SETTLEMENT CHIKWINYA
and
KUCACA IVUMILE PHULU
and
WILLIAS MADZIMURE
and
REGAI TSUNGA
and
SICHELESILE MAHLANGU
and
TENDAI LAXTON BITI
and
PEOPLE'S DEMOCRATIC PARTY
versus
JACOB MUDENDA NO
and
THE PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
THE ZIMBABWE ELECTORAL COMMISSION
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
BENJAMIN RUKANDA
and
LUCIA MATIBENGA
and
PEOPLE'S DEMOCRATIC PARTY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14, 18 and 25 January 2022

Urgent Chamber Application

S M Hashiti, for the applicant
K Tundu, for 1st and 2nd respondents
T M Kanengoni, for 3rd and 4th respondents
S Simango, for 5th and 6th respondents
No appearance for the 7th respondent

CHITAPI J: The first to the sixth applicants inclusive were elected as Honourable Members of the National Assembly and therefore of the Parliament of Zimbabwe in the harmonized elections held in July, 2018. In their order they represented the following legislative constituencies upon their election:

(a) First applicant Settlement Chikwinya – Mbizo
(b) Second applicant Rucaca Ivumile Phulu – Nkukumane
(c) Third applicant Willias Madzimure – Kambuzuma
(d) Fourth applicant Regai Tsunga – Mutasa South
(e) Fifth applicant Sichlesile Mahlangu – Pumula
(f) Sixth applicant Tendai Biti – Harare East.

The tenure of office of the applicants upon their election was five (5) years to 2023 when the life of the current Parliament would come to an end. The seventh applicant is a political party with power to sue and be sued, it being a *universitas*.

The first respondent is the Speaker of Parliament and stands cited in his official capacity. In terms of s 126(1) of the Constitution of Zimbabwe, the Speaker is described as the Presiding Officer of the National Assembly. The speaker is also described in s 135(1) of the Constitution as the Head of Parliament who must exercise the functions of Speaker in terms of the Standing Orders of Parliament. Parliament and the President of Zimbabwe constitute the legislature as described in s 116 of the Constitution. Section 118 of the Constitution provides that Parliament consists of the Senate and the National Assembly. The two bodies exercise powers set out in s 139 as read with s 130 of the Constitution. The two bodies have power to initiate, prepare, consider or reject any legislation and to exercise any other functions imposed upon them by any law. The proceedings of the two bodies and therefore of Parliament are regulated by Standing Orders which these two bodies individually or collectively make. I have deliberately gone into a little more detail in describing the first respondent, Parliament and the position of the first respondent in the two bodies that constitute Parliament because the description will be necessary in resolving one of the issues for determination, being whether Parliament conducted itself in any way in relation to the exclusion or recall of the applicants from Parliament or it was the first respondent's conduct at play and in the latter case whether the conduct of the first respondent in the circumstances of this case was the conduct of Parliament.

The second respondent is Parliament of Zimbabwe. As already indicated, it is constituted by the Senate and the National Assembly with its Head being the first respondent.

It must I think be stressed that the first respondent is not a Member of Parliament and if he was a Member of Parliament before his election to the position of Speaker by the National Assembly he ceases to be a Member of Parliament upon his or her election as Speaker. Section 124 of the Constitution defines or lists the composition of the National Assembly. The Speaker whom members of the National Assembly elects at its first sitting is not part of the composition of the National Assembly. The Speaker is deputized by an elected Deputy Speaker in terms of s 127(1) of the Constitution. Unlike the Speaker, the Deputy Speaker remains a member of Parliament which implies that when the Deputy Speaker is not in the Chair of Speaker, he or she participates in deliberations of the National Assembly and would be entitled to vote on a matter on which it is necessary for the National Assembly to vote to pass or reject a motion. By contrast, the Speaker albeit being the Head of Parliament does not have voting rights in either of the two houses, the Senate and National Assembly that constitute Parliament.

Just to complete the matrix on who constitutes the second respondent, the Senate is the other body constituted in terms of s 120 of the Constitution which together with the National Assembly constitute Parliament. A reference to an act done by or passed by Parliament implies that the act has been done by the two constituent bodies which make up Parliament. Again, what I state here may appear to be a simple question with an easy or given answer. The question is what constitutes an act of and/or conduct of Parliament? The answer informs the determination of an issue raised in the notice of opposition by the first, second, fifth and sixth respondents on whether or not the judgment of MAFUSIRE J which is at the centre of this application raised a matter concerning the conduct of Parliament. The issue will be discussed later in more detail.

The third respondent is the Zimbabwe Electoral Commission. It is a constitutionally created body by virtue of s 238 of the Constitution. Its functions are set out in s 239 of the Constitution. Broadly speaking, the body prepares for, conducts and supervises elections of the President, Parliament, Local Authorities, Chiefs and Referendums. Its further ancillary or related functions are listed in subs (b) to (k) inclusive of s 239. Due to the nature of the relief sought by the applicants in this application which does not impact upon the functions of the third respondent the third respondent advisedly filed a notice to the effect that is would abide the decision of the court. Counsel for the third respondent Mr *Kanengoni* however sat through the proceedings in a watching brief.

The fourth respondent is the President of the Republic of Zimbabwe. The President is not a Member of Parliament. He was cited because he issued a Proclamation of Constituencies

with vacant electoral seats. He also fixed the dates for the sitting of the Nomination Court and for voting in by-elections to fill in the vacancies. The relief sought if granted will impact on the Proclamation made by the President. He is a necessary Party. Like the third respondent, the fourth respondent filed a notice in which he indicated that he would abide the decision of the court.

The fifth respondent Benjamin Rukanda is described by the applicants as a person "whose full and further particulars are unknown" to them. He is described as the person who "purportedly" made a declaration in terms of s 129(1)(k) of the Constitution and the declaration allegedly made is said to be the source of problems which culminated in the litigation before the court. The fifth respondent in his opposing affidavit however describes himself as the Secretary for the People's Democratic Party. He attached to the notice of opposition a resolution from the extract of minutes of a meeting of that party held at the sixth respondent's residence in Gweru dated 12 September 2020. The essence of the resolution is to give the fifth respondent authority to *inter alia* institute and defend legal proceedings on behalf of the Party, such proceedings being concerned with recalls of party members from Parliament and Local Authorities.

The sixth respondent is Lucia Matibenga. The applicants describe her as the former Chairperson of a political party called the People's Democratic Party. The applicants aver that the sixth respondent leads a breakaway group being the seventh respondent. The seventh respondent uses the same name as the applicant. The fifth and sixth respondents through their counsel Mr *Simango* submitted in relation to the seventh respondent that there was no legal entity called the People's Democratic Party splinter group. There is therefore a clear dispute amongst the applicants and the fifth and sixth respondents on the leadership of the party. Resultantly, there was no notice of opposition filed on behalf of the seventh respondent because of its disputed legal existence. I am however not called upon to determine the leadership status of the warring parties in this application and will leave that issue at that.

The gravamen of this dispute is understood easily upon reference to case No. HC 1348/21 in which this court per MAFUSIRE J rendered a judgment No. HH 576-21 on 22 September, 2021. The same parties herein were the litigants in case No. HC 1348/21. The brief material facts of case No. HC 1348/21 were that the applicants' membership of the National Assembly was terminated in terms of s 129(1)K of the Constitution at the instance of the first respondent acting on behalf of the seventh respondent. It is noted in this regard that the fifth and the sixth respondents in *casu* did not in the opposing affidavit deny the existence

of the seventh respondent nor their alleged connection with the seventh respondent. The effect of the termination was that their seats or constituencies which they represented prior to termination became vacant. To put the constitutional position on recall into proper perspective, it is necessary to quote s 129(1)(k) of the Constitution. It provides:

> "**129(1) the seat of a Member of Parliament becomes vacant -**
> (a) – (j) ……..
> (k) if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned by written notice to the Speaker of the President of the Senate, as the case may be has declared that the Member has ceased to belong to it.
> (l) – (n) ……..."

There were developments relating to splits of political parties to which the applicants and the fifth and sixth respondent had been members. I do not find it necessary to go into intricacies of the parties fall outs. It suffices that as found by MAFUSIRE J, this court made an order in case No. HC 5292/20 wherein the recall of the applicants as Members of the National Assembly was set aside for nullity. The Speaker was ordered to disregard the letters of recall. It was ruled that the applicants were not members of the breakaway party or of the party led by the sixth respondent. It followed that, that party had no powers to recall the applicants. The applicants were nonetheless recalled upon the Speaker reading to Parliament the invalid declaration of termination of the applicants' membership of the political party led by the sixth respondent. MAFUSIRE J was called to declare illegal the purported termination of the applicants' membership of Parliament or National Assembly to be precise. The learned Judge issued the declaration and ordered the fourth respondent (Speaker) and Parliament to restore the applicants' membership to their seats as legislators representing constituencies to which they were elected as representatives in the National Assembly. The learned judge further ordered that those applicants who had held positions in any Committees of Parliament be restored to such positions and that they be entitled to all benefits which they enjoyed and are entitled to enjoy in their restored positions.

The first and second respondents herein referred to as respondents in the case No. HC 1348/21 did not oppose the relief sought by the applicants. They indicated that they would abide the order of the court. Consequent on the judgment of MAFUSIRE J, the fifth, sixth and seventh respondents noted an appeal against that judgment to the Supreme Court under case No. SC 345/21 on 27 September, 2021. The appeal was however dismissed by the Registrar of the Supreme Court for an alleged failure by the respondents to pay security for costs.

Following the dismissal of the appeal by letter dated 16 December, 2021 written by the Registrar, it meant that the judgment of MAFUSIRE J took effect. The respondents have since applied for reinstatement of the appeal under case No. SC 10/2022. They filed their application on 10 January, 2022. The application is yet to be determined. The respondents sought to persuade me to accept that the application for reinstatement of appeal had merit and that it would undoubtedly be successful. The respondents' counsel drew my attention to the fact that the Registrar had admitted that she erroneously determined that the security of costs had not been paid. The thrust of the argument was that I should not be persuaded to grant an order which would have a limited life span since it was a foregone conclusion that the appeal would be reinstated and the judgment of MAFUSURE J in turn be re-suspended.

The problem with the proposition that I should express a view in relation to the success or otherwise of the application for reinstatement of appeal pending before the Supreme Court is that the decision to reinstate the appeal must be left to the Supreme Court to make. The decision involves a consideration of other factors other than the mere fact that the Registrar erroneously dismissed the appeal. The decision whether or not to reinstate the appeal as can be understood upon a reading of the Supreme Court decision in *Sergeant Mhande and Anor* v *Chairman of Police Service Commission and others* SC 63/18 is an indulgence granted in the discretion of the judge upon a consideration of all relevant facts. I would tread on dangerous grounds therefore to determine this application upon a persuasion that the application for reinstatement will be an assured success. It is therefore in this case proper to take note that without the reinstatement of appeal application having been determined there is in fact no pending appeal before the Supreme Court and the judgment of MAFUSIRE J is considered to be extant and in effect.

What brings the applicants to court on an urgent basis is that consequent on the declaration of the existence of vacancies in the constituencies represented by the applicants as already explained, the need for by elections to fill in those vacancies to be held arose. The fourth respondent by virtue of constitutional powers vested in him caused the publication of Proclamation No. 1 of 2022. The Proclamation declared vacant of elected members of the National Assembly the constituencies occupied by the applicants. The Proclamation was made on 6 January, 2022. This application was filed on the following day, the 7th January, 2022. The Proclamation fixed the dates for the sitting of the nomination court as 26 January, 2022 and the date of the by elections as 26 March, 2022.

In this application the applicants in essence pray to the court for an order setting aside the proclamation by the fourth respondent to the extent that it includes the constituencies represented by the applicants. The applicants submitted that there were no vacancies for which by elections were due because the declarations which led to the termination of the applicants membership in the National Assembly had been declared null and void by judgment of MAFUSIRE J. The fourth respondent, the President of Zimbabwe who issued the proclamation for the holding of the by-elections and existence of vacancies in constituencies represented by the applicant, filed a notice through his legal practitioners that he would abide the decision of the court. The same position was adopted by the third respondent, not surprisingly so, because its mandate is to conduct the elections and not make determinations on disputes regarding process and validity of recall of members of Parliament.

The first and second respondents opposed the application. It must be noticed that in the judgment of MAFUSIRE J they did not contest the application and undertook to abide the decision of the court. They did not appeal against the decision of the court and to that extent they remain bound to the judgment aforesaid and are expected everything being equal to implement it to the extent that they are required to do so. In opposing the application the first and second respondents raised three points *in limine*. Firstly they submitted that the application was brought in an incorrect manner. They submitted that the rules of court did not provide for an application called "Urgent Court Application". They contended that the applicants ought to have filed a court application giving the respondents ten (10) days within which to oppose the application. The first and second respondents further submitted that the applicants if they intended that the court application is heard on an urgent should then have filed a certificate of urgency in a separate application for an urgent hearing. The respondents prayed for the dismissal of the application arguing that the application was fatally defective for want of form.

It is not intended to unduly interrogate the issue of the form of an application wherein the applicant prays for declaratory relief as *in casu*. A declaratory order is normally in the form of a final order. I have considered the provisions of r 57(1) and 57(2) of the court Rules. They read as follows:

> "1. Subject to this rule, all applications made for whatever in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made:
> a) as a court application, that is to say, in writing to the court on notice to all interested parties having a legal interest in the matter; or
> b) as a chamber application, that is to say, in writing to a judge.
> 1. an application shall not be made as chamber application unless
> a) the matter is urgent and cannot wait to be resolved through a court application; or

b) these rules or any other enactment so provide; or
c) the relief sought is procedural or for a provisional order where no interim relief is sought only; or
d) the relief sought is for a default judgment or a final order where-
   i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default ; or
   ii) there is no other interested party to the application; or
   iii) every interested party is a party to the application; or
e) There are special circumstances which are set out in the application justifying the application."

Upon an analysis of the quoted rules, it may be recorded that r 57(1) applies to all applications made for whatever purpose in terms of the court rules or applications made under any other law. The current application is for declaratory relief and the jurisdiction of this court to grant a declaratory order is located in s 14 of the High Court Act, [*Chapter 7:06*]. The Act becomes "any other law". Therefore the default position is that the application should be in the form of a court application made on notice to all interested parties. In terms of r 59 (1) the application should be in form 23 and be supported by affidavit(s) which set out facts on which the applicant relies.

Rule 60 (1) provides that a chamber application shall be made by way of entry in the chamber book and be accompanied by Form No. 25 and unless it is for default judgment and facts are evident from the record shall be supported by one or more affidavits setting out facts upon which the applicant relies. If a chamber application is to be served upon interested parties, then it must be in form of 23 with appropriate modifications. The nature of the modifications are not set out. It may be advisable to do so as well as to give time lines by which the respondents who are required to be served with a chamber application should respond to such application if they intend to oppose it.

In casu the applicants headed their application, "Urgent Court Application for Declaratory and Ancillary relief in terms of s 14 of the High Court Act". They then stated as follows:

> "TAKE NOTICE THAT the applicants intended to apply to the High Court of Zimbabwe at Harare by way of an URGENT Court application for an order in terms of the Draft Order annexed to this notice and that the accompanying affidavits/ and documents will be used in support of the application.
>
> FURTHER TAKE NOTICE THAT if you intend to oppose this application you must note the days within which to file your papers have been shortened for urgency and so you will have to do so on an urgent basis as follows;
>
> a) You must file any Notice of Opposition in Form No. 24 as provided for in the Rules of Court, together with one or more opposing affidavits within 3 (three) days of service of this application upon you.

b) You must serve a copy of the Notice of Opposition and affidavits (together with any annexures thereto) on the applicant at the address for service specified below as soon as it is filed and in any case no later than 1 (one) day filing.
c) The applicants will then file their Answering Affidavits and Heads of Argument within 2(two) days of service of the opposing papers.
d) The applicants will approach the Registrar for the matter to be set down on an urgent basis in which matter must be set down for interim basis which date must be before 15th of January 2022.
e) In between receipt of the Applicants'' Heads of Argument and the date of set down for hearing, you may file any Heads of Argument to be relied upon at the hearing

TAKE FURTHER NOTICE THAT the Court may issue additional directions."

The first and second respondent described the format above as alien and indicated that they were entitled to ten (10) days to respond to the application and not to three (3) days. I have pointed out to the respondents' interpretation of how to deal with an urgent court application. However r 57(2) provides for instances when an application which would otherwise be required to be filed as a court application may be filed as a chamber application. I record the contents of r 57(2):

"2. An application shall not be made as chamber application unless
a) The matter is urgent and cannot wait to be resolved through a court application; or
b) These rules or any other enactments; or
c) The relief sought is procedural or for a provisional order where no interim relief is sought only; or
d) The relief sought is for a default judgment or a final order where-
i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default ; or
ii) there is no other interested party to the application; or
iii) every interested party is a party to the application; or
f) There are special circumstances which are set out in the application justifying the application."

From an analysis of r 59(2), it is competent to bring as a chamber application, an application which would ordinarily be required to be brought as a court application in the above circumstances. *In casu*, the applicants filed a certificate of urgency together with the application and justified the urgency. The urgency was in my view established because the Nomination Court to register candidates for the by-elections will sit on 26 January, 2022. In my view the by-elections are a matter of national interest and good governance. There can be no doubt that the parties and the electorate concerned would have an interest to have the application determined urgently. If there should be no elections to be held in the disputed constituencies, then there would be no reason to kick start the process of elections. Elections are a huge cost for the fiscus and for the parties who intend to contest them. The question of

whether or not the by-elections be held or not commended itself for urgent resolution. The issue of urgency was commendably not persisted in by counsels for the respondents.

I have dealt with only one instance where a matter which would otherwise have been dealt with as a court applications is dealt with as a chamber application because it is urgent and cannot wait resolution through a court application. There are other instances which include the existence of special circumstances which justify the making of a court application as a chamber application. It will be the duty of the applicant to establish the grounds for bringing as a chamber application an application which otherwise should have been brought as a court application where the other party has challenged the propriety of the chamber application. Ultimately however, it is the judge before whom the chamber application is placed who must decide on its propriety. It is also axiomatic that save for instances in which a law specifically provides that defined proceedings must be commenced by way of court application as provided for in r 8 in which case the applicant would be obligated to follow that procedure, r 58 (13) provides as follows:

> "without derogation from rule 8 but subject to any enactment, the fact that an applicant has instituted-
> (a)a court application when he or she should have proceeded by way of chamber application; or
> (b)a chamber application when he or she should have proceeded by way of a court application;
> shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that-
> (c) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form ; and
> (d) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs.

It follows from the above rule that the bringing of an application by way of court application instead of by way of chamber application or *vice versa* does not on its own standing constitute a ground for dismissing an application. There are however exceptions in the quoted rule when the application may be dismissed in the discretion of the court of judge. The exceptions are detailed in para (c) as read with para (d). They are grounded in prejudice to interested parties who could have been prejudiced by a failure to institute the application in the proper form. For such perceived prejudice to be deemed sufficient cause for the dismissal of the application, the court of judge will consider whether the perceived prejudice cannot be cured by giving a direction that the party (ies) who may be prejudiced should be served and they are given an opportunity to make representations. The court may penalize the errant

applicant with a costs award against him where the court has made an order for service of the application upon the interested party.

In casu, the first and second respondents did not in the opposing affidavit allege any prejudice suffered by them by virtue of their alleged improper form of the application. When I asked counsel for the first and second respondent to orally address the issue of prejudice, counsel submitted that the first and second respondent did not have sufficient time to fully instruct counsel. When I enquired on whether or not the first and second respondents wanted to supplement their affidavit, counsel submitted that the first and second respondents stood by their affidavit and that it was not intended to file a supplementary affidavit. It followed that the prayer for the dismissal of the application for want of form was not legally sustainable in the absence of proof of perceived prejudice to the first and second respondents. To the extent that the fifth and sixth respondents feebly raised the issue of the form of the application without giving much detail in their affidavit nor through counsel in argument, their point *in limine* cannot be legally sustained on the same basis as for the first and second respondents.

On the urgency of the application, I have touched on this in some detail. The respondents relied on a common argument to argue that the application was not urgent. The respondents submitted that the need to act arose when the applicants became aware that they had lost their seats on Parliament on 17 March 2021. It was submitted that the applicants must have known that the President would make a Proclamation for the holding of by-elections and that the applicants ought to have acted at that time. The respondents submitted that the Proclamation was always envisaged and that its declaration and the fact that 26 January, 2022 being the date that the nomination court will seat is around the corner did not render the application urgent. As I have noted the objection was not strenuously persisted in by the respondents' counsels.

I observed that the matter was urgent and it was one of national importance, good governance and the rule of law. The history of the matter upon a consideration of the paper trail shows that following their recall from the National Assembly the applicants challenged the legality of the recall. The challenge culminated in the judgement of MAFUSIRE J. In my view, the question whether or not an applicant has acted with urgency in any given matter is circumstantial. The facts of each case are considered in reaching a decision on whether in his discretion the judge or court as the case maybe is persuaded to agree to determine the application on the urgent roll.

In the case of *Document Support Centre (Pvt) Ltd v Mapuvire* 2006(2) ZLR 240 at 243, MAKARAU J (as she then was then) stated:

> "Without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications."

As I have pointed out, the President's stance in the matter that he would abide the court's decision is no doubt legally informed because it does not really make sense for the President to persist on by elections being held where the vacancies of representation are under challenge in the courts. To do so would mean that there would be endless by elections being held depending on the court's judgment. It makes eminent jurisprudential sense to await the decisions of courts to resolve a dispute concerning the availability of a constituency for contestation in a by election where this is contested. It is my view that this is an appropriate case to remind litigants that objections based on the urgency of a matter should not be taken as routine. The facts must clearly establish that the matter is not urgent. MATHONZI J (as he then was) lamented in the case *Telecel Zimbabwe* v *Portraz and Ors* 2015 (1) ZLR 657 (H) that it has become routine or fashionable for legal practitioners to raise points *in limine* even where the objection did not have merit. Further discussion on the undesirability of taking underserved points *in limine* is to be found in many judgments which include *Halopac Enterprises (Pvt) Ltd* v *Chinhoyi Municipality* HH 119/20; *Blankent Mine (1983) Pvt Ltd* v *Fisan Moyo* ZOB HB 160/21: *Thandezile Jubane* v *Kumbulani Jubane* HB 97/17. The taking of the objection on urgency in this application was without merit on the facts and circumstances being considered holistically.

The last issue which was taken by all the opposing respondents was that the judgement of MAFUSIRE J dealt with or was concerned with the invalidity of the conduct of Parliament and thus required confirmation by the Constitutional Court before it could be of force. Reliance was placed on s 175 (r) of the constitution which reads as follows:

> "Where a court makes as order concerning the constitutional invalidity of any law or any conduct of the President of Parliament; the order has no force unless it is confirmed by the Constitutional Court."

The first and second respondent deposed as follows in para(s) 4.2 to 4.4

> "4.2 Having challenged their expulsion from Parliament in terms of Section 129 (1)(k) of the Constitution, the matter that was before MAFUSIRE J was, therefore, a constitutional matter and the applicants case was that their expulsion from Parliament was invalid.

4.3 The dispute concerned the constitutional invalidity of the conduct of Parliament. At page 4 of the judgment paragraph (8) which is attached as Annexure AA to the Founding Affidavit, the learned judge concluded by saying that:-

> **"As such, the argument concludes, it was wrongful for the Speaker to have recognized that letter and to have purported to act in term of it"**

4.4 At page 6 of the judgment paragraph 16, the Court has this to say:-

> **"The present matter no longer concerns the first respondent. E is out of the picture. The matter is now between the applicants and the Speaker and Parliament"**

And the end of the day, the Court ordered that:-

> **"The termination of membership to the Parliament of Zimbabwe of the first, second, third, fourth, fifth and sixth applicants herein on 17th March 2021 is hereby set aside"**

All of which means that the judgment of this Honourable Court, *vide* HH 516-21 concerns the constitutional invalidity of the conduct of Parliament."

The fifth and sixth respondents raised the same argument and stated as follows in para 5 and 6 of the fifth and sixth respondents opposing affidavit.

"ORDER SOUGHT IS INCOMPETENT

5. It is submitted that the matter under HH516/21 was a Constitutional matter and the order of the Court will be enforceable upon confirmation of the order by the Constitutional Court. See section 175(1) of the Constitution of the Republic of Zimbabwe which provides as follows:-

> "where a Court makes an order concerning the constitutional invalidity of any law as any conduct of the President or Parliament, the order has no force unless it is confirmed by the constitutional Court".

6. It is therefore submitted that up and until the order of MAFUSIRE J is confirmed by the constitutional Court, the order has no force. The applicants did not take steps to cause confirmation of the order but only reacted after the so called dismissal of the Appeal by the Registrar of the Supreme Court which dismissal the Registrar admit that it was in error."

The respondents in argument submitted that the judgement of MAFUSIRE J did not require confirmation because it did not relate to the invalidity of the conduct of Parliament. It is my view unnecessary to engage in hair splitting arguments on the issue. The starting point in the context of this application is to interpret the meaning of the words "conduct of Parliament". One needs to appreciate the definition of Parliament. This appeared to be elementary until as I experienced in this application, it became clear that respondents counsel exhibited a want of knowledge on the definition. Parliament as I have already noted comprises two legislation houses namely the Senate and the National Assembly. Therefore the conduct

of Parliament must perforce be shown to be constituted by what the two legislative houses did. Conduct connotes the carrying out of a defined activity. The manner of the management of the defined activity is considered in determining the activity of the body or person who is said to have engaged in a certain conduct. The simple question to address was, what was the conduct of Parliament in regard to which MAFUSIRE J made a declaration of constitutional invalidity and was any declaration made against Parliament by the learned judge?

It is also an elementary fact that the Senate and National Assembly conduct business in accordance with Standing Orders passed by the two houses. *In casu* there was no allegation made or evidence provided to show that either of the two houses placed the issue of the recall of the applicants on the agenda paper for discussion. None of them made any resolutions relative thereto. The issue of the constitutional invalidity of the conduct of Parliament was never addressed by MAFUSIRE J. It was not the issue for determination.

The provisions of s 129 (1) (k) of the Constitution are clear. The process of recall or termination of membership of an elected member of the Senate or National Assembly as the case may is an issue that involves the Speaker or President of the Senate and the Political party to which the affected member was a member at the time of such members' election to the National Assembly or Senate as the case maybe. The process of termination of membership of either of the two legislative houses is very simple as evident upon a reading of s 129(1)(k). The process starts with the political party in which the affected member belonged to at the time of the members' election giving the Speaker of Parliament of the Senate or may be the case, a written notice in which the political party declares that the member has ceased to belong to the political party concerned. Where this has happened, the cessation or termination of the affected members' membership follows as matter of law. Neither the Speaker, President of Senate nor indeed any of the two legislative houses debates the issue. At best the Speaker or President of the Senate as the case maybe may inform the legislative house concerned of the event. No motion is tabled before either of the houses or Parliament for debate in that regard and no vote is taken. If it can be said that Parliament conducts itself in any manner in relation to the application of s 129(1)(k) aforesaid, then such conduct is passive in nature. It would consist in the members having to sit back and listen to the Speaker or the Senate President advising of the fact of recall of an affected member and/or that such member has ceased to be a member of the house concerned.

It is all too clear for any discerning reader to appreciate that MAFUSIRE J in his judgment did not interrogate nor rule on the invalidity of the conduct of the Parliament. What conduct if

one may ask? The leaned judge simply made a finding that the applicants' recall by their purported political party was invalid. It followed that the purported termination of the applicants membership of Parliament had to be set aside. The order of MAFUSIRE J was also clear that Parliament was never adjudged to have conducted itself in anyway in the matter. It was also a surprise that the first and second respondents having not opposed the application decided by MAFUSIRE J were making a u-turn and opposing the same relief in effect which they had agreed to in the earlier judgement. Mr *Tundu* in the end and after he was asked to explain the real basis of the opposition by the first and second respondents submitted that all that the first and second respondents wanted was for the law to be followed and that there was need for MAFUSIRE J's judgment to be confirmed by the Constitutional Court first before it could have force and be implemented. It has been amply demonstrated that MAFUSIRE J's judgment did not pronounce upon any conduct of Parliament, let alone the constitutional invalidity of any conduct of Parliament.

Section 129(1)(k) refers to the Speaker. The Speaker is the Head of Parliament. He is not a Parliamentarian. Being Head of Parliament does not mean that the Speaker is synonymous with Parliament. The speaker is the Head of administration of Parliament. The conduct of the Speaker and that of Parliament must not be conflated. The fact that MAFUSIRE J makes reference to the Speaker of Parliament must be contextualized. Firstly the judgment order is clear. It does not speak to the conduct of Parliament. Parliament never acted in the matter. The reference to Parliament meant no more than that the reinstatement or restoration of applicants' membership to the bodies to which they belonged was administratively an issue for the Speaker and Parliament. That is a far cry from declaring that Parliament conducted itself unconstitutionally. To the extent that Mr *Simango* for the fifth and sixth respondents advanced the same arguments as done by Mr *Tundu* in relation to MAFUSIRE J's judgment having declared invalid any conduct of Parliament, the argument is equally devoid of merit.

In my view therefore the application must succeed. It cannot be said that there are vacancies for by-elections contestations in the constituencies occupied by the applicants at this time. Having said that, I need to briefly deal with the issue of costs. The applicants pray for costs against fifth sixth and seventh respondents on the higher scale of legal practitioner and client. Costs awards are made by the court in its discretion. I am not persuaded to grant costs on the higher scale. The fifth and sixth respondents did not abuse the court process in their opposition which was in essence premised on the fact that they had an appeal pending which had been erroneously dismissed by the Registrar and that this should persuade the court not to

grant the declaration sought on the basis that the appeal would be reinstated without doubt, rendering the declaration if made, a moot one. I do not think that the argument though not successful was *infantile* or p*uerile*. The applicants did not pray for a costs order against the rest of the respondents.

The applicants also prayed for an order that the judgment should remain unsuspended despite the noting of any appeal which may be filed by the respondents. Generally speaking the noting of the appeal would suspend this judgment. It is also the position that the court can order the execution of its judgment despite the noting of appeal. The order sought is therefore not incompetent because the court has thus inherent power to order execution pending appeal. The issues raised by the respondents were issues of law. Their arguments undoubtedly have no merit. More significantly and importantly none of the respondents opposed the prayer that the judgment should hold despite the noting of appeal in either the heads of arguments or in oral submissions. The failure to oppose the terms of the draft order sought implies that the respondents in the event that the application succeeds will not have qualms with the order sought. I will grant the prayers in terms of the draft order as amended as follows:

IT IS ORDERED THAT:

1. As of the 5th of January 2022 before the publication of Proclamation No. 1 of 2022 in S I 2/2022 there were no electoral vacancies open for contestation in By-elections in the constituencies of Nkulumane, Mbizo, Kambuzuma, Mutasa South, Pumula and Harare East.
2. It is declared that there are not electoral vacancies for By-elections contestations in the seats of Nkulumane Constituency, Mbizo Constituency, Kambuzuma Constituency, Mutasa South Constituency, Pumula Constituency and Harare East Constituency.
3. The 4th respondent's proclamation contained in S I 2/2022 to the extent that it announces vacancies, nominations and by-elections in Nkulumane Constituency, Mbizo Constituency, Pumula Constituency, Kambuzuma Constituency, Mutasa South Constituency and Harare East Constituency be and is hereby set aside only to that extent.
4. This judgment shall remain extant and in operation despite any appeal which may be noted against the same by the respondents.
5. The 5th and 6th respondents pay costs of suit.

Tendai Biti Law Chambers, applicants' legal practitioners
Chihambakwe, Mutizwa & Partners, first and second respondents' legal practitioners
Nyikadzino Simango & Associates, fifth & sixth respondents' legal practitioners
No appearance for the seventh respondent