being provided is inadequate for the protection of the right to social security and the right to life.

5.4.5. Right to health

The right to health care is protected in section 76 of the Constitution. Health rights are also specifically protected for the elderly in section 82, and for children in section 19. This area has obviously been particularly salient during the COVID-19 pandemic, and some successes have been secured. In ZLHR's case of *Zimbabwe Association of Doctors for Human Rights (ZADHR) v Minister of Health and Child Care, Minister of Finance and Economic Development and*

Minister of Transport and Economic Development, [249] the High Court (Justice Joseph Musakwa and Justice Owen Tagu) issued a consent order compelling government: to provide all frontline health practitioners with personal protective equipment (PPE) to protect them from coronavirus as they execute their duties, to adequately equip public hospitals to curb the spread of the epidemic, to conduct tracing of contacts exposed by infected people, and to supply sufficient testing kits at all designated public hospitals, airports and ports of entry. Government had not put in place measures to ensure that health practitioners across the country were adequately protected against the deadly epidemic. In another case brought by ZLHR, the *Combined Harare Residents Association (CHRA) v City of Harare*, [250] the City of Harare had closed all its polyclinics due to lack of Covid-19 related resources, including personal protective equipment (PPE), resulting in those requiring emergency care, including pregnant women,

248 *Markham & Anor v Minister of Health and Child Care & 3 Others* (15 April 2020) High Court Harare unreported case 263/2020, HC 2168 of 2020; [2020] ZWHHC 263.

249 *Zimbabwe Association of Doctors for Human Rights (ZADHR) v Minister of Health and Child Care, Minister of Finance and Economic Development and Minister of Transport and Economic Development* (unreported), available at https://www.zlhr.org.zw/?p=2004.

250 *Combined Harare Residents Association (CHRA) v City of Harare* (unreported), discussed at https://nehandaradio.com/2020/10/08/high-court-orders-city-of-harare-to-open-all-clinics-attend-to-pregnant-mothers/.

being turned away. High Court Judge Justice Edith Mushore issued an order that the City of Harare ensure that all pregnant women receive emergency medical services and that all 42 council clinics be reopened by 14 October 2020.

5.5. Conclusion and recommendations

Since 2013, significant progress has been achieved in the enforcement of negative obligations through the courts, particularly the duty to refrain from interfering with the existing access to the rights. For example, there is a significant amount of jurisprudence that has been developed by the courts interdicting the state from conducting arbitrary evictions, arbitrarily disconnecting water supplies, and interdicting education authorities from barring learners from attending school. However, the courts have been reluctant to enforce positive obligations, especially in cases where they have been petitioned to compel the state to implement positive measures to provide or facilitate access to those who are currently deprived of access to their rights. For example, several attempts have been made to enforce the positive obligation of the state to provide alternative accommodation to families who have suffered arbitrary evictions, and the courts have either rejected these petitions or avoided addressing the issue.

The failure or hesitation by the courts to enforce positive obligations is a major challenge, given that the majority of the people in Zimbabwe are living in poverty and cannot afford access to socio-economic livelihoods without the state playing its role in implementing positive measures to render them the necessary assistance. The failure and/or hesitation to enforce these positive obligations also contributes towards the disregard of the rule of law and violation of the negative obligations themselves. For instance, despite the rich jurisprudence indicating that the state must not conduct evictions without a court order, the government has repeatedly conducted evictions without court orders.

This is because the state and public officials face very few consequences after conducting arbitrary evictions. To address this, ZLHR has brought a number of damages claims on behalf of victims of arbitrary evictions.[251] Sustained litigation to enforce positive obligations, such as compelling the state to provide alternative accommodation or compensation for victims of arbitrary evictions, will hopefully deter the government and public officials from conducting forced evictions in future.

There are isolated instances where the High Court has issued orders to enforce certain aspects of the state's positive obligations, albeit through orders rather than written judgments. For instance, as mentioned above, when the COVID-19 pandemic broke out in 2020, ZLHR brought a petition[252] in court to compel the state to provide protective clothing to all frontline health care workers to protect them from contracting COVID-19 during the course of discharging their duties. By way of a consent order, the court compelled the Minister of Health to take positive steps to ensure that adequate PPEs were made available to the frontline health care workers. The hesitation by the courts to enforce positive obligations is not a challenge that is peculiar to Zimbabwe. It is a

251 Columbus Mahvunga, "Zimbabwe court orders payment to farmers evicted by Grace Mugabe" *Deutsche Welle* (2 March 2018) available at https://www.dw.com/en/zimbabwe-court-orders-payment-to-farmers-evicted-by-grace-mugabe/a-42806037

252 *Zimbabwe Association of Doctors for Human Rights (ZADHR) v Minister of Health and Child Care, Minister of Finance and Economic Development and Minister of Transport and Economic Development* (unreported High Court decision, 14 April 2020) available at https://www.zlhr.org.zw/?p=2004

challenge that has been experienced in other jurisdictions.[253] Usually the basis for such hesitation is that the courts sometimes perceive their role as being constrained by the separation of powers doctrine. Elsewhere[254] I have thoroughly discussed this challenge and offered proposals on how courts can couch their role to enforce the positive obligations without undermining the separation of powers. I have argued thus:

> "[It is necessary] to strike a balance between the need for the judiciary to respect the separation of powers, while at the same time enforcing the obligation of the state to provide the vulnerable members of society with access to the minimum core of these rights, so that they can (at least) have access to the basic decencies needed for them to lead dignified human lives. In summary I contend that the minimum core content of each socio-economic right has a qualitative and a quantitative dimension. In order to enforce the minimum core obligation without violating the separation of powers, the judiciary must be perceived to have a primary and a secondary role. The primary role of the court must be to enforce meaningful engagement between the state and the rights bearers in determining the quantitative minimum core content of each right. Once the state has developed this core content, the court can review its reasonableness by measuring it against the qualitative minimum standards imposed by the right. In circumstances of urgent need, and where the state has failed to develop a reasonable quantitative minimum core content, the court should invoke its secondary role which entails setting the quantitative minimum core content to be provided by the state as a temporary measure, until the state develops a reasonable minimum core content."[255]

A deeper conversation on this approach needs to be had with both the judiciary and lawyers, as part of the efforts to promote the enforcement of positive obligations in Zimbabwe. A further challenge which may have also contributed towards the slow progress in the judicial enforcement of positive obligations is that litigation on these obligations has been difficult to co-ordinate and plan strategically. It has often been conducted on an urgent and *ad hoc* basis in response to dire situations, making it difficult to plan and constraining follow-up. For instance, in *Dusabe*, the court dismissed the petition for an order compelling the state to provide alternative accommodation and compensation for victims of arbitrary eviction primarily because (in its opinion) those issues could not be properly resolved in an urgent application. As a follow up to this type of application in similar cases in the future, an ordinary action by way of summons seeking damages and alternative accommodation for the affected victims could be filed. Similar litigation could also be undertaken as a follow up to cases such as the *Makani* case, where the court ruled that the evictions conducted by the state were arbitrary and were a violation of section 77 of the Constitution.

In some of the major cases seeking to enforce positive obligations, applicants' arguments and the focus of the litigation could also be expanded and refined. For instance, in *Makoka*, whilst the applicants had a strong footing on the right to life to enforce the positive duties of the state to provide social safety nets, the case could have also invoked section 82 of the Constitution, which expressly guarantees the right of elderly persons to

253 See Justice Mavedzenge "Revisiting the role of the judiciary in enforcing the state's duty to provide access to the minimum core content of socio-economic rights in South Africa and Kenya" (2021) 7(2) *Journal of Comparative Law in Africa*, 60–89.

254 *Ibid*.

255 *Ibid* 61.

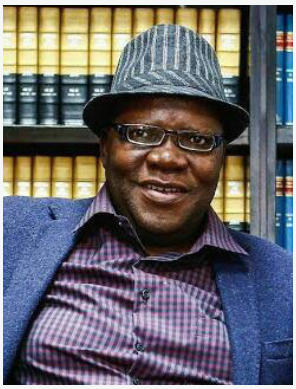
receive social security. The use of victims directly affected by violations can also strengthen applications. The *Makoka* application would have been strengthened if it had been made on behalf of a specific group of elderly persons as litigants. A thorough testing and review of the existing legislation on the provision of social security, including section 3 of the Social Welfare Assistance Act, could also lead to strategic litigation demanding the state to undertake legislative measures to protect and fulfil the right to social security. Similarly, in *Amalgamated Rural Teachers Union of Zimbabwe & Another v ZANU PF & Minister of Primary and Secondary Education,* the relief sought could have gone beyond seeking prohibitive interdicts against the conduct of the ruling party which interfered with the right to education. The applicants could also have sought a *mandamus* aimed at enforcing certain positive obligations of the government, especially to undertake and implement policy measures to guard against the abuse of leaners and school property, through the development of an appropriate code of conduct on the use of school property and attendance of children at political rallies.

It must be acknowledged that the ability to enforce positive obligations through the courts is very much dependent on the independence and capacity of the judges to apply and enforce the law impartially without fear or favour. There are valid concerns that the independence of the Zimbabwean judiciary is constrained.[256] This accounts for some of the lack of progress in the enforcement of the positive obligations. However, there might also be other challenges restraining the courts from enforcing the positive obligations. As discussed above, these include the misperception of the separation of powers doctrine by some of the judges and lawyers, and perhaps a lack of judicial capacity and training on socio-economic rights. There is need for a very considered and co-ordinated litigation strategy on socio economic rights by those championing the enforcement of these rights in Zimbabwe going forward.

256 Justice Mavedzenge "The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years" (2020) *African Human Rights Law Journal* 181-205.

CHAPTER 6

6. LITIGATION ON FREEDOM OF EXPRESSION, ASSEMBLY, PROTEST AND ASSOCIATION - *Tendai Biti*



Mr Tendai Biti

Tendai Biti is a senior lawyer and member of Zimbabwe Lawyers for Human Rights. He has had over 30 years of experience of public interest litigation in Zimbabwe's courts, setting important precedent in many cases. He occasionally lectures at Harvard University and Cornell University as a visiting lecturer.

6.1. Introduction

In contested and dominated social formations such as Zimbabwe, a constant tension, and indeed an ongoing struggle, exists between a powerful state controlled by elites, and a dispossessed citizenry, which seeks to assert its right to freedom, to survival and to human dignity. In this constant struggle, expressive rights —including freedom of speech, the right to vote, political rights, religious rights, and the rights to freedom of association and assembly— form the core of a bundle of rights previously known as "first generation" rights.

The rights to freedom of expression, assembly and association, constitute a web of mutually supporting rights that are an essential cog of the Zimbabwean Constitution. These rights are key in the establishment of democracy but also in defining the individual, and bestowing identity and agency on the citizen. Since its establishment in 1995, ZLHR has spent the bulk of its time and resources in asserting and defending the expressive rights of citizens, in particular the right to freedom of expression, speech, voting, assembly, association and religion, which work has been key in limiting and mitigating authoritarian hegemony by Zimbabwe's ruling elite.

6.2. Lawfare and the defence of human rights in post-independent Zimbabwe

Zimbabwe's long history of conflict, attrition, violence and attacks on citizens' rights is well documented.[257] Since attaining independence in 1980, Zimbabwe remains mired in an avalanche of disputed elections, serious abuse of human rights, political conflict and violence.

One of the critical historical periods in Zimbabwe is the genocide and massacre of citizens by the Zimbabwean state during the period known as *Gukurahundi*, from 1981 to 1987, where more than 20,000 Zimbabweans in the South and South West parts of the country were murdered by state security agents. This period saw the *de facto* banning of the opposition liberation movement ZAPU, led by Joshua Nkomo, and a sustained drive towards the establishment of a one-party state, which ambition was only brought to a halt due to protests by students and the labour movement, and the subsequent fall of the Berlin war in 1989.

A second disruptive period was the violent land reform exercise that took place from 2000, primarily motivated by the ruling party's loss of a constitutional referendum in February 2000. The land reform programme, done without respect to due process and the rule of law, resulted in confiscation of over 15 million hectares of land belonging to commercial white farmers, hundreds of deaths, and the displacement of over a million black farmers.

In 2005, the government embarked on a massive "clean-up" operation now known as "Operation *Murambatsvina*", where thousands of homes and urban structures were destroyed in towns and cities, leaving many homeless and destitute. Shortly thereafter, the country witnessed massive political violence, particularly directed at the labour-backed official opposition party, the Movement for Democratic Change (MDC), which saw hundreds of its members killed, particularly in the run-off to the 2008 presidential election.

In the same period, the law was viciously used by the regime as a means of establishing political control and

257 See chapter 2 by Tererai Mafukidze on the history of public interest litigation in Zimbabwe.

authoritarian consolidation. From 1980 to 2008, the Constitution was amended 17 times and in the majority of these amendments, the sole agenda was to maintain political hegemony and authoritarian consolidation. The period between 1980 to now has seen systematic use of the law as an instrument of coercion and legitimation.

The law has been instrumental in the construction of the Zimbabwean state as we know it today, just as in the colonial order that preceded the modern Zimbabwean State in 1980. The construction of the new Zimbabwean State entailed the institutionalisation of law and legal discourse as an authoritative language of the state, and the medium through which the state acquired discursive presence and authority. However, as the State became more repressive and as political space was closed, the citizenry — deprived of other means of expressing itself — resorted to the law and to the courts as centres of arbitration and relief.

Thus litigation, and constitutional litigation in particular, has been as much a permanent feature of Zimbabwe's landscape as has been brutality, violence and repression. In short, lawfare has become an increasing and permanent feature of Zimbabwe, with the courts replacing traditional political battlefields such as the streets, parliament and the polling station, as an avenue of political arbitration. This is not a uniquely Zimbabwean outcome, as Jean and John L Comaroff have observed:

> "Politics itself is migrating to the courts… Conflicts once joined in parliaments by means of street protests, mass demonstration, and media campaigns through labour strikes, boycotts, blockades and other instruments of assertion, tend more and more … to find their way to the judiciary. Class struggles seem to have metamorphosed into class actions."[258]

This contribution will focus on litigation and lawfare in so far as it relates to expressive rights in post-independent Zimbabwe. It will also show the central role that ZLHR, and other law-based human rights organisations, have played as an anchor to and pillar of the important litigation that has helped mitigate against authoritarianism.

6.3. Eclectic and Inconsistent: The Court's Treatment of the Right to Freedom of Expression, Freedom of Movement and Freedom of Association

6.3.1. Freedom of Expression

There are discernible differences in the tone, texture and jurisprudence relating to human rights in general and the court's treatment of expressive rights during different periods in Zimbabwe's history. As a matter of fact, the distinct periods are characterised by the different Chief Justices that presided at the time. Zimbabwe had a State of Emergency imposed from independence until 1989. During the State of Emergency, the Bill of Rights in the Constitution was not justiciable. Therefore real constitutional litigation in Zimbabwe emerged after 1990.

258 JL Comaroff & J Comaroff "Law and Disorder in the Postcolony: An Introduction" in J Comaroff & JL Comaroff (eds) *Law and Disorder in the Postcolony* (2006) Univeristy of Chicago Press 27.

6.3.1.1. The Gubbay Era

In its real first judgment on the Bill of Rights in the case of *In Re Munhumeso & Others*,[259] the Zimbabwean Supreme Court described freedom of expression as "one of the most precious of all the guaranteed freedoms." The Chief Justice, Gubbay CJ, writing for the full bench of the Supreme Court stated as follows:

> "The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man'."[260]

In arriving at the decision, the court identified four special purposes that freedom of expression serves. These are that:

a. it helps an individual to obtain self-fulfilment,
b. it assists in the discovery of truth,
c. it strengthens the capacity of an individual to participate in decision-making, and
d. it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

The approach by Gubbay CJ would find progeny in subsequent judgments in the region. Thus, in *South African National Defence Union v Minister of Defence*, O'Regan J, relying on *In re Munhumeso*, defined two fundamental causes for the right of freedom of expression, in the following terms:

> "Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy. Its implicit recognition and protection of the moral agency on individuals in our society and its facilitation of the search for the truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear from and express opinions and views freely in a wide range of matters."[261]

Three judgments of the Gubbay era stand out and demonstrate this court's inviolable commitment to the right to freedom of expression. In *Chavhunduka*,[262] the court dealt with the constitutionality of section 5(2)(a) of the Law and Order Maintenance Act [*Chapter 11:07*]. This section, typical of repressive colonial laws, outlawed the publication of false statements, rumours or reports which were likely to cause fear, alarm or despondency among the public, or any section thereof, or likely to disturb the public peace.

The applicants, Mark Chavhunduka and Ray Choto, were a journalist and newspaper editor. Charges were brought against them for breach of section 5(2)(a) of the Law and Order (Maintenance Act) [*Chapter 11:07*]. The

259 In Re *Munhumeso & Others* 1995 (1) SA 551 (ZSC).

260 *Ibid* 557C-D.

261 *South African National Defence Union v Minister of Defence* (1999) ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 para 7.

262 *Chavhunduka & Anor v Min of Home Affairs & Anor* 2000 (1) ZLR 552 (S).

Constitutional Court had no hesitation in holding unlawful and unconstitutional the false statement provision contained in the Law and Order (Maintenance) Act. In outlawing the provision, Gubbay CJ emphasised that free speech had to be protected no matter how unpalatable and unpopular a particular view was. At 558F-G the following was stated:

> "Plainly embraced and underscoring the essential nature of freedom of expression are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered HOLMES J so wisely observed in *US v Schwimmer* 279 US 644 (1929) at 654, the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom of thought for those that we hate.' Mere content, no matter how offensive, cannot be determinative of whether a statement qualifies for the Constitutional protection afforded to freedom of expression. See *R v Keegastra* (1991) 3 CRR (2d) 193 (Can SC) at 286. Sixty years later in *R v Zundel* (1992) 10 CRR (2d) 193 (Can SC) MADAM JUSTICE MCLACHLIN expressed much the same sentiment as HOLMES J."

In *Woods v Minister of Justice Legal and Parliamentary Affairs*,[263] a full bench of the Supreme Court considered the constitutionality of section 141(1)(a) of the Prison Regulations of 1956, which restricted class D prisoners to writing or receiving only one letter in four weeks. In outlawing the impugned Prison Regulations, the Supreme Court emphasised that prisoners did not lose their constitutional rights upon conviction and, more importantly, that freedom of expression, which includes the right to receive or write letters, was the most precious of all protected freedoms, lying at the very foundation of a democratic society, and one always to be jealously guarded by the court.

The third judgment is *Retrofit (Pvt) Ltd v Post and Telecommunications Corporation*.[264] In this case, the applicant, Retrofit (Pvt) Ltd, challenged section 26 (1) of the Post and Telecommunications Corporation Act [*Chapter 12:05*] which gave a government parastatal, the Posts and Telecommunications Corporation, the exclusive right and monopoly of establishing a mobile cellular telephone service in Zimbabwe. In an extremely brave and lucid judgment, the Gubbay court struck down the monopoly provided to the Posts and Telecommunications Corporation on the basis that it breached the freedom of expression provision in the Zimbabwean Constitution.

The key feature of these judgments is the extensive reference to international law and comparative judgments in other jurisdictions. The court made extensive reference to judgments particularly from the United States of America, the Commonwealth, and other jurisdictions. It also made reference to international conventions, in particular article 19 of the Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights, and article 9 of the African Charter on Human and Peoples' Rights.

At a technical level, the court adopted a two-pronged approach in its determinations of whether or not the legal provisions, which were sought to be impugned, were constitutional or not. The first point of enquiry was to determine whether or not the particular provision was an infringement of the right to freedom of expression.

263 *Woods v Min of Justice Legal and Parliamentary Affairs* 2000 (4) SA 1 (ZS).

264 *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1996 (1) SA 847 (ZC).

Here a broad, generous and purposive approach was adopted. At the second level, the court determined whether or not the provisions sought to be impugned were reasonably justified in a democratic society. In dealing with the burden of justification, the courts adopted a narrow restrictive approach. In general terms, it is now accepted that this is the manner in which constitutional challenges are handled. The post-Gubbay era, at the onset, tried to follow the tradition and precedent set in the Gubbay era.

6.3.1.2. The Chidyausiku Era

In the case of *Constantine Chimakure & Others v the Attorney-General*,[265] the Chidyausiku bench was faced with the constitutionality of criminal defamation or false news, proscribed in terms of section 31 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The applicant, Constantine Chimakure, a journalist working for a weekly newspaper, *The Independent*, had in 2009 publicised stories of abductions made by state security agents against activists and members of the MDC. In one of the articles published, Chimakure had revealed the specific names of intelligence operatives who had been responsible for the abductions and the torture of the opposition activists. The state brought criminal proceedings against Chimakure and the newspaper alleging that they had published falsehoods.

In a judgment that followed the tradition of the Gubbay era, the Supreme Court struck down the false news provisions in Zimbabwe's law. The court asserted that the law cannot be used to restrict the exercise of freedom of expression under the guise of protecting public order. The maintenance of public order or preservation of public service is synonymous with the protection of fundamental human rights and freedoms. Public order is a concept used to describe the state of calm or even tempo of the life of the community brought about by laws enforced by the state.

The court proceeded further to make the point that truth is not the only protected aspect of freedom of expression but even false statements. Malaba DCJ, as he then, was writing for the majority, and stated as follows:

> "In other words truth is not a condition *sine qua non* of the protection of freedom of expression. This freedom applies to all expression regardless of their nature, content, quality or truth. The content of a statement should not therefore determine whether it falls within s 20(1) of the Constitution's protection: see *New York Times v Sullivan* 376 US 254(1964) at 271-272. Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. The constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies are not necessarily without intrinsic social value in fostering individual self fulfilment and discovery of truth. For that reason the Constitution protects against State interference in the rights of every person to speak or write and communicate or publish to others what he or she thinks. These rights are part of the 'freedom' or 'liberty' guaranteed by the Constitution."

Possibly the most important judgment of the Chidyausiku era is *Nevanji Madanhire & Another v Attorney General.*[266]

265 *Chimakure & Ors v A-G* 2013 (2) ZLR 466 (S).

266 *Madanhire & Anor v Attorney General* [2014] ZWCC 2.

This case outlawed section 96 of the Criminal Code, which provisions criminalised criminal defamation. Criminal defamation had remained a constant tool against journalists and the journalism profession. In an eloquent judgment, the court spoke out against the chilling effect of criminalising defamation and also the fact that there was a sustainable alternative remedy to criminal defamation in the form of ordinary defamatory laws, holding:

> "It cannot be denied that newspapers play a vital role in disseminating information in every society, whether open or otherwise. Part and parcel of that role is to unearth corrupt fraudulent activities, executive and corporate excesses, and other wrongdoings that impinge upon the rights and interests of ordinary citizens. It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This in turn may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices."[267]

Another progressive decision, consistent with Gubbay jurisprudence, was the case of *Law Society of Zimbabwe v Minister of Transport & Another.*[268] In that case, the Law Society of Zimbabwe challenged the constitutionality of sections 98(2) and 103 of the Postal and Telecommunications Act [*Chapter 12:05*] which gave the President power to direct interception of postal articles. The lawyers argued that the provision infringed their right to freedom of expression and also the privacy of attorney-client privilege. The court held that section 98(2) was a derogation of the right to freedom of expression conferred by section 20 of the Constitution. Further, the court held that the President had unlimited and unrestrained power and an unfettered discretion to intercept mail and communications, which could not be justified in a constitutional order. The impugned section was excessively vague, such that the citizen was unable to regulate his conduct in such a way as to avoid the interception of his mail communications. They were therefore illegal and unconstitutional.

However, in spite of these initial progressive judgments, stock differences subsequently clearly began to emerge between the Gubbay and Chidyausiku benches. The most critical difference was in the manner in which the different courts dealt with the land question and electoral disputes. These are, however, not the subject of the present chapter. Expressive rights, and in particular the right to freedom of expression, also soon began to suffer under the Chidyausiku era, through a series of eclectic and inconsistent judgments.

The case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State Information Publicity & Others*[269] marked a new and sadly decisive departure from the progressive era of Gubbay CJ. In 2002, the government published the Access to Information and Protection of Privacy Act [*Chapter 10:27*], which in section 66 required newspapers and media houses to register with the Media and Information Commission before being allowed to publish. Further, section 79 required journalists to be accredited with the Commission before they were allowed to practise.

267 *Ibid*.

268 *Law Society of Zimbabwe v Min of Transport & Anor* 2004 (1) ZLR 257 (S).

269 *ANZ (Pvt) Ltd v Min of State for Information & Os* 2004 (1) ZLR 538 (S).

The Associated Newspapers of Zimbabwe (Pvt) Ltd (ANZ), the publishers of a then fiercely independent daily newspaper, *The Daily News* — whose printing press was to be subsequently bombed and thereby brought out of business for a period of more than 15 years — made an application to the Supreme Court contending that the requirements for registration were in breach of the right of freedom of expression codified in section 20 of the Constitution. To assert its rights, the media house and its journalists had refused to register and be accredited.

In a now infamous judgment, the Supreme Court held that there was an obligation on citizens to comply with the law first, even one which they did not consider legitimate, and that any person who did not comply with the law was approaching the court with dirty hands and therefore could not receive audience form the court. At 548 Chidyausiku CJ stated as follows:

> "This court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is required to do is to submit itself to the law and approach this court with clean hands on the same papers."

In 2013, in a judgment penned by Justice Kate O'Regan (retired South African Constitutional Court judge) sitting in the Supreme Court of Namibia, the court stated that the Chidyausiku Court had misunderstood the English authority it claimed to rely on and declined to follow the *ANZ* decision. It held that there was a fundamental difference between the English case cited as authority and the *ANZ* case. In the English case, the state sought and obtained an interim order requiring compliance with the statutory orders pending the determination of their validity by the court. There was no question of the applicants being denied the opportunity to challenge the validity of the impugned statutory orders, even though the applicants had launched the challenge at a time when they admitted they were not complying with the orders.

In *ANZ*, on the other hand, the state did not seek as interim relief an order requiring compliance with the impugned legislation pending determination of its constitutionality. Instead, the state argued, successfully, that the applicant should be barred from approaching the court and thus prevented from obtaining a determination of the constitutionality of the impugned legislation. The Namibian Supreme Court held that the English case does not support the outcome in the Zimbabwean case: it was authority for the proposition that a litigant may, by order of court, be compelled to comply with a legal provision pending the determination of the provision's validity. It was not authority for the proposition that a litigant may be prevented from obtaining the determination of the validity of a legal provision as a result of non-compliance with the provision.[270]

In *Association of Independent Journalists and Others v Minister of State for Information & Others*,[271] the applicants, an association of independent journalists, approached the Supreme Court seeking to set aside provisions of

270 *Shaanika and Others v Windhoek City Police & Ors* (15 July 2013) [2013] NASC 9.

271 *Association of Independent Journalists & Ors v Minr of State for Information & Others* 2004 (1) ZLR 94 (S).

the Access to Information and Protection of Privacy Act [*Chapter 10:27*], which required them to register and be accredited as journalists before they were allowed to practice. The court held that whilst section 20(1) of the Constitution of Zimbabwe guaranteed an individual's right to freedom of expression, it did not expressly guarantee the exercise of that right through any means of one's choice. There was therefore nothing wrong in a law that regulated the practice of journalists. A similar ruling was made in a challenge brought against the constitutionality of the Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations 2002 (SI 169C/2002) in the matter of *ANZ (Pvt) Ltd v Minister of State for Information and Others*.[272]

The decision in *Zimbabwe Lawyers for Human Rights & Another v President of Zimbabwe & Another*[273] makes sad reading. ZLHR made an application to the court based on freedom of expression and access to information, demanding the release of the reports of two Commissions of Inquiry instigated at the instance of the country's president, in relation to the disturbances, violence and genocide in Matabeleland that occurred between 1982 and 1987, now commonly referred to as *Gukurahundi*. As mentioned above, *Gukurahundi* represented the darkest period of Zimbabwe's post-independence history, and involved a period in respect of which more than 20,000 Zimbabweans were killed at the hands of state security agents. Nothing could therefore be more in the public interest than the release of those two reports. Regrettably, the Supreme Court turned down the application on the basis that freedom of expression was not a right that was insensitive to the rights of others.

A further indictment of the Chidyausiku era is the case of *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Others*.[274] Capital Radio (Pvt) Ltd was a private broadcasting entity that sought to establish an independently owned broadcasting house in Zimbabwe. In 1999, during the Gubbay era, it had approached the Supreme Court of Zimbabwe and successfully challenged section 27 of the Broadcasting Act [*Chapter 12:01*], which gave a monopoly and exclusive right to the Zimbabwe Broadcasting Corporation on broadcasting in Zimbabwe. The Gubbay court had set aside that monopoly.[275]

Soon after the abolition of that monopoly, the applicant imported into Zimbabwe one antenna, one transmitter, hired some broadcasting equipment, and began broadcasting. The authorities quickly moved in to stop this. First, the President decreed regulations in terms of the Presidential Powers (Temporary Measures) Act banning independent broadcasting. This was followed by the enactment of the Broadcasting Services Act [*Chapter 12:06*] which came into force on 4 April 2001 and, in various sections, required that all broadcasters should be licensed.

In any country broadcasting has to be regulated, particularly as it relates to the issuance of spectrum, but this particular case ought to have been decided on the basis that the new Broadcasting Services Act [*Chapter 12:06*] could not have had retrospective effect to take away the rights due to Capital Radio as a result of its success in challenging the ZBC monopoly. Instead, in an extremely long and convoluted judgment,[276] the court upheld the constitutionality of the bulk of the provisions in the Broadcasting Services Act. A further disappointing

272 *ANZ (Pvt) Ltd v Min of State for Information & Ors* 2005 (1) ZLR 222 (S).

273 *ZLHR & Anor v President of Zimbabwe & Anor* 2003 (2) ZLR 444 (S).

274 *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Others* 2003 (2) ZLR 236 (S).

275 *Capital Radio (Pvt) Ltd v Min of Information* (1) 2000 (2) ZLR 243 (S).

276 *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003 (2) ZLR 236 (S).

judgment is *National Constitutional Assembly v The President & Others*.[277] A civic society organisation, the National Constitutional Assembly, convened a constitutional conference where it received views from Zimbabweans on a model draft Constitution. It proceeded to draft the model Constitution and sought to hand it over to the President who declined to receive it. It then approached the High Court for an order compelling the President to accept and receive the draft. The court held that the President could not be compelled to receive the constitutional draft. This is notwithstanding that constitutional law-making was a matter of public importance in Zimbabwe at the time and the President himself, only five years before, had carried out his own constitution-making process resulting in a constitutional referendum.

In *Majome v Zimbabwe Broadcasting Corporation & Others*,[278] the applicant Jessie Majome sought an order declaring that certain provisions of the Broadcasting Services Act, which required her to pay a licence fee, were unconstitutional. Her argument was that she could not be compelled to pay a licence fee when she did not watch or listen to the Zimbabwe Broadcasting Corporation (ZBC) as a result of its propaganda and bias towards the authorities and the ruling ZANU PF party. She argued that the requirement to pay her licence was a breach of her right to freedom of the media, her right to freedom of assembly and association, and her right to freedom of expression. In dismissing the application, the court held that the licence paid to the ZBC was a tax, which was permitted by the Constitution.

In *S v Mwonzora*,[279] the applicant, then an opposition politician, brought a challenge to section 33(2)(a) of the Criminal Law Code, which made it an offence to make statements that undermine the authority of the President. Sadly, the court refused to entertain the challenge to the constitutionality of section 33(2)(a) of the Criminal Law Code but did strike down the particular charge against Mr Mwonzora on the basis that it lacked certain necessary averments.

6.3.2. The Right to Freedom of Association and Assembly

The right to peaceful assembly is a fundamental foundational right provided for in international law. Article 20 of the Universal Declaration of Human Rights guarantees the right of peaceful assembly and association, and of course not to be compelled to belong to an association. Article 11 of the European Convention on Human Rights, adopted on 3 September 1993, protects the right to peaceful assembly, with the caveat that third parties may enforce limitations on the exercise of that right. However such limitations must be:

> "(a) Prescribed by law; and
> (b) Exercised in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

The African Charter on Human and Peoples' Rights, in article 10 and 11, also provides for the right to freedom of association and assembly. In the South African case of *South African Transport and Allied Workers' Union &*

277 *National Constitutional Assembly v The President & Ors* 2005 (2) ZLR 310 (H).

278 *Majome v ZBC & Others* Constitutional Court unreported case CCZ 14/2016.

279 *S v Mwonzora* Constitutional Court unreported case CCZ 17/2016.

Another v Garvas & Others (SATAWU), [280] the South African Constitutional Court defined the goals of the right to freedom of assembly in the following terms:

> "The right of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political economic power and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principle means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the excess and achievements of all other rights."

In Zimbabwean law, that right was recognised and entrenched in the Gubbay era in the seminal decision of *In re Munhumeso* discussed above. The facts were that the Zimbabwe Congress of Trade Unions (ZCTU) applied to the Zimbabwe Republic Police, in terms of section 6(2) of the Law and Order (Maintenance) Act, for permission to stage a peaceful public procession. This request was turned down. Notwithstanding this, the ZCTU proceeded with a peaceful march which was dispersed by the police but six people, the applicants in the matter, were arrested.

On their remand, the applicants (represented by the writer) applied for the matter to be referred to the Supreme Court in terms of section 24(1) of the Constitution, arguing that section 6(2) of the Law and Order (Maintenance) Act, which required police permission before a peaceful procession could take place, was unconstitutional. The Constitutional Court upheld the applicants' contention and set aside the provision. The court held, among other things, that whilst the power to control a public procession in a public place may be necessary in the interest of public safety or public order, such power had to be exercised in a manner far less restrictive and authoritarian than provided for in the fatally flawed Law and Order (Maintenance) Act.

Despite this important victory, at all material times the police constantly abused the Law and Order (Maintenance) Act in denying activists, civil society and the opposition MDC the right to assemble, gather and march. In 2003, the Government of Zimbabwe repealed the Law and Order (Maintenance) Act and replaced it with the Public Order and Security Act [*Chapter 11:17*] ("POSA") in 2001. POSA still provided that notification had to be provided to a regulating authority, which had power to grant or refuse permission for a procession to take place.

Section 24(1) of POSA required police notification to be provided to a regulating authority who had the power to reject it. In 2002, the present author brought a constitutional challenge to the legality of the provisions of section 24 of POSA on the basis it was an infringement of his right to freedom of assembly and association, as protected by section 21 of the Constitution. The Chidyausiku court, on nebulous grounds, upheld the constitutionality of section 24 of POSA. At page 202C to D, the court stated as follows:

> "In my view, s 24 of the Act does not arbitrary or excessively invade the enjoyment of the freedom of expression and the freedom of assembly and association. It merely

280 *South African Transport and Allied Workers' Union & Another v Garvas & Others (SATAWU)* 2013 (1) SA 83 (CC).

> requires the organiser of the public gathering to give the written notice to the regulating authority. Most importantly, it does not give the regulating authority the power to prohibit the gathering or to order the persons taking part in the gathering to disperse. These powers are given to the regulating authority in terms of other sections of the Act which are not under consideration in the present application."

Section 27 of POSA allowed a regulating authority, in the interest of public safety and security, to ban or prohibit public meetings or gatherings for a period not exceeding three months in any designated area. In 2017, faced with mounting and regular protests in Harare demanding electoral reform, the regulating authority of the Harare Metropolitan area banned the holding of public meetings and gatherings for the month of September 2017. A few political parties, churches and civil society organisations challenged this ban and the constitutionality of the Public Order and Security Act.

In a positive development, in the case of *Democratic Assembly for Restoration Empowerment v Saunyama NO*,[281] the Constitutional Court of Zimbabwe declared section 27 of POSA unconstitutional. The court stated as follows:

> "I may add on a general note that protests and mass demonstrations remain one of the most vivid ways of the public coming together to express an opinion in support of or in opposition to a position […] Long after the demonstrations, and long after the faces of the demonstrators are forgotten, the messages and the purposes of the demonstrations remain as a reminder of public outrage at, or condemnation or support of an issue or policy … Demonstrations have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom."

6.4. Challenges in Constitutional Litigation

The above survey of cases on freedom of expression, assembly and association, show the huge levels of jurisprudential inconsistency by the courts. An eclectic approach that has no rational basis or explanation gives rise to fears of capture and judicial manipulation. This is regrettable and not acceptable. Section 164 of the Constitution of Zimbabwe guarantees independence of the judiciary. Indeed, the constitution makes it very clear that the judiciary should be free from any political interference. Furthermore, section 165 of the Constitution makes it clear that the paramount duty of judicial officers is to protect human rights. Often times this has not been the case.

A study of constitutional judgments, particularly in the Chidyausiku/ Malaba era, also reflects a deliberate over-technical approach to the law, which has operated to deny constitutional relief. The doctrines of ripeness, mootness and subsidiarity, which are dubious procedural rules of questionable origins, have now constantly been used by a hesitant and uncertain court unwilling to make decisions that will offend the executive.[282] This has certainly brought extreme frustration amongst human rights and constitutional law practitioners who have

281 *Democratic Assembly for Restoration Empowerment v Saunyama NO & 3 Ors* Constitutional Court unreported case CCZ 9/2018.

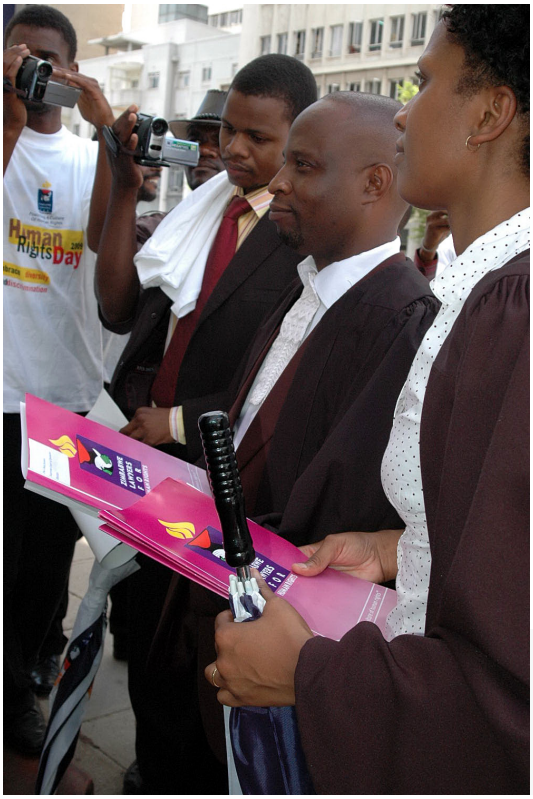
282 See chapter 4 by Fadzayi Mahere, discussing procedural rules.

watched the practice of constitutional law reduced to a kick-and-hope exercise. However, there are instances where the legal profession must take responsibility. Constitutional law and practice is extremely complicated. There is no room for tardiness, untidiness and ill-researched court applications. The absence of a systematic, comprehensive and continuous education programme in the profession, the balkanisation of the profession and the university, and more importantly the silo approach of the profession, with each practitioner stuck in his or her little office, has not helped to advance jurisprudence. In the end, an unaccountable court is therefore left at large to make important decisions that negatively impact the public and cripple constitutional jurisprudence.

6.5. Conclusion

Despite the challenges highlighted, constitutional litigation on the cluster of rights discussed in this chapter remains important. As long as the democratic space remains closed and as long as Zimbabwe remains a heavily contested, socially-dominated formation, lawfare will be inevitable. In this regard, there is no greater instrument of protection than the Constitution itself. Expressive rights, in the form of the right of free speech, political rights, and the rights of freedom of assembly and association, lie at the cornerstone of every democracy.

It is therefore hoped that the quest for a consistent, clear jurisprudence may long continue. An empowered profession, with capacity for sophisticated research and litigation, must be met by an independent, qualified and well supported judiciary. These two goals may be aspirational but they are not impossible.



ZLHR lawyers presenting a petition to Parliament on abduction of pro-democracy campaigner Jestina Mukoko

CHAPTER 7

7. ANTI-IMPUNITY LITIGATION - *Fiona Iliff and McDonald Moyo*[283]



Ms Fiona Iliff

Fiona Iliff is a human rights and environmental lawyer, and the Research and Advocacy Manager, at Zimbabwe Lawyers for Human Rights. She represents diverse communities and individuals in Zimbabwe, advocating for equal protection of human rights. Her litigation, advocacy, and academic work cover all aspects of human rights law, with a particular focus on anti-impunity claims and environmental law.



Mr McDonald Moyo

McDonald Moyo is a Programmes Lawyer at Zimbabwe Lawyers for Human Rights in the Research and Advocacy Unit. He conducts research, advocacy and legal analysis on all aspects of human rights law in Zimbabwe, with a particular focus on constitutional law, and civil and political rights protection and remedies.

7.1. Introduction

Zimbabwe's police service and security sector have a poor history, dating back to colonial times, of violating the fundamental human rights and freedoms of those that they are supposed to protect, under the pretext of enforcing law and order. Brutality by state security agents, and non-state actors acting with the knowledge, consent or direction of the state, is a frequent practice that occurs with impunity. To deter further violations and fight impunity, offenders must be held accountable.

For almost 25 years, ZLHR, as well as other law-based human rights organisations such as the Human Rights NGO Forum, have assisted thousands of victims of human rights violations to file civil claims asserting their right to an effective remedy. Those bringing these claims have faced numerous challenges, such as lengthy and expensive court proceedings, restrictive statutes of limitation, lack of enforcement, and devaluation of court judgments due to currency depreciation. The courts, independent constitutional commissions, and commissions of inquiry are also yet to award holistic remedies, other than compensation. However, the extensive anti-impunity litigation work that has been done has resulted in thousands of victims receiving compensation, and landmark precedents being set in the courts. These have led to the settlement of cases with similar facts and circumstances, inspired more victims to come forward, and deterred would-be perpetrators.

7.2. What is Impunity?

The UN Commission on Human Rights has defined impunity as:

> "The impossibility, *de jure* or *de facto*, of bringing [...] perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings, since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."[284]

De facto impunity refers to the state's failure to prosecute human rights violators due to a lack of capacity or political will. *De jure* impunity occurs when laws providing for amnesty – or other legal barriers to prosecution such as immunities – extend and strengthen the impact of *de facto* impunity, making it impossible to prosecute a perpetrator for human rights abuses.[285] Both forms of impunity exist in Zimbabwe, facilitating grave human rights violations and emboldening perpetrators to commit further crimes.

The state's failure to bring perpetrators of human rights violations to account results in a denial of victims' rights to justice and redress, deepening their pain and that of their relatives in the case of unlawful deaths and disappearances. In addition to creating an environment in which new cycles of violence take root, the persistence of impunity undermines faith and confidence in government, the security sector, and the criminal justice delivery

283 This chapter has been adapted and modified for this publication from the ZLHR publication *Anti-Impunity Litigation by Zimbabwe Lawyers For Human Rights from 2018 - 2019: Successes, Challenges And Recommendations* (April 2021) ZLHR. Available at https://kubatana.net/2021/06/02/anti-impunity-litigation-by-zimbabwe-lawyers-for-human-rights-from-2018-2019-successes-challenges-and-recommendations/.

284 Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity E/CN.4/2005/102/Add.1 (8 February 2005) hereafter "Updated Principles on Combatting Impunity".

285 Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102/Add.1 (8 February 2005).

system more broadly.[286] Within a systematic culture of impunity for security sector brutality, other rights such as freedom of information and assembly are also suppressed, the protective role of the police and other security forces is eroded, and the independence of the judiciary is undermined.[287]

7.3. Impunity in Zimbabwe

Although there were strong hopes for reform after the transition from Mugabe's authoritarian regime in November 2017, regressive trends have continued under Zimbabwe's "New Dispensation". Of particular concern is the involvement of the military in civilian affairs, including in violent crackdowns on peaceful post-election protesters on 1 August 2018,[288] and during and after a national stay-away protest against fuel hikes in January 2019.[289] Human rights defenders have also frequently been the subject of abductions and torture by unknown actors, which offences have not been investigated and prosecuted. The police and the courts have instead been used to crack down on freedom of expression, assembly and association, through the application of arbitrary and malicious arrests, lengthy pre-trial detentions, and trial proceedings lacking judicial independence and impartiality. At the time of writing, the government had also announced a sinister intention to amend the Criminal Law (Codification and Reform) Act ("Criminal Law Code") in a way which would further entrench impunity, with so-called "patriotic" provisions: outlawing protests that coincide with international events; criminalising "the unauthorised communication or negotiation by private citizens with foreign governments", and proscribing "unsubstantiated claims of torture and abductions that are concocted to tarnish the image of government".[290]

Targeted amnesties, indemnities and clemencies have entrenched impunity as a systemic feature of the state in Zimbabwe. Corruption and deep-rooted systems of patronage are also compounded by a range of state practices which have the effect of covering up state involvement in violence and shielding perpetrators, such as:

- the deployment of state-sponsored "militia" alongside official security agents, to obscure the responsibility of the state as the perpetrator;
- preventing human rights defenders (HRDs) and the independent media from investigating and publishing accounts of human rights violations through the use of the criminal law, such as pursuing prosecutions against journalists and activists for criminal defamation, making false statements prejudicial to the state, or for inciting public violence;
- using the criminal justice system and repressive legislation such as the Criminal Law Code and the Maintenance of Public Order Act 9 of 2019 as political weapons to target and prosecute political

286 Human Rights Watch *Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe* (2011) 6; Amnesty International *Zimbabwe: Toll of impunity* (25 June 2002) AFR 46/034/2002, available at: https://www.refworld.org/docid/3d199ed54.html.

287 Amnesty International *Zimbabwe: Toll of impunity* (25 June 2002) AFR 46/034/2002, available at: https://www.refworld.org/docid/3d199ed54.html.

288 *Report Of The Commission Of Inquiry Into The 1 August 2018 Post-Election Violence* (18 December 2018) Motlanthe Commission of Inquiry available at http://kubatana.net/wp-content/uploads/2018/12/Final-Report-of-the- Commission-of-Inquiry-18-DEC-18.pdf.

289 Zimbabwe Human Rights NGO Forum *On the days of darkness in Zimbabwe. An updated report on the human rights violations committed between 14 January 2019 to 5 February 2019* (2019) 7. Available at http://kubatana.net/2019/02/07/on-the-days-of-darkness-in-zimbabwe-an-updated-report-on-the-human- rights-violations-committed-between-14-january-2019-to-5-february-2019/.

290 L Towindo "New law to criminalise unpatriotic acts" *The Sunday Mail* (4 October 2020) available at https://www.sundaymail.co.zw/new-law-to-criminalise- unpatriotic-acts.

opponents, HRDs, and other perceived enemies of the state,[291] whilst shielding perpetrators of human rights violations from prosecution;

- politically manipulating the police to thwart investigation of human rights violations by state agents and members of the ruling party;
- undermining the judicial system by eroding the independence of the judiciary and circumventing its effectiveness. Some examples of these tactics include forcing agreement on summary trials, denial of bail, or withdrawing charges at the last moment where a constitutional challenge is likely to be successful which prevents the judiciary from correcting unconstitutional laws and practices;[292] and
- outright denials of the involvement of state actors in rights violations.

7.4. International law and impunity

Zimbabwe is a party to several international treaties in terms of which it is obliged to make prompt, thorough, and impartial investigations of violations; to ensure that those responsible for serious crimes are prosecuted, tried and duly punished; and to provide an effective remedy to victims.

The International Covenant on Civil and Political Rights (ICCPR)[293] obliges states to adopt measures to protect fundamental rights, including through the provision of remedies within the legal system.[294] The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[295] emphasise the duty of states to provide effective remedies to victims of human rights abuse.[296] The Updated Principles to Combat Impunity (Updated Principles) reaffirm the duty of states to ensure that adequate measures are taken to combat impunity by providing victims with a right to effective remedies in the form of criminal, civil, administrative or other disciplinary proceedings.

291 One of the common strategies used to prevent criticism of state officials has been prosecutions under sections 31 and 33 of the Criminal Law (Codification and Reform) Act 23 of 2004. Section 33 criminalises statements that are false and cause hostility, hatred, contempt or ridicule of the President or his office; or which are determined to be abusive, indecent or obscene. The penalty for violating this provision is a level six fine or a year's imprisonment, or both. Efforts to challenge the constitutionality of this provision in the Constitutional Court have repeatedly failed as the state has withdrawn the charges at the last moment, rendering the matter moot and avoiding a determination.

292 Amnesty International Zimbabwe: *Impunity enables ever more human rights violations* (2002) Available at https://reliefweb.int/report/zimbabwe/zimbabwe-impunity-enables-ever-more-human-rights-violations.

293 International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, acceded to by Zimbabwe 13 August (ICCPR).

294 Articles 2(2) and 3(a) of the ICCPR require states to ensure that victims of human rights violations have an effective remedy, regardless of whether or not the offence has been committed by persons acting in an official capacity.

295 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: https://www.refworld.org/docid/4721cb942.html.

296 See Principle II.3.(d) and Principles VII.11.(c) and X.24 which provide that states must avail information to victims about the investigations which have been conducted into violations of their rights. This information should include details on the causes and conditions which have led to a breach of their rights.

The Updated Principles also provide that amnesties may not be granted to perpetrators of serious crimes such as torture, genocide and enforced disappearances under international law.[297] The African Charter on Human and Peoples' Rights also calls on state parties to adopt legislative or other measures to give effect to the rights, obligations and freedoms enshrined in the Charter.[298] The African Commission on Human and Peoples' Rights has held that state parties to the African Charter have a specific responsibility to investigate and prosecute all illegal acts that amount to human rights violations.[299] The African Commission's General Comment on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment addresses the obligations to provide prompt, full, and effective redress; to ensure rehabilitation; to protect against intimidation and reprisals; and to provide redress for collective harms.

7.5. The Zimbabwean Constitution and impunity

The Zimbabwean Constitution obliges state actors to uphold fundamental rights and grant effective remedies to victims. Section 208 of the Constitution provides that members of the security services must act in accordance with the Constitution and the law.[300] Sections 44 and 45 oblige members of the security services to respect, protect, promote and fulfil citizens' fundamental rights and freedoms. These fundamental rights are enshrined in the Declaration of Rights of the Constitution, most notably: the right to life, the right to human dignity, the right to personal security, and freedom from torture or cruel, inhuman or degrading treatment or punishment. Section 3(2)(g) of the Constitution also declares that the state and all institutions and agencies of government at every level are bound by principles of good governance which include "transparency, justice, *accountability* and responsiveness".

In terms of victims' right to a remedy, section 68 of the Constitution provides for the right of "every person" to administrative justice that is "lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair", and for the right to review of unlawful administrative conduct. Section 69 of the Constitution also provide for the right to a fair trial, and the right of access to the courts for the resolution of any disputes. Under section 85, any victim, as well as someone acting on their behalf, or someone acting in the public interest, is entitled to approach a court alleging that their fundamental right or freedom enshrined in the Declaration of Rights has been, or is likely to be, infringed and to seek *appropriate relief*, including "a declaration of rights and an award of compensation".[301]

297 Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005 available at https://digitallibrary.un.org/record/543366?ln=en. Principle 24. See also the rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, UN Security Council, 23 August 2004 (S/2004/616).

298 Article 1 of the African [Banjul] Charter on Human and Peoples' Rights (African Charter), adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 REV.5, 21I.L.M.58 (1982), entered into force 21 October 1986, ratified by Zimbabwe 30 May 1986. See articles 10 which guarantees individuals the right to be heard, and the right of recourse "to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force" and Article 26 which establishes the right to compensation for miscarriage of justice.

299 African Commission *Noah Kazingachire and al v Zimbabwe* (2012) Communication 295/04, § 126–133l; African Commission on Human and People's Rights *General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* available at <https://www.achpr.org/legalinstruments/detail?id=60>.

300 Section 208(1) of the Constitution.

301 See Zimbabwe Lawyers for Human Rights *Anti-Impunity Litigation by Zimbabwe Lawyers for Human Rights from 2018 - 2019: Successes, Challenges and Recommendations* (2021) available at https://kubatana.net/2021/06/02/anti-impunity-litigation-by-zimbabwe-lawyers-for-human-rights-from-2018-2019-successes-challenges-and-recommendations/ [accessed on 21 September 2021].

Section 85 has significantly widened the scope of legal standing and introduced the possibility of public interest litigation.[302] It means that individuals or organisations can institute legal proceedings on behalf of third parties whose rights have been violated. This contributes to ensuring people in disadvantaged sections of society are granted greater access to justice. It also creates a protective mechanism: people do not have to wait for their rights to be violated before seeking redress in the courts. Individuals can now approach the court and seek enforcement of their rights where their rights have been threatened — but the threat has not yet been acted upon.

7.6. Anti-impunity litigation in Zimbabwe

7.6.1. The framework for litigation

There are three main mechanisms through which victims can seek justice for human rights violations by members of the state security services in Zimbabwe: criminal prosecution, civil litigation, and judicial review and related actions.

7.6.1.1. Criminal prosecution

The Constitution provides for the criminal prosecution of violations of human rights where those violations also amount to crimes as defined in Zimbabwe's criminal law.[303] Crimes — even where they result in harm to an individual — are considered as offences against the community at large and it is the state which is therefore responsible for prosecuting these violations. Convictions will result in custodial sentences, community service sentences, or fines. Criminal prosecutions for human rights violations are important for punishing perpetrators and deterring them from committing further human rights crimes. They also provide an opportunity for victims to be heard. Successful criminal prosecution of offences relating to abuses by the security services face several challenges:

- *Prosecutorial practice:* The state is very reluctant to prosecute official perpetrators. The widespread use of amnesties, the difficulty of identifying who to prosecute due to the use of militia, and the scope of existing defences, complicate the picture further. It is common practice, for example, for members of the security services to give the excuse that they were acting on the instruction of those "above" or that they were not aware that their actions constituted criminal acts.[304] In other cases, the police may open an enquiry docket, but the docket will be prepared poorly, with insufficient investigation. As a result, the cases will not proceed, or officers may be convicted, but only on minor assault charges. Alternatively, officers may be subjected to internal disciplinary proceedings: in these cases, however, victims are not informed. With unlawful death

302 See chapter 4 by Fadzayi Mahere on procedural rules in this volume.

303 Zimbabwe also has international legal duties to effectively prevent, investigate, prosecute, punish and redress human rights violations such as those stemming from article 2 of the International Covenant on Civil and Political Rights and article 1 of the African Charter on Human and Peoples Rights.

304 Zimbabwe Human Rights NGO Forum *Anti-impunity report 2019.* Available at http://www.hrforumzim.org/wp-content/uploads/2019/07/ANTI-IMPUNITY-REPORT-COMPRESSED.pdf [Accessed 3 September 2021].

cases, inquest proceedings are usually conducted in secret: the deaths are treated as "sudden deaths", not investigated as homicides, and are determined on the papers. Victims are not called to give evidence.[305]

- *Treatment of victims:* When victims report offences, they can be re-traumatised by the process when the police fail to investigate and prosecute properly. They can also be subjected to further persecution, even criminal charges, for the "crime" of coming forward. In June 2020, for example, three MDC-Alliance youth leaders, Joana Mamombe (MP for Harare West), Cecilia Chimbiri (MDC Alliance Youth Assembly Vice-Chair) and Netsai Marova (Deputy Organising Secretary for Youth) were arrested and charged with falsifying the accusation of their abduction and torture at the hands of suspected state security agents.[306] The three had claimed that they had been arrested at a roadblock guarded by the police and army at Warren Park, then abducted and tortured by unknown actors.

- *Scope of offences:* Although torture is routinely used by the security services, torture cannot be separately prosecuted as an offence: Zimbabwe has neither signed nor ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[307] Enforced disappearance is also not a punishable offence. Despite the long history of enforced disappearances going back to the liberation war, none of the perpetrators have been held accountable. The International Convention on the Protection of all Persons from Enforced Disappearances (ICPPED) came into effect in 2010 but Zimbabwe has not yet signed or ratified it.[308]

- *Private prosecutions*: Where the state fails to prosecute, it is open to an individual to undertake a private prosecution. In practice, however, these cases are very difficult to pursue. This is due both to the standard and burden of proof which is required in a criminal trial, and the fact that the state prosecutor must issue a *nolle prosequi* — a statement that the state is not intending to proceed against the accused individual — in order for the case to be permitted to go ahead. Although there have been private prosecutions where the prosecution has been ordered to issue a *nolle prosequi* in other contexts such as sexual assault of a minor,[309] it is unlikely that an application for a *nolle*

305 See *Varaidzo Chiyanike & Julius Choto v Commissioner-General of Police, Minister of Home Affairs & Cultural Heritage and Rachid Siri* 25 November 2020 High Court Harare unreported case 6409/19; 20-HH-999 (discussed below) in which damages were eventually awarded to the family of an innocent bystander shot and killed by police during protests outside a police station. Damages were claimed for nervous shock exacerbated by the police failure to investigate and prosecute the perpetrator. After much pressure from the family and their legal representatives, the matter was finally referred to a magistrate for an inquest but in secret, to the exclusion of the family and witnesses. The matter was determined on the basis of the police docket to be a "sudden death", not a homicide.

306 Amnesty International Zimbabwe *Persecution of tortured female opposition leaders continues as they are denied bail* (15 June 2020). Available at https://www.amnesty.org/en/latest/news/2020/06/zimbabwe-persecution-of-tortured-female-opposition-leaders-continues-as-they-are-denied-bail/.

307 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), entered into force on 26 June 1987. CAT obliges States to take all legislative, administrative, judicial and other measures to prevent acts of torture or cruel, inhuman or degrading treatment or punishment within their territories, including criminalising torture as a separate offence and providing appropriate sanction in law.

308 ICPPED requires that states take the necessary measures to ensure that enforced disappearances are criminalised and punished appropriately.

309 In Re: *Prosecutor-General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (28 October 2015) Constitutional Court unreported case CCZ 13/2017 Const Application No. CCZ 8/15; [2017] ZWCC 13.

prosequi would be successful in the context of a case attempting to challenge impunity for state violators of human rights.

7.6.1.2. Civil litigation

Civil litigation is critical to enforcing accountability and obtaining justice for victims of state brutality where the state consistently fails to combat impunity through prosecution of offenders. Civil litigation involves the contestation of disputes between individuals, or between individuals and the state, over the legal duties and the responsibilities owed between, and to, citizens.[310] If details are known, a state officer or employee can be sued in their official capacity as well as in their personal capacity.

Victims of human rights violations have the right to seek damages under the common law of delict. Types of delicts include assault, malicious prosecution, unlawful arrest and unlawful detention, and unlawful deaths or killings. Victims may also seek "appropriate relief" under section 85 of the Constitution, for violations of fundamental rights such as the right to life, the right to personal security, the right to personal liberty, the right to human dignity, and the freedom from torture or cruel, inhuman, or degrading treatment or punishment.

A successful civil claim will result in the award of monetary damages or orders from the court to do or refrain from doing something. Civil claims in anti-impunity litigation can seek compensation for damages, or to compel the state to conduct prompt investigations and prosecutions of offenders, encourage institutional reform, or amend laws that contribute to impunity. ZLHR has successfully assisted thousands of victims in civil claims claiming damages for assault, inhuman and degrading treatment, and other violations.

7.6.1.3. Judicial review and *habeas corpus* applications

Judicial review is a type of court proceeding in which a judge examines the legality of a public body's decision or action: the emphasis in a judicial review application is on how the decision was made or how it was carried out. A *habeas corpus* application is an action to compel the authorities to produce a person in their custody or control before the court: it can be an effective tool in pressuring the authorities in situations of disappearances. Following the disappearance in September 2019 of Dr Peter Magombeyi, a doctor who had been leading strike action for the improvement of health workers' working conditions, ZLHR successfully filed a *habeas corpus* application at the High Court resulting in the authorities being ordered to investigate his disappearance.[311] The case captivated the public's interest and went viral on various social media platforms, and ZLHR also litigated to allow health workers to conduct a protest for his release. After five days, Magombeyi was discovered alive on the side of a road about 35 kilometers outside of Harare, disoriented and in pain.[312] Not all such applications are as successful. Itai Dzamara

310 Civil proceedings are regulated by the Civil Evidence Act [*Chapter 8:01*], the State Liabilities Act [*Chapter 8:14*], the Police Act [*Chapter 11:10]*, the Magistrates Court (Civil) Rules, 2019 and the High Court (Civil Procedures) Rules, 2004.

311 Peter Magombeyi, a doctor and leader of the Zimbabwe Hospital Doctors Association (ZHDA) an organisation advocating for labour rights and access to health care for all, was abducted on 14 September 2019. His organisation had served notice to the Minister of Health and Child Care that doctors across the country would go on strike. Magombeyi was abducted from his home at night by three masked men suspected to be state security agents. He was held in a basement and tortured.

312 D Chingarande "Magombeyi: Abduction mystery deepens" *The Standard* (2019). Available at https://www.thestandard.co.zw/2019/09/22/magombeyi-abduction-mystery-deepens/.

is a freelance journalist and pro-democracy activist who was abducted on 9 March 2015 by five unidentified men while he was at a barbers' shop in Harare's Glen View suburb. He was handcuffed, forced into a white truck without a number plate, which then drove off. On behalf of his wife, Sheffra Dzamara, ZLHR filed a *habeas corpus* application at the High Court to order state security agent officials "to do all things necessary to determine his whereabouts".[313] The court ordered officials to advertise his disappearance on all state-owned media, and for the police to work closely with his legal representatives, and to report on the progress of their investigation every Friday until his location was known. To date, however, authorities have continued to deny involvement in Dzamara's disappearance and no one has been held accountable.

7.6.2. Snapshot of anti-impunity cases

This section provides a snapshot of some of the successful court judgments, in which victims of human rights violations by state security agents have been able to assert their rights in litigation to redress unlawful arrests, detention, malicious prosecution, assaults and torture. The cases illustrate the context in which actions for the award of compensation have been successful – including where previous prosecutions have failed – and the challenges frequently faced in terms of obstructive conduct by state lawyers, and lack of enforcement of court judgments.

Jestina Mukoko is a pro-democracy campaigner and Director of the Zimbabwe Peace Project (ZPP), who was abducted in 2008. She was held incommunicado and tortured for three weeks at various locations by state security agents, then charged and held in pre-trial detention for three months before she was finally released with 31 other human rights defenders who had been abducted over a seven week period.[314] Four years later, in a landmark judgment in 2012, the Supreme Court determined that she had undergone treatment at the hands of state agents which constituted a violation of her fundamental right not to be subjected to torture. The court granted a permanent stay of prosecution on the grounds that prosecution based on information or evidence obtained from torture, inhuman and degrading treatment was in violation of the Constitution.[315] ZLHR then lodged a civil claim for damages on her behalf and ten years after her abduction, on 12 October 2018, the parties finally agreed to a consent order, with the state agreeing to pay US$150 000 as compensation for the damages she suffered when she was abducted, detained, maliciously prosecuted and ill-treated.[316] Importantly for enforcement, the consent order that was agreed to included a date for payment within two weeks of the order, and the judgment debt was accordingly satisfied. An important lesson from this case is that where an accused person has been tortured, it is critical to place the evidence of torture on record right from the remand stage.

Cynthia Manjoro was among 29 opposition MDC-T political activists unlawfully arrested, detained, subjected to inhumane treatment, and maliciously prosecuted on charges of murdering a police officer in Glen View in Harare in 2011. When she was arrested by the police, she informed the arresting and investigating officers that

313 *Sheffra Dzamara v Minister of Home Affairs, Minister of State Security, Commissioner General of the Police & Director General of the Central Intelligence Organisation* (13 March 2015) High Court Harare unreported case 2211/15

314 *Zimbabwe Lawyers for Human Rights (ZLHR)* "Further developments relating to individuals subjected to enforced disappearances" (25 December 2008), Available at <http://archive.kubatana.net/html/archive/hr/081225zlhr.asp?orgcode=ZIM007&year=2008&range_start=1>.

315 *Mukoko v Attorney-General* (20 March 2012) Supreme Court unreported case 12-SC-011.

316 *Mukoko v Minister of State Security & Ors* (27 September 2018) High Court Harare unreported case 18-HH-000.



Cynthia Manjoro

she had an alibi for her whereabouts. Nevertheless, she was detained under inhuman and degrading conditions and assaulted while in police custody. Initially, the court dismissed her bail application resulting in detention for almost two months.[317] She also spent another seven months in custody when her trial began on 1 March 2012. At trial, substantial evidence proved her innocence. The police officer investigating her case testified that she was being used as bait to lure and arrest her alleged boyfriend who was a known political activist and whom the police accused of being connected to the murder. Cynthia was finally found not guilty on 19 September 2013, two years and four months after her arrest.[318] As a result of the unlawful arrest, detention and prosecution, however, she lost her job. She had also sustained long-term injuries from the assault and ill-treatment.

ZLHR instituted civil proceedings against the Minister of Home Affairs, the Commissioner-General of Police and the Prosecutor-General seeking redress for Cynthia's unlawful arrest, detention, assault, and malicious prosecution.[319] The court ordered the payment of US$18 075 for unlawful arrest; assault; malicious prosecution; past and future medical expenses; pain and suffering and contumelia; and loss of income. When the defendants failed to pay the judgment debt, ZLHR filed a contempt of court application, resulting in her being finally paid. Unfortunately, she was paid in Zimbabwe dollars at a rate of 1:1, as required at the time in terms of Statutory Instrument (SI) 33 of 2019, which hugely reduced the value of the payment.[320] Manjoro's co-defendants, Last Maengahama and Tungamirai Madzokere, who were convicted of murder in 2013, were eventually acquitted in July 2021 after serving eight years in prison. The Supreme Court ruled that the duo had been convicted on unreliable evidence.[321]

Tendai Lynette Mudehwe was assaulted by police officers while participating in a peaceful demonstration on 4 January 2016, sustaining soft tissue injuries and extensive bruising. ZLHR instituted legal proceedings on her behalf against the Minister of Home Affairs and Cultural Heritage and the Commissioner-General of Police.[322] On 25 April 2018, her case was finally set down for trial after six postponements by lawyers representing the Minister of Home Affairs and the Commissioner-General of Police. The defendants failed to attend the hearing and a default judgment was eventually granted in her favour: the Minister of Home Affairs and the Commissioner-General of Police were ordered to pay Lynette the sum of US$6 210.96. ZLHR had to file a mandamus and contempt

317 *Tungamirai Madzokere and 13 Ors v The State* High Court unreported case 154-11; CRB B 632/11 B 656/11.

318 *S v Madzokere & Others* High Court Harare unreported case 55/2012, ZWHHC 337.

319 *Cynthia Fungai Manjoro v Minister of Home Affairs, Commissioner-General of Police and Prosecutor-General* Harare High Court unreported case 2965/14, 153/18.

320 Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real-Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (Statutory Instrument 33 of 2019).

321 *Madzokere and 3 Ors v The State* Supreme Court unreported case ZWSC 71/21.

322 *Tendai Lynette Mudehwe v Minister of Home Affairs and Cultural Heritage, Commissioner-General of Police and Minister of Finance and Economic Development* Harare Civil Magistrates Court unreported case 32525/16.

application to compel the state to pay the judgment. Unfortunately, the judgment was paid in Zimbabwe dollars at a rate of 1:1, as a result of Statutory Instrument 33 of 2019— a significant reduction in the value of the award.

Loveness Chiriseri was shot and critically wounded by police in August 2018, when they indiscriminately shot at a taxi, in which she was a passenger, when the driver failed to stop at a police roadblock in Harare. ZLHR instituted proceedings on her behalf. In July 2020[323] Honourable Justice Mushore issued a progressive judgment determining that "police officers have one chief and primary duty of care and that is to protect civilians" and awarded high damages to Chiriseri of USD$ 16 788.75 "or the equivalent in local currency", on the basis that "culpability should be assessed subjectively to the particulars of the event and the wrongdoer's actions". The court also accepted ZLHR's legal submissions that the value of the claim issued in US dollar currency should be protected, in accordance with the principle of adequate compensation and restitution, rather than be issued in Zimbabwe dollars at a rate of 1:1.[324]

Kevin Tinashe Choto (22) was shot and killed by an identified member of the Zimbabwe Republic Police when live ammunition was used to suppress a protest over the hiking of fuel prices and general economic decline on 14 January 2019. His family approached the courts and successfully compelled state authorities to release the results of his post mortem after they had initially refused.[325] The results showed that a bullet fractured his skull and caused extensive damage. His wife and his father then sued the authorities for damages resulting from his death.[326] His family received a progressive damages award in the combined amount of ZWL$4 368 000. Not only was Choto's widow awarded damages for loss of support for her and her daughter, she and the deceased's non-dependent father were also awarded damages for nervous shock. The case is significant both in terms of the extent of damages awarded and for recognition of the father as suffering reasonably foreseeable harm from the traumatic circumstances of his son's death. The officer involved was also personally cited, creating a deterrent for other police officers to refrain from arbitrary and excessive use of force against civilians.

Joyce Karizamondo and her husband were plaintiffs in the landmark case of *Karimazondo J & Karimazondo v Minister of Home Affairs*[327] from 2001, which set an important precedent that is particularly relevant as guidance for cases before the courts today. Mungwira J awarded substantial damages of ZWL$1 500 000 to the plaintiffs as victims of unlawful detention, and for Ms Karizamondo as a victim of horrific torture and sexual violence, whilst in police custody. The court decided to look beyond certain irregularities in the drafting of the proceedings, holding that these were not fatal. Extensive psychological evidence was produced by Amani Trust, and the court adopted a victim-centred approach by accepting the veracity of the evidence, in spite of noting that the victim did not give testimony to much of what was produced in the psychological report. It held that: "The brutality and

323 See *Chiriseri L v Commissioner of Police, Min of Home Affairs & Oi/c St Mary's Police Stn* (17 September 2019 & 8 July 2020) High Court Harare unreported case 11669/18) 20-HH-450.

324 The court determined that in a multi-currency climate, particularly in an unsteady economy, courts have the discretion to make awards of damages in United States dollars and awarded damages in the amount of US$16 788.75, or its equivalent in local currency on a willing buyer/willing seller basis.

325 *Julius Choto v The Minister of Home Affairs and Cultural Heritage, Commissioner General of Police, Officer in Charge of Makoni Police Station, Chief Executive Officer of Parirenyatwa Group of Hospitals & Minister of Health and Child Care* Civil Magistrates Court Harare unreported case 3882/19.

326 *Varaidzo Chiyanike & Julius Choto v Commissioner-General of Police, Minister of Home Affairs & Cultural Heritage, and Rachid Siri* (25 November 2020) High Court Harare unreported case 6409/19; 20-HH-999.

327 *Karimazondo J & Karimazondo v Minister of Home Affairs* (31 October 2001) High Court Harare unreported case 01-HH-191.

callousness with which the assaults were perpetrated on the first plaintiff instils in any right thinking person a sense of horror and shock". The court also held that the unlawful and inhumane treatment was totally unnecessary, vindictive and malicious. The court made an award which expressed its disapproval of the seriousness, brutality and humiliating effect of such treatment. The decline in the value of money since the issuance of the claim was also taken into account.

7.7. Challenges to successful anti-impunity litigation in the legal framework: Key issues

There are a number of challenges that plaintiffs have faced in anti-impunity litigation and having judgment awards enforced, including:

- The restriction on bringing claims against the Police Service within a limited period of eight months after the cause of action has arisen, in terms of section 70 of the Police Act [*Chapter 11.10*];
- The prohibition on the attachment of state property to satisfy debts, in terms of section 5 of the State Liabilities Act [*Chapter 8.11*];
- The difficulty in identifying perpetrators to sue them in their individual capacities; and
- Devaluation of judgment claims: for judgments issued in USD, Statutory Instruments had pegged local currency and the United States Dollar at a rate of 1:1; and for recent judgments issued in Zimbabwe dollars, they are being devalued due to inflation.

7.7.1. Time limits

Section 70 of the Police Act requires that civil claims for violations by the police must be filed within eight months of the occurrence of the cause of action.[328] Section 6 of the State Liabilities Act[329] specifies a 60-day time limit after issuing a "notice of intention to sue" (a letter of demand) before an action can filed. Taken together, these two sections have the effect that a claim may only be made within a limited period of six months after a waiting period of two months from the date of serving a notice of intention to sue.

In the case of *Nyika and Tobaiwa,*[330] the applicants challenged the constitutionality of the eight-month time limit for suing the police. The court ruled that section 70 of the Police Act was in conflict with sections 56(2) and 69(2) of the Constitution and infringed citizens' rights to equal protection before the law and to a fair trial within a reasonable time, and referred the case to the Constitutional Court for confirmation of the declaration of invalidity. The plaintiffs' actions were stayed pending the decision of the Constitutional Court. However, several years after

328 Police Act [*Chapter 11.10*] from now on referred to as the "Police Act". General limitation periods are captured in the Prescription Act [*Chapter 8.11*] while the time limit period set out in the Police Act is an example of a special limit period.

329 Section 6 of the State Liabilities Act [*Chapter 8:14*] imposes the 60-day time limit after issuing a "notice of intention to sue" (a letter of demand) before instituting proceedings against the state, or the President, a Vice-President or any Minister or Deputy Minister in their official capacity, or any officer or employee of the state in his or her official capacity.

330 *Michael Nyika & Crispen Tobaiwa v Minister of Home Affairs, Commissioner-General of Police NO, Inspector Damburai and Constable Lisborne Chibanda* Harare High court unreported case 181/16 (*Nyika and Tobaiwa*).

referral, the Constitutional Court removed the matter from the roll on a technicality. The case *Netsai Marova*[331] has now been referred to the Constitutional Court to determine the same issue.

7.7.2. State Liabilities Act: Execution or attachment of state property in satisfying debts

Section 5 of the State Liabilities Act prevents the execution or attachment of the property of the state and directs that judgment debts only be paid out of the Consolidated Revenue Fund. The Government of Zimbabwe has a history of using this provision to escape from compensating victims of human rights violations. The constitutionality of this provision was challenged in the case of *Mangwiro.*[332] The applicant had attempted in vain to have the respondents pay an award of damages granted to him by the court in a previous matter. The High Court upheld the application for a declaration of constitutional invalidity because the provision violated the right to equal protection of the law, the right to dignity and the right of access to justice.[333]

Unfortunately, the Constitutional Court avoided dealing with the issue, originally by determining that the matter had been referred unprocedurally by the High Court judge. After a variation order was obtained and the matter was referred back to the Constitutional Court correctly, the Constitutional Court ruled that the matter was academic as the state had paid the applicant in full immediately prior to the hearing. The court was able to avoid making a decision on constitutionality once more. Human rights lawyers continue to struggle to enforce orders for payment of compensation to victims of human rights violations due to refusal by the state to pay judgment debts. As a measure of last resort, lawyers institute additional costly and time consuming litigation such as applications of contempt of court proceedings against the state to force the state to comply.

7.7.3. Identification of perpetrators and suing in individual capacity

Section 6(d) of the State Liabilities Act regulates claims against individuals working for the state who commit violations, allowing for them to be held accountable in their personal capacity if their identities are known. Unfortunately, while some victims of state brutality may see the faces of their perpetrators, they usually cannot identify them. Further, even if they register official complaints, state institutions are not willing to investigate and assist with their identification. It is impractical for victims to be expected to gather the names of the assailants during the course of an assault. In most cases, perpetrators have their faces covered up by balaclavas, masks, helmets, scarves or hats making identification impossible.

As a result of these challenges in identification, claims are usually brought against representatives of the relevant ministries (the Minister of Defence or the Minister of Home Affairs) or institutions (the Commander of the Zimbabwe National Army and the Commissioner-General of Police) in their official capacities. Such actions filed on behalf of the victims against members of the security services in their official capacity are being challenged as defective where the perpetrators have not been personally identified. In some cases, the army has claimed

331 *Netsai Marova v Chief Superintendent & 6 Ors*, Harare High Court unreported case 288/21.

332 *Tendai Blessing Mangwiro v Minister of Justice, Legal and Parliamentary Affairs, Minister of Home Affairs and the Attorney-General of Zimbabwe* Harare High court unreported case 1027/17; Constitutional Court case CCZ 23/18.

333 *Dingaan Hendrick Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Minister of Justice and Constitutional Development with Centre for Constitutional Rights* CCT 19/07 (2008) ZAAC 8.

that the perpetrators were rogue elements or a "third force" stealing their uniforms to commit crimes. ZLHR has successfully challenged efforts to dismiss cases on the grounds of non-identification of individual perpetrators on several occasions, arguing that state officials are vicariously liable for the actions of uniformed officers acting in the course and scope of their employment. However, these challenges have resulted in lengthy drawn-out court processes, deterring would-be claimants from pursuing matters against the security forces.

7.7.4. Devaluation of judgment debts

The ever-debilitating economic conditions in Zimbabwe contribute to the difficulties in seeking redress for victims of human rights violations. Since 2019, a number of statutory instruments have been promulgated to try to reduce inflation without much success. On 20 February 2019, the Government of Zimbabwe combined three financial instruments – the "bond notes", electronic money and coins – into a new currency known as the "RTGS dollar", later called the Zimbabwe dollar (ZWL$)), at parity with the US Dollar at a one-to-one (1:1) rate (Statutory Instrument 33).[334]

The effect of the 2019 Statutory Instruments, the Finance Act, inconsistent monetary policies, and inflation and has meant that judgment debts in US Dollars were wholly devalued when they were enforced in Zimbabwe dollars at a rate of 1:1 to the US$. This has negatively affected victims of state brutality as the damages awarded to them have been devalued significantly. Attempts have been made to challenge the devaluation of judgments in a number of cases. In the case of *Chiriseri*,[335] lawyers made specific submissions on the need to protect the value of claims issued in US Dollars, in accordance with the principles of adequate compensation and restitution. The court agreed that the award should be paid in US$ or the equivalent in ZWL$. In *Panganayi*,[336] the plaintiff also obtained a *mandamus* order that the original judgment in US$ be paid in US$, or the equivalent in ZWL$.

More recently the Law Society of Zimbabwe has challenged the constitutionality of SI 33 of 2019: judgment is awaited. Due to the fact that SI 33 of 2019 was introduced into law through the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] in terms of section 6 of that statute, the SI technically expired on 21 August 2019 but the Finance Act is yet to be amended to allow for exchange rates to be duly applied in relation to judgment debts.

7.8. Conclusion

In the context of an oppressive operating environment in Zimbabwe, anti-impunity litigation has played a critical role in challenging rights violations, particularly aided by the 2013 Constitution and its framework for strategic intervention, litigation and reform. In its anti-impunity litigation, ZLHR has faced numerous challenges in obtaining effective remedies for victims, ranging from vexatious technical defences, to policies resulting in devaluation of judgment debts. In spite of these hurdles, ZLHR continues to obtain numerous damages awards

334 Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (Statutory Instrument 33 of 2019).

335 See *Chiriseri v Commissioner of Police, Minister of Home Affairs & Officer in Charge, St Mary's Police Station* (17 September 2019 & 8 July 2020) Harare High Court unreported case 11669/18, 20-HH-450.

336 See *Sylvester Panganayi v Minister of Home Affairs & Commissioner-General of Police and Sergeant Nepson Utete* Harare Civil Magistrates Court unreported case 16927/17.

for victims, and in some recent cases such as *Chiriseri* and *Chiyanike & Choto,* there has been a willingness by certain judges to adopt a progressive approach in anti-impunity claims. Going forward, human rights lawyers are recommended to pursue the confirmation by the Constitutional Court of precedent-setting judgments, such as those obtained in the *Mangwiro*[337] and *Nyika*[338] cases, in which judges declared sections of the State Liabilities Act and Police Act to be unconstitutional. Lawyers are also encouraged to explore public interest litigation challenging unconstitutional provisions of the Criminal Law (Codification and Reform) Act, which facilitate the persecution of those who attempt to expose the violence and impunity of state agents. The adoption of new litigation strategies may also be appropriate, such as in cases challenging the constitutionality of repressive legislative provisions, organisations acting in the public interest may be joined as co-applicants rather than only using defendants facing criminal charges, or individual plaintiffs seeking enforcement of judgments, to prevent the state from simply withdrawing charges or paying off victims to avoid orders of constitutional invalidity being issued.[339]

337 *Tendai Blessing Mangwiro v Minister of Justice, Legal and Parliamentary Affairs and Minister of Home Affairs and the Attorney-General of Zimbabwe* Harare High court unreported case 1027/17 (CCZ 23/18).

338 *Michael Nyika and Crispen Tobaiwa v Minister of Home Affairs and Commissioner-General of Police NO and Inspector Damburai and Constable Lisborne Chibanda* Harare High court unreported case HH 181-16.

339 As permitted under section 85(1)(d) of the 2013 Constitution.

CHAPTER 8

8. LITIGATING FOR WOMEN'S RIGHTS IN ZIMBABWE - *Choice Damiso*



Advocate Choice Damiso

Advocate Choice Damiso practices at the Advocates Chambers, Harare. She is a Lecturer at the University of Zimbabwe Law School. She is also a board member of Women and Law in Southern Africa (WLSA), as an expert in the area of gender and human rights. She managed the gender equality programme of the UNFPA country office in Zimbabwe for six years. She litigates on women's rights in her capacity as a WLSA member and a senior advocate in Zimbabwe's courts.

8.1. Introduction

Litigation is initiated upon the basis and presumption that a right or interest, which is protected by law, that has been impaired or is being threatened, will be restored and protected by a decision of the court, which will provide an appropriate remedy. This chapter explores experiences in various attempts made to use litigation as a tool for social justice when it comes to enforcing the rights of women. It will identify key actors, discuss the issues at stake, and analyse the efficacy of the strategies that have been used to navigate the cases through the system. Ultimately, the chapter will attempt to identify the factors that can make litigation an effective tool for enforcing the rights of women in Zimbabwe.



Deputy Chief Justice Elizabeth Gwaunza

8.2. Background

The previous Lancaster House Constitution of 1979 presented a number of barriers to the full use of the law to promote the rights of women in Zimbabwe.[340] Although the principle of constitutional supremacy was enshrined in s 3 of the Constitution, and the Constitution contained a justiciable declaration of rights, there were major shortcomings as far as women's rights were concerned. First, the declaration of rights articulated only civil and political rights and omitted social, economic and cultural rights. The exclusion of socio-economic and cultural rights had a disproportionately adverse impact on women due to inequitable gender roles and the historically subordinated status of women in Zimbabwean households and society in general.

Secondly, women's rights have traditionally been treated as low priority by governments and legal systems in Africa.[341] Women have been subordinated under the auspices of deep-rooted African customs and cultural practices, compromising their fundamental rights. Any legal regime that fails to address discriminatory customs and cultural practices will not be competent to deliver full social justice to women. From this perspective, s 23(3) of the Lancaster House Constitution, far from addressing discriminatory African customary laws and practices,

340 See generally chapter 2 by Tererai Mafukidze on the history of public interest litigation in Zimbabwe.

341 L Sithole & C Dziva "Eliminating harmful practices against women in Zimbabwe: Implementing article 5 of the African Women's Protocol" (2019) 19 *African Human Rights Law Journal* 568-590 http://dx.doi.org/l 0.17159/1996-2096/2019/vl 9n2a1.

actually reinforced them.[342] The two cases of *Katekwe v Muchabaiwa*[343] and *Magaya v Magaya*[344] illustrate the extent to which clawback clauses in the Lancaster House Constitution presented a formidable barrier to promotion of women's rights through litigation.

In the case of *Katekwe v Muchabaiwa*, the Supreme Court was called upon to interpret the provisions of the Legal Age of Majority Act No. 15/82. The 1982 Act provided that all Zimbabweans, including women, would attain majority status upon reaching the age of 18. In *Katekwe*, the Supreme Court ruled that, as a result of the Act, an African father had lost the right, under customary law, to sue for damages for the seduction of a daughter who had attained the age of 18 years at the time of seduction, as she could now sue in her own name. Beyond the facts of the particular case, the reasoning or *ratio* of the ruling could be and was extended to mean that African women, who had up to that point been considered perpetual minors under customary law, now attained full legal capacity and emancipation upon attaining the age of 18 and could therefore now make juristic decisions in their own right and standing.

Dumbutshena later on publicly spoke of his frustration with the oppression of women in independent Zimbabwe. One of the earliest cases he dealt with on appointment as a High Court judge in 1980 involved a woman who stood to lose all her contributions to matrimonial property on the basis that the two were not married. His decision in *Katsidzira v Chiromo*[345] had tried to advance the position of women but it was unfortunately reversed by the Supreme Court on appeal in *Chiromo v Katsidzira*.[346] The decision in *Katekwe v Muchabaiwa* became a watershed. The Supreme Court decision in *Chihowa v Mangwende*[347] held that one of the consequences of s 3 of the Legal Age of Majority Act 1982, was that a woman who has attained the age of 18 years could now be validly appointed as intestate heiress to her father's estate, with the same rights and duties as those which devolve upon a male person under customary law. *Katekwe* was followed by *Nyemba v Jena*.[348] Sandura JP delivered judgment on 31 October 1984. In this matter the plaintiff, a married woman, claimed from the defendant the sum of $18 143, together with interest and costs of suit. That sum represented damages for the personal injuries which she sustained when, as she alleged, the defendant unlawfully and maliciously shot and injured her. When the matter came up for trial, the defendant made an application *in limine* for an order that the woman did not have *locus standi in judicio* because she was not entitled to sue the defendant in her own right unassisted by her husband. The plaintiff was a married African woman to whom African customary law applied.

The plaintiff and her husband had initially contracted a customary union which was duly registered under the

342 Section 23(3) of the Lancaster House Constitution provided: "(3) Nothing contained in any law shall be held to be in contravention of subsection 1(a) to the extent that the law in question relates to any of the following matters: - (a) matters of personal law; (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case."

343 *Katekwe v Muchabaiwa* 1984(2) ZLR 112 (S). A full analysis of this decision can be seen in Ncube, W. "The decision in Katekwe v Muchabaiwa: A Critique" (1983-84) vol 1 & 2 *Zimbabwe Law Review* 217–228. Available at http://hdl.handle.net/10646/3078.

344 *Magaya v Magaya* 1999 (1) ZLR 100 (S).

345 *Katsidzira v Chiromo* 1981 ZLR 87.

346 *Chiromo v Katsidzira* 1981 ZLR 418 (C).

347 *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC); 1991 (2) SA 825 (SC).

348 *Nyemba v Jena* 1984 (2) ZLR 169 (H).

African Marriages Act [*Chapter 238*]. Thereafter the parties entered into a civil marriage by Christian rites. This was a marriage under the Marriage Act [*Chapter 37*]. The defendant argued that the Legal Age of Majority Act 15 of 1982 did not affect the plaintiff's capacity. She still required the assistance of her husband in order to sue the defendant for damages. In terms of s 3 of the Legal Age of Majority Act 15 of 1982, a person becomes a major for all purposes on reaching the age of 18 years.

Sandura JP held that the effect of this provision was that any previous statute which imposed any reduction in capacity was impliedly repealed. Two such provisions are s 13 of the African Marriages Act [*Chapter 238*] and the proviso to s 3(3) of the Customary Law and Primary Courts Act 6 of 1981. The effect of such implied repeal was that an African woman was entitled to sue in her own right, unassisted by her husband. He alluded to the decision of the Supreme Court in *Katekwe*, which had determined that the father of a girl who has reached the age 18 years and had been seduced had no *locus standi in judicio* to sue for seduction damages. In the later matter of *Chawanda*,[349] Chidyausiku CJ cited with approval the dictum in *Katekwe v Muchabaiwa* "that the courts by their judgments should seek to heal the pangs inflicted on African women by legal disabilities. This is a movement towards the removal of legal disabilities suffered by African women**".** *Katekwe v Muchabaiwa* therefore became the bedrock for several decisions which supported the emancipation of women and extended their rights in law.

The case of *Magaya v Magaya* was decided in 1999 by the Supreme Court. The court had to decide whether an adult female child enjoyed the same rights of intestate succession under customary law as her brothers. The court, which was led by a different Chief Justice from the one who had led the bench that had decided the *Katekwe* case, ruled that the *Katekwe* case had been wrongly decided. The court found that there was nothing unconstitutional in holding that the Legal Age of Majority Act had not interfered with the perpetual minority status of women in areas of personal law like inheritance. Thus, the customary law principle which discriminated against women in matters of succession had survived the Legal age of Majority Act. The court based its decision on the claw back clause contained in section 23(3) of the Constitution, which provided that any law, act or conduct which arose from the application of African customary law would not be construed as discriminatory.

Commenting on the case, Bigge and Briesen observed:

> "If the international human rights community and the progressive community within Zimbabwe wish to better the position of women under customary law, they must attack the problem at its source: by addressing the shortcomings of judicial reliance upon undefined 'custom', and, more importantly, by addressing the weaknesses of a legal system that grants discretion as broad as that which made the Magaya decision a logical one."[350]

The case discussed above should be contrasted with the much later ZLHR case of *Jennifer Williams and 3 others v Co-ministers of Home Affairs and 2 others*, SC 207/11, which was also decided under the former Constitution. The applicants, all women activists from a civil society organisation known as Women of Zimbabwe Arise (WOZA), had been arrested for demonstrating against poor service provision by the Zimbabwe Electricity Supply

349 See also *Chawanda v Zimnat Insurance Co Ltd* 1989 (2) ZLR 352 (H); *Zimnat Insurance Company Limited v Chawanda* 1990 (2) ZLR 143 (S).

350 David M Bigge and Amelie Von Briesen "Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self Determination in Magaya v Magaya" *Harvard Human Rights Law Journal* Vol. 13 289 at https://harvardhrj.com/wp-content/uploads/sites/14/2020/06/13HHRJ289-Bigge.pdf.

Authority (ZESA). They were detained for five days at Harare Central Police Station Holding cells in conditions that were inhuman and degrading. In particular, they were made to remove intimate inner garments and kept in an overcrowded cell, the floors of which were overflowing with human excrement. They were forced to relieve themselves in full view of all the other inmates in latrines that were filthy because they could only be flushed from the outside by police officers, who did so very infrequently. They were denied food and water and were not availed the necessary wares for hygienic and dignified menstruation management. They sought and obtained a declaration that their rights protected under section 15 of the Constitution, which protected the right to freedom from torture, cruel, inhuman and degrading treatment, had been violated by the deplorable conditions that they had been kept in. They also obtained a declaration that the same conditions constituted discrimination on the grounds of sex, prohibited under section 23 of the Constitution.

Many of the cases involving women's rights are about enforcing the economic social and cultural rights of women, with outcomes benefiting women only. The *Katekwe* and *Magaya* cases discussed above are a good example. However, the *Williams* case was significant because it provided a good example of successful litigation of women's civil and political rights, with broader application for all sexes. The ruling of the court with respect to the need to improve the conditions of detention in police holding cells stands to benefit men as much as women, particularly given the many more men who get arrested and end up detained in police cells.

8.3. Opportunities for Litigating Women's Rights in the New Constitution of 2013

Given the challenges faced by women under the Lancaster House Constitution, the promulgation of a new "people driven" Constitution in 2013 was seen by many marginalised groups, including women, as presenting greater opportunities to litigate for their rights. Among the key provisions of the current Constitution that encourage greater use of litigation for the rights of women are: s 56, which prohibits discrimination on a comprehensive set of grounds including sex, gender, marital status, pregnancy, culture and class, unimpeded by a clawback clause; s 80 which elaborates on the rights of women; and s 63 which, while recognising the right of every person to cultural expression, prohibits the expression of culture in any manner that is inconsistent with the fundamental rights protected under Chapter 4. Also significant is the inclusion of socio-economic rights.[351]

International human rights law is a key resource in the fight for the human rights of women. The provisions in the Constitution regulating the status of international law in Zimbabwe – ss 34,[352] 46(1)(c),[353] 326[354] and 327(6)[355]

351 See the Chapter by Justice Mavedzenge on socio-economic rights.

352 Section 34 provides that the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

353 Section 46(1)(c) provides:"(1) When interpreting this Chapter, a Court, tribunal, forum or body — (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;"

354 Section 326 provides: "(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament. (2) When interpreting legislation, every Court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law."

355 Section 327(6) provides: "When interpreting legislation, every Court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."

– are accordingly of fundamental importance when it comes to using litigation as a strategy for promoting the rights of women, because they pave the way for the application of international standards in the protection of the rights of vulnerable groups, among them women.

The Constitution also introduced principles governing fundamental rights litigation, designed to make the courts more easily accessible to the public. Section 85(1) permits litigants other that the affected person herself or himself to bring proceedings for adjudication before the courts. This broadened standing is important because often the very women who require the protection of the law lack the means, knowledge and capacity, or are afraid, to pursue their rights in court. Third parties such as organisations, associations and people acting in the public interest now have authority to institute litigation to enforce fundamental rights.

In their commentary on experiences from the Zimbabwean courts under the previous constitution, with regard to litigating the rights of women, Ndashe and Sacco made the observation that "a general trend has been that Courts are more willing to strike down discriminatory laws that do not affect property and inheritance norms".[356] This observation was made after an analysis of how the courts had dealt with a number of cases that had come before it that challenged the constitutionality of legislative and common law provisions on the grounds of being discriminatory against women under the Lancaster House Constitution. Notable among these cases was *Magaya v Magaya* discussed above.

The question which this Chapter asks is whether, in the eight years that have passed since the promulgation of the current Constitution, there has been any improvement. The Constitutional Court has heard a number of cases in which litigants have challenged the constitutionality of legislative and common law provisions affecting the rights of women. Some of these cases offer insights into how approaches to strategic litigation for women's rights can be improved and fine-tuned to ensure outcomes that are favourable for not only the individual women litigants but for the society and the system as a whole. The experience of litigation under the current Constitution seems to suggest a slight shift from the trend noted by Ndashe and Sacco above. The courts have continued to show enthusiasm to utilise all manner of resources at their disposal to declare as unconstitutional laws that do not affect property and inheritance norms, as seen in the case of *Loveness Mudzuru and Ruvimbo Tsopodzi v Minister of Justice Legal and Parliamentary Affairs, Minister of Women Affairs, Gender and Community Development and the Attorney General of Zimbabwe* CCZ 12/15 (discussed below) which outlawed s 22 of the Marriage Act [Chapter 5:11] allowing the marriage of girls below the age of 18 in violation of s 78 of the Constitution. The same case also declared the Customary Marriages Act [*Chapter 5:07*] unconstitutional in that it does not provide for a minimum age limit of eighteen (18) years in respect of any marriage contracted under that Act.

When it comes to addressing discrimination in relation to women's access to property, however, the experience has been mixed, as shown in the cases of *Judith Ishemunyoro (nee Mandidewa) v Anthony Ishemunyoro, Tynserve Distributors (Private) Limited, the Registrar of Deeds and the Sheriff*[357] and *Penelope Chigwada v Gerald Chigwada*

356 Sibongile Ndashe and Solomon Sacco "Watch the Court Dance: litigating the right to non-discrimination on the grounds of sex" (2009) 4 *Equal Rights Review* 26

357 *Judith Ishemunyoro (nee Mandidewa) v Anthony Ishemunyoro, Tynserve Distributors (Private) Limited, the Registrar of Deeds and the Sheriff* Supreme Court unreported case SC 14 / 19.

and 2 Others[358] on the one hand, and the case of *Emmaculata Mhora v Govati Mhora* on the other hand.[359] I will discuss these cases in turn. First, however, I introduce the key actors in relation to women's rights litigation in Zimbabwe.

8.4. The Actors

Litigating women's rights in a deeply patriarchal society like Zimbabwe can be daunting. The Zimbabwean experience has shown that when different communities and organisations with a common purpose work together, pooling resources and building synergies, it is possible to overcome some of the barriers in accessing justice that women typically face in a patriarchal society. These barriers include the high cost of legal representation and unfamiliarity with the protective provisions of the law. This section looks at how different actors have played a significant role in litigating women's rights in Zimbabwe.

8.4.1. Zimbabwe Lawyers for Human Rights (ZLHR)

ZLHR is an organisation of lawyers in Zimbabwe whose mission it is to protect and defend human rights through, among other things, sustainable litigation. ZLHR has been a key player in litigating fundamental rights in Zimbabwe. Their work cuts across the spectrum of all rights protected under Zimbabwean law. In relation to the rights of women, they have partnered with communities and public interest organisations to identify and litigate cases in pursuit of the rights of women not only in the superior of courts of Zimbabwe but also before the magistrates' courts. A recent example of this kind of intervention is the case of *Chipo Masimo v Ernest Munhari*,[360] in which ZLHR assisted a widow living in a rural village in Manicaland to obtain a protection order against her brother-in-law who was threatening to evict her from her home after she turned down his sexual demands. This case was significant for a number of reasons:

- It demonstrated that litigation is a tool that can be used successfully to deliver justice in the rural areas which are usually considered as marginalised and hard to reach.
- The case succeeded in using the law to indirectly tackle conduct fitting the definition of sexual harassment in the absence of a Zimbabwean law that defines and prohibits sexual harassment.
- The case also indirectly challenged the cultural belief that widows that have been left in occupation of the matrimonial home in communal areas should justify their occupation of those homes by availing sexual favours to a male member of her deceased husband's family.
- The case also demonstrated the use that can be made of the lower courts, which courts are more accessible to the communities, to litigate the rights of women. This is important because often there is a tendency to think that women's rights should be litigated in the "big" cases before the superior courts.

Recently, ZLHR has also filed a case before the High Court of Zimbabwe which brings to the fore the role of religious

358 *Penelope Chigwada v Gerald Chigwada and 2 Others* Supreme Court unreported case SC 188 / 2020.

359 *Emmaculata Mhora v Govati Mhora* Supreme Court unreported case SC 89 /20.

360 *Chipo Masimo v Ernest Munhar*, Mutasa Civil Magistrates Court unreported case.

beliefs and church teachings in perpetuating practices that discriminate against women, in this case, the practice of child marriage.[361] The case seeks to compel two different sects of the Apostolic church to either publicly take ownership of the discriminatory doctrines that are commonly attributed to them or to denounce them. This case is significant in that for the first time, the role of religious teachings in perpetuating discriminatory practices will be put on the spotlight. The case still has to be finalised.

8.4.2. Zimbabwe Women Lawyers' Association (ZWLA)

ZWLA is a member-based civil society organisation that focuses on providing legal services to indigent women. It was formed in 1993 and has been a key player in identifying the key legal issues on the rights of women that require litigation. In 2007, ZWLA litigated the important case of *Mildred Mapingure v Minister of Home Affairs*,[362] which highlighted the administrative gaps in the implementation of the Termination of Pregnancy Act [*Chapter 15:01*], which often led to women who were by law entitled to termination of pregnancy, failing to get the services due to delays and bottlenecks in the system. This case has served as the basis for authorities conducting a gap analysis in the provision of termination of pregnancy services, and formulating standard operating procedures to streamline and integrate the services provided by the different service providers.

More recently, in the case of *Mhora v Mhora*,[363] ZWLA supported a woman to obtain a 50 per cent share of the matrimonial home upon divorce. The court determined that, under the guidelines set out in section 7 of the Matrimonial Causes Act [*Chapter 5:13*] for equitable distribution of the property of the spouses upon divorce, it is possible, after taking into account the needs of the spouses, for a court to award a 50 per cent share to a wife who could not demonstrate that she had made any direct monetary contribution to the acquisition of that property. This case was widely publicised and applauded by the public as a positive step.

ZWLA has also made an application for direct access to the Constitutional Court to bring a challenge against the constitutionality of section 2 of the Matrimonial Causes Act because it defines marriage in a manner that excludes unregistered customary marriages. The exclusion of unregistered customary marriages from the definition of marriage means that, upon divorce, the court cannot use the equitable principles set out in section 7 of that Act to divide the property between the divorcing spouses. In particular, the court cannot take into account the indirect contribution of the spouses. While this provision is gender neutral, its effect is disproportionately averse to women because women are more likely than men to have made indirect, rather than direct, contribution to the purchase of immovable property like the matrimonial home. Judgment in that case was reserved.

8.4.3. Women and Law in Southern Africa (WLSA)

WLSA is an organisation which, like ZWLA, is involved in providing critical legal services to women. At the beginning of the COVID 19 Pandemic, in March 2019, WLSA partnered with the Combined Harare Residents Association (CHRA) to institute proceedings in the High Court compelling the City of Harare to avail adequate clean water to high-density suburbs, in light of the newly promulgated lockdown regulations, as the lack of water

361 *Sharon Moffat & 2 others v Marange Apostolic Church of St Johanne and 8 others* Harare High Court unreported case HC5112/21.

362 *Mildred Mapingure v Minister of Home Affairs and 2 Others* Supreme Court unreported case SC 22/14.

363 *Govhati Mhora v Emmaculata Mhora* Supreme Court unreported case SC 89/20.

was disproportionately affecting women.[364] The case was litigated at a time when Harare was experiencing a critical shortage of clean water. Most households in high-density suburbs do not have access to clean running water and have to rely on informal water sources such as community boreholes or water bowsers for their daily water needs. At first glance it may not be apparent how this case could be about enforcing the rights of women since the entire community was affected by the water shortages, but when one considers the gender roles in Zimbabwean households it is clear that women carry the primary responsibility of providing water for the family and for taking care of sick family members. In a pandemic involving a highly infectious disease, women are put at greater risk of contracting the disease if they have to gather at crowded water points, where social distancing is impossible to implement, and if they lack adequate water for hand washing after taking care of infected relatives.

This case was significant because it demonstrated how law-based organisations can partner with communities to quickly mobilise the law in the face of an emergency crisis to address critical concerns for women.

8.4.4. Veritas

Veritas is a legal watchdog organisation that provides information on the work of the Parliament of Zimbabwe, and the laws of Zimbabwe, and makes legal information widely available in the public domain. They have established a programme specifically dedicated to the rights of women. "Veritas Women" is a helpdesk legal advisory forum about women's rights and legal issues. Veritas also conducts strategic impact litigation, including on the rights of women, and most notably brought the landmark case of *Mudzuru*, discussed below.

8.5. A Tale of Two Cases

8.5.1. *Mudzuru & Tsopodzi*

In this case, which was spearheaded by Veritas, two adult women who had been married as girls below the age of 18 approached the Constitutional Court challenging the constitutionality of s 22 of the Marriage Act [*Chapter 5:11*], which provided that girls below the age of 18 could get married provided that the Minister gave his consent to the marriage. This case was notable because the judgment ruled on many aspects that up to that point had not been clear. It clarified that in a case brought in terms of s 85 of the Constitution, the applicants need not demonstrate that they are personally affected by the violation in question since s 85 recognises the *locus standi* of persons acting in the public interest.

The case demonstrated the willingness and capacity of the court to make reference to, and be guided by, international human rights law in the interpretation of the Constitution, and to use international law as a standard against which to test the validity of statutory provisions. The court also demonstrated proclivity towards a value-based, rather than text-based, approach to legal interpretation. The Constitution itself does not contain any provisions that explicitly prohibit the marriage of girls below the age of 18. Section 78 of the Constitution only provides that every person who has attained the age of 18 has the right to found a family. It was argued on behalf of the respondents that a literal interpretation of this provision does not support an outright prohibition of marriage of persons below the age of 18; that it simply protects the rights of people over the age of

364 *Combined Harare Residents Association v The City of Harare and 4 Others* Harare High Court unreported case HC 2156/20.

18 to marry and found a family; and that while the right of people below the age of 18 to marry is not guaranteed, it is not precluded. The court rejected this argument and utilised the principle of the best interests of the child provided for in ss 19(1) and 81(2) of the Constitution, and provisions of the UN Convention on the Rights of the Child (CRC) and the AU Convention on the Rights and Welfare of the African Child, to make an unequivocal ruling that the marriage of children could not be countenanced under any circumstances.

While *Mudzuru & Tsopodzi* declared that s 22 of the Marriage Act was unconstitutional, it did not and could not declare as criminal the purported marriages of children. The logical follow-up to the ruling was for Parliament to pass a law giving effect to the judgment and, in addition, defining and sanctioning criminal conduct in relation to child marriage. It is concerning that at the time of writing this chapter in 2021, Parliament has not yet come up with such a law.

In the meantime, the judgment has been rendered a toothless bulldog because the practice of child marriage has continued, as was painfully brought to the attention of the nation in the distressing case of Anna Machaya. According to verified media reports, Anna Machaya was a young girl who, at the age of 15 was married off to a much older man in accordance with the religious practices of the church to which her family belonged. She died in July 2021 while giving birth at a Johanne Marange Apostolic Church shrine.[365] It is believed that the case of Anna Machaya is not isolated and in fact the practice of child marriage has continued unabated in some communities around the country despite the ruling of the Constitutional Court. As a response to what happened to Anna Machaya, ZLHR instituted the abovementioned case *of Sharon Moffat & 2 others v Marange Apostolic Church of St Johanne and 8 others* HC 5112/21, which raises issues around the role of churches and religious teachings in perpetuating discrimination against women and girls. This case is still to be heard by the court.

In her book, *Strategic Human Rights Litigation*,[366] Helen Duffy argues against the cliché of legal victory, and the illusion that winning in Court is the ultimate solution to solve human rights violations. The case of Anna Machaya painfully demonstrates this. It exposes the fact that a courtroom victory is sometimes just the first battle in a long drawn-out war. There are no quick fixes. Activists must be in it for the long haul.

8.5.2. *Ishemunyoro* [367]

The case of *Ishemunyoro v Ishemunyoro* serves as an example of the conservative approach that is unfortunately still adopted by the courts when it comes to dealing with women's rights in the area of access to property and economic resources. In this case, a married woman challenged the right of her husband to alienate his share of a jointly owned property. The woman had, through her own resources, acquired a house from her employer, the Government of Zimbabwe, but the title deed had been registered in the names of both herself and her husband as equal joint owners. The husband had subsequently bound himself as surety for a debt owed by a company with which he had become involved. When the company failed to pay the debt, the husband's half share was attached but the wife's half share could not be attached.

365 See the report at https://www.zbcnews.co.zw/memory-machaya-a-case-of-stolen-identity-to-conceal-a-heinous-crime/.

366 Helen Duffy *Strategic Human Rights Litigation: Understanding and Maximising Impact* 1 ed (2018) Hart Publishing).

367 *Judith Ishemunyoro (nee Mandidewa) v Anthony Ishemunyoro, Tynserve Distributors (Private) Limited, the Registrar of Deeds and the Sheriff* Supreme Court unreported case SC 14 / 19.

The wife applied to the High Court for an order declaring that the creditors could not attach immovable matrimonial property that was the matrimonial home to satisfy a debt accrued by either spouse. She did not succeed in the High Court and appealed to the Supreme Court, adding in her argument before the appeal judges that the High Court had "timidly" failed to take a "robust approach" to protect women's rights, as required by the Constitution.

Deputy Chief Justice Elizabeth Gwaunza, writing for a unanimous court, held that the husband and wife owned the property in equal, undivided shares. Even though the wife might have paid for the entire purchase herself, it had been transferred into both their names. Having used her own money to pay for the property, she could have safeguarded her real rights by having it registered in her name only. The societal factors that could have influenced her decision to register the property in their joint names fell outside the dictates of the law. The fact that the husband's name was on the title deed gave him real rights in the property at law, which could not be lightly interfered with.

The court opined that there was a clear need for activists on the rights of women and children to lobby law-makers to pass legislation that addressed the problems experienced by the wife in this case. It had already been done in other countries, which had passed laws that prevented the alienation of a matrimonial home by one spouse without the consent of the other and gave the court the power to set aside a transaction if there were no such consent.

Such a law would be desirable in Zimbabwe and would go a long way in safeguarding a families' rights to shelter. It would also protect the integrity of a matrimonial home and promote the economic empowerment of women. It was precisely because there was no such law in Zimbabwe that the wife's appeal had to fail. As far back as 2005, in *Muswere v Makanza*,[368] Justice Makarau, then a High Court judge, had dealt with a similar dispute and forcefully stated that the issue needed urgent law reform. But there has been no change. In 1991, McNally JA had also made a similar point in the case of *Muzanenhamo and Another v Katanga.*[369]

Justice Gwaunza said she regretted that "no concerted effort" had been made by activists in the field of gender and women's rights to lobby for changes to this law. The courts had had to deal with "many disputes of this nature" and the need for change had "clearly been demonstrated". In the end therefore, and despite the court's sympathy, the wife lost the appeal, with costs, and could lose half of the family home.

There is no doubt that this would be a fruitful field for legal reform, and with the Appeal Court's comments to back them up, activists would have considerable force in their arguments for urgent change.

While it is easy to criticise the court for its seeming recalcitrance in tackling a long standing socio-legal problem, the case also presents an opportunity for women's rights activists to take stock of the efforts that they have made in the 14 years from 2005, when the court decided *Muswere v Makanza*, to 2019 when the court decided *Ishemunyoro*. The issues were the same and the stance of the court remained unchanged: the court will not do what it considers to be Parliament's job. Women's rights activists need to consider: what lobbying and advocacy

368 *Muswere v Makanza* 2004 (2) ZLR 262.

369 *Muzanenhamo and Another v Katanga* 1991 (1) ZLR 182 (S).

for legislative reform has been conducted in this period, as recommended by the judges? What strategies have been adopted and implemented to ensure that women are aware of the pitfalls of joint ownership, or of a husband's sole ownership of property? What actions were taken to empower women themselves to hold Parliament accountable for legislative reform?

Perhaps the greatest lesson for lawyers to come out of *Ishemunyoro* is this: sometimes a leopard does not change its spots. When the court has made its position clear on a certain issue, there is perhaps little point in continuing to litigate the same issue in the same manner, hoping for a different result. It is fruitless and discouraging. There is a point beyond which an issue cannot be taken any further in litigation and lawyers need to recognise and respect this boundary and begin to innovate other strategies for dealing with the issue.

8.6. Factors Critical for Success in Litigating Women's Rights

In her paper titled "Upholding Women's Rights Through Litigation" presented to the 54th session of the [UN] Commission on the Status of Women,[370] Sapana Prahdhan Malla discusses the experiences of using litigation to advance the rights of women. She discusses several case studies where the courts have issued important judgments with far-reaching positive implications for the rights of women, and attempts to isolate the factors that have contributed to the success of litigation as an effective strategy in the fight for women's rights. Some of the recommendations that she puts forward find resonance when one has regard to the experiences in Zimbabwe, including the following:

8.6.1. Research on discriminatory laws and its impact, followed by periodic updates

Where possible, strategic litigation should be preceded by research on the discriminatory laws in question so that their impact is well understood and documented.

8.6.2. Communication and partnerships with stakeholders at all levels before the filing of proceedings, and after judgment, for advocacy and implementation purposes

This exercise ensures the selection of applicants whose circumstances present the best chances of success to challenge a particular issue. It also helps in securing a critical mass of stakeholders ready and able to act as allies. Among the stakeholders who should be targeted are: parliamentarians, particularly the portfolio committees that deal with women affairs and gender issues; community leaders including traditional leaders; local government authorities; and other policy makers.

Regarding the issue of child marriage that arose in *Mudzuru*, ZLHR has been conducting a campaign around child marriages, including through mobile legal clinics, and an essay competition for high school children. It is

370 Sapana Malla, Froum for Women, Law and Development "Upholding Women's Rights through Litigation" (1-12 March 2010) UN Commission on the Status of Women, available at]https://www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Sapana%20Pradhan%20Malla%20paper.pdf.

not yet clear to what extent these and other efforts have penetrated rural communities around Zimbabwe to build consensus that child marriage is wrong and unconstitutional. As communities continue to engage with the concept of child marriage as something that will not be countenanced by the law, they may become more ready to accept and comply with the ruling of the court. As highlighted above, ZLHR has also instituted litigation to compel the two main sects of the apostolic churches to clarify their position on child marriages.

8.6.3. Making use of the recommendations of international law and the treaty monitoring bodies to support relief sought in litigation

Zimbabwe is party to all the key human rights instruments including those that articulate the rights of women and girls.[371] Section 46 of the Constitution mandates courts to take into account international law in the interpretation of legislation, meaning that the recommendations of the CEDAW may be used as guidance in women's rights cases before our courts. In Zimbabwe's experience, the extent to which international human rights law has influenced judgments in cases involving the rights of women seems to depend on the nature of the case. In cases that do not involve women's right to property and economic rights, the courts seem to have been more ready to apply international human rights law standards. Lawyers and women's rights activists may also look beyond Zimbabwean courts and call upon international mechanisms to hold the state (including the judicial arm of the state) accountable for enforcement of its obligations under international law. In this regard it should be noted that paragraph 38 of the CEDAW committee's concluding observations to Zimbabwe's combined 2nd to 5th periodic report has recommendations on marriage and family relations, including the recommendation to amend all discriminatory laws that hinder women from enjoying equal access to family property. These recommendations can be used as leverage in formulating legal arguments around women's issues with regard to access to property, as well as provide a basis for legislative reform.

8.6.4. Sensitisation of judiciary through capacity building

This has often served as an important strategy in gaining favourable judgments on gender issues. Such initiatives should also be extended to lawyers, with special emphasis on strategic use of public interest litigation as a tool for law reform, as well as to beneficiaries, in order to create awareness on their roles in proper implementation of judgments.

8.6.5. Empowerment of legal defenders

Not all lawyers have the interest or flair to act as public interest litigators in women's rights. Lawyers and activists defending women's rights are often accused of destroying societal norms and institutions such as marriage. Those who have the interest and appetite for this kind of work should be empowered, supported and adequately rewarded. It is also necessary to do advocacy to promote understanding of the fact that upholding women's rights is not a confrontation with men, or a denial of men's basic rights, but rather an attempt to counter patriarchal values in society adopted by both men and women in society, and to ensure equality and non-discrimination for all.

371 Zimbabwe has still not ratified the Optional protocol to CEDAW which would have permitted individuals to bring complaints directly to the CEDAW committee after exhausting domestic remedies

8.7. Conclusion

Law and society are complementary to each other and function in parallel. This means that unless there is a change in mindset amongst people, the achievement of a positive decision from the court is not enough to realise rights in practice. Ensuring rule of law and legal protection is a continuous process and exercise based on acceptance of the need for change in society and the need for its reflection in norms that regulate the society. The mere enactment of a law is not enough if a culture of non-compliance with law and impunity is encouraged or ingrained in society. From this standpoint, the enactment or reform of laws is a basic step towards recognition of rights and the creation of societal norms. If laws are discriminatory, or if rights are not recognised, individuals within society will fail to claim what is rightfully theirs.

CHAPTER 9

9. ELECTORAL LITIGATION IN ZIMBABWE - *Godfrey Mupanga*



Dr Godfrey Mupanga

Dr Godfrey Mupanga teaches in the Faculty of Law at the University of Zimbabwe. He runs the human rights practice of Mupanga Bhatasara Attorneys in Harare, and is a member of Zimbabwe Lawyers for Human Rights. He has served in various positions as Consultant, Director and Chief of Party for programmes on human rights, access to justice, and rule of law. He has published in all areas of human rights law, including on electoral law.

9.1. Introduction



Gift Konjana and his lawyer Moses Nkomo of ZLHR

Various mechanisms that are established under the Electoral Act [*Chapter 2:13*] ("the Act" or "the Electoral Act") with the mandate to resolve electoral disputes only become operational during the "electoral period". In terms of the definition of the term "electoral period" under the Act, these mechanisms are only activated when a proclamation fixing an election date is published, and cease to operate at the completion of the announcement of election results.

This suggestion that elections are an event rather a process impacts relevant stakeholders, including civil society organisations, seeking to ensure that the operating environment and procedures are in place for free, fair and peaceful elections at all times. As a result, in between elections, most civil society organisations who should rightly remain engaged with the electoral process and the electoral laws concentrate their efforts elsewhere, only becoming active in electoral matters when election season commences. However, various opportunities exist in between elections for relevant civil society organisations to remain engaged. During this period, civil society organisations could take advantage of the cooling in political tempers to improve the law and practice of elections thereby ensuring that the next elections are held on an "even playing field".

Since independence in 1980, Zimbabwe has had a chequered electoral history. All elections that have been held since independence appear to have been tainted by pre-election periods characterised by illegalities and electoral malpractices of one kind or another. Malpractices and criminal acts range from flagrant abuse of state resources by the incumbent party in election campaigns, a state-controlled and openly biased public media, partisan traditional leaders, failure by the election management body to keep a clean and accurate voters' roll, politically motivated violence, and many egregious violations of the provisions of the Electoral Code of Conduct for Political Parties and Candidates and Other Stakeholders. As a result, there is no election outcome since independence that has not been contested or challenged. Mutangi and Maja have rightly suggested that electoral justice is ubiquitous in, and ought to implicate, the whole electoral cycle: that consists of pre-election, polling day and post-election phases.[372]

Considering electoral litigation specifically, elections are highly political and, as such, dealing with election disputes through the court system seems to present a particular difficulty for judges. It is said that electoral litigation risks alienating the electorate. When elections are decided in courts, voters come to believe that they lack a voice. As Justice Frankfurter wrote in *Colegrove v Green* in 1946, "it is hostile to a democratic system to involve the judiciary in the politics of the people". Fuller and Winston have argued that the public's confidence in neutral, non-political adjudication of disputes is put at risk each time an election case, by nature fraught with partisan conflict, confronts the courts.[373] On their part, courts are generally wary of decisions that might give the

372 T Mutangi & I Maja "The Judiciary and Electoral Adjudication in Zimbabwe" (Manuscript with author, yet to be published).

373 Lon L Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication', (1978) vol 92, no. 2, *Harvard Law Review* 353 – 409.

appearance that the judiciary is replacing its will for that of the people. Consequently, courts tend to tread with a lot of caution when they decide cases of election disputes. This especially applies with post-election litigation.

Yet, the judiciary as a whole is an indispensable part in the electoral dispute resolution matrix. According to the Venice Commission, "if the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body" and whatever form of appeal body a state adopts, "there should be some form of judicial supervision in place". Litigation is necessary to assert legal rights extended by the Electoral Act and fundamental rights enshrined in the Constitution. Whatever other methods of electoral dispute resolution that might exist, litigation must remain as a default solution.

This seems to have been well understood by ZANU PF. The 1980 general election was the precursor to independence. Considering its importance it was a high stakes event. Under the new Constitution, an election for 80 members to be elected by African voters was due to commence on 27 February 1980 and to last until the 29th, a period of three days. The first reported electoral dispute came before the courts regarding alleged electoral malpractices during the campaign period.[374] The case was brought by ZANU PF against its rival, the United African National Congress.

The case was heard by Goldin J and Beck J on 23 February 1980.[375] ZANU PF sought to prevent the manner in which a four-day rally, which had already commenced, was taking place and was to continue taking place. ZANU PF now sought to interdict the UANC from providing food, drink and entertainment at the political rally, and from conducting a draw at the rally with six motor-cars as prizes. The rally had been widely advertised as "*Huruyadzo* Rally" (the biggest one). The court held that providing voters with food, drink and entertainment became the offence of treating, in terms of section 111 of the Electoral Act, 1979, only if it was done in order to influence the voters how to vote, but not if it was done merely to enable or induce them to attend a political rally. However, the court held further, that the proposed draw of motor-cars was not necessary to enable persons to attend the rally, and amounted to the offence of bribery in terms of section 113 of the Electoral Act. The court therefore prohibited the car draw as it deemed it bribery of the voters.

This desire for electoral morality did not last forever. After the 2000 elections, the MDC, which had contested the election, instituted election petitions in respect of 37 constituencies. The President and leader of ZANU PF, Robert Mugabe tried to stop the hearing of election petitions altogether. The hearings were due to begin on 8 January 2001. On 8 December 2000, the President issued a statutory notice under the Electoral Act seeking to stop the petitions from being heard.. The full bench of the Supreme Court in *Movement For Democratic Change & Another v Chinamasa & Anor NNO*[376] was asked to determine the constitutionality of the statutory instrument issued by the President. The effect of the notice was that the results of those elections being contested in the High Court had been predetermined by the President as valid, irrespective of any finding by the High Court of corrupt or illegal practices or other irregularity. Members of Parliament who may have been guilty of grossly corrupt and illegal practices, such as intimidation and ballot rigging, and not in truth and in fact elected by the will of

374 *Zimbabwe African National Union (Patriotic Front) v United African National Council and Others* 1980 ZLR 69 (G).

375 GG Chidyausiku, for the applicant. RR Horn, SC, for the respondents.

376 *MDC & Anor v Chinamasa & Anor NNO* 2001 (1) ZLR 69 (S).

the voters, would retain their seats. The applicants, the party and one of its candidates in the election, brought a constitutional application to the Supreme Court. They alleged, among other things, that the notice was contrary to s 18(1) (the right to protection of the law) and s 18(9) (the right to a fair hearing by an impartial court) of the Constitution. The Supreme Court held *inter alia* that the applicants had the civil right to partake in an election that was free and fair and devoid of corrupt or illegal practices, to challenge the result of an election which was claimed to have been tainted by corrupt and illegal practices, and to seek practical and meaningful redress in the form of a High Court order certifying that the results were tainted.

The notice effectively deprived them of that right. The right of full and unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes. On whether the rights of the applicants as protected by subss (1) and (9) of s 18 of the former Constitution were infringed, the court held that they had a civil right to seek practical redress in the form of a High Court order, certifying that corrupt and illegal practices were committed with reference to one or more of the 37 election results. They were legitimately entitled to expect that the result in every constituency would be free and fair and properly representative of the will of the voters. It was the existence of such civil rights that the applicants were seeking to have determined by the High Court**.** It held that preventing the applicants from securing relief in the form of fresh elections upon a finding that an election was not free and fair curtailed the applicants' right of access to the High Court, contrary to the protection of the law as accorded in s 18(9) of the Constitution. The notice was set aside. Explaining the right to full and unimpeded access to courts, the Supreme Court explained that:

> "The right of full and unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes. It ensures a mechanism by which such disputes are resolved in a peaceful, regulated and institutionalised manner."

Yet other tactics were employed to ensure that they would not be finalised. Below are examples of the delays in the finalisation of 40 electoral cases brought after the 2000 elections which brought a lot of anxiety to the public. The delays in finalisation of the petitions and the appeals to the Supreme Court are well-documented. The following are examples:

Concerning Mutoko South constituency, in the matter of *Muzira v Muchena*[377], the trial commenced on 15 March 2001. Judgment was given in favour of the MDC candidate on 27 April 2001. An appeal to the Supreme Court was lodged by the ZANU PF candidate. The appeal was set down for hearing in the Supreme Court on 20 September 2004. However, it was postponed on that date at the instance of the Chief Justice. The appeal was then heard on 4 November 2004. This was after more than 3 years and 7 months. Judgment was reserved.

For Chiredzi North constituency, in *Mare v Chauke*, judgment was given in favour of the MDC candidate on 20 June 2001. An appeal was lodged by the ZANU PF candidate on 4 July 2001. The appeal was heard in the Supreme Court on 14 June 2004 (almost 3 years later). Judgment was reserved. Regarding Makoni East constituency, in *Mudzengerere v Chipanga*, the trial concluded on 11 October 2001. Judgment in favour of the MDC candidate was only granted two years later on 22 October 2003.

377 *Mutoko South Election Petition* (*Muzira v Muchena)* 2001 (1) ZLR 308 (H).

There were more delays in settling electoral matters. ZLHR and the Institute for Human Rights and Development took the Government of the Republic of Zimbabwe to the African Commission on Human and People's Rights in terms of the African Charter on 6 October 2004. The two organisations alleged a violation of equality, non-discrimination (denial of enjoyment of Charter rights); equal protection of the law (difference in treatment,); and fair trial (right to be heard; decision within reasonable time; impartiality; independence of judiciary). The matter centred on the failure of the judiciary to expeditiously deal with election petitions and the general failure of the electoral dispute settlement system to guarantee the right to a fair trial in electoral matters. The decision of the African Commission is reported as *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* (2008) AHRLR 120 (ACHPR 2008). It was decided at the 43rd Ordinary Session, May 2008. The African Commission ultimately found the communication admissible, but found on the merits that no violations had been established.

9.2. Establishment of the Electoral Court

After amendments effected to the Electoral Act in 2018, the Electoral Court is permanently established as a division of the High Court of Zimbabwe, in terms of section 161 of the Act. As a permanent institution, the jurisdiction of the Electoral Court is not limited to the electoral period. The Electoral Court has exclusive jurisdiction over electoral matters. Exclusive jurisdiction means that the Electoral Court is the sole forum for the determination of electoral cases. It is, therefore, the court of first instance in all election-related matters. While the powers of the Electoral Court are limited to matters implicating the Electoral Act, in exercising those powers in such matters, the Electoral Court has the same powers as the High Court. In terms of section 161 of the Act, the orders and directions of the Electoral Court shall have the same effect, and shall be enforced in the same way, as the orders of the High Court of Zimbabwe.

Appeals from the Electoral Court lie to the Supreme Court and from there to the Constitutional Court. However, the exclusive jurisdiction of the Electoral Court does not limit the right of a party, in an appropriate case, to approach the Constitutional Court to enforce fundamental rights directly under section 85 of the Constitution of Zimbabwe, 2013. Similarly, as "a court", the Electoral Court necessarily has powers to interpret the Declaration of Rights when the issue involves the Electoral Act. In terms of section 161(2) of the Electoral Act, the Electoral Court's exclusive jurisdiction extends to appeals, applications and petitions in terms of the Act. The Electoral Court also has exclusive jurisdiction to review any decision of the Electoral Commission (ZEC) or any other person made or purporting to have been made under the Act. Decisions that fail to meet the standards of administrative justice enshrined in section 68 of the Constitution, which are made in terms of the Electoral Act by any person, can come up for review by the Electoral Court. It is therefore possible, in an appropriate case implicating the Electoral Act, for a person to approach the Electoral Court complaining about administrative failures in contravention of section 68 of the Constitution. In fact, it appears that the Electoral Court exercises its jurisdiction in such cases to the exclusion of any other court.

In *Ian Muteto Makone & Another v The Chairperson of the Zimbabwe Electoral Commission & Another*,[378] the court noted that due to recent amendments, the electoral laws are not fully understood by lawyers. Even before these extensive amendments, the overly technical and complex electoral laws were not fully understood. In this case,

378 *Makone & Anor v Chrmn, ZEC & Anor* 2008 (1) ZLR 230 (H).

declining the invitation by the respondents' legal practitioner to award punitive costs on the higher scale of legal practitioner and client, Justice Uchena showed outstanding judicial situational awareness. Even the respondent's lawyer who had sought punitive costs had himself been mistaken on a point related to the jurisdiction conferred on the Electoral Court by the Electoral Act to hear and determine "applications".

Consequently, held Justice Uchena, as the law was still evolving, the court would not punish litigants for failing to understand the law by awarding costs on the higher scale. Rather, the court would continue to guide lawyers and litigants through its judgments. This judicial approach is consistent with ss 85(3)(a) and (c) of the Constitution, which requires that courts fully facilitate parties' right to approach the court and, while observing the rules of natural justice, do not unreasonably restrict access based on procedural technicalities. There is a distinct advantage in establishing the Electoral Court as a permanent and specialised division of the High Court. Increased understanding of electoral laws, and the establishment of a cadre of specialist lawyers and judges, will lead to better interpretation of the electoral laws. This will naturally lead to a levelling of the playing field in elections, and elections that are not contested. It is a truism that uncontested elections have a positive effect on the democratic imprint of the state and they increase the legitimacy of the government elected under such elections. More, not less, electoral litigation is necessary for increased understanding of the electoral laws and for the entrenchment of democracy.

9.3. Litigating During the Pre-Election Period

As shown above, while all litigation associated with elections can present difficulties before the courts, post-election litigation has been particularly problematic. Before or in between elections, civil society in Zimbabwe has also filed litigation in the courts in order to review legal rules that regulate the electoral process to ensure an "even playing field".[379] Results have been mixed, but some important wins have been recorded which have resulted in improvements to the law and practice of elections. Even where cases have been lost, there are instances where the courts have taken the opportunity to provide greater clarity in the law. There are many opportunities for lawyers interested in electoral litigation to file suits inviting courts to review the legal rules that regulate the electoral process. Examples of the results that have led to some changes are identified here below.

9.4. Campaign financing and disclosure requirements

The Electoral Act and Regulations have provisions that govern election expenses and disclosure of expenditure by election candidates. The Political Parties (Finance) Act [*Chapter 2:11*] regulates the provision of public funding to political parties. The Electoral Act defines election expenses as follows: "election expenses, in relation to a candidate at an election, means all moneys expended or expenses incurred on account of or in respect of the conduct or management of that election by that candidate, or on his or her behalf or in his or her interests, but does not include the nomination fee or any moneys expended, or expenses incurred, by or in the interests of, a political party of which the candidate is a member, if they do not relate directly to him or her". Sections 93–101 of the Act outline items that constitute the categories of election expenses that are permissible and not permissible. The Electoral Regulations provide the limits of elections expenditure. However, the regime for regulating

379 See Mutangi & Maja (n 372 above).

campaign funding is not very well developed in Zimbabwe. The most pertinent of these provisions are those that limit amounts that can be spent by a candidate in an election, and those that require candidates to disclose the manner in which their campaign money is spent. It appears that there has been no attempt so far in Zimbabwe to enforce the provisions that limit election expenditure and disclosure of campaign financing expenditure through the courts. It may very well be that candidates participating in elections and political parties use out-of-court means to enforce these provisions but, as shown below, the limitation of elections expenditure and disclosure of elections expenditure is an area that is ripe for litigation in order for the law to be developed. According to the Ace Project, how campaigns are financed and what candidates and political parties do with donations can be the source of many integrity problems.[380] Thus, article 7(3) of the *United Nations Convention against Corruption*, in recognition of the influence of money in politics, requires all countries to take all appropriate legislative and administrative measures to "enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties". Virtually all states have ratified or acceded to this Convention. Zimbabwe signed it on 20 February 2004 and ratified it on 8 March 2007.

Moreover, even though candidates with enough resources can reach the electorate more easily with their messages, they can also skew electoral competition.[381] Wealthy benefactors and interest groups can have a disproportionate amount of influence in electoral outcomes. Even if donations by wealthy individuals and interest groups can be made without any conditions attached, they can create pressure on the candidate to do the benefactors' bidding. Such expenditure can also breed perceptions of influence-buying and special treatment. Perceptions can be created that only those with a lot of money, and not the poor, can participate in elections as candidates.[382]

In *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*[383], Mogoeng CJ showed why it is necessary to regulate election funding:

> "Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a 'rightful place' in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus and deliver on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation."

There has been litigation on entitlement to public funding for campaign financing in terms of the Political Parties (Finance) Act [*Chapter 2:11*]. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others,*[384] the minimum threshold for a political party to qualify for public funding was significantly reduced. Recently, in

380 See Ace Project at https://aceproject.org/main/english/ei/eif01b1.htm.

381 Magnus Öhman and Hani Zainulbhai (eds) *Political Finance Regulation: The Global Experience* (2009) IFES, Washington DC: available at http://www.eods.eu/library/IFES.Political_Finance_Regulation_The_Global_Experience.pdf.

382 *Ibid.*

383 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17 para 41.

384 *United Parties* v *Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 (2) ZLR 254 (S).

Zimbabwe Development Party & Voice of the People v President of Zimbabwe & Speaker of Parliament & Chairperson of Zimbabwe Electoral Commission[385] the applicants challenged this minimum threshold. They argued that by fixing a minimum threshold, the Political Parties (Finance) Act contravened section 67(4) of the Constitution, which provides that "for the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties". The applicants contended that they had not been allocated funding in terms of this Act, despite having participated in the 2013 harmonised general elections.

They interpreted the provisions of section 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. The litigation on campaign financing in these cases may not have brought immediate financial benefits to the litigants. However, the court had an opportunity to expound the law on the issue of financing elections and matters that arise from that issue. As a result of the decisions of the court, we are able to identify areas of the law that need to be improved by legislative amendments and by litigation.

One of the issues that comes out clearly from the decisions of the court is that there is a vital connection between a proper exercise of the right to vote and the right of access to information. The right to vote is not to be exercised blindly or without proper reflection.[386] In this regard, in *President of the Republic of South Africa v M & G Media Limited,*[387] Ngcobo CJ made the following observation: "In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined". According to Mogoeng CJ, in order to give practical and meaningful expression to the right of access to information and the right to vote, the state must pass legislation that provides for the recording, preservation and reasonable accessibility of information on private funding.[388]

A further issue with the Zimbabwean system for public financing of election expenses is that only political parties are considered. Independent candidates, no matter how well they do, will not receive any public funding for their election expenses. However, independent candidates are still required to comply with the provisions of the Electoral Act on limitation of expenditure and allowable electoral costs. There are various instances when independent candidates have won elections. It appears therefore that a form of discrimination, which cannot be justified in a state that espouses democracy, is occasioned by the system of campaign financing, which limits it to political parties only. It is an area of the electoral law that needs to be thoroughly looked at.

9.5. Some proposals for amendment of the laws on election expenses

- ZEC should monitor cash payments and contributions to political parties and candidates. Cash transactions exceeding a certain amount should be prohibited by law and all cash donations

385 *Zimbabwe Development Party & Voice of the People v President of Zimbabwe & Speaker of Parliament & Chairperson of Zimbabwe Electoral Commission* Constitutional Court unreported case CCZ 3/2018.

386 *My Vote Counts* (Mogoeng CJ) para 35.

387 *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) para 10.

388 *My Vote Counts* para 44.

should be deposited in a bank account on the same day or the next business day if the donation is made after banking hours. Restrictions should be imposed on amounts that can be kept in the cash box!

- Statutory provisions and guidelines from ZEC specifying the following should be considered:
  i. Transactions between parties and candidates should be by bank transfer or mobile money transfer or cheque and not by cash.
  ii. All campaign expenses should be incurred from a single bank account, opened for the purpose. The law should require that once an election is declared, every candidate should open a fresh bank account for the purposes of transacting election expenses only.
  iii. A neat record of the names and traceable addresses of all donors who contribute amounts above a specified threshold should be maintained at the campaign offices of the candidate and at the headquarter of his/her political party.
- Donating to a candidate or political party through a third party should be proscribed.
- The law should specify a maximum amount of donation per donor.
- At the end of the election period a copy of audited accounts should be sent to the ZEC and published in a newspaper with national circulation. The ZEC must publish the accounts on its website. The law should allow inspection of accounts of the candidates by election observers.

Non-compliance with any of the financial probity requirements should be a ground for disqualifying a candidate or automatically voiding the election if the defaulting candidate wins. As in India, there should not be any need to show that the default cited affected the election result.

9.6. Voter education

The provisions of the Electoral Act on voter education are an area of Electoral law that tend to cause some difficulties among civil society organisations and other civic-minded persons. The provisions governing voter education were inserted in 2012 as Part IXA, sections 40A–40E of the Act. Section 40A defines "voter education" as "any course or programme of instruction on electoral law and procedure aimed at voters generally and not offered as part of a course in law or civics or any other subject for students at an educational institution." Before 2012, the Act had no provisions on voter education. Any civic-minded person could carry out voter education without any undue restrictions. In fact, the practice prior to 2012 was that civil society organisations took on precisely this responsibility.

The insertion of this part of the Act on voter education can be explained as being politically motivated. A highly informed electorate is a threat to the government, which has been in power since 1980. So, it was important for the government to re-establish control of the nature and extent of the information that goes out to the electorate. By gaining control of voter education and excluding civil society organisations from carrying out voter education, the government has been able to control the nature of the information reaching the electorate and keep the size of the electorate that is informed to a bare minimum.

In terms of section 40C of the Act, only ZEC and political parties are allowed to provide voter education. Other

persons can carry out voter education only by way of assisting the ZEC, provided that ZEC gives such permission. Anyone else besides ZEC, political parties and persons permitted to assist ZEC, who carries out voter education or disguises voter education as a course in law or civics commits a criminal offence.[389] ZEC has the discretion to permit any organisation or person to assist it to carry out voter education. In exercising this discretion, ZEC shall ensure that the person fits the qualifications and attributes outlined in section 40C(1)(d) through 40C(5).

These qualifications are:

- The person must be "a citizen or permanent resident of Zimbabwe domiciled in Zimbabwe";
- An incorporated or unincorporated association whose membership must consist "wholly or mainly of citizens or permanent residents of Zimbabwe domiciled in Zimbabwe"; or
- Lawfully constituted trusts, "the majority of whose trustees are citizens or permanent residents of Zimbabwe."[390]

Any organisation seeking permission to assist ZEC with carrying out voter education must furnish ZEC with information on the course that it wants to undertake as well as copies of all the educational materials that the organisation intends to use in its voter education programme. The organisation must not only disclose to ZEC its "manner and sources of funding",[391] but also "all the names, addresses, citizenship or residence status and qualifications of the individuals who will conduct voter education".[392]

When the voter education provisions were inserted in 2012, section 40F proscribed, at the pain of a fine and imprisonment, use of foreign donations or contributions in voter education. What comes out clearly from these provisions is the intention to exclude foreign influence in the election process. Again, it can be seen that this was motivated by the politics of the time, when the Government of Zimbabwe stood in international isolation. Thankfully, this section 40F was repealed in 2018. However, other provisions that seek to exclude foreign influences, enacted pursuant to section 40F, have been retained. An example is section 40C(2)(c), which requires an organisation seeking permission to assist ZEC in voter education to disclose its "manner and sources of funding". This clause ought to have been repealed when section 40F was repealed.

The second, and probably more serious, issue is the limitations imposed by the Electoral Act on who may carry out voter education. It is submitted that the limitations imposed by the law on persons that are authorised to carry out this important exercise are inconsistent with constitutional provisions on the following rights:

- The right to freedom of expression and access to information in section 61;
- Political rights in section 67 which include the right to free and fair elections; and,
- The right to equality and equal protection of the law without any discrimination in section 56.

Overall, more than these specific rights, the limitations fundamentally violate the founding values outlined

389 Section 40C(3) of the Electoral Act [*Chapter 2:13*].

390 See section 40C(1)(d).

391 Section 40C(2)(c).

392 Section 40C(2)(d).

in Chapter 1 of the Constitution, and the national objectives explained in Chapter 2 of the Constitution. The limitations are contrary to the whole democratic ethos based on "openness, justice, human dignity, equality and freedom" that forms the mosaic of the Constitution of Zimbabwe. It is an area that is ripe for litigation. In fact, on 19 December 2017, Veritas, a civil society organisation, commenced public interest litigation in the High Court on this issue. It sought an order declaring sections 40C(1)(g), 40C(1)(h), 40C(2) and 40F of the Electoral Act, that place some limitations on voter education, as being *ultra vires* sections 56, 61 and 67 of the Constitution, the allegation being that the impugned sections infringe the right of the public in general, and that of Veritas in particular, to equality and non-discrimination, freedom of expression and their political rights, including the right to a free and fair election, and to make political choices freely.[393] As has become the norm in electoral litigation, the case was dismissed for technical reasons regarding the citation of the applicant and the format of the application that was adopted by the applicant. Apart from section 40F, which was subsequently repealed, the merits of the argument that the provisions of the Electoral Act that place limitations on voter education are inconsistent with the Constitution are yet to be determined by the courts.

Errant traditional leaders

From recent elections, a phenomenon seems to be growing where traditional leaders are used by the incumbent governing party to campaign and deliver the vote to the candidates representing the incumbent governing party. Traditional leaders have also openly come out declaring their support for ZANU PF and openly attending ZANU PF conferences as delegates. Yet, the Constitution and the Traditional Leaders Act [*Chapter 29:17*] require traditional leaders to remain non-partisan. Section 281 of the Constitution states that traditional leaders should not be partisan. Section 45 of the Traditional Leaders Act prevents traditional leaders from standing for or holding any political office as President, Parliamentarian or Councillor while they hold office as a traditional leader. It also proscribes participation in political activities by chiefs, including canvassing, or serving as an election agent or manager for any candidate, in elections for State President, Member of Parliament or Councillor. But, like all other citizens, the proviso in s 45 guarantees for traditional leaders the right to exercise their right to vote in any national or local government election or referendum.

It is not difficult to see why the highest law of the land requires traditional leaders to stay out of partisan politics. As the late Phiri J. stated, the purpose of the limitation of the rights of traditional leaders to participate in partisan politics "is to ensure that traditional leaders remain independent and impartial. It is intended to ensure that, as a logistical institution, traditional leadership is kept outside the toxic politics of political parties thereby retaining the dignity and respect that traditional leaders command."[394] In this respect, Zimbabwe Lawyers for Human Rights and Elections Resource Centre have obtained orders from the High Court declaring that traditional leaders should remain partisan. The two civil society organisations have also obtained orders directing the President of the Council of Chiefs, Chief Fortune Charumbira to withdraw certain of his partisan statements and to behave in public in an acceptable non-partisan manner. However, it seems that Chief Charumbira has contemptuously ignored the orders of the court. As late as October 2021, Chief Charumbira attended a ZANU PF annual conference

393 *Veritas v ZEC & 2 Others; Firinne Trust also known as Veritas v ZEC & 2 Others* Supreme Court unreported case 103/2020.

394 *Election Resource Centre v Charumbira & 2 Ors* High Court unreported case 270/2018 at p 7 of the unreported judgment.

in Bindura as a delegate and made remarks that show utter defiance of the orders of the High Court of Zimbabwe. Election Resource Centre and Zimbabwe Lawyers for Human Rights have filed complaints.[395] However, effective mechanisms to enforce ethical conduct by traditional leaders that are contemplated under section 287 of the Constitution of Zimbabwe have not yet been established. The operative part of the judgment in *Election Resource Centre v Charumbira & 2 Others* has a paragraph which directs the Minister responsible for local government to take steps to implement the provisions of section 287 of the Constitution. But it does not appear that the Minister has done anything. The issue of implementing the provisions of the Constitution is an area of the law and has a close link with electoral laws that cries out for further consideration.

9.7. Post-Election Litigation and Matters Arising

After the end of the election period, electoral litigation challenging the results of the election is conducted through election petitions. There are, broadly, three types of election petitions in Zimbabwean electoral law. These are:

a. The presidential election petition in which the validity of an election of a President or Vice-President can be challenged;
b. Parliamentary election petition in which the election of a member of Parliament can be challenged; and,
c. The local government election petition complaining of an undue return or an undue election of a councillor to a local government authority. As we can see, the three types of election petitions correspond with the three ballots that a voter engages with on election day.

Parliamentary, local government and presidential elections are the epitome of politics. Any action brought to court challenging the legality of the election of an individual to parliament, local government council and as president of the country, implicates the almighty concepts of popular sovereignty and democracy. Under the Constitution, the power to rule flows from the people. Basically, election petitions are about the determination of quintessentially political matters from the lenses of lawyers and judges. It is a very difficult exercise.

Furthermore, a petition to challenge the results of an election implicates several fundamental rights and freedoms and, whichever way the result of any particular petition is decided, it certainly affects large segments of the population. As a result, election petitions seem to be well suited for public interest litigation, but also present distinct challenges. In the Namibian case of *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others*, Damaseb JP expressed the view that parties directly locked in horns in an election application are not the only ones with an interest in its outcome. An election application has a much wider public interest.[396]

In a Zimbabwe Lawyers for Human Rights (ZLHR) Zvimba East election petition, *Zvidzai Mugari v Tawanda Tungamirai,* Justice Hungwe located election petitions within the framework of fundamental rights and freedoms guaranteed in the Constitution of Zimbabwe, 2013. He expressed the view that "election petitions form part of a fundamental constitutionally entrenched process for the enjoyment of the political rights of citizens in section 67

395 ERC Complaint Against Chief Charumbira for Partisan Comments made at ZANU PF Annual Conference at https://kubatana.net/2021/11/07/erc-complaint-against-chief-charumbira-for-partisan-comments-made-at-zanu-pf-annual-conference/

396 *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others* [2010] NAHC 7 at para 29.

of the Constitution. Where a citizen is aggrieved by an administrative action, that citizen is entitled to a process of redress that is prompt, efficient, reasonable, proportionate, impartial and both substantially and procedurally fair, as guaranteed in section 68 of the Constitution."[397]

Elections provide one of the best examples of human rights in practice.[398] Several provisions of the Constitution of Zimbabwe seem to cater to election petitions. Among these are the protection of political rights in s 67 and the right to administrative justice in s 68 that are specifically cited by Justice Hungwe. In his decision, he also cited the right to the equal protection and benefit of the law in s 54; the national objectives in Chapter 2, and the founding values and principles on good governance, the rule of law and fundamental human rights and freedoms in s 3 of the Constitution, among others. Locating the matter of election petitions within the framework of human rights is key to resolving election petitions.

Yet, the way in which the law in Zimbabwe limits *locus standi* in election petitions,[399] elevates form over substance, and regards an election petition as a private law matter, severely limits opportunities to engage in public interest litigation to challenge the results of an election.

9.8. A history of election petitions in Zimbabwe

Since independence in 1980, Zimbabwe has had a chequered electoral history. All elections that have been held in Zimbabwe since independence appear to have been tainted by pre-election periods characterised by illegalities and electoral malpractices of one kind or another. Malpractices and criminal acts ranging from flagrant abuse of state resources by the incumbent party in election campaigns, a state-controlled media openly biased in favour of the incumbent, to utter violence against the opposition, have been the order of pre-election periods. As a result, there is no election outcome since independence that has not been contested or challenged. Resolution of election disputes has critical implications for the democratisation process of a state.

Elections are obviously highly political. Dealing with election disputes through the court system seems to present a particular difficulty for judges. Generally, courts are wary of decisions that might give the appearance that the judiciary is replacing its will for that of the people. In the beginning, there was no specialised electoral court in the legal system of Zimbabwe. Consequently, cases in which election results were challenged were brought to the High Court, pursuant to its original jurisdiction. In *Mandava v Chigudu & Others*,[400] Justice Devittie observed that since 1980, the practice in cases concerning disputed election results was that they had been commenced in the High Court by way of opposed court applications. Justice Devittie commented that it was undesirable to bring election petitions via opposed court applications. Yet if this practice had continued, it might have kept avenues for public interest litigation open.

397 *Zvidzai Mugari v Tawanda Tungamirai* Electorial Court unreported case EC30/2018 at p 3 of the unreported ruling on point *in limine*.

398 *Compendium of International Standards for Elections* 4 ed (2016) Election Observation and Democratic Support, Publication Office of the European Union, Luxembourg.

399 See the chapter by Fadzayi Mahere on procedural rules in this volume.

400 *Mandava v Chigudu & Others* 2000 (1) ZLR 679 (H).

9.9. Presidential election petition

The presidential election petition procedure is set out in section 93 of the Constitution of Zimbabwe. A presidential election petition is a constitutional matter that falls under the exclusive jurisdiction of the Constitutional Court. However, the provisions of the Electoral Act also provide for seeking nullification of an election in a presidential election petition. The provisions of the Constitution and the Electoral Act should be read together with the Rules of Procedure of the Constitutional Court.[401]

Since independence in Zimbabwe in 1980, the validity of a presidential election has been challenged on only three occasions. All of them featured the same political parties and they give a glimpse into the political rivalry between the ruling ZANU PF party and the opposition MDC. The first presidential election petition was filed by the late Morgan Tsvangirai on 12 April 2002 challenging the results of the presidential election held on 9–11 March 2002.[402] This challenge was brought before the advent of the 2013 Constitution. Unlike the 2013 Constitution, the old Lancaster House Constitution did not make the presidential election petition a constitutional matter. Since then, there have been numerous amendments to the Electoral Act. In particular, during the life of the Government of National Unity between 2009 and 2014, the Electoral Act is among statutes that were extensively amended in an effort to flatten the elections terrain and to make the law consistent with the letter and spirit of the 2013 Constitution.

However, the first presidential election petition was filed in terms of the provisions of the Electoral Act as they existed then. Thus, the petition was filed before the High Court because section 136 of the Electoral Act at that time specifically reposed jurisdiction over election petitions in the High Court. The second presidential election petition was filed again by the late Morgan Tsvangirai in August 2013 challenging the validity of the results of the presidential election held on 31 July 2013.[403] The latest election petition, and probably the most well-known because it was streamed live on national television, was filed by Nelson Chamisa challenging the validity of the presidential election held on 30 July 2018.[404]

It is a regrettable matter that none of the presidential election petitions has succeeded. This is despite the fact that some parliamentary elections have been declared invalid due to generalised violence and corrupt practices. How is it that the court could nullify the results of elections in one or two parliamentary constituencies while upholding the validity of a presidential election held in the country? It is a common-sense matter, which was raised by the petitioner who argued the case as a self-actor in *Samson Njanina and Others v Zimbabwe Electoral Commission and Others*[405]. In this case, the petitioner's citation of the second respondent as "*Candidates to the March 2008 Harmonised Elections in Zimbabwe"* invited the ire of lawyers representing the other parties. The petitioner's common-sense retort was that "he cited the 2nd respondent in such a manner as the presidential election took place at same time with other elections. One cannot invalidate the presidential election and leave

401 Constitutional Court Rules 2016, Statutory Instrument 61 of 2016.

402 See *Tsvangirai & Anor v The Editor,* The Herald *& Anor* 2003 (1) ZLR 451 (H) at 452B-C, *Tsvangirai v Mugabe & Ors* 2003 (1) ZLR 457 (H).

403 *Morgan Tsvangirai v Robert Mugabe & Others* Constitutional Court unreported case CCZ 20/2017.

404 *Nelson Chamisa v Emmerson Dambudzo Mnangagwa* Constitutional Court unreported case CCZ 21/2019.

405 *Samson Njanina and Others v Zimbabwe Electoral Commission and Candidates to the March 2008 Harmonised Elections in Zimbabwe and ZANU PF and MDC Candidates and Others* Harare High Court unreported case HH100-08.

out the others as the complaint of corrupt practices applies to all the elections".[406] It is also a regrettable matter that all the presidential election petitions filed in Zimbabwe so far were never heard on the merits. Although in *Morgan Tsvangirai v Robert Mugabe and Others*, the Constitutional Court held that the final decision in a presidential election petition "is required to be based on the merits of the case".[407] the reality seems to be that so far, all presidential election petitions have all been dismissed on technicalities.

However, lessons learnt from the 2018 presidential election petition,[408] and the subsequent decision of the Supreme Court of Malawi nullifying the presidential election of May 2019,[409] seem to have energised political scientists, lawyers and others interested in electoral issues in Zimbabwe. Putting aside the matter of technicalities, there are two pertinent lessons that can be drawn from the presidential election petitions in Zimbabwe and in Malawi that lawyers instructed to argue election petitions in future should be acutely aware of. The first one relates to the nature of the evidence required before the court can set aside an election. The second one relates to the correct interpretation of section 177 of the Act, which sets out circumstances under which the courts will declare an election void owing to mistakes or non-compliance with the provisions of the Act by election officials.

9.10. Evidence produced to prove electoral malpractices

In the history of election petitions in Zimbabwe, lack of evidence has always been an issue. Many a lawyer representing petitioners in election petitions has failed to take heed of lessons from the old case of *Margaret Dongo v Vivian Mwashita and Others.*[410] In that case, Mr Biti, who represented Margaret Dongo, requested that the ballot boxes be opened in order for scrutiny of the ballots to be carried out. The dispute was resolved without further ado when the investigation showed that there had indeed been serious tampering with ballots that had inflated the numbers for Mwashita, the candidate who had been declared the winner.

In the case of *Chamisa*, however, no evidence whatsoever was led to prove the alleged electoral malpractices. A dispassionate consideration of the case shows that the petitioner sought to rely on anecdotal evidence. Unfortunately, our courts require real evidence before they can set aside an election. In many cases in Zimbabwe and other jurisdictions, there exists a settled rule that an election will not be disturbed on flimsy grounds. Proper, uncontroverted evidence ought to be marshalled by the petitioner to move the court to set aside an election.

In previous petitions where the Zimbabwean Electoral Court has set aside an election, it is clear that uncontroverted oral and documentary evidence had been led. I would cite here one example of the *Buhera Election Petition,*[411] where Justice Devittie set aside the election of Kenneth Manyonda and ordered a fresh election. A reading of that case shows that both *viva voce* and documentary evidence was led on the offences committed by a local businessman, one Kitsiyatota, and an officer of the Central Intelligence Organisation, referred to as Mwale. It

406 *Ibid*, at p 4 of the unreported judgment.

407 *Morgan Tsvangirai v Robert Mugabe & Others* Constitutional Court unreported case CCZ 20/17, at p 18 of the unreported judgment.

408 *Nelson Chamisa v Emmerson Dambudzo Mnangagwa* Constitutional Court unreported case CCZ 21/19.

409 *Dr Saulos Klaus Chilima and Dr Lazarus Mccarthy Chakwera v Professor Arthur Peter Mutharika and The Electoral Commission* Constitutional Reference 1 of 2019.

410 *Dongo v Mwashita & Others* 1995 (2) ZLR 228 (H).

411 *Buhera North Election Petition* 2001 (1) ZLR 295 (H).

appears that it is the gruesome details provided on the killing of Talent Mabika and Tichaona Chiminya that convinced the court that electoral malpractices had affected the result of the election in that constituency and indeed taken place. In the case of *Doctors Chakwera and Chilima*, the petitioners were able to call witnesses to provide *viva voce* evidence on the electoral malpractices, and how these malpractices had affected the results of the election. In addition, the petitioners were able to take the court through the numbers on the various returns and show that serious errors that had affected the outcome of the election had been committed. On the other hand, in *Chamisa*, the petitioner's lawyers were invited by the Constitutional Court to a scrutiny of the ballot papers. They declined the invitation on the basis that the ballot boxes were the "poisoned chalice" from which they could not drink!

In many election petitions, the petitioners invariably argue that the ballot boxes were stuffed, but they forget or overlook to ask for the ballot boxes to be opened. To be fair to petitioners, the provisions of section 67A of the Electoral Act on the time limits for the ballot boxes to be opened is unfairly restrictive. It is difficult to understand why the law requires that the request for the ballot boxes to be opened should be made within 48 hours of the declaration of the results by a constituency elections officer. During the 48 hours, the results from other constituencies are probably still being announced. The parties are still soaking up the results that have been announced and consulting on how they should proceed. Within 48 hours of the declaration of the results in a constituency, too much is still going on to expect a political party or a candidate to ask for the ballot boxes to be opened. Political parties and candidates usually wait until the end of the elections to decide the constituencies where they have the best chance of winning a petition.

The rule ought to be that the ballot boxes can be opened at any time until the time for presenting an election petition has expired; or, better still, where an election petition is filed, the ballot boxes should be available for opening until the final decision in the petition is made. Where the petitioner appeals all the way to the Constitutional Court, the ballot boxes should be open for inspection of their contents until the Constitutional Court passes judgment on the case. In this respect, it is proposed that s 67A of the Electoral Act be amended to ease the time limit within which a candidate can make a request for the ballot to be opened.

A best practice would also be to include the procedure of scrutiny in the election petition process. Further to extending the 48-hour period, the procedure of scrutinising the ballot papers could be included in the Electoral Act as part of the election petition procedure. An example can be gleaned from the procedure adopted in England and Wales, where the Representation of the People Act allows for scrutiny of the ballot papers as an inherent procedure of the election petition process. Under the law in England and Wales, the election petition procedure includes a process called "scrutiny", which can be used to correct the result.

Using this procedure, the Electoral Court can examine election materials that include used and unused ballot papers and particular votes, the voter register and the completed polling station returns, among other materials, to determine whether the electors who cast them were entitled to do so. During this process, the court has the power to strike off any invalid votes.[412] The election result can be corrected without going all the way to hearing evidence in court. For election candidates, while the Electoral Act insists on the 48-hour rule for the opening of

412 *Legal Challenge to Elections* UK Law Commission Research Paperavailable at http://www.lawcom.gov.uk/app/uploads/2015/03/Electoral-Law_Legal-Challenge.pdf

ballot boxes, candidates and their campaign teams might consider including an election petition at the close of the elections as part of their campaign strategy. Candidates should not wait until the end of the election to think about presenting an election petition. An example of such campaign strategies can be taken from the United States of America.[413] If candidates adopt this approach, during the course of the campaigns, they will be able to strategically collect and properly document evidence in a form that is acceptable by the Electoral Court, and identify witnesses. That way the candidates will not rely on anecdotal evidence as Chamisa did at the hearing of the petition. If they win the election, they will simply file away the evidence. They will not lose much, apart from the cost of collecting and documenting the evidence. The cost of not gathering the evidence in the event that they lose the election far outweighs the cost of gathering the evidence and winning the election.

9.11. Interpretation of section 177 of the Electoral Act

Section 177 of the Electoral Act suggests that the court will only annul an election on the basis of non-compliance with the law if the petitioner can show that the alleged non-compliance affected the result of the election. The Supreme Court of Malawi captured this point when it stated that: "The Zimbabwe case of *Chamisa v Mnangagwa and 24 Others* (supra) seems to suggest that as a general rule an election will not be annulled if a breach of the law did not affect the election result. We have doubts that this would be a good approach, particularly where a serious breach of the law is involved. What if the numbers themselves are as a result of inaccurate counting, intimidation, fraud or corruption? Surely, for an election to be truly free, fair and credible it must be conducted in full compliance with the constitution and applicable electoral laws".

The manner in which the Malawi Supreme Court interpreted a similar section under the law in Malawi is consistent with the interpretation of a similar clause in English law by Lord Denning in the case of *Morgan v Simpson*.[414] It is not always that a breach of the law must be followed by proof that such breach affected the results of the election. Lord Denning's articulation of the law, while interpreting section 37 of the UK Representation of the People Act, which is similar to Zimbabwe's section 177 of the Electoral Act, establishes what has come to be known in election petitions law as the substantial effect doctrine. According to Lord Denning, "if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not". Unlike the Zimbabwean Constitutional Court, the Malawi High and Supreme Courts applied the substantial effect doctrine.

Furthermore, a reading of the decisions of the High Court and Supreme Court of Malawi shows no hesitation at all on the part of the courts. The lawyers representing the incumbent, Professor Mutharika, did not try to raise any objections based on technical matters of form. Both the bench and the bar in Malawi appear to have been prepared to deal with the petition on the substance of the grounds raised. In the case of *Chamisa v Mnangagwa* on the other hand, time was spent arguing technical issues such as the fact that although the petition had been filed in time, it had been served one day late! The incumbent's lawyers sought that the whole petition be dismissed on this technical ground alone without considering the merits of the case. To its credit, the Constitutional Court dismissed that technical objection.

413 See Joshua A Douglas "Discouraging Election Contests" 2013 (47) *University of Richmond Law Review* 1015, available at: https://scholarship.richmond.edu/lawreview/vol47/iss3/9

414 *Morgan v Simpson* [1975] QB 151; [1974] 3 WLR 517; [1974] 3 All ER 722.

9.12. *Locus Standi:* who may be parties in an election petition?

Under the common law, a person with a direct and substantial interest in the subject matter of the litigation must be joined. However, the courts have said on countless occasions that an election petition is not a cause of action that is known under the common law. It is rather a creature of statute. Therefore, unfortunately, everything about election petitions, including all rights and obligations flowing from this cause of action, has to be found within the four corners of the statute. In this case, it is the Electoral Act that establishes who may be cited in an election petition. In respect of a presidential election petition, which is brought pursuant to s 93 of the Constitution, we need to additionally consider the provisions of the Constitution. Section 167 of the Electoral Act provides that election petitions "may be presented to the Electoral Court by *any candidate* at such election." Thus only the candidates in an election are granted *locus standi* to bring an election petition to the Electoral Court. Section 166, that defines a respondent in an election petition, strengthens this view that only candidates have *locus standi* in election petition cases.

Section 166 of the Electoral Act states that the *respondent* in an election petition "*means* the President, a member of Parliament, or councillor, whose election or qualification for holding the office is complained of in an election petition." The manner in which ss 166 and 167 define the petitioner and the respondent suggests that the list of who qualifies as a petitioner or a respondent in an election petition is closed. Even in cases where a petitioner alleges that the election was tainted by mistakes committed by officials of the Zimbabwe Electoral Commission (ZEC), a literal interpretation would mean that the election management body shall not be cited as a respondent in an election petition. However, the petitioner's complaint would be based on irregularities committed by the elections management body *per se* and not by the other candidate declared as the winner or his agents.

Section 93(1) of the Constitution confirms the restricted form of *locus standi* that is provided for by the Electoral Act in respect of a presidential election petition. In terms of this section, a presidential election challenge can only be filed by "*any aggrieved candidate*." This is despite the fact that the legal remedy in section 93 of the Constitution is intended to enforce the right to free, fair and regular elections guaranteed to every citizen under section 67(1) of the Constitution. The office of President is an elective public office established by the Constitution. Every Zimbabwean citizen, regardless of voting status, has a fundamental right to a free, fair and credible Presidential election. In other words, he or she has a right to a valid election of a President held in accordance with the relevant provisions of the law governing the conduct of the election. Yet, section 93 restricts the *locus standi* of applicants to a presidential election petition to only any aggrieved candidates.

The courts have confirmed this undesirable practice of limiting *locus standi* to candidates in an election on the basis that an election petition is a cause of action that is created by the Electoral Act. Therefore, courts will not look outside the Act to achieve justice. The courts will only do that which they are allowed to do by the Act. A good example of a case where the court adopted a literal interpretation of the term "respondent" in order to exclude ZEC from being called to account for its errors is the case of *Simbarashe v Zimbabwe Electoral Commission and Another*.[415] In the case of *Simbarashe v Zimbabwe Electoral Commission and Another*, the court attempted to provide the reasoning behind excluding ZEC as a respondent in election petitions. However, its reasoning is not

415 *Simbarashe v Zimbabwe Electoral Commission & Anor* 2008 (1) ZLR 342 (H).

convincing. The court reasoned that, since an election petition is designed to measure the acts or omissions of the winning candidate against the provisions of the Electoral Act, there can be no reason for entangling the Commission in the litigation. The court held that, in any case, the ZEC is enjoined to maintain its neutrality in the conduct of elections and the disputes arising therefrom. It argued that joining the ZEC as a respondent in the litigation together with the winning candidate would compromise its neutrality and independence. This reasoning fails to recognise that under the Act mistakes or errors committed by the election management body are legitimate grounds to void an election. It is difficult to see how citing ZEC as a second respondent in an appropriate election petition could compromise the neutrality and independence of ZEC.

In *Simbarashe*, the court also cited several other provisions of the Electoral Act to justify excluding the ZEC from being included as a party in election petitions, even in cases where it is alleged that the acts complained of were committed by employees of the Commission in the course and scope of their duties. For example, the court reasoned that it is clear from the Act that once the court finds that the election is void due to the wrongful actions of the candidate or his agents, the automatic result is that a fresh election must be held. This is by reason of the peremptory provisions of the Act. The court held that nothing more needs to be done to get ZEC to conduct another election. The declaration of the court is sufficient to trigger the holding of a fresh election.

However, in election petitions, the role of the Electoral Court is not limited to examining the actions of the challenged candidate and his agents. In terms of section 177 of the Electoral Act, the court can inquire into the manner in which the election was managed by ZEC. If the court finds mistakes or non-compliance with the provisions of the Act by election officials, the court can declare the election void. It would be desirable to cite the election management body in election petitions for institutional accountability and reform purposes. Litigation, especially public interest litigation, can present an opportunity for the ZEC to learn. During the course of litigation, the ZEC might draw lessons on aspects of the electoral law and practice that need to be improved. There are two important matters arising on the issue of *locus standi* in election petitions. The first is that the Electoral Act severely restricts *locus standi* in election petitions to individuals. Secondly restricting *locus standi* to the candidates in the concerned election tends to equate an election petition with a private legal action.[416] Yet, there is a significant public interest in any case where the result of an election is challenged.

9.13. An election petition is a private legal action

The manner of restricting *locus standi* to the candidates in an election follows the practice in old English law, which allowed only candidates and electors to bring election petitions to court. In *Godfrey Don Mumbamarwo v Saviour Kasukuwere (Mount Darwin South Election Petition)*, Justice Makarau seemed to confirm the view that election petitions are private legal cases between individuals when she stated that, "election petitions are essentially civil proceedings brought by one party against the winning candidate who is the Member of Parliament for that constituency".[417] However, in England Caroline Morris has decried the reluctance of the law

416 Electoral Commission, Challenging Elections in the UK, September 2012, available at https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf

417 *Godfrey Don Mumbamarwo v Saviour Kasukuwere (Mount Darwin South Election Petition)* Harare High Court unreported caseHH-8-2002, at p 5 of the unreported judgment.

on elections to acknowledge its public nature.[418] The Electoral Commission in England has called for reform of the law, and has attempted to explain the reasons why the law was couched in this way. Apparently, when the law on elections was developed in England in the 1860s, no political parties existed and elections were regarded as a personal business. Candidates seeking to be elected to public office had to face the electorate on their own. Seats could be passed down from father to son. Elections were purely an individual endeavour.

Things have, however, significantly changed. As Caroline Morris argues, electoral matters are now quintessentially public law matters.[419] In the *Mount Darwin South Election Petition*, Justice Makarau expressed the view that the provisions of our Electoral law that were copied from the English statute are inadequate to deal with the kind of issues that arise in election petitions of today. Consequently, she called for a wholesale review of the Electoral law so that it is relevant to our current needs.

The call for comprehensive reform of the electoral law is in order. Equating election irregularities with private wrongs between individuals is clearly outdated, drawn as it is from 1860s English conditions. Whether an election is upheld or set aside implicates the whole machinery of representative government. Indeed, in the *Slough Borough Council Petition*, the Commissioner expressed the view that "there is a legitimate public interest in ensuring that democratic elections are fairly and honestly carried out and that those elected to public office, whether at national or local level, are properly elected".[420]

It is, therefore, a matter that affects not only the candidates in that election, but the community as a whole. In the *Slough Borough Council Petition*, it was further said that "for electoral policy to be policed by what are, in effect private civil law actions brought at the expense of the litigant cannot be acceptable".[421] Our law requires comprehensive reform that, among other things, locates election petitions within the public law rubric so that it is able to adequately address the issues that arise in elections in the modern-day world.

Locus standi for submitting an election petition to the Electoral Court under the Electoral Act is severely restricted to the individuals contesting the election. This position of the law is not desirable. Legal costs may also deter a losing candidate with a good case that might help to develop the law from petitioning the court. This situation can be corrected if the electoral law is amended by extending *locus standi* in election petitions to allow other persons and organisations, with substantial interest in the matter, and sufficient funds, to bring election petitions to court. The law should allow a registered voter in a constituency to bring an election petition to court arguing that the results certified by the ZEC amount to disenfranchisement of voters.

9.14. Form over substance

It is a truism that most election petition cases that have been dismissed in Zimbabwe so far have not been dismissed for lacking in merits, but for failing to comply with very technical procedural requirements. For example, petitions have been dismissed simply because they were not signed by the petitioner. In all such cases,

418 Caroline Morris *Parliamentary Elections, Representation and the Law* (2012) Hart Publishing, Oxford..

419 *Ibid*.

420 *Lydia Emelda Simmons v Eshaq Khan* [2008] EWHC B4 (QB) at paragraph 13.

421 *Ibid*.

the petitions were signed by the authorised legal representatives of the petitioner and had attached to them affidavits signed under oath by the petitioners. Yet, the courts still dismissed the petitions because the Electoral Act and the rules of the Electoral Court state that a petition must be signed by the petitioner.

The Constitution of Zimbabwe 2013 decidedly demands transformation of the law and legal culture in respect of elections. The Electoral Act needs to be extensively amended so that it reflects the new democratic ethos ushered in by the Constitution. Much of the jurisprudence that is currently available and applied was developed during the era of the much-amended Lancaster House Constitution. Since the new Constitution was enacted in 2013, only a handful of election petition cases arising from the 2018 elections have been considered, and those thanks to ZLHR and others.[422] But it seems that most of the judges who have heard these election petitions do not appreciate that the legal framework for dealing with election petitions has changed under the new Constitution. Take for example ZLHR's 2018 Chegutu West election petition in the case of *Gift Konjana v Dexter Nduna*. After the 30 July 2018 Parliamentary elections, Dexter Nduna was erroneously declared the winner when Gift Konjana had in fact won the election. ZEC made a simple error of misallocating votes and adding up numbers incorrectly. Upon being notified of the error, ZEC publicly admitted that it had made the error. ZEC however, said that it was *functus officio*. Konjana needed to petition the Electoral Court for the error to be corrected.

Konjana, represented by ZLHR, duly filed the petition. However, the Electoral Court then dismissed the petition on the flimsiest of technicalities. Justice Mary Zimba-Dube ruled that Gift Konjana's petition was fatally defective because it was written on a wrong template for election petitions. However, to the contrary, everything about the petition was in order. The judge made an issue of the fact that it started with the words, "*Take notice that …*". Yet, in terms of the judge's ruling, election petitions should not be brought on notice.

This decision is at odds with the new constitutional dispensation. The new Constitution of Zimbabwe, 2013, favours substantive justice and eschews the practice of deciding disputes on technicalities and formalities. Section 85(3)(b) and (c) require that in dispensing justice, procedural technicalities and formalities must be kept to a minimum and must not be allowed to stand in the way of substantive justice. Among the ideals embraced by the new Constitution are substantive justice, popular sovereignty and participatory democracy.

In s 85, the new Constitution specifically requires formalities in constitutional litigation to be kept at a minimum. Granted, rules of natural justice should be followed, but under section 85, that should not result in procedural technicalities unduly restricting courts from the search for justice. Moreover, the new Constitution contains principles to guide how judicial power should be exercised. Among these principles are the need for people exercising judicial authority to commit to the search for justice in all cases and to be the vanguard for human rights and freedoms and the rule of law.[423] This is not to say that under a transformed legal culture that is demanded by the new Constitution the rules of procedure should not be followed. Far from it. That would be to advocate for anarchy. The rules of natural justice should be observed. The text of legislation will not be disregarded where that would amount to usurping the powers of the legislature. The separation of powers is one of the guiding principles of our democracy. According to the late former Chief Justice of South Africa, Pius Langa, there is much to be said

422 After the 2018 Presidential, Parliamentary and Local Authorities elections, several elections petitions were filed. Only one proceeded to be heard on the merits. The rest were dismissed on technicalities.

423 See section 165(1)(a) and (c) of the Constitution of Zimbabwe, 2013.

about sticking to the rules when they are clear and good.[424] The problem arises when adherence to the word is taken too far and becomes dogmatic and arbitrary. Rules become a millstone around our necks and formalism becomes dangerous when "the upholding of a law obscures or ignores that the law exists to try, however difficult, to ensure justice."[425]

The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament, or technical readings of legislation, as providing justifications for their decisions. Under a transformative constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.[426] The Electoral Court ought to keep formalities and procedural technicalities in the prosecution of election petitions at a minimum. In *Besigye v Museveni and Another*[427] the Supreme Court of Uganda commented on the issue of technicalities in election petitions litigation. In that case, in terms of Ugandan law, the evidence had to be adduced in the form of affidavits as opposed to what is known in Ugandan law as statutory declarations. The document was headed "affidavit", but at the end of it the witness had stated that he made "this solemn declaration conscientiously believing the same to be true and *by virtue of the Statutory Declaration Act 135*". The document had been executed before a "Solicitor/Commissioner for Oaths". The court found that the witness intended to swear an affidavit, but the form the document took was that of a statutory declaration. Relying on the constitutional tenet that "substantial justice shall be administered without undue regard to technicalities" the court admitted the document as an affidavit, holding that "the most important element is that it was made on oath".[428] The Ugandan Supreme Court emphasised that "rules of procedure should be used as handmaidens of justice, but not to defeat it".[429]

9.15. Need for a Comprehensive Review of the Electoral Act

Commenting on the corpus of our electoral laws in *Makamure v Mutongwizo*,[430] Justice Devittie suggested at that time that: "We thus have at our disposal as effective an instrument as in any English-speaking jurisdiction to deal with electoral malpractices."[431] However, that comment no longer holds true, if it ever did. Some provisions of the Electoral Act are worded in similar terms to the law in England. As an example, under English electoral law an election petition may be brought on the grounds of an undue election, an undue return, that the candidate was at the time of election disqualified, or that the election was voided by corrupt or illegal practices. Under English law, an "undue election" refers to flaws in the process whereas an "undue return" refers to an error in the outcome.[432]

424 Pius Langa "Transformative Constitutionalism" Prestige lecture delivered at Stellenbosch University on 9 October 2006 (2006) 17 *Stellenbosch Law Review* 351.

425 *Ibid*.

426 *Ibid*.

427 *Besigye v Museveni and Another* Election Petition No. 1 of 2001; [2001] UGSC 4.

428 *Per* Odoki CJ at p 15 of the cyclostyled judgment

429 at page 21 of cyclostyled judgment

430 *Makamure v Mutongwizo* 1998 (2) ZLR 154 (H).

431 *Ibid* at 168.

432 *Charles Edward Irwin and Another v William Mure* (1874) 1 R. 834 at 836 by Lord Neaves.

The Zimbabwean Electoral Act is worded in similar terms. In fact, our courts have observed that our law on elections is based on the law applied in England in the mid-19th century.[433] Over the years, however, the United Kingdom Parliament has effected amendments to its elections statutes to suit current circumstances at different intervals. Our legislature, on the other hand, has not been proactive in updating the Electoral Act, particularly the provisions dealing with election petitions.

The provisions on election petitions did not get much attention until more recently, because of the paucity of election petitions cases before the 2000 elections, including when Justice Devittie made the comment in *Makamure* above. Election petitions spiked after the hotly contested 2000 general elections. (The 2000 elections were the first time since 1980 that ZANU PF lost its majority in Parliament. It is widely believed that, but for the violence that preceded the 2000 general elections and the 2002 presidential election, ZANU PF might have lost control of the government of Zimbabwe.)

Justice Devittie's opinion that our system for dealing with election petitions was as good as any in English-speaking countries might have been sound prior to 2000. However, developments that have occurred since the advent of the new millennium have rendered the Electoral Act woefully inadequate to effectively deal with 21st century electoral disputes problems. While there have been amendments since 2000, these are not enough. The spine of the Electoral Act is still very much 19th century English Law. On this basis alone, the Electoral Act requires comprehensive review so that the law on elections is fit to address the problems associated with elections in 21st century electoral disputes problems. This must include categorisation of election petitions under the rubric of public law. That way, doors for public interest litigation might be opened.

Apart from amending the Electoral Act, it seems that there is an opportunity to challenge the constitutionality of ss 166 and 167 of the Act that restrict parties in an election petition only to candidates that participated in the election. Such a challenge might be anchored on the right to participate in section 67 of the Constitution and the right to the protection of the law guaranteed in section 56 of the Constitution of Zimbabwe. As Damaseb JP observed in the Namibian context, an election application has a much wider public interest.[434]

433 See decisions by Devittie J. in the *Buhera North Election Petition (Tsvangirai v Manyonda)* 2001 (1) ZLR 295 (H) and Makarau J. in the *Mount Darwin South Election Petition (Godfrey Don Mumbamarwo v Saviour Kasukuwere)* unreported case HH–8–2002 and the *Gokwe North Election Petition (Sibangani Mlandu v Eleck Mlandu)* unreported case HH–04–03.

434 *Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others* [2010] NAHC 7.

CHAPTER 10

10. PUBLIC INTEREST LITIGATION OF CHILDREN'S RIGHTS IN ZIMBABWE - *Blessing Mushohwe*



Mr Blessing Mushohwe

Blessing Mushohwe is a legal practitioner and child rights expert with vast experience in academia and the child rights and protection sectors. He has consulted and advised for many organisations in the child rights sector. He is also a Law Lecturer and the current Chairperson of the Legal Undergraduate Programmes in the Faculty of Law at the University of Zimbabwe. He has published extensively on child rights in Zimbabwe.

10.1. Introduction

The adoption of the "new" Constitution of Zimbabwe in 2013 ushered in a range of positives. With regards to children,[435] the Constitution brought in section 81, which commendably expands child rights to the minimum requirements of international instruments such as the Convention on the Rights of the Child (CRC)[436] and the African Charter on the Rights and Welfare of the Child (ACRWC).[437] [438] While the human rights themselves were broadened,[439] far beyond what was contained in the old Lancaster House Constitution (LHC), a similarly broadened framework on standing to claim those rights was also built in through section 85 of the Constitution, thus raising a lot of hope around vindication of rights, including children's rights, through public interest litigation (PIL). Almost a decade later, some progress has been made on PIL on children's rights, albeit at a slower pace than expected given the enabling constitutional framework and a relatively more receptive Constitutional Court (CC).

Two cases are of particular interest as far as PIL of children's rights are concerned. These are *Mudzuru*[440] and *Chokuramba*.[441] While both built on detailed research and resulted in expansive engagement on relevant issues, *Mudzuru* also brought clarity to the issue of *locus standi* in PIL in Zimbabwe, in addition to its progressive preference for expansive purposive interpretation. On the other hand, *Chokuramba* reflects the Constitutional Court's retrogressive hesitancy to "rock the boat" in its refusal to delve into contentious issues such as corporal punishment in settings such as the home and schools.

This paper uses the two cases to analyse the courts' approach and attitude so far regarding PIL of children's rights in Zimbabwe, the strategies undertaken by the main players, and the socio-political and legal impacts of this PIL. Opportunities for further development of PIL for children's rights in Zimbabwe are discussed in the conclusion.

10.2. The *Mudzuru* case on child marriages

The landmark constitutional challenge to child marriages, the *Mudzuru* case, started in October 2014. As summarised in the judgment, the two applicants were young women aged 19 and 18 years respectively who approached the Constitutional Court in terms of section 85(1) of the Constitution.[442] Their case was that the

435 With the new Constitution of Zimbabwe Amendment (No. 20) of 2013, s 81(1), the definition of a child has been clarified to mean a boy or girl below the age of 18 years.

436 Adopted by General Assembly Resolution 44/25 of 20 Nov 1989. Ratified by Zimbabwe on the 11 SEPTEMBER 1990.

437 OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force on 29 Nov 1999. Ratified by Zimbabwe on 19 January 1995.

438 See also I Magaya & R Fambasayi "Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe" (2021) 54 *De Jure Law Journal* 17 & 26 at http://dx.doi.org/10.17159/2225-7160/2021/v54a2.

439 Chapter 4: Declaration of Rights of the Constitution of Zimbabwe Amendment (No. 20) of 2013

440 *Loveness Mudzuru and Ruvimbo Tsopodzi v Minister of Justice, Legal & Parliamentary Affairs NO; Minister of Women's Affairs, Gender and Community Development and Attorney General of Zimbabwe* Constutitonal Court unreported case CCZ 12/2015.

441 *S v Willard Chokuramba, Justice for Children Trust's intervening as* Amicus Curiae, *Zimbabwe Lawyers for Human Rights intervening as* Amicus Curiae Constutitonal Court unreported cases CCZ 10/19, CCZ 29/15.

442 The applicants were represented by Mr Tendai Biti. His thorough canvassing of issues and presentation is commended, as his arguments constituted most of the DCJ's reasoning and ruling.

fundamental rights of girl children were infringed through subjecting girls to early marriages, sometimes known as "child marriages". The challenge was therefore directed at sections of the Marriage Act[443] and the Customary Marriages Act.[444] The application was opposed, a stance which, though surprising, may have ironically given impetus to the expansive and elaborate response from the then DCJ, which enriched domestic jurisprudence on child rights and shed light on some otherwise ambiguous and grey provisions of the Constitution of Zimbabwe.[445]

Of the four issues highlighted for determination by the court, the first issue on "whether or not the applicants have, on the facts, *locus standi* under section 85(1)(a) or section 85(1)(d) of the Constitution to institute the proceedings claiming the relief they seek" is of particular importance to this chapter.

10.2.1. *Locus standi* in *Mudzuru*

The respondents in their opposing papers had alleged that the applicants had no right to approach the court (no *locus standi*).446 The applicants themselves had cited two areas on which their claim to standing relied on, i.e. ss 85(1)(a) and (d) of the Constitution. These areas of contention became crucial in *Mudzuru* as they afforded the court the opportunity to reflect on the issue of *locus standi* and public interest litigation.

Locus standi is a Latin word that means "a place to stand".[447] In law, it means the right to bring an action or to challenge some decision, to be heard in court, or to address the court on a matter before it.[448] It is the ability of a party to demonstrate sufficient connection to, and harm from, the law or action challenged, to support that party's participation in the case.[449] *Locus standi* on enforcement of fundamental human rights and freedoms is dealt with in section 85(1) of the Constitution of Zimbabwe.[450] The then DCJ took the opportunity to elaborate on the two grounds of *locus standi*. For purposes of this paper, we discuss the second ground only, section 85(l)(d) relating to PIL, as elaborated by the DCJ.

As a definition, according to Budlender, public interest law focuses on the wider public interest rather than the more private interests of a particular individual, and to this extent, it represents an approach which is different from traditional legal aid programmes".[451] He further explains that PIL is thus an attempt to produce a legal decision which will affect the conditions and circumstances of a whole class or group. Moyo adds that PIL is

443 Section 22(1) of the Marriage Act [*Chapter 5:11*].

444 [*Chapter 5:07*].

445 See also N Maphosa "Putting an old head on a child's shoulders: A critical appraisal of child marriages in Zimbabwe through the lens of *Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs NO & Others" PROLAW Student Journal of Rule of Law for Development* 1.

446 *Mudzuru* (n 440 above) 4-5.

447 See also the chapter on procedural rules by Fadzayi Mahere in this volume.

448 J Law & EA Martin *Oxford Dictionary of Law 7* ed (2009) 333.

449 *Locus Standi Law & Legal Definition* http://definitions.uslegal.com/l/locus-standi/. See also J Sloth-Nielsen & K Hove *"Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others:* A review" (2015) 15 *African Human Rights Law Journa*l 555 http://dx.doi.org/10.17159/1996-2096/2016/v16n2a11

450 See also A Moyo "Standing, access to justice and the rule of law in Zimbabwe" (2018) 18 *African Human Rights Law Journal* 272 http://dx.doi.org/10.17159/1996-2096/2018/v18n1a13, on how *locus standi* was dealt with under the Lancaster House Constitution (LHC). He avers, *"The LHC codified a restrictive approach to standing and prevented civil society organisations, pressure groups and political parties from seeking justice on behalf of marginalised groups."* See also Sloth-Nielsen & Hove (449 above) 556.

451 G Budlender "On Practising Law" in H Corder (ed) Essays on Law and Social Justice (1988) 322.

meant not only to promote human rights, but also to enhance the rule of law, by ensuring that the majority of cases are decided based on the merits and not on mere technicalities or a failure to comply with procedural formalities.[452]

While correctly rejecting the erroneous interpretation proffered by the respondents, the DCJ reasoned that section 85(1) in its entirety must be accorded a liberal, broad and generous interpretation rather than the narrow traditional conception of *locus standi*. In this regard, he aptly stated that, "The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society".[453] This view by the DCJ is supported by Cote & Van Garderen, who, while commenting on section 38 of the South African Constitution[454] (which is similar to section 85(1) of the Constitution of Zimbabwe), said:

> "This clause has expanded the traditional law of *locus standi* by a considerable amount.[455] No longer must the person who was directly affected by the unlawful action find the resources to bring a matter to court. This provision allows for a number of parties, particularly those with far more resources than the average person, to bring such an application."[456]

As further observed by Moyo, [457] there has been a significant paradigm shift brought about by section 85(1) of the Zimbabwean Constitution, towards the liberalisation of *locus standi*. Liberalising standing allows a wide range of persons who can demonstrate an infringement of their rights, or those of others, to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts.[458] The reference made by the DCJ to "justice to the masses, particularly the poor, marginalised and deprived sections of society"[459] is particularly important to child rights PIL, especially considering the disempowered and vulnerable status of children in society who, for various obvious reasons, cannot normally stand up for their own rights.[460] In this regard, the DCJ rightfully described children as falling "into the category of weak and vulnerable persons in society".[461] The endorsement of PIL in such matters affecting vulnerable and poor masses allows for institutional applicants to bring matters in the public interest to advance

452 Moyo (n 450 above) 280. See also Sloth-Nielsen & Hove (n 449 above) 555.

453 *Mudzuru* (n 440 above) 14.

454 Act 108 of 1996.

455 See also opinion by D Matyszak "*A Note on the Child Marriage Judgement*" Senior Researcher, Research and Advocacy Unit (RAU), January 2016, where he aptly sums up the commendable elaboration on *locus standi* by the DCJ.

456 D Cote & J Van Garderen "Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest" (2011) 27 South African Journal for Human Rights 171. See also J Brickhill & M DuPlessis "Two's company, three's a crowd: Public interest intervention in investor-state arbitration (Piero Foresti v South Africa)" (2011) 27 South African Journal for Human Rights 152.

457 Moyo (n450 above) 267.

458 *Ibid*.

459 *Mudzuru* (n 440 above) 14.

460 This viewpoint however recognises that while resources and other factors may preclude children from approaching the courts on their to assert their rights, the Constitution does provide them with a right to be heard in matters that affect them in s 81(1)(a). This means that even if they may have limitations in representing themselves, efforts must be put to have them heard where the matter affects them. More often than not, they become pawns in battles between adults and yet they have views which must be sought appropriately and be heard in court.

461 See also Sloth-Nielsen & Hove (n 449 above) 560.

social justice for the less privileged or those that cannot afford the usually high costs of litigation.[462] Even more welcome is the DCJ's insistence on keeping "concepts such as 'public interest' broad and flexible to develop in line with changing times and social conditions reflective of community attitudes".[463]

Indeed, the above developments on institutional applicants or support to PIL reflect how PIL on children's rights has been evolving in Zimbabwe, led by human rights and child rights CSOs such as the Zimbabwe Lawyers for Human Rights (ZLHR), Veritas and Justice for Children Trust (JCT). The two cases under discussion, and other cases on PIL for child rights, have been spearheaded or supported by the three organisations in response to the permissive provisions of section 85. Indeed, the clarity on PIL given through *Mudzuru*, opens the doors for a wealth of PIL cases fronted or supported by CSOs, including beyond the realm of child rights, such as in the field of socio-economic rights.[464] This has been, and still is, the case in South Africa.[465]

10.2.2. Reliance on international law

Another celebrated positive of the *Mudzuru* case is the expansive reference by the DCJ to international law as it relates to the issue of child rights and child marriages.[466] In its attempt to interpret section 78(1), as read with section 81(1) of the Constitution, the court resorted to international law. This is justified by section 46(l)(c) of the Constitution, which requires a court to take into account international law and all treaties and conventions to which Zimbabwe is a party to when interpreting any provision of the Constitution contained in the Declaration of Rights.[467]

In this regard, the DCJ begins by acknowledging the place and obligations of Zimbabwe in the international community by virtue of ratification of certain international conventions and treaties. He makes reference to the CRC, ACRWC, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[468] the Universal Declaration of Human Rights (UDHR),[469] and the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages.[470] While avoiding the risk of restating the otherwise very thorough and clear analysis of the relevant international law by the DCJ, it is important to highlight the willingness of the apex court in Zimbabwe to embrace the guidance of international law in interpreting constitutional provisions including, importantly, on children's rights which have not had as many cases and jurisprudence at such high

462 See also Moyo (note 450 above) 267.

463 *Mudzuru* (n 449 above) 16.

464 See the chapter on socio-economic rights litigation by Justice Mavedzenge in this volume.

465 Cases such as the *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC); *Treatment Action Campaign v Minister of Health (No 2)* 2002 (5) SA 721 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Residents of JoeSlovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Occupiers of 51 Olivia Road v City of Johannesburg 2008* (3) SA 208 (CC), among others, have all taken the form of public interest litigation. See generally Jason Brickhill (ed) *Public Interest Litigation in South Africa* (2018) Juta.

466 See also Magaya & Fambasayi (n 438 above) 33.

467 *Ibid* 18-19 on domestic application of international law in Zimbabwe.

468 Adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979.

469 Adopted by the United Nations General Assembly Resolution 217 (III) of 10 December 1948.

470 Opened for signature and ratification by General Assembly Resolution 1763 A (XVII) of 7 November 1962. See also Maphosa (n 445 above) 9-10.

levels.[471] In addition to creating and developing precedent on the application of international instruments, it reflects judicial willingness to have Zimbabwe's child rights practices measured against international norms and standards.[472] This is crucial for interpretation of legal provisions both in and outside the child rights sector. The reading of international instruments into our cases is also important in that it guides state actors that as they implement child rights and broader human rights they can no longer afford to ignore international norms and standards because, if they do, they will be found wanting when tested in the courts. It further gives CSOs a foundation upon which to continue their advocacy for full realisation of children's rights, as set out by international standards, knowing that they will be adequately supported by the judiciary in upholding such standards. All this helps to keep government on its toes, aware that it cannot rely on the courts to support them for failure to meet minimum international standards on child rights.

10.2.3. Generous, purposive interpretation of constitutional provisions

The respondents, in interpreting the meaning of the "right to found a family" in section 78(1), had argued for a literal meaning which would not equate it to the right to enter into a marriage. *Mudzuru*, however, adopted a "broad, generous and purposive interpretation" of the provision.[473] Indeed the generous, purposive interpretation commendably drives the point home that technical issues of strict legal interpretation should not be allowed to lead to negative consequences of perpetrating child sexual abuse and exploitation.[474] *Mudzuru* is welcomed for departing from a purely legalistic reasoning: acknowledging the inter-disciplinary nature of the issue of child marriages through proffering a detailed description of the social consequences of child marriages.[475]

10.3. The *Chokuramba* case on corporal punishment

Mudzuru, decided in 2016, was soon followed by *Chokuramba* in 2019. In this case, the constitutional matter before the CC for determination was the constitutionality of section 353 of the Criminal Procedure and Evidence Act[476] (the Act).[477] The section authorised the imposition of a sentence of moderate corporal punishment on a male person under the age of eighteen years who was convicted of any offence. The matter came to the court by way of the procedure for confirmation of orders concerning the constitutional invalidity of any law made by another court.[478] The High Court had earlier on in 2014 made an order declaring section 353 of the Act constitutionally invalid on the ground that it contravenes section 53 of the Constitution.[479] Section 53 protects the fundamental

471 See also Sloth-Nielsen & Hove (n 449 above) 563.

472 A Magaisa "*Thoughts on the Constitutional Court Landmark Judgement on Child Marriages*", (21 January 2016) AlexMagaisa.Com.

473 *Mudzuru* judgement, p 44.

474 See also Sloth-Nielsen & Hove (n 449 above) 563; and N Maphosa (n 445 above) 10.

475 It should ideally be the duty of every judicial officer to consider and canvass the social implications of any legal issue that they may be dealing with where applicable, thus emphasising the fact that laws do not operate in a vacuum but are implemented in society.

476 Criminal Procedure and Evidence Act [*Chapter 9:07*].

477 *Chokuramba* (n 441 above) 2.

478 Unlike in the *Mudzuru* case where there were applicants, the confirmation procedure did not have scope for presentations by the parties. However, interested parties used the strategy of *Amicus Curiae* (friends of the court) which again saw Justice for Children Trust and ZLHR being involved in the case.

479 *S v Willard Chokuramba* High Court unreported case HH 718-14.

right of every person not to be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. The protected right is absolute and non-derogable.

Adopting a similar approach to *Mudzuru*, the court engaged comprehensively with relevant international and comparative authorities on the interpretation of inhuman and degrading punishment and corporal punishment. The court, in confirming the order of the High Court concerning the constitutional invalidity of section 353, held that judicial corporal punishment is, by its nature, intent and effect an inhuman and degrading punishment within the meaning of section 53 of the Constitution.[480]

10.3.1. Reliance on international law

Similar to *Mudzuru*, the court also carefully considered international instruments in determining the correct interpretations of the Zimbabwean Constitution. It refers to the International Covenant on Economic, Social and Cultural Rights[481] and the International Covenant on Civil and Political Rights[482] in discussing the interdependency between human rights and human dignity. The Chief Justice identified Zimbabwean society as a "maturing society", which should be guided by evolving standards of decency, which requires our interpretations to have regard to international human rights norms for assistance.[483] He proceeded to consider international law to the extent that it relates to the issue of inhuman and degrading punishment.[484]

The court also sought guidance from other jurisdictions through references made to decisions of the Inter-American Court of Human Rights,[485] South African Constitutional Court,[486] Supreme Court of Namibia,[487] and the European Court of Human Rights.[488] To this extent, and as already discussed under the *Mudzuru* case above, this reflects a judicial approach that is broad, open-minded and receptive to guidance from others in interpreting the country's human rights provisions.

10.3.2. "Constitutional avoidance": Retrogressive hesitancy by the court

The issue of corporal punishment that the Constitutional Court was dealing with was, however, of public interest, not only for judicial corporal punishment, but also for its use in schools and home settings. This is because the act of corporal punishment, which the applicants argued constitutes inhuman and degrading treatment under the Constitution, is the same whether imposed by 1) a court, 2) at school or 3) in the home. It is with this thinking that the High Court in its ruling had also pronounced, as an *obiter dictum*, that corporal punishment is unconstitutional and therefore illegal in all the three settings. Muremba J had observed that:

480 *Ibid* 3.

481 Adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI), and came in force from 3 January 1976.

482 Adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976.

483 *Chokuramba* (n 441 above) 17.

484 *Ibid* 17-18 and 28-31.

485 *Ibid* 37.

486 *Ibid* 35.

487 *Ibid* 33.

488 *Ibid* 31.

> "One other issue that I feel obliged to comment on although it is not an issue before me is that s 53 of the new Constitution seems to outlaw the infliction of corporal punishment on children by their parents, guardians or by persons *in loco parentis*. As already explained above the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment is an absolute right. Under the old Constitution parents, guardians and persons *in loco parentis* were allowed to inflict moderate corporal punishment on children. It appears that that position has since changed."[489]

The court was acknowledging here that it is not logical for it to turn a blind eye to the fact that the issue under discussion is the same in other settings and as such, any interpretation of constitutional invalidity has to be equally applicable to the school and home. Against this observation from the lower court, the Constitutional Court unfortunately adopted the strategy of "constitutional avoidance" and dismissed the attempt to discuss the issue of corporal punishment in the school and home settings. The Chief Justice criticised the High Court's observations by stating that:

> "It was not for the court a quo to go outside its mandate and determine questions of constitutional validity of other types of moderate corporal punishments. Questions of constitutional validity of moderate corporal punishment inflicted on juveniles in schools and in homes by their parents, legal guardians or persons *in loco parentis* did not fall to be determined by the court in the automatic review proceedings. The court *a quo* was exercising review powers in respect of the constitutionality of legislation authorising the imposition of a sentence of moderate corporal punishment on a male juvenile convicted of an offence. Nothing further shall be said about matters relating to the constitutionality of corporal punishment administered in schools and by parents, legal guardians or persons *in loco parentis*. It is trite that courts are generally loath to determine issues not brought before them."[490]

This approach is retrogressively conservative and regrettable. While it is acknowledged that courts should generally not determine issues not brought before them, the issue before the court was also happening in other settings and affects the interests of children. It would have logically followed that the same unconstitutionality would be applicable in those settings as well, as the High Court observed. The Constitutional Court missed an opportunity to affirm the observations of the High Court and in so doing, laying the ground for law review in all those other settings where corporal punishment was still used.

This refusal by the Chief Justice to pronounce on the matter is akin to one saying "killing another using a knife is not allowed, but I will not say anything regarding killing using an axe". Corporal punishment remains inhuman and degrading treatment whether as a sentence at court, at home, or at school. Section 53 of the Constitution is not limited to judicial corporal punishment, but prohibits inhuman and degrading treatment generally. The determination of corporal punishment as inhuman and degrading treatment was supposed to be general, regardless of the environment where it happens. Giving full effect to the rights stated in section 53 would have

489 *Chokuramba* (HC) (n 479 above) 8.

490 *Chokuramba* (CC) (n 441 above) 12.

meant pronouncing constitutional invalidity of corporal punishment in all settings, as logic dictated so. And yet the Chief Justice was doing the exact opposite by virtue of silencing discussion or pronouncements on the issue.

While Malaba DCJ promoted expansive, generous interpretation of fundamental human rights in *Mudzuru*, and restated the principle in *Chokuramba*,[491] he surprisingly opted to do the opposite in that case. Presented with similar facts and the issue of judicial corporal punishment back in 1989,[492] the then Chief Justice Dumbutshena realised the relevance of the issue at hand in other settings and took the opportunity to pronounce on it. He observed:

> "The court is not called upon to decide on corporal punishment meted on school children. If it were, I would go along with what was said by Mr Klecker above."[493]

The court added further:

> "Can it be said corporal punishment in schools is justified in a civilised society with 'evolving standards of decency that mark the progress of a maturing society' such as Zimbabwe?"[494]

Ultimately, Dumbutshena CJ had held:

> "Such infliction of injury would, in my view, amount to child abuse and would be punishable at common law and, more importantly, it would violate the prohibition contained in s 15(1)."[495]

The then CJ was alive to the fact that the issue at hand is the same, and there was an expectation that the Supreme Court, being the apex court at that time, in so interpreting section 15(1) of the then Lancaster House Constitution, would also deal with the issue as it applies in other settings. It is this progressive boldness shown by Dumbutshena CJ that is evidently absent in Malaba DCJ's dismissal of any attempt at discussing the issue in *Chokuramba*. Hence, the conclusion in *Chokuramba* was retrogressively conservative in a way that does not advance children's rights. The Constitutional Court in this case became a bottleneck to reformist law development and unimpressively showed its lack of courage to touch on sensitive issues such as corporal punishment in the home.

10.4. PIL of child rights in others courts

PIL for children's rights has not been limited to the Constitutional Court but has also played out in other courts, particularly the High Court. Of note was the *Pfungwa* case[496] of 2017, where PIL was used for a Constitutional Declaratory Order, that corporal punishment in school and in the home violates the rights of children as set out in ss 51, 53 and 81 of the Constitution of Zimbabwe. By seeking to declare unconstitutionality of corporal

491 *Ibid* 17.

492 *S v A Juvenile* 1989 (2) ZLR 61 (S).

493 *Ibid* at 80G.

494 *Ibid* at 81H.

495 *Ibid* at 82E.

496 *Linah Pfungwa and Justice for Children Trust v Headmistress Belvedere Junior Primary School and Minister of Education, Sport and Culture and Minister of Justice, Legal and Parliamentary Affairs* High Court unreported case HH 148-17, HC 6029/16.

punishment in schools and home, the case sought to expand from *Chokuramba*, which was limited to judicial corporal punishment only. It is worth noting that this case was referred to the Constitutional Court for confirmation in 2017. At the time when the Constitutional Court decided on *Chokuramba* in 2019, and regrettably avoided expressing its views on corporal punishment in schools or the home, arguing that that was *ultra vires* the scope of the current application, the Constitutional Court therefore in fact had a case on its roll on the very issues it was saying were not before it. This buttresses the point already made that the court in *Chokuramba* was using a technicality to avoid the contentious issue of corporal punishment. Otherwise, the noble and logical thing would have been to join the two cases and make a ruling on all three settings, given that the issue was the same.

Another notable PIL case in the High Court and Supreme Court was the *Zimbabwe Homeless People's Federation* case[497] on children's right to shelter. This case, modelled along the famous South African *Grootboom* case[498], was the first landmark PIL children's rights case in Zimbabwe in the field of socio-economic rights. The courts found themselves having to tease out the often-contentious provisions of "progressive realisation of rights", "the State taking reasonable measures within the limits of available resources", among other similar clauses that are normally used as safe hiding places by governments for their failures to realise certain socio-economic rights. Overturning the decision of the High Court, the Supreme Court commendably declared that "the right of children to shelter, enshrined in s 81(1)(f) of the Constitution, is justiciable and enforceable as an independent right of all children, including children under parental care, subject to reasonable qualification and limitation where necessary and justified".[499] This was significant as far as children's rights are concerned as it clears the way for further PIL on other socio-economic rights of children, with the confidence that they have been declared justiciable and enforceable by our courts.

10.5. Key players and strategies

As already mentioned, there are a number of players in PIL of children's rights in Zimbabwe, including JCT, Veritas and ZLHR.[500] These organisations have either litigated the cases on behalf of the applicants, or supported the litigation as *amicus curiae*. While this is expected given that they are human rights law organisations, it is commendable that they have also prioritised PIL on children's rights, which to some is less of a priority than issues around political rights and activity. Because of their support, children's rights jurisprudence has been expanding, which in turn arouses interest from other organisations and may lead to other CSOs beginning to see PIL on children's rights as a progressive tool for advancing and vindicating child rights. In supporting PIL on child rights, a few strategies have been used in the cases so far brought before the apex court. These include:

10.5.1. Use of the same lawyers

In the cases so far brought before the Constitutional Court on child rights, it is noticeable that the same lawyers, Mr Tendai Biti, instructed by Veritas and JCT, and Mr D Hofisi, then of ZLHR, have represented the children's

497 *Zimbabwe Homeless People's Federation and Others v Minister of Local Government and National Housing and Others* Supreme Court unreported case 94/2020; Civil Appeal No. SC 541/2019.

498 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

499 *Zimbabwe Homeless People's Federation,* p 44.

500 See also O Kaaba; M Hinfelaar & T Zhou "Comparing legal activism in Zimbabwe and Zambia" (2020) *SAIPARCMI Working Paper* Number 5 20.

issues.[501] This ensures cumulative acquisition of special skills on the subject of children's rights litigation by these lawyers. The dedicated research that the lawyers have continued to do on the same area, and the knowledge they have gained on how the court handles children's issues, can only develop them into specialists on litigating children's rights, which in turn should lead to better quality litigation and possibly more positive outcomes for children. However, caution is recommended in continuously building capacity of only a few individuals because their absence can then result in a capacity gap, causing a setback in PIL of children's rights. It is important that there be progressive expansion of the pool of lawyers specialising in this area.

10.5.2. Appearance as *amicus curiae*

The players have also taken on board the common strategy of appearing as *amicus curiae* in instances where they cannot be a direct party to the proceedings. This was used by ZLHR in *Chokuramba* which had come to the Constitutional Court for confirmation, meaning there was no other way for other parties to join in save for being *amicus curiae*. As noted by Budlender, Marcus & Ferreira, *amicus curiae* interventions can play an essential role in seeking to achieve social change.[502] They allow public interest organisations to influence the development of the law without having to start litigation themselves and can prevent retrogressive judicial decisions. By appearing as *amicus curiae*, organisations such as ZLHR, Veritas and JCT contribute extensive research on the subject and share it with the Constitutional Court for consideration, thereby considerably influencing the decision-making of the court and significantly contributing to jurisprudence on the subject.

10.5.3. Timing

Timing of instituting the litigation has also been an important factor for PIL on children's rights, where the players have taken advantage of other events around the issue that have influenced public opinion and indeed the judiciary in its determination. According to Budlender, Marcus & Ferreira, litigation should not commence until and unless the climate is right and the relevant evidence is in place.[503] The effects of running litigation too soon can be disastrous, particularly as an unsuccessful piece of PIL could, in practice, permanently foreclose the issue from being re-litigated. Timing was particularly important in *Mudzuru*, where the case was brought at a time when a lot of momentum was building around ending child marriages. This included the launch of the African Union Campaign to End Child Marriages in May 2014 and the subsequent adoption of the African Common Position on the AU Campaign to End Child Marriages in Africa in July 2015. The UN Human Rights Council also unanimously adopted a resolution on ending child marriages in July 2015 and the Zimbabwe Multiple Indicator Cluster Survey (MICS) Report was released, which showed an increase in child marriages in Zimbabwe in August 2014. There was also a Motion in the Zimbabwean Parliament to end child marriages in January 2015, followed by a meeting of the SADC Parliamentary Forum in Johannesburg in February 2015, and the subsequent drafting of the SADC Model Law on Child Marriages in August 2015. Even more importantly, was Zimbabwe's adoption, and launch, of the AU campaign to end child marriages on 31 July 2015, which officially confirmed the government's willingness to end child marriages in the country. With all this happening, the collective result –

501 See also *Pfungwa* and *Zimbabwe Homeless People's Federation* cases.

502 S Budlender, G Marcus SC & N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (2014) Executive Summary published by The Atlantic Philanthropies 4.

503 *Ibid* pp 3-4.

directly or indirectly – was the 2016 ruling in *Mudzuru* declaring that child marriages are unconstitutional and therefore unlawful in Zimbabwe.

10.6. Challenges

PIL for children's rights has, however, not been without its challenges. These include protracted delays in proceedings, delayed enforcement of Constitutional Court judgments, and the problem of constitutional avoidance.

10.6.1. Protracted delays

The High Court referred *Chokuramba* to the Constitutional Court for confirmation in 2014. It however took the court almost five years to issue a judgment.[504] The negative result is that, in some cases, the delayed judgment has come out when the matter for determination is already moot, having been overtaken by other events. In instances such as *Chokuramba*, it meant that child offenders had to endure another five years of being subjected to the inhuman and degrading treatment of corporal punishment when this could have been ended back in 2014 or 2015 had the court dealt with the matter expeditiously. This challenge is not peculiar to child rights only but has also been evident in other areas as well.[505]

10.6.2. Delayed enforcement of Constitutional Court judgments

Similarly, there are worrisome delays in enacting laws to enforce the Constitutional Court judgments declaring constitutional invalidity of some provisions. It is worth noting that since 2016 when the celebrated landmark *Mudzuru* judgment was handed down, clearly pronouncing on the illegality of child marriages, it is still not practically enforceable due to the fact that there is no law yet that criminalises child marriages in Zimbabwe, thus making it difficult for law enforcement agencies to hold anyone strictly accountable for the act. A high-profile case in point is the Anna Machaya child marriage case that happened in August 2021, where the accused had to be charged with various offences ranging from murder, rape, to sleeping with a minor,[506] instead of the glaringly visible child marriage act, simply because the law is not there to facilitate such a charge. This makes the celebrated judgment in *Mudzuru* irrelevant given that nothing has changed five years after it was handed down. It is cases like these that make for a compelling argument that judgments of constitutional invalidity should be accompanied by a court-determined limited period in which the relevant statutes should be amended or enacted to give effect to the judgment, as is done in other jurisdictions such as South Africa.

10.6.3. Tactics of "Constitutional avoidance"

As already discussed, where the Constitutional Court does not feel comfortable venturing into a sensitive area, it sometimes opts to rely on procedural technicalities to avoid the issue. This was apparent in *Chokuramba*,

504 See also Magaya & Fambasayi (n 438 above) 33.

505 See *Michael Nyika and Crispen Tobaiwa v Minister of Home Affairs and Commissioner-General of Police NO and Inspector Damburai and Constable Lisborne Chibanda* High Court unreported case HH 181-16; *Chironga and Mahiya v Minister of Justice, Legal and Parliamentary Affairs and the Government of Zimbabwe* Constitutional Court unreported case CCZ 42/2015. See also chapter 4 by Fadzayi Mahere on procedural rules in this volume.

506 ZRP Report *Arrest of Hatirarami Momberume in connection with the pregnancy and death of a minor at Marange Shrine* (19 August 2021) at http://www.zrp.gov.zw/index.php?option=com_content&view=article&id=515:arrest-of-hatirarami-momberume-in-connection-with-the-pregnancy-and-death-of-a-minor-at-marange-shrine-t&catid=45&Itemid=743.

where the court used the technicality of sticking to the specific issue presented to it, as a way of avoiding making unpopular broader pronouncements on the illegality of corporal punishment in the home and school. This has the effect of stifling law development in the sense that other, possibly protracted, processes will have to take place, and hard-earned resources used, for the same conclusion to be reached.

10.7. Opportunities for further development of PIL of children's rights

While there are challenges, there are equally opportunities for further development of PIL for children's rights. It is commendable that the Constitutional Court has begun to show interest in children's rights issues, judging by the level of intellectual engagement that it has so far shown in the two major child rights cases that it has dealt with thus far. It is also worthwhile noting that it was a child rights case (*Mudzuru*) in which the court chose to provide an expansive explanation on *locus standi*. Such evidence of the court's receptiveness to children's issues should be taken advantage of by the child rights and human rights sector to further expand on PIL litigation into other socio-economic areas that affect children.[507]

These include education, health, water, shelter and sanitation among others,[508] all of which are ripe in Zimbabwe given the levels of poverty in the country, which are not matched by service provision by government.Another opportunity available for Zimbabwe is the proximity of its legal system to South Africa, sharing a very similar legal history and constitutional framework. South Africa has recognised public interest standing since 1994, and has a long tradition of PIL and, as such, has jurisprudence, including around children's rights, which Zimbabwe can draw lessons from.[509]

The apex court, as already discussed, has also shown a keen interest in holding Zimbabwe accountable to international child rights and human rights standards, through expansive reference to those standards and stating that Zimbabwe ought to be measuring up to them. The PIL sector can take advantage of this keenness to identify areas where the country is still not measuring up to international standards and institute PIL on those issues. This include rights to free education and to healthcare, among other such rights, where the country is still falling far below the minimum standards.

10.8. Conclusion

Zimbabwe's PIL's journey has been short and slow but already shows promise judging by the cases already dealt with, particularly as far as children's rights are concerned. The attitude of the courts has appeared to be quite receptive to PIL, deciding to clarify in detail the issue of *locus standi* in *Mudzuru* and its preference for expansive purposive interpretation of provisions. In both *Mudzuru* and *Chokuramba*, the Constitutional Court showed its affinity to the issue of child rights through its thorough engagement of issues and human rights concepts, wide reference to international instruments and decisions from other jurisdictions. This is positive as it shows a maturing society that is ready to take its place, both in theory and in practice, in the international community

507 See also Magaya & Fambasayi (n 438 above) 34.

508 See also Sloth-Nielsen & Hove (n 449 above) 559.

509 See the cases referred to in n 465 above. See also Ann Skelton "Children's Rights" in Jason Brickhill *Public Interest Litigation in South Africa* (2018) Juta 258-280.

of child rights. It is this growing maturity that gives hope that PIL on children's rights will continue to grow in Zimbabwe. A few areas of concern have, however, been noted, such as conservative tendencies of the court, and opting to use "constitutional avoidance" to evade pronouncing on sensitive areas, such as corporal punishment in the home and school. Protracted delays in dealing with matters, again especially those that are controversial, is also an area of concern, which, hopefully will not continue to negatively taint the country's PIL in children's rights, which had started well.

CHAPTER 11

11. AN OVERVIEW OF ENVIRONMENTAL RIGHTS LITIGATION IN ZIMBABWE - *Memory Mafo and Fiona Iliff*



Ms Memory Mafo

Memory Mafo is a partner at Scanlen and Holderness, and a member of Zimbabwe Lawyers for Human Rights. She litigates extensively in administrative law and environmental rights cases, particularly in wetlands protection cases. She has successfully litigated high profile cases which have contributed to the development of environmental law jurisprudence. She regularly speaks and facilitates at local conferences and workshops on this topic.



Ms Fiona Iliff
*Bio on page 86

11.1. Introduction

This chapter is written at a critical moment in the development of environmental law, with the UN Human Rights Council adopting Resolution 48/13, recognising the right to a clean, healthy and sustainable environment for the first time under international law, and calling upon UN Member States to co-operate to implement this right. Zimbabwe's 2013 Constitution is one of approximately 100 progressive constitutions across the world that recognise the right to a healthy environment for present and future generations. This critical right recognises that human rights and the environment are interconnected and interdependent: without a healthy and sustainable environment, people are deprived of the enjoyment of other rights, such as the right to food, clean water, dignity and health; and sustainable environmental governance depends upon respect for all human rights. The substantive right is enforced through procedural rights such as the right of access to information, the right to public participation, and the right to administrative justice. In certain countries, such as Ecuador, there has also been recognition of the rights of nature itself: to exist, persist, maintain and regenerate its vital cycles, and not be degraded.[510]

In spite of these progressive environmental rights standards enshrined in domestic and international law, Zimbabwe's subsidiary domestic legislation has not been aligned, consolidated or applied in accordance with these standards. There is widespread pollution and ecological degradation occurring across the country, particularly from mining, poor planning, poor corporate governance, and unregulated development in ecologically sensitives areas. To address these challenges, Zimbabwe Lawyers for Human Rights (ZLHR), and other organisations such as the Zimbabwe Environmental Law Association (ZELA) and Advocates4Earth, have been bringing environmental rights cases before the courts, and lobbying for legislative reform, with environmental rights jurisprudence slowly developing as a result, as will be highlighted below.

11.2. Environmental rights under Zimbabwean Law

Following the impetus of the 1992 Rio Earth Summit, the Zimbabwean Ministry of Environment initiated a process of environmental law reform, finally resulting in the promulgation of the Environmental Management Act ("the EM Act") in 2003.[511] It was passed in a context of greater global awareness of the urgent need to improve environmental protections. This need was recognised in Zimbabwe's 2013 Constitution,[512] where environmental and socio-economic rights found a place in Zimbabwe's constitutional law for the first time. The Constitution specifically establishes "environmental rights" as part of the "fundamental human rights and freedoms" in the Declaration of Rights. Section 73(1) provides as follows:

- Every person has the right—
  a. to an environment that is not harmful to their health or well-being; and (b) to have the environment protected for the benefit of present and future generations, through reasonable

510 "Ecuador Adopts Rights Of Nature In Constitution" *Global Alliance for the Rights of Nature.* Available at: https://www.therightsofnature.org/ecuador-rights/.

511 Environmental Management Act [*Chapter 20:27*].

512 I Chirisa & A Muzenda "Environmental Rights as a Substantive Area of the Zimbabwean Constitutional Debate: Implications for Policy and Action" (2 September 2013) vol 2 *Southern Peace Review Journal* 104-121 (Special Issue with OSSREA Zimbabwe Chapter).

legislative and other measures that –

i. prevent pollution and ecological degradation;
ii. promote conservation; and
iii. secure ecologically sustainable development and use of natural resources while promoting economic and social development.

In addition, section 77(a) of the Constitution provides that "every person has the right to safe, clean, and potable water". Both of these rights require that "the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right".[513] Unfortunately there is currently very limited jurisprudence in Zimbabwe on the obligation for "progressive realisation" of environmental and socio-economic rights.[514] Among other interconnected rights, sections 68(1) and (2) of the Declaration of Rights also establish a right to administrative justice, facilitating the enforcement of these rights, by stipulating that: "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair" and that: "Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct".

The right to a healthy environment, and related rights, are not absolute in nature, as is the case with all fundamental human rights and freedoms. It is subject to a limitation clause in terms of section 86 of the Constitution. It is therefore conceivable that there may be instances where a decision or action taken in terms of a law of general application infringes somebody's environmental rights and yet is reasonable and justifiable. In every case, a balancing act is required. In the case of *Cosmo Trust*,[515] the Administrative Court conducted such a balancing act, but weighed the environmental rights of citizens and future generations to protect their water source through preservation of an internationally protected wetland above the rights of private property owners to derive the short term economic benefits of constructing a housing development on their property, holding that private property rights must be exercised reasonably and with due regard to the rights and freedoms of others.

Zimbabwe's Constitution is the supreme law of the land and any legislation contradicting the Constitution is invalid to the extent of the inconsistency.[516] All legislation must thus be interpreted in a manner that it conforms with the Constitution wherever possible. Furthermore, the courts must have regard to international best practice in interpreting these constitutional rights.[517]

513 The wording copies that of South Africa's post-apartheid Constitution and the jurisprudence developed there is of persuasive value when interpreting Zimbabwe's Constitution.

514 This is well developed in South African jurisprudence. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

515 Consolidated Appeals of *Cosmo Trust, Barbara Vitoria, Margaret Soper, Linda Bromley & City of Harare, Sharadkumar Patel, Meadows (Pvt) (Ltd), Environmental Management Agency & the Minister of Environment; & The Cosmo Trust v Minister of Environment, Environmental Management Agency, Sharadkumar Patel & Meadows (Pvt) (Ltd*) Administrative Court unreported cases ACC 81/18 and ACC 63/18.

516 Section 2 of the Constitution.

517 In the South African case of *Mineral Development, Gauteng Region, & Another v Save the Vaal Environment & Others* 1999 (2) SA 709 (SCA) the judge stated that: "Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns". Our courts are obliged to have regard to this when applying Zimbabwe's Constitution.

Zimbabwe is party to several international treaties for the protection of the environment, such as the UN Convention on Biodiversity,[518] and the Ramsar Convention on Wetlands.[519] Unfortunately these treaties have not been properly domesticated into Zimbabwean law, but even where they do not form a binding component of Zimbabwe's domestic law, constitutional rights must be interpreted and applied in conformity with these conventions and treaties.[520] Furthermore section 46(1)(c) obliges the courts, or any tribunal, forum or body, when interpreting the Constitution's Declaration of Rights, to "take into account international law and all treaties and conventions to which Zimbabwe is a party".[521] Other than the Constitution, the EM Act[522] is the primary piece of legislation protecting the environment.[523] The EM Act complements the Constitution by setting out, in section 4, several environmental rights, providing everyone with the right to:

> "a) a clean environment that is not harmful to health; and
> b) access to environmental information; and
> c) protection of the environment for the benefit of present and future generations; and to participate in the implementation of the promulgation of reasonable legislative policy and other measures that:
> i) prevent pollution and environmental degradation; and
> ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development."

Section 4 of the EM Act also establishes a set of principles relating to environmental management that apply to the actions of all persons and all government agencies, and requires public participation in environmental decisions, including that:

> "a) all elements of the environment are linked and inter-related, therefore environmental management must be integrated;
> b) environmental management must place people and their needs at the forefront of its concern;
> c) the participation of all interested and affected parties in environmental governance must be promoted;"
> d) environmental education, environmental awareness and the sharing of knowledge and experience

518 See, for example, article 6(a).

519 No. 14583 Multilateral Convention On Wetlands Of International Importance Especially As Waterfowl Habitat. Concluded at Ramsar, Iran, on 2 February 1971. The Convention does not appear to have been made part of municipal Zimbabwean law under the procedures provided for in the Constitution.

520 Section 327(6) of the Constitution provides that: "When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."

521 And see *Loveness Mudzuru and Anor v Minister Of Justice, Legal & Parliamentary Affairs NO* Constitutional Court unreported case 12/2015 at 25-38.

522 The Act repealed and consolidated provisions from several other Acts relevant to environmental protection: the Natural Resources Act [*Chapter 20:13*]; Atmospheric Pollution Prevention Act [*Chapter 20:03*]; Hazardous Substances and Articles Act [*Chapter 15:05*]; Noxious Weeds Act [*Chapter 19:07*].

523 Other relevant legislation includes the Water Act [*Chapter 20:24*], the Zimbabwe National Water Authority Act [*Chapter 20:25*]; the Forest Act [*Chapter 19:05*]; Parks and Wildlife Act [*Chapter 20:14*]; Mines and Minerals Act [*Chapter 21:05*], the Communal Land and Forest Produce Act [*Chapter 19:04*], the National Museums and Monuments Act (National Museums and Monuments Act [*Chapter 25:11*], the National Trust Act [*Chapter 25:12*]; the Tourism Act [*Chapter 14:20*]; the Regional Town and Country Planning Act [*Chapter 29:12*]; the Urban Councils Act [*Chapter 29:15*]; and Administrative Court Act [*Chapter 7:01*].

must be promoted;
e) development must be socially, environmentally and economically sustainable.
f) anticipated negative impact on the environment and on people's environmental rights must be prevented where possible, otherwise minimised and remedied;
g) any person who causes pollution or environmental degradation must meet the cost;
h) global and international responsibilities relating to the environment must be discharged in the national interest;
i) sensitive, vulnerable and highly dynamic or stressed ecosystems require specific attention in management and planning procedures; and
j) waste generated shall be controlled in a manner that prevents and minimizes pollution."

In terms of the EM Act, the Minister of Environment has issued numerous regulations on matters such as atmospheric pollution, Environmental Impact Assessments (EIAs) for wetlands developments, effluents and solid waste disposal, hazardous waste management, prohibition and control of ozone depleting substances, and control of alluvial mining. In terms of these regulations, permits may be issued if certain controls are in place.[524] Unfortunately the criteria for issuing these permits are not always clear, they are issued by the Environmental Management Agency (EMA) unilaterally, and the regulations do not provide adequate provisions for public participation in the decision-making process. Their implementation is also not generally well monitored.

ZLHR dealt with a case of the LaFarge cement factory emitting excessive dust pollution resulting in neighbouring households being covered in grey dust, and its permits were only finally suspended after ZLHR intervened.[525] To be able to fully realise environmental rights, procedural rights are essential. Stakeholder participation is key to environmental management and protection: to take account of the needs and values of all interested and affected parties. Decisions must be made in an open and transparent manner, with full information and reasons being provided to interested parties in writing in terms of the law.[526] As highlighted, the constitutional right to administrative justice protects the right to administrative action that is lawful, reasonable and procedurally fair.[527] The Administrative Justice Act[528] also compels administrative authorities to decide matters before them timeously, or within a reasonable time, and to provide written reasons for their decisions.[529] Section 62 of the Constitution protects the right of access to information. The right to public participation and stakeholder consultation is also

524 Environment Management (Atmospheric Pollution Control) Regulations, 2009 (SI 72 of 2009); Atmospheric Pollution Prevention (Appeal Board) Regulations, 1975 (SI 148 of 1975); Environment Management (Environmental Impact Assessment and Ecosystems Protection) Regulations, 2007 (SI 7 of 2007); Environmental Management (Access to Genetic Resources & Indigenous Genetic Resource-based Knowledge) Regulations, 2009 (SI 61 of 2009); Environmental Management (Effluents and Solid Waste Disposal) Regulations, 2007 (SI 6 of 2007); Environmental Management (Hazardous Waste Management) Regulations, 2007 (SI 10 of 2007); Environmental Management (Plastic Packaging and Plastic Bottles) Regulations, 2010 (SI 98 of 2010); Environmental Management (Prohibition and Control of Ozone Depleting Substances & Ozone Depleting Substance Dependent Equipment) Regulations, 2011 (SI 7 of 2011); Environmental Management Control of Alluvial Mining Regulations, 2014 (SI 92 of 2014); Environmental Management Control of Hazardous Substances (General) Regulations, 2018 (SI 268 of 2018); Environmental Management Hazardous Substance and Articles (Declaration of Group I Hazardous Substances) (Cosmetics Containing Hazardous Ingredients) Notice 2000 (SI 247 of 2000); Natural Resources Court Rules, 1974 (RGN 353 of 1974).

525 "EMA shuts Lafarge Cement plant" *Newsday* (18 August 2020), Available at: https://www.newsday.co.zw/2020/08/ema-shuts-lafarge-cement-plant/.

526 Section 4(2) EM Act.

527 Section 68 of Constitution.

528 Administrative Justice Act [*Chapter 10:28*].

529 *Ibid*.

protected broadly throughout the EM Act (and to some extent in its regulations), the Administrative Justice Act, and to a limited extent in related pieces of legislation such as the Regional Town and Country Planning Act and the Urban Councils Act.

In terms of section 130 of the EM Act, any decision or permit issued by the Environmental Management Agency (EMA) may be appealed to the Minister of Environment, whose decision may then be further appealed to the Administrative Court. The Administrative court is a special tribunal dealing mostly with appeals and reviews of administrative decisions, as provided for by statute. Appeals from the Administrative Court are dealt with by the Supreme Court. With its inherent jurisdiction, the High Court can also preside over environmental matters, in particular to determine applications for interdicts and other "appropriate relief" in constitutional rights matters. The Constitutional Court hears referrals for confirmation of declarations of constitutional invalidity of legislation or policy from the lower courts, and any direct constitutional applications.[530]

Section 85(1) of the Constitution has also considerably broadened the *locus standi*, or standing, for a person or organisation to bring a claim or appeal asserting their rights to a healthy environment. In terms of this provision, anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members has a right to approach a competent court, alleging that a right has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. Many non-government organisations and community-based organisations – notably the Harare Wetlands Trust (HWT), the Community Water Alliance, and ZELA – have been able to utilise this broad application of standing and have acted as applicants to protect environmental rights on behalf of the public, as highlighted in the cases below.

In *Harare Wetlands Trust*,[531] the court considered whether the interest of an environmental organisation dedicated to the protection of wetlands was sufficient to constitute direct and substantial interest within the contemplation of section 14 of the High Court Act. It applied international precedent, in terms of section 46(1) of the Constitution, to determine the standing of the applicant. Applying *R v Inspectorate of Pollution*,[532] it determined that an organisation with a genuine concern for the environment — that is not a mere busybody but is genuinely representing the interests of the public facing harm due to environmental degradation and pollution — must be awarded standing in such matters, failing which those it represents would not have an effective way to bring such issues before the courts.

The environmental rights set out in the Constitution and the EM Act thus provide a strong weapon that can, in theory, be used to challenge any action or decision of state actors, or even of non-state entities and private juristic persons, which threatens or harms the environment, to the detriment of any person's health or well-being.

530 See the chapter on procedural rules by Fadzayi Mahere in this volume.

531 *Harare Wetlands Trust and Another v Life Covenant Church & 5 Others* Harare High Court unreported case HH819/19; HC3440/19.

532 *R v Inspectorate of Pollution & Another*; Ex parte *Greenpeace Limited* [1994] 4 All ER 329.

Environmental rights protected in the Constitution and the EM Act have precedence[533] over all other laws[534] and are binding on the legislature, the executive, the judiciary and all organs of state.[535] With this powerful recognition of the right to a healthy environment — as well as interdependent other rights such as the right to life, the right to dignity, the right of access to information, the right to administrative justice, and the right to water — there has been an increase in litigation challenging governmental action and inaction impacting on the environment, and the alarming rates of non-compliance with environmental laws affecting different communities across the country.

11.3. Environmental Rights Jurisprudence

Environmental rights cases in Zimbabwe, a snapshot of which is highlighted below, have included: applications to stop mining operations or developments on wetlands without EIA certificates; appeals of EIA certificates and town planning permits issued on wetlands and other ecologically sensitive and protected areas; applications to challenge relocation of communities for mining without compensation and prior consultation; actions to stop human rights violations and disruption of economic activities by security forces in mining areas; actions to stop pollution of rivers and other water sources; actions to stop air pollution by factories; and actions to get mining companies to promote infrastructural developments in local mining communities and mitigate environmental degradation and pollution.

11.3.1. Wetlands protection

ZLHR has instituted numerous proceedings on behalf of residents' associations, community-based organisations, and environmental organisations such as the Harare Wetlands Trust (HWT) and Community Water Alliance (CWA), to protect wetlands. Harare is sitting in its catchment area, so the protection of wetlands is critical to protecting its water source from drying out and becoming polluted. The litigation has predominantly been in the form of appeals of EIA certificates and town planning development permits, and applications for prohibitory and mandatory interdicts to stop developments: where no permits have been issued, or where they have been issued unlawfully. Some important environmental law precedent has come out of these cases.

The Conservation Society of Monavale (COSMO) Trust has instituted numerous proceedings to protect Monavale Ramsar Site, a wetland site of international importance in Harare. In *Cosmo Trust v Meadows (Pvt) Ltd*,[536] the trust and local residents appealed against a town planning development permit that had been issued for the development of a cluster house development on the site, without an EIA. The Administrative Court held that section 97(5) of the EM Act prescribed that no authority, in this case the City Council, could issue a license for development, without the EMA having first issued an EIA certificate, rendering the development permit null and void. Without consulting the residents, the private owners then applied to the EMA for an EIA certificate,

533 *Debshan (Pvt) Ltd v The Provincial Mining Director, Matabeleland South Province & Others* Bulawayo High Court unreported case 17-HB-011.

534 Section 3(2) of the Environment Management Act provides that: "If any other law is in conflict or inconsistent with this Act, this Act shall prevail".

535 Section 2(2) Constitution.

536 *Cosmo Trust, Barbara Vitoria v Meadows (Pvt) Ltd, Sharadkumar Patel, The Mayor of City of Harare, Director of Works City of Harare, Engineer Philip Pfukwa, Jonathan Mutimukulu, Chairman of Environmental Management Committee of City of Harare & Environmental Management Committee* (4 November 2016) Administrative Court unreported case AC 38/16. The procedural aspects of the judgment were upheld by the Supreme Court in *Sharadkumah Patel & Anor v Cosmo Trust & Ors* Supreme Court unreported case SC 163/21.

and to the City of Harare for a development permit. The residents appealed against the EIA certificate and development permit that were issued. The appeals were consolidated and the Administrative Court granted the appeals and revoked the EIA certificate and development permit,[537] on the grounds that: various administrative requirements had not been complied with during the application processes for the permits, the extent of the land and conditions for the development had been not been clearly established in the permits and, most significantly, the developers had failed to comply with the residents' natural justice rights to object to the permits and have their objections considered in the decision-making process. It also upheld the residents' right, in terms of the rights to a healthy environment and to water, to protect the internationally protected wetland as a water source for present and future generations. As highlighted above, the court balanced the public's right to a healthy environment against the private owners' right to develop their property, and found in favour of the public interest to a healthy environment. The court applied the Ugandan case of *Nyakaana v National Environment Management Authority and Ors* (2015) UGSC 14 which held that:

> "A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land…. **citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole**…. The individual's interest must be viewed in the context of the Constitution and the laws made thereunder." (emphasis added)

The above case and the related case of *Cosmo Trust v City of Harare*[538] applied the precautionary principle of environmental law, which was also affirmed in *Mutsai v City of Harare*,[539] discussed below. These cases provided that "environmental law recognises the precautionary principle which obliges the State to take a protective approach to the environment" and that "in the absence of any scientific certainty" of the environmental impact of a project, it is "prudent to proceed on the side of caution" by protecting the environment before irreversible damage is caused.

Mutsai concerned a challenge by 20 residents from Hillside and Eastlea to the City of Harare's development of a bus terminus and people's market on Coronation Park wetland. The developments had commenced without due public consultation and consideration of the environmental and social impact of the development. In addition to recognising the precautionary principle, the judgment issued by Justice Chatukuta is important for environmental law because it recognised the public's interest and standing in environmental cases in terms of their environmental rights under the Constitution and the EM Act, and in particular highlighted the public's procedural rights: to public consultation, to access information, and to fair administrative action in terms of their right to administrative justice. The court determined that limitation of the residents' environmental rights in terms of section 86(2)(b) of the Constitution under the circumstances would not be fair, reasonable, necessary and justifiable in a democratic society, taking into account all relevant factors. In a number of cases, orders

537 Consolidated Appeals of *Cosmo Trust, Barbara Vitoria, Margaret Soper, Linda Bromley v City of Harare, Sharadkumar Patel, Meadows (Pvt) (Ltd), Environmental Management Agency & the Minister of Environment; & The Cosmo Trust v Minister of Environment, Environmental Management Agency, Sharadkumar Patel & Meadows (Pvt) (Ltd*) (8 March 2019) Administrative Court unreported cases ACC 81/18; ACC 63/18.

538 *Cosmo Trust, Margaret Soper, Linda Bromley v City of Harare, Sharadkumar Patel, Meadows (Pvt) (Ltd), Environmental Management Agency & the Minister of Environment* (25 October 2018) Administrative Court unreported cases, ACC 22/18,ACC 91/18.

539 *Mutsai M & 19 Ors v City of Harare & Ors* (14 December 2017) High Court Harare unreported case 17-HH-835.

and judgments have been issued to the effect that developments without the requisite permits, such as an EIA certificate, development permit and permit from the Catchment Council in place, are unlawful. These include *Hillside Park Association v Glorious All Time Functions (Pvt) Ltd*,[540] relating to the development of a wedding venue on a public park and wetland; *Harare Wetlands Trust & Newlands Residents Association v Life Covenant Church,*[541] relating to the development of a cathedral on Eastlea wetland in Harare; and *Trustees of the Harare Wetlands Trust v University of Zimbabwe*,[542] relating to the development of a fuel station and shopping centre on a wetland next to a river on the University of Zimbabwe property in Harare.

These judgments and orders have unfortunately mostly been limited to the procedural illegalities, rather than prohibiting the developments due to the environmental impact of the proposed developments. Private developers have therefore not been prohibited from simply applying for the required permits afterwards, resulting in lengthy and expensive litigation. The case of *Harare Wetlands Trust & Newlands Residents Association v Life Covenant Church & Others* went a bit further in developing the jurisprudence on "sustainable development"[543] in domestic law.[544] On its first page and in the introduction of its judgment, Chinamora J stated that:

> "The need to strike a proper balance between development and **sustainable environmental management** has often been expressed as follows: 'In each individual case the particular economic and other benefits of planned action must be assessed and weighed against the environmental costs; alternatives must be considered which would affect the balance of values'." (emphasis added)

As highlighted above, the case also importantly recognised the standing of environmental organisations in terms of their direct and substantial interest in such matters. The court recognised that the HWT's principal concern was the conservation of the wetland area due to a genuine interest in the health and well-being of the residents proximate to the construction area who may be affected by any interference with the riverbank or public stream that flows near the site.

Unfortunately, in a number of wetlands cases, developers have simply ignored court orders and judgments, and developments have continued. In the case of Latimer Road wetland in Greendale, Harare, developers ignored both an interdict and a contempt order, until finally a demolition order was sought. The High Court ordered the City of Harare to immediately demolish houses illegally constructed on wetlands in Latimer, Greengrove in Greendale and slapped the council with costs.[545] All of these cases show that in the absence of specific legislation

540 *Hillside Park Association v Glorious All Time Functions (Pvt) Ltd & Others* Harare High Court unreported case 19-HH-349.

541 *Harare Wetlands Trust & Newlands Residents Association v Life Covenant Church & Others* Harare High Court unreported case HH 819/19, HC 3440/19.

542 *Trustees of the Harare Wetlands Trust v University of Zimbabwe, Environmental Management Agency, City of Harare & Upper Manyame Catchment Council* (10 August 2018) High Court Harare unreported case HC 7043/18.

543 Sustainable development can be defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs; meeting human development goals while simultaneously sustaining the ability of natural systems to provide the natural resources and ecosystem services on which the economy and society depend.

544 *Harare Wetlands Trust & Newlands Residents Association v Life Covenant Church & Others* Harare High Court unreported case HH 819/19, HC 3440/19 at 1.

545 *Greendale Residents and Ratepayers Association v City of Harare & 4 Others* Harare High Court unreported case HC 2000/19, HC 5033/19, HC 4639/2.

protecting wetlands as non-development sites, the authorities will continue to issue permits for these sites, and the degradation of Harare's water source will continue. Some of the wetlands were previously gazetted by the Minister of Environment in terms of section 113 of the EM Act, but the General Notices were revoked in the case of *Augar Investments OU v Minister of Water and Climate*.[546] The court held that the legislation only allowed for the declaration and protections of wetlands as "ecologically sensitive areas", whereas they had been designated as "wetlands" which was a question of fact, not a legal term. The court also held that the private owners of the wetlands had not been consulted in the gazetting process. After considerable advocacy efforts by the HWT and ZLHR, at the time of writing in October 2021, the Minister had published a notice of his intention to regazette Harare Province wetlands as ecologically sensitive areas, but the extent of the gazetting and what restrictions will be placed on the mapped wetland sites is currently unknown.

11.3.2. Mining challenges

Poor mining practices in Zimbabwe have had a huge impact on the environment and human rights, for example resulting in: displacements of communities; water pollution impacting on the health of communities; encroachment on private game reserves; disturbance of farming and agricultural activities; disturbance of wildlife and natural ecosystems in National Parks; and degradation of wetlands, among many other concerns.

The case of *Debshan (Pvt) Ltd v The Provincial Mining Director, Matabeleland South Province* related to the grant of mining permits in a safari ranch in Insiza District in Matabeleland South.[547] Like the *Cosmo* case above, the courts held that the issuing of permits without an EIA certificate issued by the EMA was unlawful in terms of section 97(5) of the EM Act. The case also specifically confirmed the supremacy of the EM Act over all other legislation in terms of section 3(2).

In *Sithini Ndlovu & Rhodine Sibanda v Zibusiso Sibanda t/a Imani Mine*,[548] ZELA filed an application on behalf of residents of Ultra, a high-density suburb in Gwanda, Matabeleland South, challenging the practices at Imani Mine in using hazardous cyanide and failing to take precautions to prevent poisoning of water supplies. As with *Debshan*, they obtained an interdict prohibiting the mining activities of Zibusiso Sibanda t/a Imani Mine without an EIA.

In another case, *ZELA v Anjin Investments (Pvt) Ltd*,[549] ZELA and inhabitants of riparian villages in Marange Communal Lands applied for a declaration of rights and an interdict, to the effect that diamond mining companies operating in the area were acting unlawfully in discharging untreated waste material and effluent, as well as untreated human waste, into the Odzi River, Singwizi River and Save River, and were prohibited from doing so. The court dismissed a special plea by the mining companies, and held that ZELA had legal standing due to its direct and substantial interest in the matter, and that the High Court had jurisdiction to determine the application for a declaration of rights and interdict, as there was no alternative remedy, given that the EMA had taken no

546 *Augar Investments OU v Minister of Water and Climate & Another* Harare High Court unreported case 15-HH-278.

547 *Debshan (Pvt) Ltd v The Provincial Mining Director of Matabeleland South Province, The Provincial Mining Director of Matabeleland North Province, The Minister of Mines and Mining Development & the Secretary for Mining and Mining Development* (26 January 2017) Bulawayo High Court unreported case 17-HB-011.

548 *Sithini Ndlovu & Rhodine Sibanda v Zibusiso Sibanda t/a Imani Mine & Anor* Harare High Court unreported case HC 5732/19.

549 *ZELA and Others v Anjin Investments (Pvt) Ltd & Others* Harare High Court unreported case HH-523/15.

action to stop the unlawful activities. ZLHR and ZELA are also increasingly challenging mining activities taking place in National Parks and Wilderness Areas such as Chimanimani, Hwange and Mavuradonha. Unfortunately the Mines and Minerals Act [*Chapter 21:05*], Parks and Wildlife Act [*Chapter 20:14*] and the National Museums and Monuments Act [*Chapter 25:11*], do not prevent mining activities in these protected areas, which may be authorised in terms of a special grant authorised by the president. Such grants are increasingly being given to foreign companies.

ZELA lodged an interdict application in the case of *ZELA & Fidelis Chima v Zimbabwe Mining Development Corporation (ZMDC), Zhongxin Mining Group Tongmao Coal Company, Minister of Mines and Minister Development & the Environmental Management Agency*[550] to challenge coal mining in Hwange National Park without an EIA, but the matter was struck of the roll for non-citation of the President and the Minister of Environment, Tourism and Hospitality Industry. The government then made an announcement that all mining would be banned in parks, but to date the Mines and Minerals Act and the Parks and Wildlife Act have not been aligned to reflect this commitment.

ZLHR is similarly representing villagers facing eviction from communal lands, such as Kaseke Village in Uzumba, Mashonaland East province,[551] due to mining claims being granted to foreign mining companies, with permits under the Mines and Minerals Acts, and the Minister's discretion to set aside communal land for other purposes, having precedence over communities' rights under the Communal Land Act [*Chapter 20:04*].[552]

11.3.3. Pollution

In *ZELA v Chitungwiza Municipality*,[553] ZELA brought a challenge in relation to the discharge of sewerage into Lake Chivero. It obtained an order interdicting Chitungwiza Municipality from releasing sewerage into water bodies, water courses, streams, tributaries, or any part of the environment. The order directed the Municipality, within three months of the order, to repair or otherwise upgrade its water treatment plants and sewer systems to ensure proper treatment of effluent before discharge into the environment and water bodies. The EMA was also directed to conduct compliance assessments within three months and submit a report to the Registrar of the High Court. The judgment set critical precedent by granting a structural interdict ensuring the progressive realisation of the right to a healthy environment and the right to potable water, through the requirement for periodic inspections and submission of compliance reports to the court.

11.3.4. Access to Information

In the ZLHR case of *Community Water Alliance v EMA & Minister of Environment*,[554] the court upheld the procedural rights required for the realisation of the right to a healthy environment. The EMA was making information

550 *ZELA and Fidelis Chima v Zimbabwe Mining Development Corporation (ZMDC), Zhongxin Mining Group Tongmao Coal Company, Minister of Mines and Minister Development & the Environmental Management Agency* Harare High Court unreported case HC 4888/20.

551 *ZLHR Intervenes to Protect Villagers at Risk of Losing Land to Miner*, Zimbabwe Lawyers for Human Rights (8 September 2021) at <https://kubatana.net/2021/09/08/zlhr-intervenes-to-protect-villagers-at-risk-of-losing-land-to-miner/>.

552 Section 10, Communal Land Act [*Chapter 20:04*].

553 *ZELA v Chitungwiza Municipality* Harare High Court unreported case HC 2778/20.

554 *Community Water Alliance v Environmental Management Agency & Minister of Environment, Tourism and Hospitality Industry* (2 September 2020) Harare High Court unreported case HC 2304/20.

and documentation on EIA applications and certificates inaccessible to the public by charging a USD $250 fee and denying members of the public the right to make copies of the documents. The court held that the EMA's application of section 108 of the EM Act in a manner that prohibits members of the public from viewing and reproducing documents in its possession was *ultra vires* the right to information in terms of section 62 of the Constitution. The court directed that members of the public be allowed to: inspect documents on a machine-readable record, make notes of EIA documents, and make copies at their own expense. The judgment has greatly enhanced the capacity of communities and the public at large to have access to information held by the Agency.

11.4. Challenges

Zimbabwe's environmental laws, if and when fully, adequately and properly implemented in good faith, are sufficient to protect the environment. However, frequently the legislation is ignored or deliberately misinterpreted and distorted by the administrative bodies and the citizenry at large, in order to meet various objectives which are at variance with the constitutional imperative to protect the environment. Subsidiary legislation has not been sufficiently consolidated and aligned to the Constitution, the EM Act, and international treaties, allowing for loopholes to be exploited.[555] Mining permits and EIAs will continue to be issued on wetlands and in protected areas as long as such activities are not specifically prohibited by law, and there is no environmental and social impact criteria regulating the decision-making process.

The lack of consolidation of the legislation has also made litigating environmental matters very expensive and time-consuming. Litigants have to challenge numerous permits issued by various authorities acting in silos, in relation to the same activity, in a number of different forums, as well as having to apply for interdicts to stop the activities pending the outcome of such challenges. Environmental cases also generally require expert scientific evidence, which is costly and requires very specific expertise.

There are also only a limited number of civil society organisations that have the capacity, resources and expertise to litigate these matters. While it is commendable that environmental organisations have been willing to come forward to act as applicants, court challenges brought by organisations as the only applicants tend to result in *locus standi* disputes. In the absence of clear statutory provisions, the common law has been used to widen the scope of standing, but directly affected community organisations and members have the clearest interest in such matters. Unfortunately, communities do not necessarily have community structures in place, and are often polarised over whether to litigate, with some favouring the short term economic benefits of mining or development over long term environmental protection, and others facing victimisation as environmental champions in their communities. There is also often limited knowledge in communities about environment rights, as there have been no meaningful awareness campaigns by the Ministry of Environment and the EMA, contrary to the requirements in the EM Act for environmental education.

The general operating environment in the country also makes mobilisation and formalisation of civil society organisations and community-based organisations difficult. There is a general lack of respect for the rule of law, and political elites are protecting companies that are disregarding environmental laws.

555 Such as the Parks and Wildlife Act, the Mines and Minerals Act, the Communal Lands Act, the National Museums and Monuments Act, the Regional Town and Country Planning Act, and environmental regulations.

Environmental jurisprudence in Zimbabwe is still relatively limited. Judgments are inadequately reasoned and there is a lack of environmental sensitivity on the bench. This may be as a result of the fact that there has been very limited environmental law training for judges and lawyers. Cases are often won or dismissed on procedural and technical grounds, rather than substantive grounds. Other than the *ZELA v Chitungwiza Municipality* water pollution case highlighted, the courts have not shown a willingness to delve into how authorities may progressively realise environmental rights, for example. There are also extensive delays in the processing of matters and delivery of judgments, with no automatic suspension of activities pending judgments, contrary to the precautionary principle requiring the maintenance of the status quo and protection of the environment pending final determination.

11.5. Conclusion and Recommendations

In spite of the challenges highlighted above, the numerous successful outcomes in the cases discussed show that environmental jurisprudence is slowly developing. Environmental and human rights law-based organisations should be encouraged to continue to bring strategic litigation to further develop the jurisprudence on environmental rights in the public interest. Learning from the challenges highlighted, cases should ideally be brought in the names of affected communities, where possible, to avoid *locus standi* obstacles. Environmental organisations should work closely with communities to promote trust and confidence, and should hold feedback meetings with affected communities to jointly discuss the next steps after litigation. There is also a need for greater collaboration between different organisations to harness synergies, with organisations providing *amicus curiae* briefs and acting as applicants in each other's cases, for example. Organisations should provide training workshops in environmental law for lawyers. Information and lessons obtained from litigation should also be used for advocacy initiatives, including to push Parliament to align and consolidate all legislation in accordance with environmental rights standards. Advocacy initiatives should also call for environmental law training of the judiciary, with the possible establishment of an Environmental Tribunal in Zimbabwe.

CHAPTER 12

12. CONCLUSION – *Jason Brickhill*



Advocate Jason Brickhill
*Bio on page 1

12.1. Introduction

The rich contributions to this volume offer a full-textured account of the challenges and successes of public interest litigation in Zimbabwe under the 2013 Constitution. From their collective work emerge sharp insights regarding the context for public interest litigation in Zimbabwe, the resources required to succeed, and the key decisions that public interest lawyers confront in this work. The volume also has a contribution to make to future work on the subject, both in Zimbabwe and globally.

12.2. The Zimbabwean context

The authors paint a vivid picture of the challenging context in which public interest lawyers in Zimbabwe operate. Mafukidze's rich historical account in chapter 2 traces that context to colonial conquest over a century ago, carefully illustrating how the evolving political context has produced the present. In the introduction, drawing on Roux, the Zimbabwean legal system of today is characterised as authoritarian legalism.[556] The various chapter contributions bear this out, revealing a political context in which repression of civil and political rights is pervasive. Several of the contributors to this volume have themselves been victims of arrest and prosecutions simply for representing clients asserting constitutional rights, or for ordinary political activity.

Several chapters provide examples of "backlash" following judicial victories, including government amending the law following adverse court decisions. Tendai Biti's account of the passing of POSA in chapter 6 is a powerful example. The political context has also tended to impede judicial independence. Nowhere is this more apparent than in Moyo and Iliff's account of anti-impunity litigation (chapter 7) and Godfrey Mupanga's account of elections litigation in Zimbabwe (chapter 9). This political context puts public interest lawyers on the back foot in some matters, as they face being labelled "busy-bodies" by courts and government litigants, as both Coltart (chapter 3) and Damiso (chapter 8) describe.

The socio-economic context sees the vast majority of the population living in extreme poverty, so that the need to realise socio-economic rights is vast and far exceeds the available public interest legal services. Adding to high poverty levels, unrestrained development activity, especially in mining, is increasingly threatening the environmental rights of communities across the country. Mafo and Iliff's chapter on environmental rights litigation reveals some encouraging success in halting harmful developments, for example in wetlands, but also high levels of non-compliance with environmental laws. Relatedly, the cultural context remains strongly patriarchal in many parts of the country.

The chapters by Choice Damiso on women's rights (chapter 8) and Blessing Mushohwe on children's rights (chapter 10) reveal the challenges that dominant patriarchal attitudes present for public interest litigation to advance the rights of women and girls, especially in the context of marriage and matrimonial property. However, both authors describe the success in litigating the issue of child marriage.

Central to the legal context, and the greatest cause for hope, the 2013 Constitution has provided a robust legal foundation for public interest litigation in Zimbabwe. Though many important parts of the Constitution have

556 Theunis Roux *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (2018) Cambridge University Press 193–241.

not been implemented, provisions such as the rights in the Declaration of Rights offer promising new legal tools. However, beyond the law on the books, the legal context includes a legal culture with strong formalist and textualist tendencies that are in tension with building a constitutional jurisprudence that promotes constitutional values. Chapter after chapter recounts judicial decisions that avoid considering the impact on rights of a particular law or government action and instead decide cases on narrow and technical grounds.

Time and again, authors describe how courts focus their interpretation of laws on the text alone, rather than seeking the interpretation that best promotes constitutional values. Fadzayi Mahere's chapter 4 on procedural rules reveals how rules such as subsidiarity, standing and mootness/ripeness have been abused to prevent the determination of important constitutional issues.

Justice Mavedzenge in chapter 5 reflects on how, following the constitutional recognition of socio-economic rights, courts have been inconsistent in enforcing them and have tended to shy away from ordering the state to actually provide rights (as opposed to merely ordering the state to refrain from taking away existing rights). In relation to civil and political rights, Tendai Biti provides a picture of similar judicial inconsistency, with the apex court generally failing to protect the core rights of expression, assembly, protest and association over the last two decades, despite some important progressive decisions in the first 20 years after independence.

12.3. Litigation resources

The chapters reflect the central importance of litigation resources, most notably the availability of suitable litigants, legal representation and funding.[557] It is crucial that resources are made available to marginalised communities because, otherwise, even with a strong constitutional text, litigation will tend to be used by, and to most benefit, elites in society.[558]

12.3.1. Suitable litigants

The first "resource" that emerges powerfully from several chapters is the availability of suitable litigants themselves, whether individuals or specialist organisations, able to build cases and bring them to court. The chapters reflect a mixture of directly affected individuals asserting their own rights, and NGOs acting in the public interest.

12.3.2. Lawyers

The second vital resource for public interest litigation that the contributions reaffirm is, of course, suitable lawyers. This goes beyond just having legal representation. Blessing Mushohwe (chapter 10: Children's Rights) reflects on the importance of having "repeat-players"[559] — both in respect of organisations with the capacity to litigate, and lawyers who have developed specialist expertise in an area of law and are able to plan strategically for the long-term — as well as the importance of capacitating other lawyers for the future.

557 Charles Epp *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (1998) UCP .

558 Octávio Ferraz *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (2020) Cambridge University Press .

559 Marc Galanter "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change Essay" (1974) 9 *LSR* 95.

Damiso's account of women's rights litigation (chapter 8), for example, reveals the powerful role played not only by ZLHR but also ZWLA, WLSA and Veritas.

12.3.3. Funding

The final key resource is funding. Mafukidze (chapter 2) reflected that this lesson was learnt in hard ways even in pre-independence public interest litigation concerning colonial land dispossession, where communities' inability to pay their lawyers compromised the litigation.

12.4. Strategic and tactical lessons

Despite the challenges of context and resources, the chapters in this volume recount significant learning, both in victory and defeat, across extensive litigation, about the importance of key litigation decisions. Several important tactical and strategic considerations emerge from the collective contributions,[560] including:

12.4.1. Use of multiple strategies alongside litigation

Coltart's chapter 3 shares various strategies – not limited to litigation – to advance human rights and the rule of law, that reflect the adaptiveness and creativity of Zimbabwean public interest lawyers. Relatedly, Damiso (chapter 8) calls for judicial capacity-building, and training and empowerment of human rights defenders, as strategies to complement litigation on women's rights. Mupanga, discussing elections litigation (chapter 9), emphasises the need for legislative reform, as does Biti in relation to laws restricting free expression and other civil liberties (chapter 6).

12.4.2. Selecting litigants

Several chapters reflect on the importance of carefully selecting litigants. Moyo and Iliff (chapter 7) recommend using litigants acting in the public interest (such as suitable NGOs), and not only individual litigants, to prevent the state from simply paying off victims or withdrawing charges under laws whose constitutionality is challenged. This is often a powerful strategy, combining the advantages of a sympathetic individual litigant who brings the human dimension to a case with the tactical benefits of public interest standing.

12.4.3. Framing or characterising the case

One of the key decisions at the outset, as recognised in comparative literature,[561] is how the protagonists across the chapters "framed" the disputes, both inside and outside court. In terms of legal framing, one useful technique has been to rely heavily on international human rights law, as illustrated for example in the *Mudzuru* case on child marriage, discussed by Damiso in chapter 8 and Mushohwe in chapter 10.

560 For a similar contribution offering lessons on public interest litigation in a different jurisdiction, see Steven Budlender, Gilbert Marcus and Nick Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) Atlantic Philanthropies.

561 Erving Goffman and Bennett Berger *Frame Analysis : An Essay on the Organization of Experience* (1986) NUP; Lisa Vanhala *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (2011) Cambridge University Press; Budlender, Marcus and Ferreira (n 564).

12.4.4. Timing

Another key litigation decision is timing, considering when to launch proceedings bearing in mind broader developments in the national context. For example, Mushohwe, chapter 10, reflects on the importance of timing in the *Mudzuru* child marriages challenge, explaining how the case was brought following a national scandal and growing momentum favourable to the litigation.

12.4.5. Use of *amici curiae*

Several chapters reflect on the potentially game-changing value of *amici curiae*. Mahere, in chapter 4 reflects generally on the scope for *amici* and their advantages, and Mushohwe describes their benefits in the specific context of children's rights litigation in chapter 10.

12.4.6. Persistent enforcement and resisting backlash

What emerges from several chapters is the need for persistence in enforcing court victories. Several chapters reveal how initial court victories have been frustrated either by delays in the apex court or by government non-compliance. In some instances, there has been backlash in the form of reprisals against litigants or amendments to the law to circumvent court decisions. The lesson from all of these experiences is the need to plan for long-term processes of enforcement that extend beyond securing a favourable judgment.

12.5. The future

This publication provides an opportunity for Zimbabwean public interest lawyers to take stock, to recognise the significant progress that has been made, and the setbacks experienced. As the human rights sector in Zimbabwe looks to the future, the authors here offer valuable learning that can inform future work.

This work also offers lessons for the international community and provides a basis for fruitful comparative research and learning by public interest lawyers in other jurisdictions around the world. Zimbabwean public interest litigation is likely to be of interest, especially to scholars and practitioners in jurisdictions with similar constitutional and political landscapes. The constitutional text in Zimbabwe is similar to South Africa[562] and Kenya,[563] inviting comparisons to public interest litigation in those jurisdictions. However, the political context is more similar to states battling authoritarianism, such as Uganda,[564] India,[565] and several countries in Eastern Europe, inviting comparisons with those states, too. As the chapters in this volume reflect, Zimbabwean law has been developed by drawing powerfully on international human rights law and also on appropriate comparative examples. In the ongoing dialectic of this process, the jurisprudence and experiences discussed in this volume

562 See Jason Brickhill *Public Interest Litigation in South Africa* (2018) Juta; Budlender, Marcus and Ferreira (n 564).

563 For a recent account in one area of Kenyan law, see Victoria Miyandazi *Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions* (2021) Hart.

564 Christopher Mbazira *Public Interest Litigation and Judicial Activism in Uganda : Improving the Enforcement of Economic, Social and Cultural Rights* (2009) Human Rights & Peace Centre, Faculty of Law, Makerere University.

565 For recent accounts of the experience in India, see Gautam Bhatia *The Transformative Constitution : A Radical Biography in Nine Acts* (2019) HarperCollins Publishers, India; Anuj Bhuwania *Courting the People: Public Interest Litigation in Post-Emergency India* (2017) Cambridge University Press.

will, in turn, contribute to developments in other jurisdictions. Public interest litigation is a powerful tool for social change. Zimbabwean conditions present serious challenges to its use as a strategy, but the contributions in this volume reflect nevertheless its real potential when the necessary litigation resources are available and public interest lawyers take astute litigation decisions.

TABLES OF AUTHORITIES

Treaties and other international instruments

African [Banjul] Charter on Human and Peoples' Rights (African Charter), adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 REV.5, 21I.L.M.58 (1982), entered into force 21 October 1986

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 Nov 1999

African Commission on Human and People's Rights, *General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, adopted at 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, 23 February to 4 March 2017

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85

Convention on the Rights of the Child, adopted on 20 November 1989, entered into force on 2 September 1990, 1577 UNTS 3

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5; adopted on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 221

International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), entered into force 23 March 1976, 999 UNTS 171

International Covenant on Economic Social and Cultural Rights (ICESCR), adopted 16 December 1966, GA Res 2200A (XXI), entered into force 3 January 1976, 993 UNTS 3

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, resolution adopted by the General Assembly on 15 October 1999, A/RES/54/4, entered into force 22 December 2000, 2131 UNTS 83

Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, A/HRC/4/18, 5 February 2007, Annex 1: Basic Principles and Guidelines on Development-based Evictions and Displacement.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations, 14 December 1990, E/1991/23*

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, *E/1992/23*

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1):forced evictions*, 20 May 1997

UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity E/CN.4/2005/102/Add.1 (8 February 2005)

Constitutions and legislation

Access to Information and Protection of Privacy Act [*Chapter 10:27*]

Administrative Court Act [*Chapter 7:01*]

Atmospheric Pollution Prevention (Appeal Board) Regulations, 1975 (SI 148 of 1975)

Environment Management (Environmental Impact Assessment and Ecosystems Protection) Regulations, 2007 (SI 7 of 2007)

Atmospheric Pollution Prevention Act [*Chapter 20:03*]

Broadcasting Act [*Chapter 12:01*]

Broadcasting Services Act [*Chapter 12:06*]

Civil Evidence Act [*Chapter 8:01*]

Communal Land Act [*Chapter 20:04*]

Communal Land and Forest Produce Act [*Chapter 19:04*]

Constitution (Ratification) Act No.1 of 1966

Constitutional Court Rules, 2016

Criminal Law (Codification and Reform) Act 23 of 2004 [*Chapter 9:23*]

Criminal Procedure and Evidence Act [*Chapter 9:07*]

Customary Marriages Act [*Chapter 5:07*]

Electoral Act [*Chapter 2:13*]

Emergency Powers (Special Courts Martial: Martial Law) Regulations, 1978

Emergency Powers Act Chapter 83 (R)

Environment Management (Atmospheric Pollution Control) Regulations, 2009 (SI 72 of 2009)

Environmental Management (Access to Genetic Resources & Indigenous Genetic Resource-based Knowledge) Regulations, 2009 (SI 61 of 2009)

Environmental Management (Effluents and Solid Waste Disposal) Regulations, 2007 (SI 6 of 2007)

Environmental Management (Hazardous Waste Management) Regulations, 2007 (SI 10 of 2007)

Environmental Management (Plastic Packaging and Plastic Bottles) Regulations, 2010 (SI 98 of 2010)

Environmental Management (Prohibition and Control of Ozone Depleting Sub stances & Ozone Depleting Substance Dependent Equipment) Regulations, 2011 (SI 7 of 2011)

Environmental Management Act [*Chapter 20:27*]

Environmental Management Control of Alluvial Mining Regulations, 2014 (SI 92 of 2014)

Environmental Management Control of Hazardous Substances (General) Regulations, 2018 (SI 268 of 2018)

Environmental Management Hazardous Substance and Articles (Declaration of Group I Hazardous Substances) (Cosmetics Containing Hazardous Ingredients) Notice 2000 (SI 247 of 2000)

Fingo Location (Distribution of Land) Act [*Chapter 20:07*]

Forest Act [*Chapter 19:05*]

Hazardous Substances and Articles Act [*Chapter 15:05*]

High Court (Civil Procedures) Rules, 2004

Lancaster House Constitution, 1979

Land Apportionment Act, 1930

Law and Order (Maintenance) Act, 1960

Legal Age of Majority Act No. 15 of 1982

Magistrates Court (Civil) Rules, 2019

Marriage Act [*Chapter 5:11*]

Mines and Minerals Act [*Chapter 21:05*]

National Museums and Monuments Act (National Museums and Monuments Act [*Chapter 25:11*]

National Trust Act [*Chapter 25:12*]

Natural Resources Act [*Chapter 20:13*]

Natural Resources Court Rules, 1974 (RGN 353 of 1974)

Noxious Weeds Act [*Chapter 19:07*]

Parks and Wildlife Act [*Chapter 20:14*]

Police Act [*Chapter 11:10*]

Post and Telecommunications Corporation Act [*Chapter 12:05*]

Postal and Telecommunications Act [*Chapter 12:05*]

Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real-Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, 2019 (Statutory Instrument 33 of 2019)

Private Voluntary Organizations Amendment Bill, H.B. 10, 2021

Public Order and Security Act [*Chapter 11:17*]

Regional Town and Country Planning Act [*Chapter 29:12*]

State Liabilities Act [*Chapter 8:14*]

Tourism Act [*Chapter 14:20*]

Urban Councils Act [*Chapter 29:15*]

Water Act [*Chapter 20:24*]

Zimbabwe National Water Authority Act [*Chapter 20:25*]

Zimbabwean cases

Amalgamated Rural Teachers Union of Zimbabwe & Another v ZANU PF & Another Masvingo High Court unreported judgment HMA 36/18

Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information & Others 2005 (1) ZLR 222 (S)

Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State Information Publicity & Others 2004 (1) ZLR 538 (S)

Association of Independent Journalists & Others v Minister of State for Information & Others 2004 (1) ZLR 94 (S)

Augar Investments OU v Minister of Water and Climate & Another Harare High Court unreported case 15-HH-278

Buhera North Election Petition (Tsvangirai v Manyonda) 2001 (1) ZLR 295 (H)

Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Others 2003 (2) ZLR 236 (S)

Capital Radio (Pvt) Ltd v Minister of Information 2000(2) ZLR 243 (S)

Catholic Commission for Justice and Peace, Zimbabwe v Attorney-General & Others 1993 (1) ZLR 242 (S), 1993 (4) SA 239 (ZS)

Chamisa v Mnangagwa Constitutional Court unreported case CCZ 21/2019

Charera v University of Zimbabwe & 2 Others Harare High Court unreported case HH 419-17

Chavhunduka & Another v Min of Home Affairs & Another 2000 (1) ZLR 552 (S)

Chawanda v Zimnat Insurance Co Ltd 1989 (2) ZLR 352 (H)

Chawira & 13 Others v Minister, Justice Legal & Parliamentary Affairs & Others Constitutional Court unreported case CCZ 3/2017

Chigwada v Chigwada& 2 Others Supreme Court unreported case SC 188/2020

Chihowa v Mangwende 1987 (1) ZLR 228 (S), 1991 (2) SA 825 (SC)

Chinamora v Angwa Furnishers (Pvt) Ltd & Others 1996 (2) ZLR 664 (S), 1998 (2) SA 432 (ZS)

Chinanzvavana v Minister of Justice, Legal & Parliamentary Affairs & Others Masvingo High Court unreported case HMA 13/19

Chiriseri v Commissioner of Police, Minister of Home Affairs & Officer in Charge, St Mary's Police Station Harare High Court unreported case 20-HH-450

Chiromo v Katsidzira 1981 ZLR 418 (C)

Chironga & Anor v Minister of Justice, Legal & Parliamentary Affairs Constitutional Court unreported case [2020] ZWCC 14

Chironga & Mahiya v Minister of Justice, Legal and Parliamentary Affairs & the Government of Zimbabwe Constitutional Court unreported case CCZ 42/2015

Chitowa v Zimbabwe National Water Authority (unreported)

Chiyanike & Choto v Commissioner-General of Police, Minister of Home Affairs & Cultural Heritage and Rachid Siri Harare High Court unreported case 20-HH-999

Choto v The Minister of Home Affairs and Cultural Heritage, Commissioner General of Police, Officer in Charge of Makoni Police Station, Chief Executive Officer of Parirenyatwa Group of Hospitals & Minister of Health and Child Care Harare Civil Magistrates Court unreported case 3882/19

City of Harare v Mukungurutse & 3 Others Supreme Court unreported case 18-SC-046

City of Harare v Mushoriwa Supreme Court unreported case [2018] ZWSC 54

Charera v University of Zimbabwe & 2 Others Harare High Court unreported case HH 419-17

Combined Harare Residents Association v City of Harare & 4 Others Harare High Court unreported case HC 2156/20

Community Water Alliance v Environmental Management Agency & Minister of Environment, Tourism and Hospitality Industry Harare High Court unreported case HC 2304/20

Consolidated Appeals of *Cosmo Trust, Barbara Vitoria, Margaret Soper, Linda Bromley & City of Harare, Sharadkumar Patel, Meadows (Pvt) (Ltd), Environmental Management Agency & the Minister of Environment; and The Cosmo Trust v Minister of Environment, Environmental Management Agency, Sharadkumar Patel & Meadows (Pvt) (Ltd*) Administrative Court unreported cases ACC 81/18 and ACC 63/18

Cosmo Trust, Barbara Vitoria v Meadows (Pvt) Ltd, Sharadkumar Patel, The Mayor of City of Harare, Director of Works City of Harare, Engineer Philip Pfukwa, Jonathan Mutimukulu, Chairman of Environmental Management Committee of City of Harare & Environmental Management Committee Administrative Court, unreported case [AC 38/16]

Cosmo Trust, Margaret Soper, Linda Bromley v City of Harare, Sharadkumar Patel, Meadows (Pvt) (Ltd), Environmental Management Agency & the Minister of Environment Administrative Court, unreported case, [ACC 22/18] [ACC 91/18] (18-AC-022)

Deary NO v Acting President, Rhodesia, & Ors 1979 (4) SA 43 (R)

Debshan (Pvt) Ltd v The Provincial Mining Director of Matabeleland South Province, The Provincial Mining Director of Matabeleland North Province, The Minister of Mines and Mining Development & the Secretary for Mining and Mining Development (26 January 2017) Bulawayo High Court unreported case 17-HB-011

Democratic Assembly for Restoration Empowerment v Saunyama NO & 3 Others Constitutional Court unreported case CCZ 9/2018

Dhlamini & Ors v Carter NO & Another NO (2) 1968 (2) SA 464

Dongo v Mwashita & Others 1995 (2) ZLR 228 (HC)

Dusabe v Harare City Harare High Court unreported case [2016] ZWHHC 116

Dzamara v Minister of Home Affairs, Minister of State Security, Commissioner General of the Police & Director General of the Central Intelligence Organisation Harare High Court Harare unreported case HC 2211/15

Election Resource Centre v Charumbira & 2 Ors Harare High Court unreported case HH270/2018

Firinne Trust & Ors v Zimbabwe Broadcasting Corporation & Ors, Masvingo High Court unreported case HMA 23/19

Gokwe North Election Petition (Sibangani Mlandu v Eleck Mlandu) Harare High Court unreported case HH-04-03

Greendale Residents and Ratepayers Association v City of Harare & 4 Others Harare High Court unreported case HC 2000/19, HC 5033/19, HC 4639/2

Harare Wetlands Trust & Newlands Residents Association v Life Covenant Church & Others Harare High Court unreported case HH 819/19, HC 3440/19

Hillside Park Association v Glorious All Time Functions (Pvt) Ltd & Others Harare High Court unreported case 19-HH-349

Homeless People's Federation & Ors v Minister of Local Government and National Housing & Ors Supreme Court unreported case Civil Appeal No. SC 541/2019

In Re *Munhumeso & Others* 1995 (1) SA 551 (ZSC)

In Re: *Prosecutor-General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* (28 October 2015) Constitutional Court unreported case CCZ 13/2017 Const Application No. CCZ 8/15; [2017] ZWCC 13

Ingham-Thorpe & Others v Zimbabwe Electoral Commission & Anor Harare High Court unreported case HC 3584/18

Ishemunyoro v Ishemunyoro, Tynserve Distributors (Private) Limited, the Registrar of Deeds and the Sheriff Supreme Court unreported case SC 14/19

Karimazondo & Karimazondo v Minister of Home Affairs, Harare High Court unreported case 01-HH-191

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (S)

Katsamudanga & Arnold Farm & Ors v Minister of Land and Rural Settlement NO & 2 others (unreported)

Katsidzira v Chiromo 1981 ZLR 87

Kika v Minister of Justice & Others; YLAZ v JSC and Others Harare High Court unreported case HH 264-21

Law Society of Zimbabwe v Minister of Transport & Another 2004 (1) ZLR 257 (S)

Madanhire & Anor v Attorney General Constitutional Court unreported case CCZ 2/14

Madzimbamuto & Anor v Lardner-Burke NO & Anor 1966 (4) SA 462 (R)

Madzimbamuto v Lardner-Burke NO & Anor NO; Baron v Ayre NO & Ors NNO 1968 (2) SA 284 (RA)

Madzokere & 13 Ors v The State High Court unreported case 154-11; CRB B 632/11 B 656/11

Madzokere & 3 Others v The State Supreme Court unreported case ZWSC 71/21

Magaya v Magaya 1999 (1) ZLR 100 (S)

Majome v ZBC & Others Constitutional Court unreported case CCZ 14/2016

Makamure v *Minister of Public Service, Labour and Social Welfare & Another* Constitutional Court unreported case CCZ 1/2020

Makamure v Mutongwizo 1998 (2) ZLR 154 (H)

Makani v Epworth Local Board Harare High Court unreported case HH 550–14

Makani & Others v Arundel School & Others Constitutional Court unreported case CCZ 7/2016

Makhiwa v Min of Education & Others Bulawayo High Court unreported case HC 51/2013) [2013] ZWBHC 6

Makoka v Minister of Health and Child Care & 4 Others Harare High Court unreported case HH 414/2020, HC 3003/2020), [2020] ZWHHC 414

Makone & Anor v Chrmn, ZEC & Anor 2008 (1) ZLR 230 (H)

Maluleke v Dupont NO & Anor 1967 (4) SA 31 (RA)

Mandava v Chigudu & Others 2000 (1) ZLR 679 (H)

Mangwiro v Minister of Justice & Legal Affairs NO & Others Harare High Court unreported case HH 172/17

Mangwiro v Minister of Justice, Legal and Parliamentary Affairs, Minister of Home Affairs and the Attorney-General of Zimbabwe Constitutional Court unreported case CCZ 23/18

Manjoro v Minister of Home Affairs, Commissioner-General of Police & Prosecutor-General Harare High Court unreported case 2965/14, 153/18

Mapingure v Minister of Home Affairs and 2 Others Supreme Court unreported case SC 22/14

Markham & Anor v Minister of Health and Child Care & 3 Others HH 263/2020, HC 2168/2020), [2020] ZWHHC 263

Marova v Chief Superintendent & 6 Others Harare High Court unreported case (HC 288/21)

Masimo v Munhar Mutasa Civil Magistrates Court unreported case

Mawarire v Mugabe NO & Others Constitutional Court unreported case CCZ 1/2013

MDC & Anor v Chinamasa & Anor NNO 2001 (1) ZLR 69 (S)

Mhora v Mhora Supreme Court unreported case SC 89/20

Minister of Justice and Law and Order & Attorney-General v Musarurwa & Ors and Nkomo &Ors 1964 RLR 298 (A); 1964 (4) SA 209 (SRA)

Moffat & 2 others v Marange Apostolic Church of St Johanne & 8 others Harare High Court unreported case HC5112/21

Mount Darwin South Election Petition (Godfrey Don Mumbamarwo v Saviour Kasukuwere) Harare High Court unreported case HH-8-2002

Moyo v Chacha Constitutional Court unreported case CCZ 19/2017

Mpofu v ZERA & 2 Others Constitutional Court unreported case CCZ 13/20

Mudehwe v Minister of Home Affairs and Cultural Heritage, Commissioner-General of Police and Minister of Finance and Economic Development Harare Civil Magistrates Court unreported case 32525/16

Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs NO & Ors Constitutional Court unreported case CCZ 12/2015 [2016] ZWCC 12

Mugari v Tungamirai Electoral Court unreported case EC30/2018

Mukoko v Minister of State Security & Ors Harare High Court unreported case 18-HH-000

Mukoko v Attorney-General (20 March 2012) Supreme Court unreported case 12-SC-011

Mukungurutse & Others v City of Harare & Anor Harare High Court unreported case 16-HH-558

Mumbamarwo v Kasukuwere (Mount Darwin South Election Petition) Harare High Court unreported case HH-8-2002

Mupungu v Minister of Justice, Legal and Parliamentary Affairs & 6 Ors Constitutional Court unreported case CCZ 7/21

Mushoriwa v City of Harare Harare High Court unreported case HC 4266/2013, [2014] ZWHHC 195

Muswere v Makanza 2004 (2) ZLR 262

Mutoko South Election Petition (*Muzira v Muchena)* 2001 (1) ZLR 308 (H)

Mutsai & 19 Ors v City of Harare & Or High Court Harare, unreported case 17-HH-835

Muzanenhamo & Another v Katanga 1991 (1) ZLR 182 (SC)

National Constitutional Assembly v The President & Others 2005 (2) ZLR 310 (H)

Ndlovu & Sibanda v Zibusiso Sibanda t/a Imani Mine & Anor Harare High Court unreported case HC 5732/19

Njanina & Others v Zimbabwe Electoral Commission and Candidates to the March 2008 Harmonised Elections in Zimbabwe and ZANU PF and MDC Candidates and Others Harare High Court unreported case HH100-08

Nkomo & Anor v Attorney-General & Ors 1993 (2) ZLR 422 (S); 1994 (3) SA 34 (ZS)

Nkomo v Lardner-Burke NO & Anor 1965 RLR 557 (AD); 1966 (1) SA 357 (SRA)

Nyambirai v National Social Security Authority & Anor 1995 (2) ZLR 1 (S)

Nyemba v Jena 1984 (2) ZLR 169 (H)

Nyika & Tobaiwa v Minister of Home Affairs, Commissioner-General of Police NO, Inspector Damburai and Constable Lisborne Chibanda Harare High court unreported case 181/16

Panganayi v Minister of Home Affairs and the Commissioner-General of Police and Sergeant Nepson Utete Harare Civil Magistrates Court unreported case 16927/17

Patel & Anor v Cosmo Trust & Ors Supreme Court unreported case SC 163/21

Pfungwa & Justice for Children Trust v Headmistress Belvedere Junior Primary School & Minister of Education, Sport and Culture and Minister of Justice, Legal and Parliamentary Affairs Harare High Court unreported case HH 148-17, HC 6029/16

Pitamber v City of Harare and *Ephraim Matanda & United Mutare Residents and Ratepayers Trust v City of Mutare* (unreported)

R v Archion Ndhlovu & 31 Ors 1968 (4) SA 515 (RAD)

R v Musarurwa 1964 (4) SA 36 (SRA)

Retrofit (Pvt) Ltd v Post and Telecommunications Corporation 1996 (1) SA 847 (ZC)

S v A Juvenile 1989 (2) ZLR 61 (SC)

S v Madzokere & Others Harare High Court unreported case HC 55/2012, ZWHHC 337

S v Mpofu & Another Constitutional Court unreported case [2016] ZWCC 5

S v Mwonzora Constitutional Court unreported case CCZ 17/2016

S v Chokuramba, Justice for Children Trust's intervening as Amicus Curiae*, Zimbabwe Lawyers for Human Rights intervening as* Amicus Curiae Constitutional Court unreported case CCZ 10/19, CCZ 29/15

Simbarashe v Zimbabwe Electoral Commission & Anor 2008 (1) ZLR 342 (H)

Smith NO and Lardner-Burke NO v Wonesayi 1972 (1) RLR 262 (A); 1972 (3) SA 289 (RA)

Sogolani v Minister of Primary and Secondary Education & 3 Others Constitutional Court unreported case CCZ 20/2020; [2020] ZWCC 20

South African Transport and Allied Workers' Union & Another v Garvas & Others (SATAWU) 2013 (1) SA 83 (CC)

Trustees of the Harare Wetlands Trust v University of Zimbabwe, Environmental Management Agency, City of Harare & Upper Manyame Catchment Council High Court Harare unreported case HC 7043/18

Tsvangirai & Anor v The Editor, The Herald *& Anor* 2003 (1) ZLR 451 (H)

Tsvangirai v Mugabe & Others 2003 (1) ZLR 457 (H)

Tsvangirai v Mugabe & Others Constitutional Court unreported case CCZ 20/2017

Tsvangirai v Registrar-General of Elections 2002 (1) ZLR 20

United Parties v *Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 (2) ZLR 254 (S)

Veritas v ZEC & 2 Others; Firinne Trust also known as Veritas v ZEC & 2 Others Supreme Court unreported case 103/2020

Williams & 3 others v Co-ministers of Home Affairs & 2 others Supreme Court unreported case SC 207/11

Woods v Minister of Justice Legal and Parliamentary Affairs 2000 (4) SA 1 (ZS)

ZELA & Fidelis Chima v Zimbabwe Mining Development Corporation (ZMDC), Zhongxin Mining Group Tongmao Coal Company, Minister of Mines and Minister Development & the Environmental Management Agency Harare High Court unreported case HC 4888/20

ZELA & Others v Anjin Investments (Pvt) Ltd & Others Harare High Court unreported case HH-523/15

ZELA v Chitungwiza Municipality Harare High Court unreported case HC 2778/20

Zimbabwe Association of Doctors for Human Rights (ZADHR) v Minister of Health and Child Care, Minister of Finance and Economic Development and Minister of Transport and Economic Development (unreported High Court decision, 14 April 2020)

Zimbabwe Development Party & Voice of the People v President of Zimbabwe & Speaker of Parliament & Chairperson of Zimbabwe Electoral Commission Constitutional Court unreported case CCZ 3/2018

Zimbabwe Homeless People's Federation & Others v Minister of Local Government and National Housing & Others Supreme Court unreported case 94/2020; Civil Appeal No. SC 541/2019

Zimbabwe Lawyers for Human Rights & Anor v President of the Republic of Zimbabwe 2000 (1) ZLR 274 (S)

Zimbabwe Lawyers for Human Rights & Another v President of Zimbabwe & Another 2003 (2) ZLR 444 (S)

Zimbabwe Lawyers for Human Rights v Minister of Transport & Others 2014 (2) ZLR 44 (H)

Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143 (S)

ZIMTA & Ors v Minister of Education 1990 (2) ZLR 48 (H)

Regional cases and domestic cases from other jurisdictions

Besigye v Museveni and Another Election Petition No. 1 of 2001; [2001] UGSC 4

Charles Edward Irwin and Another v William Mure (1874) 1 R. 834

Dr Saulos Klaus Chilima and Dr Lazarus Mccarthy Chakwera v Professor Arthur Peter Mutharika and The Electoral Commission Constitutional Reference 1 of 2019

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC)

Fox v Queen [2002] 2 AC 284 (PC) (St Kitts and Nevis)

Government of the Republic of South Africa v Grootboom *2001 (1) SA 46 (CC)*

Gundu v Sheriff of Southern Rhodesia 1965 RLR 301 (AD)

In re *Southern Rhodesia* [1919] AC 211

Joseph v City of Johannesburg 2010 (4) SA 55 (CC)

Lydia Emelda Simmons v Eshaq Khan [2008] EWHC B4 (QB)

Madzimbamuto v Lardner-Burke [1968] 3 All ER 561

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)

Morgan v Simpson [1975] QB 151; [1974] 3 WLR 517; [1974] 3 All ER 722

My Vote Counts NPC v Minister of Justice and Correctional Services and Another [2018] ZACC 17

Noah Kazingachire and al v Zimbabwe, Communication 295/04, § 126–133l, African Commission on Human and People's Rights (2012)

Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Minister of Justice and Constitutional Development with Centre for Constitutional Rights CCT 19/07 (2008) ZAAC 8

Occupiers of 51 Olivia Road v City of Johannesburg 2008 (3) SA 208 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

President of the Republic of South Africa v M & G Media Limited [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC)

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC)

Queen v Hughes [2002] 2 AC 259 (PC) (St Lucia/St Vincent and the Grenadines)

R v Inspectorate of Pollution & Another; Ex parte Greenpeace Limited [1994] 4 All ER 329

Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others [2010] NAHC 7

Regina v Mapolisa 1964 RLR 591 (PC)

Regina v Runyowa 1966 RLR 42 (PC)

R*esidents of JoeSlovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC)

Reyes v Queen [2002] 2 AC 235 (PC) (Belize)

South African National Defence Union v Minister of Defence (1999) ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 61

Treatment Action Campaign v Minister of Health (No 2) 2002 (5) SA 721 (CC)


CELEBRATING
25
YEARS
1996 - 2021
Human rights| Justice
Tolerance| Constitutionalism
Rule of law| Equality| Democracy
LEGAL
RESOURCES
FOR
HUMAN RIGHTS