REPORTABLE (20)

(1) THOKOZANI KHUPE
(2) MOVEMENT FOR DEMOCRATIC CHANGE – TSVANGIRAI (MDC-T)

v

(1) PARLIAMENT OF ZIMBABWE
(2) SPEAKER OF THE NATIONAL ASSEMBLY
(3) MORGEN KOMICHI

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC & MAKONI JCC
HARARE, MAY 30, 2018, OCTOBER 17, 2018 & NOVEMBER 6, 2019

L Madhuku, for the applicants

T Mpofu, with him *A Demo*, for the first and second respondents

S M Hashiti, with him *T Zhuwarara*, for the third respondent

MALABA CJ: This is a court application brought in terms of s 167(2)(d) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("the Constitution"). The section

provides that only the Constitutional Court ("the Court") may determine whether Parliament or the President has failed to fulfil a constitutional obligation.

The applicants seek an order declaring the first respondent to have failed to fulfil its constitutional obligation to protect the tenure of seat of a Member of Parliament, allegedly as required by ss 119(1) and 129(1)(k) of the Constitution.

Section 119(1) of the Constitution provides that Parliament must protect the Constitution and promote democratic governance in Zimbabwe. Section 129(1)(k) of the Constitution provides as follows:

> **"129 Tenure of seat of Member of Parliament**
>
> (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 or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it; …".

The applicants seek a further declaratory order to the effect that the first applicant is still a Member of Parliament. They also seek an order declaring the letter written by the third respondent to invoke the operation of the provisions of s 129(1)(k) of the Constitution to be invalid.

The Court holds that the question of whether or not Parliament failed to fulfil its constitutional obligation with regard to the circumstances in which the seat occupied by the first applicant became vacant has been rendered moot by the occurrence of events subsequent to the making of the court application. The matter no longer presents a live dispute between

the parties requiring the Court to exercise its jurisdiction to hear and determine it in accordance with the principle of justiciability.

It is common cause that in terms of s 143(1) of the Constitution the life of the Parliament concerning the vacancy of the seat in respect to which it is alleged it failed in its constitutional obligation came to an end at midnight on 29 July 2018. That was the day before the first polling day in the general election held on 30 July 2018. The seat of Parliament, the right of occupation of which the first applicant sought to vindicate, became irrefutably vacant and lost to her when Parliament, which had been elected for a five-year term, stood dissolved in terms of s 143(1) of the Constitution at midnight on 29 July 2018. The matter has thus been overtaken by events.

A declaratory order is by its nature a discretionary remedy. The discretion to grant a declaratory order must be judiciously exercised, taking into account the fact that the Court does not decide matters which are purely academic or abstract.

There are no exceptional circumstances, the consideration of which could have caused the Court to exercise its discretion in the interests of justice to hear and determine the matter despite it being moot.

The application must be dismissed with no order as to costs. The reasons for the decision now follow.

FACTUAL BACKGROUND

The second applicant is a political party. The first applicant asserts that in 2006 she was elected as the second applicant's Deputy President at the latter's congress. She further averred that she was re-elected to the same position at subsequent congresses, including the one held in 2014. On the authority of the outcome of the congress held in 2014, the first applicant claims

the right to be the President of the political party following the death, in February 2018, of Mr Morgan Tsvangirai, who was the President. The first applicant claims the ascendancy to the office of the President of the MDC-T, pending the holding of a congress to elect a new President in terms of the political party's constitution.

It is the first applicant's case that in the general election held on 30 July 2013 she was elected a Member of the National Assembly to represent the Bulawayo Metropolitan Province on the second applicant's ticket in terms of s 124(1)(b) of the Constitution.

On 10 April 2018 the third respondent sent a written notice to the second respondent. The written notice made the declaration that the first applicant had ceased to be a member of the Movement for Democratic Change-Tsvangirai ("the MDC-T"). The written notice also declared that the first applicant had been relieved of the right to represent the MDC-T in the National Assembly in terms of s 129(1)(k) of the Constitution.

The written notice declared that the second applicant's National Council had resolved to expel the first applicant from the MDC-T. It was also said that the first applicant had been informed of the decision expelling her from the political party concerned on 23 March 2018. Acting on the written notice, the second respondent announced to Members of the National Assembly on 12 April 2018 that a Proportional Representation vacancy had arisen in the Party-list seat for the Bulawayo Metropolitan Province.

Aggrieved by the loss of her seat, the first applicant approached the Court alleging that the first respondent had failed to fulfil a constitutional obligation to protect the tenure of the seat of a Member. She averred that she was recalled from the political party concerned illegally, hence the creation of a vacancy in her seat was invalid.

The first applicant averred that she wrote a letter to the second respondent on 12 March 2018, notifying him that there were factional conflicts in the MDC-T. On the strength of that letter, she contended that the second respondent ought not to have acted on the basis of the written notice sent to him by the third respondent. The first applicant took the view that in acting on the basis of the written notice the first respondent, represented by the second respondent, acted irrationally, thereby failing to fulfil its constitutional obligation.

It was further contended by the first applicant that s 119(1), as read with s 129(1)(k), of the Constitution imposes an obligation on the second respondent not to announce a vacancy other than that strictly occurring in terms of the Constitution. The first applicant further averred that the aforesaid provisions impose a further obligation on the first respondent to submit every dispute that impacts on the tenure of the seat of a Member of Parliament to the courts for determination before the provisions of s 129(1)(k) of the Constitution take effect. The contention was that s 129(1)(k) of the Constitution does not have an automatic effect.

It was further averred that once the first respondent is put on notice by any of its Members about a potential dispute in a political party to which a Member belongs, it has a constitutional obligation to either put into motion a process akin to interpleader proceedings and require a court of law to resolve the dispute or to refer the parties to a court. The suggestion was that the procedure referred to was a requirement of s 129(1)(k) of the Constitution.

The first and second respondents, on the other hand, contended that the first applicant's case did not establish a breach of the Constitution. The contention was that the first respondent had no constitutional obligation arising from the provisions of s 119(1), as read with s 129(1)(k), of the Constitution, notwithstanding the interpretation of these provisions by the first applicant aimed at laying the ground for approaching the Court in terms of s 167(2)(d) of the Constitution. The argument was that Parliament would have discharged its obligation of

protecting the Constitution and promoting democratic governance when it acted in terms of s 129(1)(k) of the Constitution. The section is a self-contained provision laying down a specific procedure for creating a vacancy in a seat of Parliament.

The contention by the respondents was that the attempt to invoke the jurisdiction of the Court by reference to matters provided for under s 167(2)(a) of the Constitution was a deliberate strategy designed to avoid the consequences of the failure by the first applicant to use the appropriate remedy for the protection of her rights of membership of the political party concerned. A challenge to the legality of the decision to expel the first applicant from the MDC-T in the courts and its result would have been the only remedy by which the operation of the provisions of s 129(1)(k) of the Constitution on the first applicant's seat could have been averted or reversed during the life of Parliament. The argument was that there was no basis for approaching the Court in terms of s 167(2)(d) of the Constitution, because the facts which constituted the cause of action did not reveal breach by Parliament of its constitutional obligation within the meaning of s 119(1), as read with s 129(1)(k), of the Constitution.

The first and second respondents further argued that the first applicant ought to have approached the courts for relief when she became aware of her expulsion rather than argue that it was the second respondent who had the duty to refer the dispute to the courts. According to the respondents, the correct interpretation of s 129(1)(k) of the Constitution is that a seat of Parliament becomes vacant by operation of law once the procedures required by s 129(1)(k) are complied with and the things required to be done are done in the manner prescribed and brought to the notice of the official designated to receive the written notice. They contended that the obligation that the first applicant alleged Parliament breached is alien to the provisions of s 119(1), as read with s 129(1)(k), of the Constitution.

The third respondent argued that the Court cannot read into s 129(1)(k) of the Constitution obligations which do not flow from it and find that the first respondent failed to fulfil them.

Pursuant to the 30 July 2018 general election, new Members of Parliament have been elected. In view of the relief sought by the first applicant, the determination of the matter turns on the question of whether or not the controversy is still live. If the dispute is no longer live, the question is whether the applicants have made out a case for the Court to exercise its discretion to hear a moot case.

WHETHER OR NOT THE MATTER IS MOOT

A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot. It is an established principle of law that not every constitutional point raised by a litigant can be heard by the courts. The constitutional limits on the exercise of judicial power, combined with notions of the limited nature of judicial power, have evolved into a broad doctrine known as "justiciability". (See Stern, Gressman & Shapiro, *Supreme Court Practice* 6 ed, The Bureau of National Affairs, Inc, Washington, 1950) at pp 706 and 709).

Justiciability deals with the boundaries of law and adjudication. Its concern is with the question of which issues are susceptible to becoming the subject of legal norms or adjudication by a court of law. Justiciability is not a legal concept with a fixed content or one that is susceptible to precise scientific verification. Its utilisation is the result of many subtle pressures. *Poe* v *Ullman* 367 U.S. 497 (1961) at 508.

In *Flast* v *Cohen* 392 U.S. 83 (1968) the Supreme Court of the United States of America held as follows at p 95:

> "Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the 'case and controversy' doctrine. Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." (the underlining is for emphasis)

The question of mootness is an important issue that the Court must take into account when faced with a dispute between parties. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of "such a nature that the decision sought will have no practical effect or result".

The principles relating to mootness were referred to in *Koko* v *Eskom Holdings Soc Limited* (J200/18) [2018] ZALCJHB 76 at para 21 as follows:

> "The doctrine of mootness is well developed in the American constitutional law jurisprudence. A case becomes moot if a party seeks to obtain judgment on a pretended controversy, when in reality there is none, … or a judgment upon some matter which when rendered, for any reason, cannot have any practical effect upon an existing controversy. Courts exist to resolve controversies and not abstract issues. As I see it, for a court to intervene and assist the warring parties, there must be controversy between the parties. The dictionary meaning of the term controversy is a dispute, argument, or debate, especially one concerning a matter about which there is a strong disagreement. Further, the controversy must be a live one. Put differently it must exist between the warring parties. A case would be moot if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision. It is moot, if it no longer presents an existing or live controversy or the prejudice or threat of prejudice which, to an applicant, no longer exists".

In *National Coalition for Gay and Lesbian Equality and Others* v *Minister of Home Affairs* 2000 (2) SA 1 (CC), footnote 18 to para 21 records the following:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *J T Publishing (Pty) Ltd and Another* v *Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599), where DIDCOTT J said the following at para [17]:
>
> > '(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become.'"

The question for determination in relation to the justiciability of the issues raised and the relief sought in the court application is whether the dissolution of Parliament by operation of s 143(1) of the Constitution has rendered the issues raised by the court application moot.

Section 143(1) of the Constitution provides that:

> **"143 Duration and dissolution of Parliament**
>
> (1) Parliament is elected for a five-year term which runs from the date on which the President-elect is sworn in and assumes office in terms of section 94(1)(a), and Parliament stands dissolved at midnight on the day before the first polling day in the next general election called in terms of section 144."

It is common cause that the life of the National Assembly in which the first applicant had a tenured seat ended at midnight on 29 July 2018. Thus, the relief sought by the first applicant that she be declared a Member of Parliament is no longer possible. It would be an invalid order. The question therefore is whether in the circumstances the Court can still make a determination on whether or not the first respondent failed to fulfil an alleged constitutional obligation to protect the tenure of the seat of its Member, as contended by the applicants.

The question is not just whether Parliament has the constitutional obligation of the nature contended for by the first applicant under s 119(1), as read with s 129(1)(k), of the Constitution. Such a question would have been posed and determined for the specific purpose of having the relief sought by the first applicant granted as protection and enforcement of the right she claimed she had in the occupation of the seat of Parliament.

A matter is not moot only at the commencement of proceedings. It may be considered moot at the time the decision on the matter is to be made. The reason for determining the question whether the first applicant has shown that Parliament has a constitutional obligation under s 119(1), as read with s 129(1)(k), of the Constitution of the nature and scope alleged would be the grant of the relief sought. The decision would follow a finding of breach of the constitutional obligation in relation to the right of the first applicant to occupy the seat of Parliament. The dissolution of Parliament rendered it legally meaningless for the Court to grant the first applicant the specific relief she sought by way of the court application. It also became a futile exercise to embark on the consideration and determination of the question whether or not Parliament had a constitutional obligation under s 119(1), as read with s 129(1)(k), of the Constitution of the nature and scope contended for by the first applicant.

In *Borowski* v *Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada set out the stages of an inquiry into the question whether or not a matter is moot. At p 4 of the downloaded copy of the judgment[1] it said:

> "The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it. The approach with respect to mootness

[1] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/421/...

> involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)" (the underlining is for emphasis)

The constitutional application before the Court is moot, as there is no longer a concrete legal dispute between the parties. The purported live controversy is whether the first respondent has a constitutional obligation to subject every dispute that impacts on the tenure of a seat of a Member of Parliament in terms of s 129(1)(k) of the Constitution to the courts for determination. The question became an abstract question when the key relief sought by the first applicant to be declared a Member of Parliament was no longer within the power of the Court to grant by operation of law. The relief sought in terms of para 3 of the applicants' draft order, that the third respondent's written notice to the second respondent be declared null and void, was no longer grantable.

In *De Funis* v *Odegaard* (1974) 416 US 312, a student was denied admission as a first year law student at the University of Washington Law School. He challenged the decision, contending that the procedures and criteria employed by the Law School Admission Committee discriminated against him on account of his race in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. The trial court granted a mandatory injunction commanding the law school to admit the student. On appeal the judgment was reversed by the Washington Supreme Court. The student then petitioned the United States Supreme Court for a writ of *certiorari*. The writ resulted in a stay of execution of the Washington Supreme Court's decision pending the final disposition of the case. By the time the substantive matter came before the Supreme Court, the student had registered for his final quarter in the law school. The Supreme Court held that it could not consider the substantive constitutional issues raised by the parties because the student would complete his law school

studies regardless of the decision of the Court. Woolman & Bishop *Constitutional Law of South Africa* (2 ed Juta & Co (Pty) Ltd, Cape Town, 2008) (Cheryl Loots at pp 7-19.)

The Court cannot order occupation of a seat in a Parliament that has been dissolved in terms of the law at the end of its five-year term. A determination of the question of the existence or otherwise of the alleged constitutional obligation on the first respondent would be done in the abstract as its outcome would have no practical effect on the relief sought by the applicants. The determination of the matter would be an academic exercise. A decision in favour of the first applicant would not be carried into effect.

The refusal of courts to decide cases which have become moot because of cessation of a dispute between parties derives from the common law notion that the function of a court is limited to determining rights and obligations that are actually controverted in the particular case before the court. In *Mills* v *Green* 159 U.S. 651 (1895) at p 653, the Supreme Court of the United States of America held as follows:

> "The defendant moved to dismiss the appeal, assigning as one ground of his motion -
>
> > 'that there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this Court can operate.'
>
> We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record or discussed by counsel.
>
> The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v *Veazie,* 8 How. 251; *California* v *San Pablo & Tulare Railroad,* 149 U.S. 308." (the underlining is for emphasis)

WHETHER OR NOT THE COURT MAY HEAR THE MATTER DESPITE THE FINDING OF MOOTNESS

The mere fact that the matter is moot does not constitute an absolute bar to a court to hear a matter. Whilst a matter may be moot as between the parties, that does not without more render it unjusticiable. The court retains a discretion to hear a moot case where it is in the interests of justice to do so. *J T Publishing (Pty) Ltd* v *Minister of Safety and Security* 1997 (3) SA 514 (CC) at 525A-B.

Courts may be guided in the exercise of discretion by considering the underlying rationale of the mootness doctrine. The Supreme Court of Canada in the *Borowski* case *supra* outlined the policy considerations a court may take into account in deciding whether or not to exercise its discretion to hear a moot case. At p 5 of the downloaded copy of the judgment[2] it said:

> "The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

Courts in this jurisdiction do pay homage to the demands of the adversarial system of resolution of disputes. The adversarial system contemplates a situation in which both parties before a court have an interest in the outcome of the case. The system envisages a situation where the determination of the matters in dispute would have practical and tangible

[2] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/421/

consequences for the contending parties. It would not be in the interests of justice for a court to determine a moot case where its decision has no practical effect on the parties.

In *Independent Electoral Commission* v *Langeberg Municipality* 2001 (3) SA 925 (CC), the Constitutional Court of South Africa had occasion to consider the factors which ought to be taken into account in determining whether it is in the interests of justice to hear a moot matter. It held as follows at para 11:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues."

The argument advanced by *Mr Madhuku* at the hearing of the court application was that the principle of mootness does not apply if the judgment of the Court will have a practical effect. He asserted that the first applicant's seat was declared vacant by the first respondent prematurely, disabling her from completing her term as a Member of Parliament. The argument was that she lost financial benefits that would have accrued to her in her capacity as a Member of Parliament. On this basis, *Mr Madhuku* argued that if the court application succeeds the first applicant may sue for damages arising out of the second and third respondents' conduct.

It was the first applicant's argument that the Court should not avoid a moot case when it is clear that it concerns issues that are capable of repetition. *Mr* M*adhuku* said that there was need for an authoritative interpretation by the Court of s 129(1)(k) of the Constitution, as numerous matters brought to the Court revolved around the disputed interpretation.

Mr Mpofu, on the other hand, was on strong ground when he argued that the exercise by a court of the discretion to hear a moot issue is dependent on the facts placed before it. There should be no new issues arising. He argued that the case of loss of financial benefits being asserted by the first applicant was not raised in the papers before the Court. It was an entirely new issue being raised in oral submissions. The factor of "fullness of argument" required to be considered in assessing whether or not it is in the interest of justice to hear a moot matter is absent.

A constitutional matter must be specifically pleaded and motivated in the founding affidavit. A party is not permitted to make his, her or its case through oral argument at the hearing of the constitutional application. It is an established principle of the law that the other party must not be left in any doubt as to the case which he, she or it has to meet. In *Prince* v *President of the Law Society of the Cape of Good Hope and Others* 2001 (2) SA 388 (CC), the Constitutional Court of South Africa held as follows at para [22]:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as (to) allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal." (emphasis added)

As regards the need for the Court to make an authoritative interpretation of s 129(1)(k) of the Constitution, it is noted that in appropriate circumstances courts have exercised their discretion to decide seemingly moot cases where the result of refusing to decide the issues would create a

situation "capable of repetition, yet evading review". Woolman & Bishop *Constitutional Law of South Africa supra* at pp 7-19.

In *Roe* v *Wade* 410 U.S. 113 (1973) the Supreme Court of the United States of America exercised its discretion to hear a moot matter because it was potentially capable of repetition yet evading review. In that case a pregnant woman's class action challenging the constitutionality of state anti-abortion statutes reached the Supreme Court of the United States of America only *postpartum*. In deciding to hear the case, it held as follows at p 125:

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or *certiorari* review, and not simply at the date the action is initiated. *United States* v *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v *Zwickler, supra; SEC* v *Medical Committee for Human Rights*, 404 U. S. 403 (1972).
>
> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review'. *Southern Pacific Terminal Co.* v *ICC*, 219 U.S. 498, 515 (1911). *See Moore* v *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v *Princess Anne*, 393 U.S. 175, 178-179 (1968); *United States* v *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)." (the underlining is for emphasis)

In *Tremblay* v *Daigle*, [1989] 2 S.C.R. 530, the Supreme Court of Canada exercised its discretion to decide an abortion case despite the fact that it had become moot. In this case Tremblay relied on the constitutional right to life of a foetus to claim an injunction against his girlfriend to restrain her from having an abortion. The Court exercised its discretion to decide the case because it believed that it was important to remove the threat of such injunctive proceedings in the interest of other pregnant women. It held as follows at p 571:

> "As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified. It would, however, be quite a different matter to explore further legal issues

> which need not be examined in order to achieve that objective. The jurisprudence of this Court indicates that unnecessary constitutional pronouncement should be avoided: *Morgentaler (No. 2), supra*, at p. 51; *Borowski*, *supra*; *John Deere Plow Co.* v *Wharton*, [1915] A.C. 330 (P.C.), at p. 339; *Winner* v *S.M.T. (Eastern) Ltd*, [1951] S.C.R. 887, at p. 915." (the underlining is for emphasis)

Where a matter is of such a nature that it might keep arising in the Court or where there is need to resolve a serious legal question, the Court may exercise its discretion to hear the moot issue by reason of its significance, as it would in such circumstances be in the interests of justice to make a determination on the issue.

It is the applicants' case that an authoritative interpretation of s 129(1)(k) of the Constitution by the Court is of utmost importance, as similar questions to those raised by the first applicant have seized the Court's mind.

The applicants' argument does not find favour with the Court. It does not take into account the fact that the Court has already made a pronouncement on the interpretation of s 129(1)(k) of the Constitution. In *Madzimure and Ors* v *The President of the Senate and Ors*, CCZ 8/19 at pp 8-12 of the cyclostyled judgment, the Court said:

> "The purpose of s 129 of the Constitution is to provide for circumstances in which the tenure of seat of a Member of Parliament comes to an end. Section 129(1)(k) of the Constitution specifies one of the circumstances in which the tenure of seat of a Member of Parliament comes to an end and the seat becomes vacant. Tenure of seat of a Member of Parliament means the tenure of the right of a Member of Parliament to occupy the seat following an election. The provisions of s 129(1)(k) of the Constitution may be summarised as being that –
>
> (a) The Member of Parliament should have been a member of a political party when he or she was elected to Parliament;
>
> (b) The Member of Parliament should have ceased to belong to the political party, either by voluntary withdrawal of membership or by being expelled from the political party concerned; and
>
> (c) The political party concerned should have given a written notice to the Speaker or the President of the Senate of the cessation of membership of it by the Member of Parliament. In the written notice the political

> party concerned must declare that the Member of Parliament has ceased to belong to it.
>
> …
>
> The rôle of the Speaker or the President of the Senate in the process leading to the creation of a vacancy in the seat of a Member of Parliament in terms of s 129(1)(k) of the Constitution is facilitative. It is not judicial in nature.
>
> The rôle the Speaker or the President of the Senate has to play in the process is to satisfy himself or herself that the document he or she has received is from a political party and that it contains a written notice declaring that the Member of Parliament who was a member of that political party when elected to Parliament has ceased to belong to the political party concerned. The Speaker or the President of the Senate has no power to prevent the occurrence of the creation of the vacancy in the seat of a Member of Parliament commanded by s 129(1)(k) of the Constitution as the consequence of the communication and receipt of the written notice."

An authoritative interpretation of the relevant section has already been given by the Court. It is questionable, to say the least, that the present case can be said to fall into the category of cases where the Court may exercise its discretion to hear a moot case in order to settle an important legal question.

DISPOSITION

In the result, the application is dismissed with no order as to costs.

GWAUNZA DCJ: **I agree**

GARWE JCC: **I agree**

MAKARAU JCC: **I agree**

GOWORA JCC: **I agree**

HLATSHWAYO JCC: **I agree**

PATEL JCC: **I agree**

GUVAVA JCC: **I agree**

MAKONI JCC: **I agree**

Lovemore Madhuku Lawyers, applicants' legal practitioners

Chihambakwe, Mutizwa & Partners, first and second respondents' legal practitioners

Atherstone & Cook, third respondent's legal practitioners