JUDICIAL TRAINING INSTITUTE OF ZIMBABWE (JTIZ)

COMPENDIUM

FIRST EDITION

November 2021

JUDGES' INDUCTION COMPENDIUM

FIRST EDITION

NOVEMBER 2021

Judges' Induction Compendium

Published by

The Judicial Training Institute of Zimbabwe (JTIZ)

162 Josiah Chinamano Avenue, Harare.

EDITORIAL TEAM

Dr. Rosalie Kumbirai Katsande	Head | JTIZ
Mr. Livard Livaroe Philemon	Deputy Head | JTIZ
Ms. Vongai Magodora	Professional Research Assistant | JTIZ
Mr. Obvious Magaso	Graphic Designer | JSC

Table of CONTENTS

FOREWORD

The Judicial Training Institute of Zimbabwe (JTIZ), the compiler and publisher of this Compendium, is a department under the Judicial Service Commission (Commission). Its fundamental mandate is to ensure that judicial and non-judicial officers within the Commission are capacitated with the requisite skills to achieve, maintain and enhance professional knowledge, operational efficiency and effectiveness. This mandate derives from the Judicial Service Commission Strategic Plan of 2021 to 2025 which underscores human capital development and continuous learning, training and development.

This Compendium, a first of its kind in the Commission, will be an invaluable and indispensable reference resource, not only for new Judges as informed by the Commission's quest to achieve world class justice through excellence in jurisprudence, but also for magistrates, legal practitioners and students of law amongst other stakeholders, for whom this work is expected to be of immeasurable academic benefit. The various papers making up this Compendium were presented during the orientation of newly appointed Judges in Victoria Falls in November 2021.

This Compendium is both *sui generis* and uniquely important; it is a product of profound judgeship in that it is the compilation and distillation of the Judges' knowledge, fossilized out of their real experience and as written by the Judges themselves. This experience, which gives this Compendium its jurisprudential impetus, is a product of many dedicated and committed years on the bench by the best legal minds in the Zimbabwean judiciary. As a consequence, this Compendium is a rich source of reference from both a practical and academic point of view. It traverses many aspects of jurisprudence, which areas of law are of undebatable significance to a Judge such as pre-trial conferences, ordinary and chamber applications, interdicts, independence of the judiciary, assessment of damages, judgment writing, judicial integrity and ethics, recusal, the jurisdiction of the High Court, bill of rights, and constitutional referrals. These papers state the law unambiguously, and thus draw their jurisprudence from old and latest authorities, infused with the progressive and purposive interpretation of our Constitution and the changing *boni mores* of our communities.

This Compendium is thus a good read both to a legal practitioner who is sharpening his or her jurisprudence and one who is researching a specific legal question. It is to that end a resource that is available and valuable to the generality of legal practitioners alike.

The JTIZ aims excellence in jurisprudence and operational excellence in service delivery based on the Commission's vision of a Zimbabwe in which world class justice prevails. It is thus not an ambitious declaration that by means of this maiden publication, JTIZ has taken its first bold and progressive step in the publication of literature that will explore and enrich both our legal and constitutional jurisprudence.

The journey to make Zimbabwean legal jurisprudence a beacon of Africa and beyond has just started!

MR. W. T CHIKWANA
SECRETARY, JUDICIAL SERVICE COMMISSION

DEFINITION AND IMPORTANCE OF JUDICIAL INDEPENDENCE AS A CONCEPT[1]

HONOURABLE LUKE MALABA

Chief Justice of the Republic of Zimbabwe

ABSTRACT

Judicial independence, simply put, is the concept that the Judiciary needs to be kept away from the other branches of government. According to the International Commission of Jurists, every judge is free to decide matters before him or her in accordance with his or her assessment of the facts and his or her understanding of the law without any improper influence, inducement or pressures, direct or indirect, from any quarter or for whatever reason. In section 164 (1) of the Constitution of Zimbabwe, 2013, it is expressly provided that the courts are independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice. The Judiciary is guaranteed independence to ensure that in the adjudication and making of judicial decisions it obeys the law only.

1. INTRODUCTION

Judicial independence, simply put, is the concept that the judiciary needs to be kept away from the other branches of government. Courts should not be subjected to improper influence from the other branches of government or from private or partisan interests. Judicial independence is therefore vital and important to the idea of separation of powers.

The International Commission of Jurists ("ICJ") defined judicial independence to mean:

> "That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducement or pressures, direct or indirect, from any quarter or for whatever reason."[2]

Sir Ninian Stephen said:

[1] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

[2] R. Brody" The Independence of Judges and Lawyers: A Compilation of International Standards", Centre for the Independence of Judges and Lawyers, April – October 1990.

> "What its precise meaning must always include is a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the state and also made as immune as humanly possible from all other influences that may affect their impartiality."[3]

Section 164 of the Constitution contains special provisions applicable to the principle of judicial independence and impartiality.

In subsection (1) of s 164 of the Constitution, it is expressly provided that the courts are independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice. Not only is it made clear to members of the Judiciary that they are independent, the public is also left in no doubt that judicial independence is a fundamental value to be upheld. The meaning of judicial independence is set out, in that it is made clear that the judiciary is guaranteed independence to ensure that in the adjudication and making of judicial decisions it obeys the law only.

Subsection (2) of s 164 of the Constitution declares in unequivocal terms that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance. As a result, section 164(2)(a) of the Constitution prohibits any kind of interference with the functioning of the courts by the State or any institution or any agency of the Government at any level or by any person. The subsection establishes an important judicial independence guarantee that prohibits any attempt to improperly influence a judicial officer in the performance of judicial functions. This means the prohibition of any acts towards a judicial officer aimed at preventing him or her from carrying out his or her professional duties or making him or her biased in order to produce an unjust decision. The prohibition of any improper influence applies to the judicial officer's full term in office. The goal of judicial independence is an impartial judgment under law, the kind of judgment not dependent upon any other person or body of persons apart from the Judge.[4]

The norms on providing members of the Judiciary with material means and welfare and social protection as the integral part of their conditions of service to improve their status are a constitutional imperative because of the specific characteristics of their professional responsibilities.

Every judicial officer in Zimbabwe accedes to judicial office by appointment. The method of selection of members of the judiciary is an important ingredient in the establishment and maintenance of judicial independence. Judicial officers should not have to compromise their independence to interpret and apply the law without fear, favour or prejudice to achieve or retain judicial office. The judicial selection

[3] N. Stephen "Judicial Independence the Inaugural Oration in Judicial Administration", *The Australian Institute of Judicial Administration Incorporated*, 21 July 1989.

[4] "Judicial Independence": *Lecture by Lord Phillips Lord Chief Justice at the Commonwealth Law Conference, Kenya*, September 2007.

process is designed to identify and appoint the most qualified candidates possible with minimum politics in the process.

In this vein, judicial independence is not just a jurisprudential notion. It is an expression of the commitment of the people to freedom. The nature and scope of the safeguards a constitution provides for judicial independence will ordinarily indicate how serious a society is about commitment to the rule of law, constitutional government and democracy. As a result, judicial independence is a matter of national and international law. The rules by which judicial independence is guaranteed are part of the rule of law, which must be obeyed by all branches of government, including the judiciary. In other words, an independent and impartial judiciary is an institution of the greatest value in a democratic society required by law. It is an essential pillar of liberty and the rule of law.

When a perusal of a Constitution reveals standards for the protection of judicial independence which fall below the level of those acceptable in other constitutional democracies, an impression may be created that there is no political will to uphold the rule of law and respect for fundamental human rights. It is not just the guarantees for judicial independence a constitution provides that matter. The actual conduct of the judiciary in the exercise of judicial authority in administering justice in individual cases and the reaction of the other branches of government or the parties involved in the proceedings to unfavourable court decisions matter a lot in building and maintaining public confidence in the independence of the judiciary.

Judicial independence is guaranteed because of the realisation that judges will sometimes have to make difficult decisions that the law requires but which are unpopular with a majority of the citizenry. Without the protection afforded to the judiciary by the Constitution, courts may not be able to issue decisions that have a dramatic impact on the life of citizens and law and thereby contribute to the social, political and economic development of the country. Independence is the foundation of the judicial branch of government.[5]

Judicial independence does not mean acting arbitrarily. It does not mean judicial immunity from criticism. Criticism of the judiciary is an expression of a fundamental right.[6] It should not be muzzled through threats of contempt of court as long as it is not based on false information, known to be false and intended to undermine public confidence in the Judiciary. The position was set out clearly by LORD ATKIN in a Privy Council decision in 1936 thus:

> "Whether the authority and position of an individual judge, or the administration of justice

[5] C. M. Larkins: "Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis" *The American Journal of Comparative Law*. Vol 44 (1996).

[6] *Craig v Harney 331 US 367, 376 (1947).*

> is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong–headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[7]

MAHOMED CJ, in an address on the "Role of the Judiciary in a Constitutional State" published in 1998 (115) SALJ at 112, had this to say about the independence of the Judiciary:

> "The exact boundaries of judicial powers have varied from time to time and from country to country, but the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundation of the civilization which it protects. What judicial independence means in principle is simply the right and the duty of the judges to perform the function of the judicial adjudication, on an application of their own integrity and the law, without any actual or perceived, direct or indirect, interference from or dependence on any other person or institution."[8]

The reason why judicial independence is of public importance is that a free society exists only so long as it is governed by the rule of law - the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.[9]

2. INTERNATIONAL STANDARDS

The independence of the Judiciary gives concrete expression to two essential elements of democracy, namely the rule of law and the separation of powers.

Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") is the "hard" law basis of the international law definition of judicial independence.[10] The Article is to the effect that all persons are equal before courts and tribunals,

---

[7] *Ambard v Attorney-General for Trinidad and Tobago* [1936] 1 ALL ER 704. *See also: R v Commissioner of Police of the Metropolis ex parte Blackburn* (No 2) (1968) 2 QB 150, 155.

[8] Role of the Judiciary in a Constitutional State" published in 1998 (115) *South African Law Journal at 112.*

[9] "Judicial Independence", *A paper delivered by the Honourable Sir Gerard Brennan (Chief Justice of Australia), Australian Judicial Conference, University House, Australian National University,* 2 November 1996.

[10] Choudhry, Sujit and Stacey, Richard, "International Standards for the Independence of the Judiciary" (2013). *The Center for Constitutional Transitions at NYU Law & Democracy Reporting International Briefing Papers (with R. Stacey) (2013). Available at SSRN: https://ssrn.com/abstract=3025990.*

and that all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal.

The United Nations Human Rights Committee provides an authoritative interpretation of the article in General Comment No. 32, which yields the following working definition of judicial independence:

> "(1) Courts must treat all parties impartially without discrimination.
>
> (2) Courts must display no bias or favour towards particular parties.
>
> (3) Courts must not pre-judge cases (i.e., there is no prejudice).
>
> (4) Courts must be politically independent; they must not be beholden to, or subject to manipulation or influence from the executive, administrative or legislative branches of government, which will often be parties before the courts.
>
> (5) Courts must be able to fulfil their functions without fear: courts cannot act independently if they face retribution for judgments unfavourable to private parties or government."[11]

The United Nations Basic Principles on the Independence of the Judiciary bring these elements of judicial independence together in a succinct definition in para 2 thereof. It states:

> "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[12]

The Universal Declaration of Human Rights ("UDHR")[13] is a non-binding declaration of the United Nations General Assembly, although some of its provisions are considered customary international law. The UDHR affirms the right to a fair trial before an independent and impartial tribunal (Article 11), the right of accused persons to be presumed innocent (Article 11), and the guarantee that all are equal before the law and enjoy all rights and freedoms equally. The UDHR imposes no legal obligations on countries, but is an important interpretive guide to the ICCPR[14] and other international treaties that do impose obligations of rights protection and judicial independence.

Further to that, the United Nations Special Rapporteurs are individuals who bear either a thematic or a country-specific mandate from the United Nations Human Rights Council to investigate human rights issues on behalf of the United Nations. Since 1994, the United Nations has appointed a Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur has filed

[11] UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007.
[12] UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly Resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985, para 2.
[13] Universal Declaration of Human Rights was published by the Unite Nations on 10 December 1948.
[14] International Covenant on Civil and Political Rights was published on 16 December 1966.

Annual Reports.

Alongside the Annual Reports, the Special Rapporteur also undertakes periodic missions to selected countries. The reports compiled on the basis of these missions are in-depth case studies of judicial and legal institutions in individual countries, and an assessment of how those structures and institutions succeed or fail in upholding the principles of judicial independence. Both kinds of documents offer useful analyses of how principles of judicial independence can be translated into practice in domestic contexts. At the same time, the documents offer warnings of how domestic judicial and legal systems can fail to uphold principles of judicial independence.

The reports of other thematic Special Rapporteurs are also valuable as soft law sources for judicial independence. For instance, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights developed the Draft Principles Governing the Administration of Justice through Military Tribunals.[15]

Other global standards on the independence of Judges are espoused in several instruments, such as the Bangalore Principles of Judicial Conduct.[16] One of the tenets contained therein is the value that judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial and that a Judiciary shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. Further, the Universal Charter of the Judge[17] also has provisions to the same effect.

On a regional scale, Article 26 of the African Charter on Human and Peoples Rights ("ACHPR")[18] places an obligation upon State parties to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ACHPR.

3. INSTITUTIONAL INDEPENDENCE

Institutional independence means that the judicial branch is independent from the legislative and executive branches of government, as a consequence of

[15] "Draft Principles Governing the Administration of Justice through Military Tribunals", Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/2006/58, 13 January 2006.

[16] "The Bangalore Draft Code of Judicial Conduct 2001" adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

[17] Approved by the International Association of Judges on 17 November 1999.

[18] Article 26 of the African Charter on Human and People's Rights mandates States to ensure that courts are fully independent to ensure the protection of the general populace.

the operation of the principle of separation of powers.[19] In Zimbabwe, one of the safeguards for judicial independence is provided under section 186(6) of the Constitution, which prohibits abolition of the office of a Judge during his or her tenure of office. The effect of the constitutional provisions guaranteeing to a Judge security of tenure of office is that he or she is not removable from office, except in the specific circumstances prescribed under section 187(1) of the Constitution,[20] and only after compliance with the specific procedure prescribed under subsections (2) to (8).

It is clear that the purpose of providing a Judge with security of tenure of office is to ensure that he or she is not a victim of fear of losing the job should he or she make a decision unfavourable to the State. In that way, a Judge is required and expected to act in accordance with the freedom secured and decide cases as justice demands, without fear of being fired should he or she make an unpopular decision. The guarantee for judicial independence is significant for prevention of illegal interference in the activities of the Judge.

Inextricably linked to the safeguard for security of tenure of office for the purposes of protecting judicial independence, is the prohibition under section 188(4) of the Constitution of reduction of salaries, allowances and benefits of members of the judiciary while they hold or act in the office concerned.

Section 188(1) of the Constitution provides that Judges are entitled to the salaries, allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President, given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance.[21] Section 188(3) provides that the salaries, allowances and other benefits of members of the judiciary are a charge on the Consolidated Revenue Fund. The purpose of the remuneration provision is to prohibit the Executive from tampering with Judges' salaries and benefits as a means of diminishing the authority of the judicial branch of government. The power to reduce judicial salaries and benefits would create the most danger to the independence of the Judiciary.

The purpose of guaranteeing financial security to members of the judiciary during the continuance of office, is to ensure that the judicial officer is free of fear of financial loss should he or she decide a case before him or her on the basis of the facts and the relevant law contrary to the interests of a State party. In other words, it was realised that consideration of loss of the job or reduction of remuneration for judicial service may overcome a Judge's ability to obey the obligation to exercise judicial authority in accordance with the Constitution and the law only. The remuneration provision is designed to benefit the public interest in a competent

[19] Inter-American Commission on Human Rights Report 1994 (OEA/Ser.L/V/11.85) (1995) pp 92-93.
[20] Section 187(1) of the Constitution of Zimbabwe, 2013.
[21] Section 188 of the Constitution of Zimbabwe, 2013.

and independent Judiciary, not the Judges as individuals by ensuring a real income purchasing power for them. The purpose is to preserve judicial independence.

Inherent and implicit in the characterization and essence of institutional independence is the concept of financial independence. An independent judiciary is one that receives enough funding to run the courts in order to protect the rights of citizens. It is only a Judiciary that is truly independent which decides matters impartially without fear, favour or prejudice; and is impervious and immune to extraneous influences. It is only a truly independent Judiciary which can withstand the pressure exerted by the demands of the principle of the rule of law.

Where the Judiciary does not have an independent source of income its independence is dependent on the other organs of State from which it obtains its funding. JUSTICE KING in the article "*Current Challenges to the Federal Judiciary,*" captured the problem well. She remarked:

> "The Constitution mandates that the powers of the federal government be separated among three independent branches: executive, legislative and judicial. But the judiciary is financed, like all other parts of the federal government, through appropriation bills passed by Congress and signed by the President. You have heard that the Judiciary does not have the power of the purse. Indeed, it does not; it is dependent for its financial livelihood on Congress and the President. So our independence must always be understood as qualified by our dependence on the other branches for our money."[22] (the underlining is for emphasis)

The Judiciary should not have to rely on the Executive or Legislature for its livelihood. There is therefore a critical need to ensure financial independence, without which there can be no absolute judicial independence.

There is an integral relationship between the remuneration provision and the tenure provision. Without the provision guaranteeing undiminished remuneration, the provision as to tenure of judicial office would be nugatory and indeed a mere mockery. The two provisions are inextricably tied to one another in the pursuit of securing judicial independence. By reducing Judges' salaries and benefits the political Branches of Government could force Judges to leave the bench, thereby achieving what they cannot achieve directly under the tenure provision.[23]

The guarantee of non-removability of a member of the judiciary from office is not absolute under the Constitution. The non-removability of members of the judiciary by the executive during their tenure of judicial office must, in general, be considered as a corollary of their independence. The very existence of the power to remove a Judge from office is a sufficient threat to judicial independence, notwithstanding the limited exercise of the power in practice and irrespective of whether its exercise

[22] Current Challenges to the Federal Judiciary", *Louisiana Law Review*, Vol. 66, No. 3, 2006 at page 662.

[23] Charles D. Cole: "Judicial Independence in the United States Federal Courts" (1988) *Journal of the Legal Profession* Vol 13:183 pp. 193-194.

would be an issue in a concrete case.[24]

Non-removability of Judges obviously does not mean that a Judge can never be removed from office. Section 187(1) of the Constitution provides that a Judge may be removed from office only for –

(a) inability to perform the functions of his or her office, due to mental or physical incapacity;
(b) gross incompetence; or
(c) gross misconduct.[25]

A Judge cannot be removed from office except in accordance with the specific procedure prescribed under section 187.

The formal recognition of non-removability in the law implies the existence of judicial independence as provided for by the Constitution. The level of protection for judicial independence is clear from the fact that none of the grounds which may give rise to a question of removal of a Judge from office have anything to do with the Judge having made a decision in accordance with the facts and relevant law.

The grounds for removal of a Judge from office relate to failure of a serious nature to exercise judicial authority. Not only is judicial independence protected from possible improper invasion by limiting the exception to the guarantee of non-removability to the three narrowly defined grounds for removal, the only procedure which would have to be complied with for the removal of a Judge from office ensures that the involvement of the executive is minimised.

The Constitution not only recognises that courts are independent and impartial, but also provides important institutional protection for the courts. The State is obliged under section 164(2)(b), through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165. The State is obliged to provide the funding and maintain the environment necessary to ensure the proper functioning of the Judiciary.

4. INDIVIDUAL INDEPENDENCE

While it constitutes a vital safeguard, institutional independence is not sufficient for the protection of the independence of the Judiciary. Unless individual Judges are free from unwarranted interference when they decide a particular case, the

[24] M. Kuijer p. 35 citing *Bryan* v *United Kingdom* ECHR 22 Nov. 1995 (Series A -335- A) para. 38.
[25] Section 187(1) of the Constitution of Zimbabwe, 2013.

concept of judicial independence is always at risk and cannot be fully realised.

One way to promote judicial independence is by granting life-tenure or long tenure for members of the judiciary, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests.

It is accepted that security of tenure is an important factor for the measurement of a judicial officer's independence in the exercise of judicial authority. Long term tenure in judicial office is certainly conducive to the facilitation of independent judicial decisions. The general principle is that the longer the term of office to be served by a judicial officer fixed by law governing judicial appointments the greater the guarantee for judicial independence. The time limit strengthens a judicial officer's belief in his or her independence due to the inviolability of his or her activity over a long period of time. A solid basis for that independence is that a judicial officer appointed for a constitutional term of office is not only an officer with judicial rights and duties, but he or she enjoys the social protection guaranteed as well.[26]

Section 186 of the Constitution makes provision for tenure of office of Judges.[27] Under section 186(2) all Judges hold office from the date of resumption of office until they reach the age of seventy years when they must retire. Judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years, but they must retire earlier if they reach the age of seventy years.

Further to the above, judicial independence is guaranteed by denying Judges the enjoyment of the right to political association. Section 165(4) of the Constitution prohibits members of the Judiciary from engaging in any political activities, holding office in or being members of any political organisation, soliciting funds for or contributing towards any political organisation or attending political meetings. In that way, judicial independence is protected from improper political influences on the judiciary which would otherwise emanate from political association.[28] The denial of rights of political association to members of the judiciary is justified on the ground that those who bring cases to courts for determination belong to different political parties and are entitled to equal protection of the law. They are entitled to expect that they shall be subjected to the same standard of adjudication, requiring the judiciary to decide cases on the facts proved and the relevant law.

Judicial independence is not a right. It is a duty. It is guaranteed to enable members of the Judiciary to administer justice. The concept expresses the sum of the values of integrity and freedom. It is not enough that members of the judiciary

[26] Michael D. Gilbert "Judicial Independence and Social Welfare" *Michigan Law Rev*. Vol 112. No. 4 (2014).
[27] Section 186 of the Constitution of Zimbabwe, 2013.
[28] Peter H. Russel "Towards a General Theory of Judicial Independence" books.google.co.zw/books.

be guaranteed an environment of freedom according to the law when performing judicial functions. They are required and expected to meet certain standards in the performance of judicial functions.

Section 165 of the Constitution requires members of the judiciary to do justice to all in the exercise of judicial authority, irrespective of status. They are not to delay justice. As Francis Bacon, the LORD CHANCELLOR OF ENGLAND, remarked in 1617, "fresh justice is the sweetest."[29] To that end, members of the Judiciary are expected to perform their judicial duties efficiently and with reasonable promptness.

Members of the Judiciary are required and expected to give their judicial duties precedence over all other activities. They are required not to engage in any activities which interfere with or compromise their judicial duties. They must always bear in mind that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

In order to be able to discharge their judicial functions efficiently and effectively, members of the Judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law. The reason is that the judicial branch of government not only tests and enforces the law, it judges the laws created by the legislature according to the standards implicit in the Constitution. Thus, unlike the legislative and executive branches, the sources of judicial authority derive in part from the will of the people and in part from standards of justice that are not bounded by national views and circumstances and are more universal in nature.

Section 165(2) of the Constitution imposes an obligation on members of the Judiciary, individually and collectively, to respect and honour their judicial office as a public trust.[30] Judges must strive to enhance their independence in order to maintain public confidence in the judicial system. It is clear that members of the Judiciary are required and expected to always bear in mind that the power they exercise is vested in the courts by the people to be exercised for their benefit.

It behooves members of the Judiciary to conscientiously uphold their independence and exercise judicial authority for the purposes it is intended to be used. In that regard, section 165(3) of the Constitution imposes an obligation on a member of the Judiciary, when making a judicial decision, to make it freely and without interference or undue influence. By prohibition of any kind of undue influence on a member of the Judiciary when making a judicial decision, the Constitution provides a tangible safeguard to secure the independence of the Judiciary and

[29] See http://www.duhaime.org/LegalResources/CivilLitigation/LawArticle-1270/Delay-in-Reasons-for-Judgment-Justice-Delayed-is-Justice-Denied.aspx (last accessed 8/2/2020).

[30] Section 165(2) of the Constitution of Zimbabwe, 2013.

ensures that members of the Judiciary are bound by the sole governance of law in performing their duties.

We need Judges of the calibre envisaged by Donald R. Cressey when he said:

> *"We need judges learned in the law, not merely the law in books but something far more difficult to acquire, the law as applied in action in the courtroom, judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest and equally important believed by all men to be independent and honest; judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman, and child that may come before them to preserve individual freedom against any aggression of government; judges with humility born of wisdom, patient and untiring in the search for truth and keenly conscious of the evils arising in a workaday world from any unnecessary delay."*[31]

In the Canadian case of *The Queen in Right of Canada* v *Beauregard,*[32] quoted with approval by the Constitutional Court of South Africa in *De Lange* v *Smuts N.O. and Others* 1998 (3) SA 785 (CC), DICKSON CJC stated the following in relation to what constitutes an independent and impartial court:

> "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider be it government, pressure group, individual or even another judge, should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."[33]

In Zimbabwe the Judicial Service (Code of Ethics) Regulations[34] requires in section 5 that judicial officers be independent and perform their duties without fear or favour. Further, it is also a requirement that a judicial officer shall at all times exhibit and promote high standards of judicial conduct in order to foster public confidence, which is universally accepted as a fundamental ingredient to the maintenance of judicial independence. This bolsters the notion that justice must not only be done but must be seen to be done.

5. THE PRINCIPLE OF SEPARATION OF POWERS

Separation of powers is a fundamental principle on which any constitutional and democratic system of government is based. The powers of the State to be exercised by the Government are divided into legislative, executive and judicial on the basis of the principle of separation of powers. The powers are vested separately in the

[31] DR Cressey "Crime and Criminal Justice" *Quadrangle Books Chicago* 1971 p.263.
[32] *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC).
[33] *De Lange v Smuts N.O. and Others* 1998 (3) SA 785 (CC).
[34] Judicial Service (Code of Ethics) Regulations (SI 107/2012).

institutions created for the purposes of exercising them. The powers are related but are to be kept separate. All the powers constituting judicial authority are vested in the courts and must be exercised by the judiciary because it is its duty to administer justice.

The separation of powers doctrine grew out of centuries of political and philosophical development. Its origins can be traced to the fourth century B.C. when Aristotle, in his treatise titled "Politics", described three agencies of Government - "the general assembly, the public officials, and the judiciary."[35] In *Book XI* of the *Spirit of Laws* (1748) Montesquieu states:

> "Again, there is no liberty if the judiciary power be not separated from the legislature and executive. Were it joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and aggression. There would be an end of everything, were the same man and the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing public resolutions and of trying the causes of individuals."[36]

The separation of powers principle implies that the three powers must be separate and independent from each other. Each power must keep in check and limit the other two powers. All the three powers should have the same weight (the check and balance principle). In this model, Judges should be independent of both external and internal pressures.

Separation of powers is not only a matter of constitutional architecture for the sake of the rational organization of powers. It is a matter of liberty for each person and for society as a whole. It is a basic condition for the effective protection of individual rights and liberties, in order to assure each individual an effective remedy against any breach of her or his rights.[37]

It is not enough that the judiciary is separated from the legislative and the executive branches of government. It must be independent from the two branches of government, in the sense that the latter should not interfere in the exercise by the judiciary of judicial authority in the administration of justice. The exercise of judicial authority in the administration of justice involves the interpretation and application of laws made by the legislature. Many cases decided by the courts involve allegations by individuals of violation of rights by the State. The cases also often involve the judiciary in reviewing legislation to determine its constitutional validity. Whether it is exercising judicial review powers or determining the legality

[35] Sam J Ervin Jr: "Separation of Powers: Judicial Independence" available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3279&context=lcp .

[36] Book XI The Spirit of Laws (1748) Montesquieu.

[37] Marta Cartabia (Vice President of the Italian Constitutional Court) "Separation of Powers and Judicial Independence: Current Challenges" European Court of Human Rights - The Authority of the Judiciary, Seminar in the occasion of the Solemn Hearing of the Court Strasbourg, January 26th, 2018.

of the conduct of the executive, the judiciary is engaged in the application of constitutionally prescribed limits to legislative and executive powers.

As said above, judicial power ought to be exercised by the judiciary alone as part of the three arms of the State. The exercise of that power is a guarantee for the delivery and attainment of justice. Justice is delivered by interpreting the law, enforcing it and ensuring that the checks and balances principle is observed.

The judiciary is required and expected in terms of the principle of judicial independence to act in accordance with the law and decide cases before it by applying the law to the facts found proved. It is not to be subjected to any undue pressure or improper influence from any quarter, public or private. No-one in the close vicinity of a judicial officer at the time he or she makes a judicial decision should demand a result from him or her.

The case of *R* v *Valente* [1985] 2 SCR 673 is a leading decision by the Supreme Court of Canada on protection of judicial independence under section 11(d) of the Canadian Charter of Rights and Freedoms. The requirements of independence and impartiality were defined as follows:

> "… The word 'independent' in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of Government, that rests on objective conditions or guarantees." (the underlining is for emphasis)

As such, the principle of separation of powers is intended to ensure that the checks and balances principle guarantees that each branch has power to limit or check the other two branches. This creates a balance between the three separate branches of the State. This principle enables one branch to prevent either of the other branches becoming supreme. Checks and balances are designed to maintain the system of separation of powers, keeping each branch in its place. The idea is that it is not enough to separate the powers and guarantee their independence, but the branches need to have the constitutional means to defend their own legitimate powers from the encroachments of the other branches. Consequently, a Government in a constitutional democracy that is regulated by the principle of separation of powers can be termed a Government of limited powers. This stems from the limited power that each branch may exercise, more so especially in relation to other branches of government. This state of affairs is brought about by the existence of the checks and balances system.

In other words, the principle of separation of powers is not just meant to ensure the independence of the branches of the State from each other, it is also meant to ensure the balance or equilibrium between the three arms of the State. The end

result of this process is the attainment of peace, stability and the protection of fundamental individual rights.

6. RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND THE PRINCIPLE OF SEPARATION OF POWERS

With the rise of the modern State and the increasing importance of the individual's rights against government, not to mention the sometimes pervasive power of the executive, judicial independence, in the context of the relationship between the Judiciary and the other branches of government, is now more important than it ever was.[38]

The Judiciary as an organ of the State plays an instrumental role in the enforcement of the rule of law. Section 165(1)(c) of the Constitution, which speaks to principles guiding the judiciary, provides that the role of the courts is paramount in safeguarding human rights and the rule of law. One of the fundamental objectives of the rule of law entails the limitation of government powers through checks and balances. It is therefore of utmost importance that the independence of the judiciary be guaranteed.

Generally, the principle of separation of powers requires that each branch of government performs its function independently of the others. The relationship between the legislature, the executive and the judiciary in a parliamentary democracy was summarised by LORD MUSTILL in *R* v *Secretary of State for the Home Department, ex parte Fire Brigades Union* in the following terms:

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed."[39]

It is generally accepted that a modern democratic State should be founded on the principle of separation of powers. The Judiciary is one of the three essential but equal pillars of a modern democratic State. All three powers provide a public service and must hold each other accountable for their actions. In a democratic State which is subject to the rule of law, none of the three powers of State act for their own interest but in the interests of the people as a whole. In a democratic State bound by the rule of law, all three powers must act on the basis of and within

[38] Anthony F Mason "Judicial Independence and the Separation of Powers - Some Old Problems and New".

[39] *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

the limitations provided by law.[40]

Constructive relationships between the three arms of government, that is, the executive, the legislature and the judiciary, are essential to the effective maintenance of the Constitution and the rule of law.[41] The interaction of these arms of government is a fundamental aspect of any Constitution founded on democracy and the rule of law. Unless there is an independent judiciary, able to interpret and apply laws in a manner based on legal rules and principles rather than on political intentions or calculations, the concept of the rule of law itself is brought into question.[42]

In principle the three powers of a democratic State should be complementary, with no one power being "supreme" or dominating the others. In a democratic State, ultimately it is the will of the people, expressed through the proper democratic process, that is supreme (sovereignty of the people). It is also fallacious to imagine that any one of the three powers of State can ever operate in complete isolation from the others. The three powers rely on one another to provide the totality of public services necessary in a democratic society. So, while the legislature provides the legislative framework, it is the judiciary that must interpret and apply it by virtue of its decisions and the executive is often responsible for the enforcement of judicial decisions in the interest of society. In this way the three powers function in a relationship of interdependence, or of convergence and divergence. Accordingly, there can never be a complete "separation of powers". Rather, the three powers of the State function as a system of checks and balances that holds each accountable in the interest of society as a whole.[43]

The prime constitutional principle of central importance in governing the relationships between the judiciary, the executive and the legislature is that of the independence of the judiciary. This does not and should not mean that the judiciary has to be isolated from the other branches of the State. Nor does it mean that the judiciary -individually and collectively – needs to be insulated from scrutiny, general accountability for its role or properly made public criticisms of conduct inside or outside the courtroom.[44]

The doctrine of separation of powers, upon which our constitutional democracy is premised, specifically embraces the independence of the judiciary. That

---

[40] Consultative Council of European Judges (CCJE) "The position of the Judiciary and its relation with the other powers of state in a modern democracy" Opinion No. 18 (2015).

[41] House of Lords Select Committee on the Constitution (2007): "Relations between the Executive, the Judiciary and Parliament", 6th report of Session 2006-7, *Authority of the House of Lords, London:* The Stationery Office Limited.

[42] Bradley A, "The New Constitutional Relationship Between the Judiciary, Government and Parliament" at para 2.

[43] See note 25 above.

[44] See note 25 above.

independence includes financial independence. It is important in this context that the judiciary is able to access funds allocated to it in the budget timeously in order to execute its constitutional mandate. Anything contrary to this will negatively affect court operations.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all sides to be essential to the preservation of liberty, it is evident that each branch should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.[45]

The judiciary must be independent to fulfil its role in relation to the other powers of the State, society in general, and the parties to litigations. The independence of Judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. The principle of the separation of powers is itself a guarantee of judicial independence. However, despite the frequently expressed importance of judicial independence, it cannot be denied that no entity, including the judiciary, can be completely independent from all influences, in particular social and cultural influences within the society in which it operates. After all: "No man is an island, entire unto itself."[46] No judiciary, as with any power in a democratic State, is completely independent. The judiciary relies on the two arms of the State to provide resources and services, in particular on the legislature to provide finances and the legal framework which it has to interpret and apply. Although the task of deciding cases according to the law is entrusted to the judiciary, the public relies on the executive to enforce judicial decisions. Shortcomings in the enforcement of judicial decisions undermine judicial authority and question the separation of powers.

Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the State. Rather, there is a fundamental need for respectful discourse between them all that takes into account both the necessary separation as well as the necessary interdependence between the powers. It remains vital, however, that the Judiciary remains free from inappropriate connections with and undue influence by the other powers of the State.[47]

[45] The Federalist, No. 51 (Hamilton).
[46] The English poet John Donne in "*Meditation XVII*.
[47] See note 25 above.

7. JUDICIAL ACCOUNTABILITY

Accountability, in as far as it relates to the Judiciary, refers to a set of mechanisms designed to ensure that judicial officers perform the duties required by their job in order to fulfil or further the goals set by the Constitution. It also refers to full disclosure on the use of public resources and the consequences of failing to meet stated performance objectives.

In recent years, public services have moved towards more openness and have accepted that they must provide a fuller explanation of their work for the public they serve. As a consequence, the notion of accountability to the public has become of increasing importance throughout public life. A public body will be accountable if it provides explanations for its actions and, of equal importance, the public body assumes responsibility for them. This accountability is as vital for the judiciary as for the other powers of the State because it, like them, is there to serve the public. Moreover, provided a careful balance is observed, the two principles of judicial independence and accountability are not irreconcilable opposites. In the judicial context, "accountable" must be understood as being required to give an account, that is: to give reasons and to explain decisions and conduct in relation to cases that the Judges must decide.[48]

Accountability does not mean that the Judiciary is responsible to or subordinate to another power of the State, because that would betray its constitutional role of being an independent body of people whose function is to decide cases impartially and according to law. If the Judiciary were accountable to another arm of the State, in the sense of being responsible or subordinate to it, then when cases involve those other powers of State the Judiciary could not fulfil its constitutional role as stated above.[49]

The Judiciary (as with the other two arms of the State) provides a public service. It is axiomatic that it should account (in the sense explained above) to the society it serves. Judicial authority must be exercised in the interest of the rule of law and of those seeking and expecting justice.[50]

While the independence of the judiciary is key in a constitutional democracy, it must be remembered that complete separation of the three arms of the Government is impossible. Thus the Judiciary and its constituents, just like any other public entity, must be beholden to the principles of accountability and effectiveness that govern the other arms of government. Judicial independence is for the protection and benefit of the public. It is to ensure that the judiciary is able to carry out its role as the

[48] See note 25 above.
[49] See note 25 above.
[50] See the CCJE Opinion No. 1(2001) para 11; Opinion No. 10(2007), para 9.

guardian of the Constitution without fear or favour, and to inspire the confidence of the public that it is able to, and will do so.

As I stated in my speech on the occasion of the official opening of the 2020 Legal Year, themed "Judicial Transparency and Accountability":

> "The Judiciary's accountability to society is made operative first and foremost by ensuring that judicial officers are accountable to the law. That means that they are required to explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis. Their decisions can be reviewed and, if necessary, corrected by the judicial hierarchy through a system of appeals."

Such is the importance of accountability that the preamble to the Constitution lists it amongst the values which need to be entrenched to guide institutions of the State at every level in the discharge of constitutional obligations. The preamble states that there is "the need to entrench democracy, good, transparent and accountable governance and the rule of law."

Judicial accountability also requires judicial officers to provide reasons for their decisions through written judgments. Reasons for judgments enable litigants and members of the public to comment on the rationale of decisions. Members of the public are afforded the opportunity to form their own opinion on the efficiency and effectiveness of the judicial system. This is especially so in cases of public interest.

In the same vein, the provision of judgments also allows a litigant who may be aggrieved with the decision of a court to exercise his or her right of appeal against the decision, where such remedy is provided for by the law. Where a judgment is delivered *ex tempore*, it must be announced in open court. Where a judgment is written, it must be published including making it readily accessible to members of the public who may wish to have sight of it.

The duty to give reasons is meant to prevent arbitrariness. It directly impacts on the constitutional right of citizens to a fair trial. Even from a common sense perspective, reasoned decisions are generally preferable to unreasoned ones. Fundamental tenets of judicial work, such as the requirement to hold public hearings and to give reasoned decisions that are available to the public, are founded on the principle that Judges must give an account of their conduct and decisions.

To that end, the Judiciary faces the responsibility of demonstrating to the other powers of the State and to society at large the use to which its power, authority and independence have been put. As such, accountability is of utmost importance.

8. CONCLUSION

The principle of Judicial Independence is an international standard. Independence of the judiciary means that the other organs of the government, the executive and legislature must not restrain the functioning of the judiciary in such a way that it is unable to do justice. Judges must be able to perform their functions without fear or favour.[51] The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to the law, uninfluenced by any other factor. Judicial independence requires the absence of constraints likely to result in interference in the administration of justice. Independence lies at both the institutional level and with the individual judge.[52]

[51] https://www.ijlmh.com/paper/independence-of-judiciary-in-india.
[52] https://www.dplf.org/sites/default/file.

JUDICIAL INTEGRITY, CODE OF ETHICS AND RECUSAL[53]

HONOURABLE ELIZABETH CHIEDZA GWAUNZA

Deputy Chief Justice of the Republic of Zimbabwe

ABSTRACT

Judicial integrity and ethics play an important role in the administration of the justice. Coupled with the principle of recusal, the public will be best assured that the administration of justice is in good hands. These three ingredients are instrumental in the effective functioning of any judicial system. In Zimbabwe, ethics for judicial officers are provided for under Judicial Code of Ethics, SI 107/2012. This code of ethics prescribes the conduct which falls short of impeachable conduct as provided for under the Constitution. This statutory instrument prescribes conduct or behaviour that is ethically improper. Ethics are important in bolstering judicial independence and promoting the rule of law. Corruption is a serious threat and cancer to the well-being of society and it must be vehemently shunned by all judicial officers. The law on recusal is fundamental in preserving public trust and confidence in the judiciary, thereby helping to prevent right-thinking people from entertaining the notion that the court was biased.

1. INTRODUCTION

This presentation draws from the paper presented by the Honourable Chief Justice L. Malaba, on the occasion of the Orientation of New High Court Judges at Nyanga, on 15 February 2020.[54] The Hon. Chief Justice's paper is very comprehensive and cites weighty authorities and international principles on judicial ethics which may not be fully covered in this presentation.

Although according to the programme, the presentation is supposed to focus on the topics of Integrity, Code of Ethics and Recusal, I have decided to collapse the first two topics since the latter encompasses integrity as one of its core values. Recusal

[53] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

[54] A Presentation by the Honourable Chief Justice L. Malaba on the Occasion of the Orientation of the new High Court Judges, Nyanga, 15 february 2020, Accessed on http://www.jsc.org.zw/jscbackend/upload/Publications/JUDICIAL%20INTEGRITY%20&%20THE%CODE%20OF%20ETHICS%20CJ%20-%20HC%20Judges%20Orientation%20Nyanga.pdf .

will be addressed last. Although the primary points of reference in addressing the topics at hand will be the Constitution of Zimbabwe, 2013 and the Judicial Service (Code of Ethics) Regulations, 2012, recourse is also had to pertinent international conventions, treaties and case authorities from within and without Zimbabwe.

The establishment of an independent and effective justice system that safeguards human rights, facilitates access to all, and provides transparent and objective recourse is a core value held the world over. We all know that the role of the courts is paramount in protecting human rights and freedoms and upholding the rule of law. This is articulated in Section 165(1)(c) of the Constitution of Zimbabwe,[55] which specifically provides for the role of the courts. The judiciary is a significant arm of the State because it is primarily mandated to interpret and apply the law to disputes of subjects of a country through the office of its appointed Judges. Therefore, judicial ethics are a core foundation for the survival of the judiciary.

2. THE JUDICIAL CODE OF ETHICS

Our Judicial Code of Ethics, SI 107/2012, was promulgated on 15 June 2012 in terms of s 18 of the Judicial Service Act [*Chapter 7:18*].[56] It addresses conduct falling short of impeachable conduct as provided for in s 187 of the Constitution,[57] which, nevertheless may attract some form of reprimand or another. Judicial ethics are therefore regulated under the banner of the Judicial Service Commission.

A Code of ethics can broadly be defined as a written set of guidelines issued to a certain group of persons to help them conduct their actions in accordance with an organisation's system's or primary values and ethical standards. A Judicial Code of Ethics is not inconsistent with judicial independence. It is a regulation of the judiciary by the Judiciary. It is not imposed from outside. The premise underlying the grant and protection of the right to judicial independence is that it is in the interest of justice. It is also vital that the independence be vested in persons who will behave ethically in their personal and judicial lives. The Code of Ethics[58] is therefore intended to uphold and not constrain the independence of the judicial officers in the discharge of their judicial functions. A judicial system that operates without regard to professional ethics and standards is not able to build and retain public trust in the fairness and objectivity of its decisions and outcomes.

[55] Judicial Service (Code of Ethics) Regulations, SI 107/2012.
[56] Judicial Service Act [*Chapter 7:18*].
[57] Constitution of Zimbabwe, 2013.
[58] Judicial Service (Code of Ethics) Regulations, SI 107/2012.

The ethics of judicial members are key in the administration of justice. This topic has gathered a lot of attention worldwide. As emphasised earlier on, the office of a Judge is important because the Judge has a constitutional mandate to protect the fundamental human rights of the people. It is in view of those fundamental human rights that certain principles regulating the ethical conduct of Judges have been developed.

In keeping with internationally set principles and standards, our jurisdiction took into account six major principles in the formulation of our Judicial Code of Ethics as follows (See sections 5 to 20).

(i) Independence;

(ii) Impartiality;

(iii) Integrity;

(iv) Propriety;

(v) Equality; and

(vi) Competence and Diligence.[59]

3. JUDICIAL INTEGRITY

The motivational speaker, *Mr Arthur Marara*, during his presentation to this forum issued the following overarching caution in relation to judicial conduct;

i) People see you when you do not see them, and

ii) Do the right thing even if no one is watching.

Judicial integrity has been defined in many different ways although the common thread remains basically the same. Our Judicial Code of Ethics provides as follows in its Section 6;

> "Integrity
>
> 6. (1) A judicial officer shall ensure that his or her conduct, in and outside court, is above reproach in the view of reasonable, fair minded, and informed persons.
>
> (2) A judicial officer shall not allow family, social, political, religious, or other like relationships to influence his or her judicial conduct or judgment.
>
> (3) A judicial officer shall participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards, so that the

[59] Judicial Service (Code of Ethics) Regulations, SI 107/2012.

integrity of the Judiciary may be preserved."[60]

This section makes it clear that integrity is a fundamental part of a Judge's life both in and out of court. That integrity must be upheld at all times because lack of it may result in overarching consequences not only on the overall work of a person in the office of a Judge but also on the credibility of the Judiciary as a whole. Most significantly, a Judge is expected to establish, maintain and enforce high standards of conduct. Thus, Judicial integrity can be summarised to include all attributes that are essential in contributing to how the public, from whom a Judge derives his or her authority, perceives that Judge and this perception is formed from the conduct of the Judge.

Judicial officers must always keep at the back of their minds, the provisions of section 165(2) of the Constitution[61] whose import is that judicial integrity plays a key role in retaining public confidence in the institution of the Judiciary. Judges are therefore required in terms of the Constitution to be persons of integrity.[62]

According to the Judicial Integrity Group[63]a judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Consequently, the courts must strive to preserve the integrity of the judicial process. This begins with the manner in which the judges handle themselves in carrying out their duties. It is imperative, for that reason, that a Judge be of utmost integrity in his/her conduct in the execution of his duties.

A Judge is therefore obligated to uphold the law. He or she should not be placed in a position of conflict in observance of the law. What in others may appear to be a relatively minor transgression may for a judge attract publicity and thus bring the judge into disrepute as well as raise questions regarding his or her integrity and the integrity of the Judiciary.

4. IMPARTIALITY

The Judicial Code of Ethics[64] outlines the circumstances that a Judge must not find himself or herself in which may compromise his or her impartiality. It states that a judicial officer shall:

1. So far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judicial officer to be disqualified from hearing or

[60] Judicial Service (Code of Ethics) Regulations, SI 107/2012.
[61] Constitution of Zimbabwe, 2013.
[62] Section 165 of the Constitution of Zimbabwe, 2013.
[63] The Group is composed of members of various Judiciaries in the world, who, among other things, are committed to coming up with effective mechanisms to reinforce the integrity of judicial systems.
[64] Judicial Service (Code of Ethics) Regulations, SI 107/2012.

deciding cases[65] (This requirement resonates with section 165(3) of the Constitution[66] which provides that, when making a judicial decision, a member of the Judiciary must make it freely and without interference or undue influence);

2. not make any public comment that may affect or may reasonably be construed to affect the outcome of any proceedings or impair their fairness, or make any comment that might compromise a fair trial or hearing;[67]

3. Where he or she may be conflicted, or perceived to be so.[68]

Section 165(4) of the Constitution,[69] as read with section 15 of the Judicial Code of Ethics,[70] in no uncertain terms, provides that a Judge must not -

(a) engage in any political activities; (*This will lead to what one of the speakers, Dr. Manyatera, referred to as politicisation of the judiciary);*

(b) hold office in or be members of any political organisation;

(c) solicit funds for or contribute towards any political organisation; or

(d) attend political meetings.

According to the United States of America Supreme Court decision in *Baker v Carr*:

> "The court's authority … possessed of neither the purse nor the sword … ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the court's complete detachment, in fact, and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."[71]

As LORD DENNING MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* once said, justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking "The judge is biased".[72]

An impartial judge does not have any personal interest of any kind in the result of a case. He or she must also have the courage to arrive at and enforce the result according to law and not because other ulterior motives and components have influenced his or her decisions. Extra-judicial activities that are likely to cause the Judge to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest arising from the activity must be avoided.

RARES J, a Judge in Australia, in the article cited *supra,* also highlighted the link between integrity and impartiality in the office of a Judge as follows:

[65] Section 13(2) of the Judicial Service (Code of Ethics) Regulations, 2012.
[66] Section 165(3) of the Constitution of Zimbabwe, 2013.
[67] Section 13(3) of the Judicial Service (Code of Ethics) Regulations, 2012.
[68] Section 14 of the Judicial Service (Code of Ethics) Regulations, 2012.
[69] Section 165(4) of the Constitution of Zimbabwe, 2013.
[70] Section 15 of the Judicial Service (Code of Ethics) Regulations, 2012.
[71] *Baker v Carr* 369 U.S. 186 (1962).
[72] *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599F.

> "Integrity is another aspect of the attribute of impartiality essential to the attainment and maintenance of public trust in the Judiciary. A judge must be honest. An accepted principle of the common law is that it is of 'fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."[73]

The result of bias is therefore partiality, and a biased judge will contravene the litigant's right to an impartial tribunal. Furthermore, a public perception of widespread bias in the judiciary would threaten the rule of law itself. People would then start to talk of a 'captured' judiciary.

As a result, the obligation to be impartial is not subject to flexibility or compromise, although there is flexibility concerning what perceptions of bias will be treated as reasonable in different settings. Judicial impartiality includes not only a protection against actual bias, but also the appearance of bias. It is generally accepted that appointment to judicial office brings with it limitations on the private and public conduct of a Judge. Judges must avoid engaging in any activities that may threaten their impartiality in any way. Transparency of judicial activities, behaviour of a judge in court and outside the courtroom, ensuring that not only does unethical behaviour not happen, but also, that the appearance of integrity in the eyes of the public is kept. Judges must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life.

Thus, conduct by a judge that violates the law in any way is unacceptable. Judges are not above the law. One would not expect a judge who violates the law to preside over cases where the very same conduct would have led to another person appearing before that very same judge.

5. PROPRIETY

Section 7(1) of the Judicial Code of Ethics[74] makes it clear that impropriety on the part of a Judge brings disrepute to the Judiciary.

The *Commentary on the Bangalore Principles of Judicial Conduct* lists the following as activities which, if not taken seriously, may compromise a Judge's propriety -

i. Being a member of a secret society;
ii. Having social relationships with litigants and lawyers;
iii. Visiting former chambers, firm or office; and
iv. Participating in occasional gatherings of lawyers.[75]

[73] Rares, S "What is a quality judiciary?" Accessed on *http://www5.austlii.edu.au/au/journals/FedJSchol/2010/44.html#:~:text=A%20quality%20judiciary%20must%20have,law%20or%20the%20civil%20law*. As cited in the Presentation by the Chief Justice cited *supra*.

[74] Section 7(1) of the Judicial Code of Ethics.

[75] United Nations Office on Drugs and Crime , Commentary on the Bangalore Principles of Judicial Conduct, September 2007, Accessed on https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf.

Section 165(5) of the Constitution[76] prohibits Judges from soliciting or accepting any gift, bequest, loan, or favour that may influence their judicial conduct or give the appearance of judicial impropriety. Section 10 of the Judicial Code of Ethics also prohibits a Judge from serving as an executor, administrator, trustee, guardian, or other fiduciary, save for the estate, trust, or person of a member of the judicial officer's family, so long, however, as any such service does not interfere, directly or indirectly, with the proper performance of judicial duties.[77] A lot of other activities are clearly listed in the Judicial Code of Ethics and Judges must pay attention to those provisions of the Judicial Code of Ethics.[78]

From the foregoing, it is evidently clear that a Judge must be a person of a high level of propriety. Issues to do with propriety have a great impact on how the public views the Judiciary. As already indicated, Judges must preserve the trust and confidence of the public in the Judiciary, as their very existence and mandate is drawn from the people.

Judges in this respect must limit their involvement or participation in the social media. Use of platforms such as Instagram, Facebook, Twitter and even some whatsapp groups, must be carefully managed or managed with great restraint. Judges must be very careful about what they post on these platforms because once some content goes out there, the judge would not be able to control or manage its spread.

6. EQUALITY

Section 165(1)(a) of the Constitution[79] provides that justice must be done to all, irrespective of status. That obligation in itself suggests that a Judge must uphold the principle of equality whilst executing his or her duties. Section 16(1) of the Judicial Code of Ethics[80] goes on to state that a judicial officer shall strive to be aware of, and to understand and be sensitive to, diversity in society and differences based on various grounds that are not (except in strict compliance with the express terms of any law) material or determinative of any issue arising in connection with his or her performance of judicial duties. This includes (but is not limited to) differences on the grounds of race, colour, gender, religion, national origin, disability, age, marital status, social and economic status and other like grounds.

[76] Section 165(5) of the Constitution of Zimbabwe, 2013.
[77] Section 10 of the Judicial Code of Ethics.
[78] See note 77 above.
[79] Section 165(1)(a) of the Constitution of Zimbabwe, 2013.
[80] Section 16(1) of the Judicial Code of Ethics.

The following are some of the duties imposed upon Judges in the *Commentary on the Bangalore Principles of Judicial Conduct* which assist in upholding the principle of equality in the execution of a Judge's duties –

i. A Judge must be responsive to cultural diversity;
ii. A Judge must avoid stereotyping;
iii. There must not be gender discrimination;
iv. A Judge has a duty to refrain from making derogatory comments;
    a. Judicial remarks must be tempered with caution and courtesy;
    b. People in court must be treated with dignity;
    c. A Judge must ensure that court staff conform to prescribed standards; and
    d. A Judge has a duty to prevent lawyers from engaging in racist, sexist, or other inappropriate conduct. [81]

From the above, it is clear that as Judges preside over proceedings in court, their duties are not restricted only to the knowledge of substantive law that may apply to the case that may be brought before them. The Judges must regulate all the proceedings, including the conduct of those that appear before them or that are involved in matters which they preside over including support staff which may result in the principle of equality being destroyed. The principle of equality is taken from the right to equal treatment of all persons before the law and to equal protection of the law. This principle necessitates that a Judge must always be alive to the different persons that appear before them as litigants. Different litigants have different needs which, if not paid attention to, may result in the violation of the fundamental right to equality as protected by section 56(1) of the Constitution.[82]

7. COMPETENCE AND DILIGENCE

In terms of section 165(7) of the Constitution,[83] members of the Judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills, and personal qualities, and in particular, must keep themselves abreast of developments in domestic and international law.

This requires the Judge to take reasonable steps to maintain and enhance the knowledge and skills necessary for the proper performance of judicial duties, to devote the Judge's professional activity to judicial duties, and not to engage in conduct incompatible with the diligent discharge of such dutie

Sections 17 to 20 of the Judicial Code of Ethics[84] go on to give lie to section 165(7) of the Constitution by providing that a Judge must -

[81] Commentary on the Bangalore Principles of Judicial Conduct.
[82] Section 56(1) of the Constitution of Zimbabwe, 2013.
[83] Section 165(7) of the Constitution of Zimbabwe, 2013.
[84] Section 17 to 20 Judicial Code of Ethics.

1. perform all judicial duties efficiently, fairly, and with reasonable promptness despite the heaviness of the workload;
2. devote his or her professional activity to judicial duties;
3. use his or her best efforts to ensure that a reserved judgment is delivered within the next ninety (90) days and, except in unusual and exceptional circumstances, no judgment shall be delivered later than one hundred and eighty (180) days from the date when it is reserved;
4. maintain order and decorum in all proceedings in which the judicial officer is involved; (*There is a set routine for the conduct of court proceedings. In short, after court sits, the judges can only rise after an adjournment is formally pronounced. A judge cannot rise and leave the court abruptly without this pronouncement, nor should a judge answer a telephone call during court proceedings);*
5. be patient, dignified and courteous in relation to litigants, assessors, witnesses, legal practitioners, and others with whom the judicial officer deals in an official capacity. It is not seemly for a judge to shout at a lawyer or litigant, or address them rudely. (*A Judge must guard against descending into the arena, as it were, no matter how strongly he or she may feel about the merits or lack thereof, of the submissions being made by and on behalf of any litigant. This might give the impression that the judge has already pre-judged the matter and formed an opinion as to the outcome thereof before proceedings are completed*);
6. attend to matters set down in chambers and those set down in court, timeously and in such manner as is necessary and appropriate to ensure the due and diligent performance of all official duties; and
7. subject to formal administrative arrangements, not assign work to himself or herself and no litigant shall have a right to choose the judicial officer who will preside over or deal with his, her or its matter. [85]

Section 165(1)(b) of the Constitution[86] provides that justice must not be delayed, and to that end members of the Judiciary must perform their judicial duties efficiently and with reasonable promptness. What that means, therefore, is that a competent and diligent Judge must deliver judgments timeously. Failure to do so amounts to a breach of a litigant's right of access to justice itself. As they say, justice delayed is justice denied. Because the judicial system is often society's last, and sometimes only, resort for the resolution of disputes, the longer the time before resolution occurs, the greater the strain on the persons who are kept in a state of uncertainty.

It can only, therefore, be emphasised that the timeous delivery of judgments is an important attribute of a Judge who upholds the Constitution by allowing litigants to have decisions on their matters pronounced timeously.

A constant commitment to improving a Judge's knowledge on the law is another

[85] See note 84 above.
[86] Section 165(1)(b) of the Constitution of Zimbabwe, 2013.

key aspect in the proper execution of a Judge's constitutional mandate. The law is ever changing; it is never static. One needs to direct his or her attention, time and effort to making sure that he or she, by all means, works towards keeping abreast with developments in the law. One can only imagine the embarrassment a Judge may face where he or she gives judgment in terms of a law that is outdated simply because he or she did not make an effort to keep abreast with developments in the law.

The Judicial Code of Ethics[87] speaks clearly on the requirement that a good Judge must be competent and diligent in the execution of his or her duties. Judges must stay alive to the fact that their intellectual integrity is key in their duty as the custodians of the law. They must be seen to take those reasonable steps in maintaining and enhancing their professional skills and knowledge of the law.

8. CORRUPTION

Related to integrity, impartiality and propriety on the part of judicial officers is the scourge of corruption. Section 165(6) of the Constitution[88] provides that members of the judiciary must give their judicial duties precedence over all other activities, and must not engage in any activities which interfere with or compromise their judicial duties. In clear terms, the Constitution condemns corrupt behaviour on the part of members of the judiciary. Judicial integrity is thus of utmost importance to avoid being entangled in corruption storms which will inevitably impair public confidence in the judiciary.[89]

Judicial corruption refers to the corruption-related misconduct of judges, through the receiving or giving of bribes, the improper sentencing of convicted criminals, bias in the hearing and judgment of arguments, and other forms of misconduct. It is undisputed that corruption in the judiciary undermines the rule of law and legal certainty. It has a deleterious impact on citizens and in the judicial system and can seriously compromise the legitimacy and stability of democratic institutions. Integrity and independence of the judiciary are necessary conditions to prevent corruption within the judiciary itself hence the inclusion of this topic in this presentation.

The existence of corruption in our country is of national concern. It is our duty as members of the judiciary to make sure that we join the nation in fighting against the scourge of corruption by maintaining high standards of judicial ethics.

[87] See note 84 above.
[88] See note 84 above.
[89] Constitution of Zimbabwe, 2013.

8.1. Types of corrupt behaviour in the judiciary

Some forms of corrupt behaviour identified across judicial systems affecting the judiciary are these:

1. Accepting bribes, gifts, or other personal favours related to the judicial office;
2. Undue political influence over the outcome of, or political interference in, a judicial process;
3. Extortion of judicial professionals, victims and witnesses;
4. Misuse of public funds and resources; and
5. Succumbing to undue influence.
6. Using the judge's office to obtain special treatment for friends or relatives.[90]

Corruption is clearly a vice that must not exist in the judiciary. The moment that a Judge is found to be corrupt, the whole fabric of the judiciary is compromised. All the six principles of judicial ethics will have been violated in the process and the primary reason for any judiciary, which is to foster public confidence in the judiciary, will have been seriously compromised.

9. RECUSAL

Very much linked to judicial impartiality is the issue of a judge's recusal from hearing or determining a matter. Recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest. It is a rule of natural justice. What recusal entails therefore is that a judicial officer whose impartiality to deal with a given case is not guaranteed on any ground, is disqualified from hearing the case.

Section 14(1) of the Judicial Service (Code of Ethics) Regulations, 2012 addresses this subject and provides as follows;

"*Recusal*

(1) A judicial officer shall disqualify or recuse himself or herself in any proceedings in which the judicial officer's impartiality may reasonably be questioned, including but not limited to instances where -

(a) the judicial officer has personal knowledge of disputed evidentiary facts concerning the proceedings; or

(b) the matter in controversy -

[90] Constitution of Zimbabwe, 2013.

(i) is one in which the judicial officer had served as a legal practitioner; or

(ii) involves a legal practitioner with whom the judicial officer had previously practised law, and such involvement began during the time when the judicial officer and legal practitioner were practising together; or

(c) the judicial officer or any of his or her family members or associates has, to his or her knowledge, a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceedings; or

(d) the judicial officer has a personal bias or prejudice concerning a party."[91]

Section (2) goes on to provide that a judge who would otherwise be disqualified by virtue of the above, may, instead of recusing him or herself, disclose to the parties the source of his potential disqualification.[92] If the parties should indicate nevertheless that they hold no reservations about the judge hearing the matter, the latter may in his/her discretion proceed to hear or not to hear the matter.

The law of recusal in this jurisdiction is settled. It has found expression in many words some of which reflect approval of decisions of other jurisdictions. It is the law against bias and where after investigation it is established that the judicial officer or decision-maker was biased, the ensuing decision is afflicted and may be vacated. Thus, the law of recusal is an expression at a very general level of the principle that justice must not only be done but must appear to have been done.[93] This is so because justice is rooted in confidence and confidence is destroyed when right-thinking people go away thinking that the court was biased or conflicted.

It is in keeping with this general principle that at all times, judges must conduct their affairs in such a way that the court's open-mindedness, its impartiality, and fairness are manifest to all those who follow the proceedings and review the outcome.

Judges swear an oath upon taking office that they will discharge their duties in an impartial manner, without fear or favour. There is also a professional or ethical duty to decide all matters impartially. The test to be applied in determining whether or not a judicial officer should recuse himself or herself is settled in this jurisdiction, and is set out by KORSAH JA (as he then was) in *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walenn Construction (Pvt) Ltd*.[94]

[91] Section 14 of the Judicial Service (Code of Ethics) Regulations, 2012.
[92] Section 14 of the Judicial Service (Code of Ethics) Regulations, 2012.
[93] This dictum was laid down by Lord Hewart, who was the then Lord Chief Justice of England in the case of *Rex v. Sussex Justices* [1924] 1 KB 256.
[94] *Leopard Rock Hotel Co. (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 273G-H and 274 A-C.

The Supreme Court established a two-fold test for satisfying the test for recusal. Firstly, the perception of bias must be reasonable in the sense that it must be based on reasonable grounds. In other words, there must be a reasonable apprehension that the judge or magistrate will be biased, and not that he or she may be biased, (See *S* v *Roberts*;[95] *S* v *Shackell)*.[96] Secondly, the person who is fearful of the bias must be a reasonable and objective person in the position of the litigant who is informed of the facts.

The same test has been applied in other jurisdictions. More relevantly, in *The President of the Republic of South Africa & Ors* v *The South African Rugby Football Union & Ors*, in the following terms:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or would not bring an impartial mind to bear upon the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel."[97]

In dealing with the question of the reasonableness of the fear of the possibility of bias, the South African Constitutional Court linked the apprehension with the judicial oath of office. The following passage from the judgment (at 177D-E) is instructive: -

> "The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry
>
> out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."[98]

Disqualification is however not appropriate if:

> (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or
>
> (b) no other tribunal can be constituted to deal with the case, or because of urgent circumstances, failure to act could lead to a miscarriage of justice.

What emerges from the decided cases across jurisdictions is that the public perception of the judiciary in deciding matters is key to the preservation of the

[95] *S v Roberts* 1999 (4) SA 915 (SCA).
[96] *S v Shackell* 2001 (4) SA 1 (SCA).
[97] *The President of the Republic of South Africa & Ors v The South African Rugby Football Union & Ors* 1999 (4) SA 147 (CC).
[98] *The President of the Republic of South Africa & Ors v The South African Rugby Football Union & Ors* p177.

integrity of the judicial system. The principle of recusal is interwoven with the six principles of judicial ethics hence should always be handled properly and on a sound basis. The Constitution guarantees that every person has a right to a fair, speedy and public hearing before an independent and impartial court in the determination of their civil rights and obligations.[99] It is self-evident that at the heart of the principle of recusal is the need to protect the right to a fair hearing, which in turn lies at the heart of the rule of law. Put differently, an application for recusal is invariably an allegation that the litigant's right to a fair hearing, as constitutionally guaranteed, is under threat of violation.

In fact, the resolution of disputes by an unbiased tribunal has been characterized as a fundamental human right. The principle of recusal therefore seeks to re-assert the independence and impartiality of the court that is demanded by s 69 of the Constitution.[100] It further seeks to enhance the notion of even-handedness, the universal standard that is required from all those who dispense justice. Recusal is not concerned solely with the rights of the apprehensive litigant. It is concerned

with the fairness of the hearing in its totality. Recusal is an important tool to protect judicial impartiality and integrity.

It, therefore, stands to reason that the law of recusal and the guarantees in section 69(2),[101] require some degree of reciprocity of fairness and good faith from the apprehensive litigant.

As a result, a Judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

A judge should, however not readily recuse themselves from hearing a matter brought before them. The High Court of Australia put it this way in *Re JRL: Ex parte* CJL: -

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearances of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."[102]

The decision for a judge or court to recuse themselves should be taken because the

[99] Section 69 (2) of the Constitution of Zimbabwe, 2013.
[100] See note 99 above.
[101] See note 99 above.
[102] *Re JRL: Ex parte CJL* (1986) 161 CLR 342 [HCA], at p 352E – F.

circumstances demand so and for the protection of the integrity of the judiciary. There should be a balance between the doctrine of recusal and the doctrine of necessity and duty to sit.

As was highlighted in the recent Constitutional Court case *Mupungu v Minister of Justice and Parliamentary Affairs & Ors*,[103] a balance must be found between an applicant's right to fair hearing which is the ground upon which the court may be asked to recuse themselves and the constitutional requirement of *a quorum* for the ends of justice to be met. Whenever an application for recusal is done, the court must not allow it in cases where doing so may paralyse the court due to the constitutional requirement regarding the composition of the bench. This is related to the common law doctrine of necessity which has been used as a basis on which administrative action which is designed to restore order is found to be constitutional. This doctrine applies where the court does not have a competent person to adjudicate a matter before it, a *quorum* cannot be formed without him and no other competent court can be constituted.

To sum up, the import of the six principles espoused by the Judicial Code of Conduct[104] can be summarised as follows: -

- Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level;
- Judges should behave with integrity in office and in their private lives;
- They should at all times adopt an approach which both is and appears impartial;
- They should discharge their duties without favouritism and without actual or apparent prejudice or bias;
- Their decisions should be reached by taking into account all considerations material to the application of the relevant rules of law and excluding from account all immaterial considerations;
- They should show the consideration due to all persons taking part in the judicial proceedings or affected by these proceedings;
- They should discharge their duties with due respect for the equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties, and ensuring each a fair hearing they should show circumspection in their relations with the media, maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with;
- They should ensure they maintain a high degree of professional competence;

[103] *Mupungu v Minister of Justice and Parliamentary Affairs & Ors* CCZ 7/21.
[104] Judicial Code of Conduct.

- They should have a high degree of professional awareness and be subject to an obligation of diligence in order to comply with the requirement to deliver their judgments in a reasonable time;
- They should devote most of their working time to their judicial functions, including associated activities;
- They should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.

10. ENFORCEMENT PROCEDURE

Sections 21 to 25 of the Judicial Code of Ethics[105] provide for the establishment of a Disciplinary Committee by the Chief Justice, outline the procedures to be followed in the determination of cases and suggest disciplinary measures to be imposed in the case of a judge being found liable. It is advisable for judges to acquaint themselves with these provisions.

11. CONCLUSION

It is clear from the foregoing that the six principles of judicial conduct, and related ones like recusal and refraining from corrupt conduct, are important to the very essence and existence of the Judiciary. Judicial office is sacrosanct. All Judges are called upon to maintain high standards of conduct because it is against those standards that the judiciary's credibility stands to be measured. Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary. They should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair-minded, and informed persons. Judges, in addition to observing these high standards personally, should encourage and support their observance by their judicial colleagues. A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities including those that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development, and family. Every Judge must make sure that he or she is not only seen to uphold the Constitution but that he or she applies it to his or her daily life in the execution of his or her duties as the custodian of the law and all that it encompasses.[106]

[105] Section 21 of the Judicial Code of Ethics.
[106] Constitution of Zimbabwe, 2013.

JURISDICTION OF THE HIGH COURT[107]

HONOURABLE PATEL BHARAT

Judge of the Constitutional Court of Zimbabwe

ABSTRACT

The Constitution of Zimbabwe, 2013 is the supreme law of the country in which the people of Zimbabwe enshrined their will. It sets out how the people of Zimbabwe desire the country to be governed. Chapter 4 of the Constitution provides for the Bill of rights which set out the rights and freedoms which the people of Zimbabwe are entitled to. Further in Section 175 the Constitution outlines the powers of courts in constitutional matters. Section 171 of the Constitution goes on to outline the jurisdiction of the High Court. All these sections of the Constitution are paramount in the area of Human rights. The rights listed in the Declaration of Rights are constitutional rights and are legally protected. Laws that take away any of these rights shall not be made unless the Declaration of Rights allows for such. Any existing laws that take away any of the rights may be declared invalid. If these constitutional rights are violated, one can sue for damages or take the matter to the Constitutional Court or any other courts of first instance in constitutional matters to get justice.

1. INTRODUCTION

Jurisdiction is that power which a court has to decide the matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. It is the power vested in a court of law to adjudicate upon, determine and dispose of a matter. For a court to have jurisdiction, it must not only have the jurisdiction to try the suit, that is, jurisdiction to entertain the subject matter of suit, but must also have the authority to pass the orders sought. Jurisdiction may also be described as the capacity of a court to take notice of a matter and the capacity to enforce the judgment of the court. The inherent power of the court to exercise its procedural jurisdiction, to avoid injustice and ensure efficiency in litigation has long been recognised as a fundamental element of the administration of justice.

In *Stander v Marais* the court cited Black's Law Dictionary, 6th ed, wherein "jurisdiction" is defined as follows:

[107] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls on in November 2021.

> *"A term of comprehensive import embracing every kind of judicial action. It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment. The legal right by which judges exercise their authority. It exists when court has cognisance of class of cases involved, proper parties are present, and point to be decided is within powers of court."*[108]

In *Katsande v Grant,* it was aptly noted that:

> "Three common law principles underpin the exercise by a court of its jurisdictional powers generally. These are the doctrine of effectiveness, the doctrine of submission and the *actor sequitur forum rei* rule." [109] See also Herbstein & Van Winsen, *The Civil Practice of the Superior Courts in South Africa, p. 29-31*.

The doctrine of effectiveness essentially means that jurisdiction depends upon the power of the court to give an effective judgment. In the case of *Steytler NO v Fitzgerald* it was held that:

> "A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit, but also of giving effect to its judgment."[110]

Then in *Morten v Van Zuilecom,* the court stated the following:

> *"the great test of the jurisdiction of a court is its power to make its decree effective". See also Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries 1969 (2) SA 295 (A) at 307; Sonia (Pvt) Ltd v Wheeler 1958 (1) SA 555 (A) at 563; Veneta Mineraria Spa v Carolina Collieries (Pvt) Ltd 1987 (4) SA 883 (A) at 893.* [111]

2. JURISDICTION IN TERMS OF THE HIGH COURT ACT

The relevant pieces of legislation regulating the jurisdiction of the High Court are the Constitution of Zimbabwe, 2013 and the High Court Act [*Chapter 7:06*][112] (hereinafter referred to as the Act) in conjunction with the High Court Rules. The High Court is created by the Act. It has jurisdiction under both common law and statute. In terms of the common law the High Court has inherent jurisdiction, it can order anything or determine any matter which is not prohibited by law. However, it is imperative to note the provisions of s 53 of the Act.[113] In terms of that section, if a person takes a matter to the High Court which could have been heard in the Magistrates' Court and if that person is successful, he cannot recover any costs

[108] *Stander v Marais* 2015 (3) SA 424 (WCC).
[109] *Katsande v Grant* 2012 (2) ZLR 231 (H).
[110] *Steytler NO v Fitzgerald* 1904 TH 108 at 111.
[111] *Morten v Van Zuilecom* (1907) 28 NLR 500 at 509.
[112] High Court Act [*Chapter 7:06*].
[113] High Court Act [Chapter 7:06].

in excess of those which would have been recovered if he had instituted the proceedings in the Magistrates' Court. If he is not successful, he will be ordered to pay costs on a higher scale of legal practitioner and client.

The High Court Act being the primary source for the jurisdiction of the High Court, provides the High Court with original civil jurisdiction by stating that:

> **"13. Original civil jurisdiction**
>
> Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.
>
> **14 High Court may determine future or contingent rights**
>
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.
>
> **15 Exercise of jurisdiction founded on or confirmed by arrest or attachment**
>
> In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."

The High Court has full original civil jurisdiction over all persons and over all matters in Zimbabwe. This entails that there is no limit to its jurisdiction regarding the nature of the claim or monetary value. The Act further gives the High Court original criminal jurisdiction over all persons in s 23 which provides that:

> **"Original criminal jurisdiction**
>
> Subject to this Act and any other law, the High Court shall have full original criminal jurisdiction over all persons and over all matters in Zimbabwe."

Section 193 of the Constitution also bestows the High Court with criminal jurisdiction.[114] Thus, the High Court has full original criminal jurisdiction over all persons and over all matters in Zimbabwe. There is no limit to its jurisdiction regarding the nature of the crime, the possible punishment and the place within Zimbabwe where the crime is committed. The High Court may impose any lawful punishment, for example, life imprisonment or the death sentence, on convicted persons. It has jurisdiction to try cases such as murder, treason, for example in *S v Tsvangirai,*[115] banditry and insurgency, as in *S v Bennet.*[116] However, its jurisdiction over persons is limited by s 98 of the Constitution, which grants the President, while in office, immunity from any

[114] Section 193 of the Constitution of Zimbabwe, 2013.
[115] *S v Tsvangirai* HH 169/04.
[116] *S v Bennet* HH 79/10.

'criminal proceedings whatsoever in any court.'

The High Court's extra-territorial jurisdiction is limited. In cases of statutory crimes, this depends on the provisions of the relevant statute. For example, Section 9 of the Public Order and Security Act [*Chapter 11:17*] provides as follows:

> "Any person who, inside or outside Zimbabwe, supplies weaponry to an insurgent, bandit, saboteur or terrorist, knowing that the person to whom such weaponry is supplied is an insurgent, bandit, saboteur or terrorist or realizing that there is a risk or possibility that such person is an insurgent, bandit, saboteur or terrorist, shall be guilty of an offence and liable to imprisonment for life."[117]

The court does not have extra-territorial jurisdiction over all common law offences. It has this jurisdiction only in respect of the crime of treason and offences where the harmful effect is felt in Zimbabwe.[118] In the case of *S v Mharapara,*[119] it was held that the High Court had jurisdiction to try a Zimbabwean diplomat who, while in a foreign country, stole money belonging to the Zimbabwean government. It has this jurisdiction over crimes committed wholly or partly outside Zimbabwe, if the conduct which constituted the crime took place in Zimbabwe, if the crime is against public security in Zimbabwe or the safety of the State in Zimbabwe, or if the crime has produced or was intended to produce a harmful effect in Zimbabwe, or was committed with the realization that there was a real risk or possibility that it might produce such an effect. The High Court also has automatic jurisdiction to review criminal proceedings the Magistrates' Court whenever any person has been imprisoned for a period in excess of 12 months.

In s 30 of the Act gives the High Court jurisdiction in civil appeals by providing that:

> ***"30 Jurisdiction in appeals in civil cases***
>
> *(1) The High Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which in terms of any other enactment an appeal lies to the High Court.*
>
> *(2) Unless provision to the contrary is made in any other enactment, the High Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act."* [120]

Having been bestowed with such jurisdiction the High Court is also empowered by s 31 upon hearing civil appeals, to confirm, vary, amend or set aside the judgment appealed against or make any appropriate order. In civil cases, the judge sits alone.[121] He or she may also appoint one or more persons to sit as an assessor(s) and assist in an 'advisory capacity'. Section 34 also gives the High Court jurisdiction

[117] Public Order and Security Act [*Chapter 11:17*].
[118] L Madhuku 'An Introduction to Zimbabwean Law' 2010 at p 62.
[119] *S v Mharapara* 1985 (1) ZLR 359.
[120] The High Court Act [*Chapter 7 :06*].
[121] The High Court Act [*Chapter 7:06*].

to hear and determine appeals in criminal cases.[122] An appeal only goes to the High Court if there is a specific provision in a statute granting a right of appeal to the High Court.

Apart from being an appellate court, the High Court has inherent review powers over the proceedings of all inferior courts and tribunals. A review is not concerned with the merits of the decision but with the decision-making process. In exercising its review powers, the High Court may set aside proceedings of an inferior court or tribunal. In *S* v *Mutero & Ors,* it was pointed out that the reviewing judge is not there to criticise or nit-pick or show off his knowledge; he is there to assist, as far as he is able, in the administration of justice and to ensure that accused persons receive fair treatment.[123] The review system complies with s 165(3) of the Constitution,[124] as it ensures judicial independence for magistrates by only allowing High Court judges, who are senior judicial officers, to confirm or correct on review or appeal a magistrate's work, at the end of the proceedings, although in exceptional cases a judge can review proceedings before they are finally determined.

In summary, it can be said that the jurisdiction of the High Court, both civil and criminal, is unlimited. The High Court is the court of original jurisdiction over all civil and criminal matters throughout Zimbabwe.[125] The High Court has jurisdiction to adjudicate any matter except those matters that fall within the exclusive jurisdiction of the Constitutional Court or those matters that the Constitutional Court has agreed to hear directly or those matters that have been assigned by legislation to another court with a status similar to that of the High Court. For instance, the Labour Court has exclusive jurisdiction over labour matters which is granted by s 89 (1) of the Labour Act.[126]However, this does not necessarily take away the jurisdiction of the High Court in labour matters, in accordance with s 171(1)(a) of the Constitution which gives the High Court jurisdiction over all civil and criminal matters.[127] To the extent that the Constitution overrides any Act of Parliament, it is certainly arguable that s 171(1)(a) overrides s 89 (6) of the Labour Act.[128]

The High Court, therefore, has power to do anything which the law does not prohibit. It is imperative to note that the High Court can only exercise its jurisdiction within the confines of the High Court Rules. There are now new High Court Rules which the judges must familiarize themselves with in the exercise of their jurisdiction because it is those Rules which determine whether or not the court can exercise its jurisdiction. See *Nyengera v The State,*[129] wherein it was held that the purpose of the Rules is to

[122] The High Court Act [*Chapter 7:06*].
[123] *S v Mutero & Ors HH* 424/14.
[124] See section 165(3) of the Constitution of Zimbabwe, 2013.
[125] Section 171(1)(a) of the Constitution of Zimbabwe, 2013.
[126] See section 89 (1) of the Labour Act [*Chapter 28:01*].
[127] See section 171(1)(a) of the Constitution of Zimbabwe, 2013.
[128] Section 89 (6) of the Labour Act [*Chapter 28:01*].
[129] *Nyengera v The State* CC 09/20.

ensure the proper exercise of jurisdiction by the High Court.

3. JURISDICTION IN CONSTITUTIONAL MATTERS

In terms of section 171(1)(c) of the Constitution, the High Court 'may decide constitutional matters except those that only the Constitutional Court may decide'. Under the same provision, such constitutional matters of concurrent jurisdiction between the High Court and the Constitutional Court may be brought before the High Court directly.[130] The form of such proceedings is governed by the High Court Rules that regulate civil proceedings. The quintessence of section 171(1)(c) is its conferment of constitutional competence to the extent that the High Court cannot usurp the powers of the Constitutional Court.

The import of this provision is that constitutional matters are in the domain of the High Court, even as a court of first instance, even though they may also go directly to the Constitutional Court. Appeals from the High Court on constitutional matters naturally go to the Supreme Court, except in the case of appeals and applications to confirm or vary an order concerning the constitutional validity of an Act of Parliament or the conduct of the President and Parliament.[131]

4. INHERENT JURISDICTION

As stated above, the High Court has inherent jurisdiction. The exercise of inherent jurisdiction is a broad doctrine allowing the High Court to control its own processes and to control the procedures before it. Section 176 of the Constitution[132] gives the Constitutional Court, Supreme Court and the High Court inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice and the provisions of the Constitution.

The case of *Cocker v. Tempest* is often cited as the originating point for the emergence of the doctrine of inherent jurisdiction, wherein the court commented as follows:

> "The power of each court over its own processes is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice".[133]

---

[130] Handbook on Constitutional and Electoral Litigation in Zimbabwe, The Law Society of Zimbabwe, June 2018, p 41.
[131] Section 171(1)(a) of the Constitution of Zimbabwe, 2013.
[132] Section 176 of the Constitution of Zimbabwe, 2013.
[133] *Cocker v. Tempest* (1841) 7 M & W 502.

The inherent jurisdiction of the High Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. Notwithstanding that the term inherent jurisdiction seems to apply to an almost limitless set of circumstances, it must be noted that there are four general categories for the use of the court's inherent jurisdiction, namely: to ensure convenience and fairness in legal proceedings; to prevent steps being taken that would render judicial proceedings inefficacious; to prevent abuses of process; and to act in aid of superior courts and in aid or control of inferior courts or tribunals.

This kind of jurisdiction is significantly broader than that of any other court because all other courts can only exercise the jurisdiction specifically granted by the enabling statute or by the Constitution. The fact that the High Court's original jurisdiction is unlimited means that all matters which may be heard by the Magistrates' Court can also at the first instance be heard by the High Court. A litigant is entitled to sue in the High Court, even in matters within the monetary limits of the Magistrates' Court. The High Court can only refuse to entertain the matter if there is a law that prohibits it from exercising jurisdiction.

Even when the jurisdiction of the High Court is barred, either expressly or impliedly, it cannot be read as excluding its jurisdiction altogether. The High Court has the jurisdiction to examine whether or not the provisions of any statute and the rules made thereunder have been complied with, or whether any order or conduct is contrary to law, *ultra vires*, perverse, arbitrary, violative of the principles of natural justice, or is based on 'no evidence'. As such, the exclusion of the jurisdiction of the High Court is not to be readily inferred.

5. LIMITATIONS TO HIGH COURT JURISDICTION

The High Court may, despite the fact that it enjoys inherent jurisdiction, refuse to exercise that jurisdiction on the basis that the dispute is not ripe for hearing or is moot. Ripeness is usually said to be at issue when the person bringing the action or application has not yet been affected by the unlawfulness of which he or she complains.[134] The term 'ripeness' may also be used where alternative remedies have not been exhausted, or an issue can be resolved without recourse to the High Court.[135] On the other hand, a matter is termed 'moot' and thus no longer justiciable by the court, if it 'no longer presents an existing or live controversy', or the prejudice

[134] Max du Plessis *et al*, Constitutional Litigation, p38.
[135] High Court Act [*Chapter 7:06*].

or threat of prejudice to the plaintiff or applicant no longer exists.[136] The doctrine is underpinned by the need to ensure that judicial resources are used economically and that the courts avoid giving advisory opinions on abstract propositions of law.[137] In circumstances in which the live dispute between the parties has fallen away, the court nevertheless has a discretion whether or not to hear the matter and this discretion must be exercised according to what the interests of justice require.[138]

6. CONCLUSION

The High Court has original jurisdiction to try all suits of a civil and criminal nature unless its jurisdiction is barred, either expressly or impliedly. To that end, its original jurisdiction is unlimited; there are no monetary limits to claims that may be brought before it, and it can hear any dispute, whatever the nature of the claim. It enjoys what is called 'inherent jurisdiction', which means that the High Court has the power to regulate its own processes and procedures.

[136] Max du Plessis *et al*, Constitutional Litigation, p39.
[137] See note 136 above.
[138] Max du Plessis *et al*, Constitutional Litigation, p39.

UNDERSTANDING THE BILL OF RIGHTS[139]

HONOURABLE PATEL BHARAT

Judge of the Constitutional Court of Zimbabwe

ABSTRACT

The Constitution of Zimbabwe, 2013 is the supreme law of the country. It sets out how the people of Zimbabwe desire the country to be governed. Chapter 4 of the Constitution provides for the Bill of Rights elaborates the rights and freedoms which the people of Zimbabwe are entitled to. All the sections embodied in Chapter 4 of the Constitution are paramount in the area of human rights. The rights listed in the Declaration of Rights are constitutional rights and are thereby legally protected. It is trite to note that these rights can only be limited in terms of section 86 of the Constitution. Any existing or new laws that take away any of the rights may be declared invalid to the extent that they infringe or violate such rights. If these constitutional rights are violated, one has a right to sue for damages or to initiate constitutional litigation.

1. INTRODUCTION

The Declaration of Rights (often referred to as the 'Bill of Rights') sets out rights and freedoms that the people of Zimbabwe are entitled to by virtue of being human. Basically the Bill of Rights is what the people are entitled to from every government of every country, and what no just government should refuse. These rights are constitutional rights and therefore legally binding. The Declaration of Rights has both civil and political rights as well as environmental, economic, social and cultural rights. While civil and political rights are enforceable at law, the implementation of environmental, economic, social and cultural rights is dependent on the availability of resources and the State is required at law to take all steps necessary to ensure the enjoyments of all rights. Most of these rights apply to anyone in the country, with the exception of the right to vote and the right to enter and live in the country, which apply only to citizens of Zimbabwe.

2. WHAT IS THE BILL OF RIGHTS?

The starting point is to refer to the American case of *West Virginia State Board of Education v. Barnett*, where it was stated:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes

[139] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

> *of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, free speech, free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections."* [140]

The Bill of Rights therefore provides a set of rights which cannot be taken away by Parliament except through an amendment of the Bill of Rights itself. These are rights which belong to persons by virtue of them being persons. To qualify for a right in the Bill of Rights all that is required is to prove that one is a person. Most modern constitutions have a Declaration or Bill of Rights setting out fundamental rights and freedoms that are specially protected by the Constitution. It is important to draw a distinction between human rights in general and justiciable rights under the Zimbabwean Constitution. If a human right is not in the Bill of Rights, it cannot be enforced in the courts as a constitutional right.

Zimbabwe's Bill of Rights is contained in Chapter 4 of the Constitution.[141] It stretches from section 44 to section 78 wherein these fundamental rights are elaborated. The first generation rights include the right to life, right to personal liberty, right to political participation, right to fair trial in court, right to equality before the law, right to privacy, right to human dignity, and the right to protection against violence, torture, forced labour and slavery. Second generation rights are related to equality and they are fundamentally economic, social and cultural in nature. They guarantee every Zimbabwean citizen equal conditions and treatment. Third generation rights are those rights that one cannot exercise alone but only collectively. They are generally collective rights. Under our Constitution these rights include the right to a protected environment, individual or class action, social and economic development, and participation in social and cultural heritage.

The court in *Judicial Services Commission v Zibani & Ors* SC 68/17 held the following as regards fundamental rights:

> "It is axiomatic that Zimbabwe is a constitutional in contradistinction to a parliamentary democracy. See *Biti & Anor* v *Minister of Justice Legal and Parliamentary Affairs & Anor* 2002 (1) ZLR 177 (S) at 190A-B. This fundamental principle and its concomitant legal ramifications and obligations are codified in s 2 of the Constitution as follows:
>
> '(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
>
> (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.
>
> Section 3 of the Constitution[142] enshrines the founding valus and principles of Zimbabwe. In its relevant parts it provides that:

[140] *Education v. Barnett* 319 US 624 [1993].
[141] See Chapter 4 of the Constitution of Zimbabwe, 2013
[142] Section 3 of the Constitution of Zimbabwe, 2013.

'(1) Zimbabwe is founded on respect for the following values and principles—

(*a*) supremacy of the Constitution;

(*b*) the rule of law;

(*c*) fundamental human rights and freedoms;

(*d*) ..... .'

By virtue of the foregoing principles, the Constitution demands strict compliance with its substantive provisions and all laws enacted under its aegis. It also demands meticulous adherence to the procedures and processes prescribed under the Constitution." [143]

In essence this serves to show that the Bill of Rights by virtue of being part of the founding values and principles of the Constitution is meant to guarantee essential rights and civil liberties. The purpose is to protect those rights against infringement by public officials and private citizens.

3. LIMITATIONS TO THE BILL OF RIGHTS

The purpose of a Declaration or Bill of Rights is to protect the rights of citizens and ordinary people living in the country. Although generally these rights must not be overridden by the government, some have to be qualified. Fundamental rights and freedoms must be exercised taking into consideration the rights of others. Human rights may be limited only by a law of general application which is necessary and reasonable in an open, just and democratic society. Rights that cannot be limited or violated are the right to life (with the exception of the death penalty as provided), right to human dignity, right not to be tortured or subjected to cruel, inhuman and degrading treatment and punishment, right not to be placed in slavery or servitude, right to a fair trial, and the right to obtain an order to disclose the whereabouts of a detained person. Section 87 of the Constitution further provides that rights in this Declaration of Rights may be limited by a written law during a public emergency but in accordance with what is strictly required by the emergency.[144] This does not permit the state and government agencies and institutions or people to act unlawfully or authorise the violation of any of the rights listed as being incapable of limitation.

Rights cannot always be absolute; they may have to be limited to allow the government to govern effectively in the interests of all its citizens, and some have to be balanced with the rights of others. For instance in the case of *Makani and Ors v Arundel School and Ors,*[145] the court found that the school's code of conduct was

[143] *Judicial Service Commission v Zibani & Ors* SC 68/17.
[144] Section 87 of the Constitution of Zimbabwe, 2013.
[145] *Makani and Ors v Arundel School and Ors* 2016 (2) ZLR 157 (CC).

applied to all learners alike and was not discriminatory. This shows that it is important that any limitations to the rights that are protected by the Bill of Rights be spelt out. In such instances the court is then called to set out the ways in which a government or any other institution may legitimately limit the rights of citizens and how they are to be balanced with the rights of others in accordance with the Constitution.

4. INTERNATIONAL STANDARDS

In 1948, the United Nations proclaimed the Universal Declaration of Human Rights (UDHR) which has become the most important and seminal document as to what should be considered the standard for basic equality and human dignity.[146] Drafted as 'a common standard of achievement for all peoples and nations', the UDHR for the first time in human history spelt out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as embodying the fundamental norms of human rights that everyone should respect and protect.

The UDHR, together with the International Covenant on Civil and Political Rights[147] and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights,[148] form the so–called International Bill of Human Rights. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights. The courts are now required to promote and be guided by the spirit and objectives of the International Bill of Rights whenever they are interpreting a law. Section 46(2) states that courts are also required to consider international law as well as treaties ratified by Zimbabwe whenever the Bill of Rights is being interpreted. Courts may also consider relevant foreign law when interpreting the Bill of Rights. This is because courts play a huge role in contributing to the understanding, implementation and development of the Bill of Rights. As such the courts, when

[146] United Nations proclaimed the Universal Declaration of Human Rights (UDHR) was established in 1948 with the sole mandate of protecting human rights.

[147] International Covenant on Civil Political Rights is a multilateral treaty that commits state parties to respect the civil and political rights of individuals for instance the right to life. It was signed and ratified in 1966.

[148] International Covenant on Economic, Social and Cultural Rights is a multilateral treat adopted by the United Nations General Assembly on 16 December 1966 and came into force from 3 January 1976.

reviewing the compatibility of domestic legislation with the respective international treaties and conventions, reinforce their role as protectors of human rights at the domestic level.

The court in *Law Society of South Africa and Others v President of the Republic of South Africa and Others* held the following as regards international law:

> "In interpreting the Bill of Rights, courts are required to consider international law. Our Constitution also insists that they not only give a reasonable interpretation to legislation but also that the interpretation accords with international law. And unless otherwise inconsistent with our Constitution, customary international law is law in this country. Implicit in this position is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country."[149]

5. APPLICATION AND ENFORCEMENT OF THE BILL OF RIGHTS

If people are to be protected against oppression or undue interference by governments, the rights contained in the Bill of Rights must be enforceable. Part 1 of Chapter 4 elaborates the application and interpretation of the Bill of Rights and when and how the Bill of Rights applies. Section 45 deals with the application of the Bill of Rights and states that the Bill of Rights applies to the state (executive, legislature and judiciary) and all state institutions and agencies of government at every level. It also applies to natural and juristic persons as duty bearers as well as holders of rights. Where the Bill of Rights applies between the individual and the state it is called vertical application; where it applies between private persons it is known as horizontal application.

Section 85 of the Constitution provides for the procedure which one must take to enforce rights and freedoms. It gives the following persons *locus standi* to appear in court to enforce the Bill of Rights:

a) Any person acting in his own interest. This provision perpetuates the ordinary meaning of *standi* to the extent that a person appears on his own behalf.

b) Any person acting on behalf of another who cannot act for himself. It refers to any person as having such competence. The only requirement is that the other person is unable to appear for himself, e.g. as a result of detention or any other form of incapacity. There is also need to prove consent of the victim or to demonstrate that it would have been obtained in the given circumstances. There is still need for the applicant to demonstrate that the one on whose behalf he is acting has a sufficient interest.

[149] *South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51.

c) Any person acting as a member or in the interest of a group or class of persons. In this case a member can act on behalf of a class of persons to advance an interest that is common to those people. The interest must be a shared interest. The whole group is bound by the outcome of the litigation process, unless there have been formally excluded from the consequences of the process.

d) Any person acting in the public interest. It must be shown that the applicant is acting in public interest and that the public has an interest in the outcome of the process. What is in the public interest is difficult to prove. The public anticipated is not necessarily the entire population but a portion of the population. See *Forum Party of Zimbabwe & Others v Minister of Local Government* SC 129/97.[150] In *Lawyers for Human Rights v Minister of Home Affairs* the court developed a list of factors that point to whether or not one is acting in the public interest. These include the nature of the relief being sought, the range of the persons standing to be affected, the degree and vulnerability of the affected persons, the nature of the right or freedom affected and the consequences of the infringement of the right concerned.[151]

e) Any association acting in the interests of its members. This would be when a body corporate is acting on behalf of its individual members as opposed to a member acting on behalf of the members of the association. The position was clarified in the case of *ZIMNAT v Minister of Education* 1999 (2) ZLR 48 (HC).[152]

The court in *Denhere v Denhere & Anor* CCZ 9/19 in dealing with section 85 held the following:

"The provision entitles any person to approach the courts and seek relief where he or she or it alleges that a fundamental right has been violated. It raises three important factors.

The first factor is that the provisions of s 85(1) of the Constitution do not limit the right of approach to vindicate a fundamental right or freedom to a specific court. The present application is based on an allegation of violation of fundamental rights. The applicant correctly approached the Court for appropriate relief.

The second point is that s 85(1) of the Constitution requires that a person with the stated interests in the protection and enforcement of a fundamental right or freedom enshrined in Chapter 4 only has to allege infringement of the right or freedom to have the right of access to a court to seek appropriate relief.

The third factor is that constitutional provisions are binding and the Court ought to be guided accordingly. Section 2 of the Constitution makes the Constitution the supreme law of the land. In this regard, s 3 of the Constitution provides for the values and principles which should guide all institutions and persons in Zimbabwe. Section 85(1) ought, therefore, to be understood in the context of s 3 of the Constitution. The most relevant principles to the present matter are the supremacy of the Constitution, the rule of law, and fundamental human rights and freedoms.

These principles are central to the approach that courts ought to take when

[150] *Forum Party of Zimbabwe & Others v Minister of Local Government* SC 129/97.
[151] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125.
[152] *ZIMNAT v Minister of Education* 1999 (2) ZLR 48 (HC).

adjudicating all matters. The Constitution itself protects fundamental rights and freedoms and further provides that all institutions including the Judiciary are bound to comply with its provisions. In this regard, the rule of law demands that there be accountability before the law by all persons and institutions exercising public authority. The requirement for accountability speaks to the need to respect fundamental human rights and freedoms through procedural fairness and regularity in the administration of justice." [153]

In *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited & Anor,* the court noted that:

"Consideration of the relevant constitutional provisions supports the view that the validity of a decision of the Supreme Court in proceedings involving non-constitutional matters may be challenged on the ground that it has infringed a fundamental right or freedom enshrined in *Chapter 4* of the Constitution. The basis of the right of a party to the proceedings to challenge the validity of a decision of the Supreme Court in the circumstances is the Constitution itself. The right given to a litigant under s 85(1) of the Constitution to approach the Court for appropriate relief on the allegation stated is correlative to the constitutional obligation imposed on the Supreme Court as a body exercising public authority. …

The scope of the right to approach the Court for appropriate relief under s 85(1) of the Constitution is not limited by specific objects against which the allegations of infringement of a fundamental right or freedom can be made. A constitutional complaint provided for under s 85(1) of the Constitution can be lodged against any act of public authority. A decision of the Supreme Court in a case involving a non-constitutional issue would fall within the category of acts, the constitutional validity of which may be challenged on the grounds prescribed under s 85(1) of the Constitution.

In this regard, s 44 of the Constitution falls under the Bill of Rights and provides that everyone must respect, protect, promote and fulfil the rights provided for in the Bill of Rights. Section 45(1) of the Constitution also falls under the Bill of Rights and binds the State and all institutions and agencies, including the Supreme Court. This in turn means

that a finding that the present application for an order for direct access on the allegation that the decision of the court *a quo* violated a fundamental right is not properly before the Court would amount to a breach of ss 44 and 45 of the Constitution. The applicant can rightfully seek redress through s 85(1) of the Constitution." [154]

6. THE ROLE OF THE JUDICIARY IN ENFORCING THE BILL OF RIGHTS

Without judicial enforcement the Bill of Rights is little more than a parchment that sits under glass in the National Archives. The courts should make a more conscious effort towards the protection and active enforcement of fundamental human

[153] *Denhere v Denhere & Anor* CCZ 9/19.
[154] *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited & Anor* CCZ 11/18.

rights contained in the Bill of Rights. This was reiterated in the case of *Mudzuru & Anor* v *Minister of Justice & Ors,* where the Court remarked that:

> "The purpose of interpreting a provision contained in Chapter 4 must be to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3 of the Constitution."[155]

In the case of *Martin* v *Attorney-General & Anor,* the court noted that if a court misconstrues the law or applies it incorrectly, there is a *prima facie* infringement of the right to equal protection of the law.[156] As such the courts are called upon to protect the integrity of constitutional principles and ensure internal coherence of the law. The courts play an important role in the consolidation of the rule of law. In doing so they must protect and defend the Bill of Rights. The courts in the exercise of their powers are held to the highest standard of interpreting and enforcing the Bill of Rights. It is not enough for justice to be done but must be seen to be done. The courts in enforcing these rights are therefore under a constitutional obligation to uphold their duty of independence, dignity, accessibility and effectiveness. A true constitutional democracy is based on the capacity of citizens to enforce their fundamental human rights and the effectiveness with which the courts protect these rights. It is important for the public to understand the essence of the courts and the overall design of constitutional jurisprudence and constitutional justice. The rights contained in the Bill of Rights are not a talisman to be waved about when it is convenient to do so and discarded when the situation is not favourable to one's interests. It is the foundation of any democratic society and is essential to the cohesion of a community. The courts are therefore obliged to take the lead in upholding the Bill of Rights.

It is the basis upon which the values of constitutionalism are developed and protected. The entrenchment of constitutional supremacy as a rule and as one of the foundational values and principles of our Constitution has empowered the courts in this jurisdiction in the exercise of their judicial review powers to interrogate, analyse and examine every decision made or action taken by the executive, legislative or judicial arms of the state and by other state agencies so as to ensure compatibility with the Constitution and the values which underpin it. The idea is to ensure that such decision or conduct does not impinge upon fundamental rights or other provisions and values and principles of the Constitution. The substantive component of the rule of law directs that government, its functionaries and any other authority must respect the individual's basic rights.

The learned authors Currie & De Waal in *The Bill of Rights Handbook* (6th ed 2013) at p 181 opine as follows:

[155] *Mudzuru & Anor v Minister of Justice & Ors* 2016 (2) ZLR 45 (CC).
[156] *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S).

> "The harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole; the violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore, the object in awarding a remedy is not only to grant relief to the litigant before the court but also to vindicate the Constitution and deter future infringements. Vindication is necessary because harm to constitutional rights, if not addressed, will diminish the public's faith in the Constitution. The judiciary therefore bears the burden of striking effectively at the source of the infringement."[157]

Given the above, it becomes clear that judges should interpret and enforce the Constitution, particularly the Bill of Rights, because they represent "a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles." This is because judges, by training, are most skilled at constitutional interpretation. The Bill of Rights is rife with terms of uncertain meaning that inescapably demand political value judgments in interpretation. Concepts such as due process, liberty, equal protection and freedom itself are not self-defining but inevitably require value judgments from the courts.

7. CONCLUSION

It is incumbent upon the judiciary to give effect and meaning to the provisions of the Constitution. Such an approach by the judiciary guards against the danger of fossilising constitutional provisions due to ineffective interpretation that renders them meaningless. Without an independent and impartial judiciary, a declaration of rights, however fine sounding, serves no purpose. The courts therefore have a duty to enforce the Bill of Rights. In this process, political value judgments are inevitable but they must be tempered with sound reason and constitutional jurisprudence.

[157] Currie & De Waal in The Bill of Rights Handbook (6th ed 2013) at p 181.

UNDERSTANDING SECTION 175 OF THE CONSTITUTION[158]

HONOURABLE PATEL BHARAT

Judge of the Constitutional Court of Zimbabwe

ABSTRACT

Section 175 of the Constitution regulates the powers of the courts in constitutional matters. It provides that an order of constitutional invalidity of any law or conduct of the president has no force unless it is confirmed by the Constitutional Court. It also provides, amongst other things, that any person with sufficient interest may appeal or apply directly to the Constitutional court to confirm or vary an order concerning constitutional validity by a court. Of note and importance as well is the fact that if a constitutional issue arises during any proceedings before a court, a person presiding over that court may, and if so requested by such party to the proceedings, must refer the matter to the constitutional court unless he or she considers that the request is merely frivolous and vexatious. This section thus deals with 'powers of courts in constitutional matters' where reference is made to 'a court' over and above specific references to the Constitutional Court. This provision clearly contemplates that the Constitution confers upon other courts constitutional competence except in those cases where the Constitutional Court has exclusive jurisdiction.

1. INTRODUCTION

Section 175 of the Constitution regulates the powers of the courts in constitutional matters. The section provides that: -

(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.

(2) A court which makes an order of constitutional invalidity referred to in subsection (1) may grant a temporary interdict or other temporary relief to a party or may adjourn proceedings, pending a decision by the Constitutional Court on the validity of the law or conduct concerned.

(3) Any person with a sufficient interest may appeal, or apply directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subsection (1)

(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.

(5) An Act of Parliament or rules of court must provide for the reference to the Constitutional

[158] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

Court of an order concerning constitutional invalidity made in terms of subsection (1) by a court other than the Constitutional Court.

(6) When deciding a constitutional matter within its jurisdiction a court may-

(a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;

(b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.[159]

The concept of constitutional invalidity relates to the power conferred on a court to declare any law that is inconsistent with the Constitution invalid and of no force or effect. The supremacy of the Constitution, as enshrined in s 2 of the Constitution, dictates that any law, practice, custom or conduct that is inconsistent with the supreme law is invalid to the extent of the inconsistency. The ineluctable consequence of this principle is that anything done by Parliament or the President that is contrary to the provisions of the Constitution would be invalid and unconstitutional to the extent of such inconsistency. As such s 175 invests the courts with power to declare any law or conduct inconsistent with the Constitution invalid, subject to confirmation by the Constitutional Court. This point was aptly underscored in the case of *Nkomo & Ors v T M Supermarkets (Private) Limited,* where the court held that anything done in contravention of the Constitution is a nullity.[160]

2. SECTION 175 (1) OF THE CONSTITUTION

Section 175 deals with 'powers of courts in constitutional matters' where reference is made to 'a court' over and above specific references to the Constitutional Court. This provision admits no interpretation other than that the Constitution confers upon other courts constitutional competence except in those cases where the Constitutional Court has exclusive jurisdiction.

An order or declaration of constitutional invalidity as envisaged in s175(1) of the Constitution[161] is a court order that declares certain conduct of the President or Parliament to be contrary to constitutional provisions hence invalid to the extent of such inconsistency. Courts are empowered to declare invalid any legislation that is inconsistent with the Constitution as part of the process of judicial review. The process draws its authority from section 2 of the Constitution which provides for the supremacy of the Constitution.

[159] Section 175 of the Constitution of Zimbabwe, 2013.
[160] *Nkomo & Ors v T M Supermarkets (Private) Limited* CCZ 4/19.
[161] See section 175(1) of the Constitution of Zimbabwe, 2013.

Section 175(1) of the Constitution empowers courts to make a declaration of constitutional invalidity where a challenge to such law or conduct is brought before it for determination. However, notwithstanding the competence of a court to make such an order, the order or declaration will have no force of law unless confirmed by the Constitutional Court, because the conduct of the President or Parliament falls into the exclusive jurisdiction of the Constitutional Court.

In *Makumire* v *Minister of Public Service, Labour and Social Welfare & Anor,* the court held the following:

> "In terms of s 175(1) of the Constitution, any declaration of invalidity of any law or any conduct of the President or Parliament made by a competent court has no force until it has been confirmed by the Court. This section is complemented by s 167(3) of the Constitution, which provides that the Court makes the final decision on whether an Act of Parliament is constitutional and must confirm an order of invalidity made by another court. The sections serve distinct yet harmonious purposes, with the emphasis being placed on the express oversight of the Court over orders of constitutional invalidity of legislation made by other courts."[162]

This serves to show that any declaration of a subordinate court is subject to the overarching jurisdiction and supervisory role of the Constitutional Court.

3. SECTION 175 (2) OF THE CONSTITUTION[163]

Section 175(2) proceeds to empower a court to grant temporary relief after making an order of constitutional invalidity pending a determination from the Constitutional Court regarding the order. This entails that a court may grant relief which is by no means final until the Constitutional Court has made a pronouncement on the order made.

In *S* v *Chokuramba* the court held as follows at p 6:

> "The Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law or conduct of the President or Parliament is inconsistent with the
>
> Constitution. It must conduct a thorough investigation of the constitutional status of the law or conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity. The Court must do so, irrespective of the finding of constitutional invalidity by the lower court and the attitude of the parties.
>
> Thorough investigation is required, even where the proceedings are not opposed or even if there is an outright concession that the law or the conduct of the President or Parliament which is under attack is invalid. The reason for this strict requirement is that invalidity of the law or the conduct of the President or Parliament is a legal consequence of a finding of inconsistency between the law or the conduct in question and the Constitution. Inconsistency

[162] *Makumire v Minister of Public Service, Labour and Social Welfare & Anor* CCZ 01/20.
[163] See section 175(2) of the Constitution of Zimbabwe, 2013.

is a matter of fact, on the finding of which the court *a quo* and the Court may differ."[164]

The above sentiments require that the Constitutional Court conduct a thorough investigation of the matter at hand whilst the lower court is then given power to grant temporary relief pending the final decision of the Constitutional Court.

4. SECTION 175 (3) OF THE CONSTITUTION[165]

Any person with sufficient interest may approach the Constitutional Court to confirm or vary an order of constitutional invalidity in terms of s 175(3). This entails that any person who has a sufficient interest has the right to approach the Constitutional Court to vindicate and protect the Constitution. What is to be regarded as sufficient interest to justify a particular applicant bringing a particular application before the court, and thus as conferring standing, depends upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

The court in *Mupungu v Minister of Justice, Legal and Parliamentary Affairs* observed the following in relation to applications to the Constitutional Court made in terms of s 175(3):-

> "In the context of s 175(3), the central objective that is to be attained is the confirmation or variation of a court order concerning the constitutional invalidity of any law or any conduct of the President or Parliament. What this means is that in order to assess the sufficiency of any person's legal interest in the matter, it is necessary to ascertain the particular purpose which has actuated that person to approach this Court to seek the confirmation or variation of the order made by the subordinate court concerning constitutional validity.
>
> …First and foremost is the wording of s 175(3) itself. The reference to 'any person' with a sufficient interest makes it abundantly clear that it is not confined to litigants or parties before the subordinate court that has rendered the order of constitutional invalidity. This is fortified by the fact that confirmation proceedings under s 175(3) to confirm or vary the order can be brought to this Court not only by way of appeal but also by means of an application.
>
> This clearly signifies that *locus standi* is extended to any person with a sufficient interest, even if he or she has not been a party to the proceedings *a quo*."[166]

The court proceeded to find that what is equally important in assessing the requisite sufficient interest is the nature, substance and gravity of the constitutional matter that has prompted the person concerned to apply to the Constitutional Court for a determination and consequential relief. Thus, s 175(3) vests in the Constitutional Court the exclusive competence to preside over confirmation proceedings, in

[164] *S v Chokuramba* CCZ 10/19.
[165] See section 175(3) of the Constitution of Zimbabwe, 2013.
[166] *Mupungu v Minister of Justice, Legal and Parliamentary Affairs* CCZ 7/21.

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.

5. SECTION 175(4) OF THE CONSTITUTION[167]

Section 175(4) of the Constitution provides a framework for referral to the Constitutional Court of constitutional matters that arise in any proceedings before a subordinate court. The provision is complemented and given practical effect by r 24 of the Constitutional Court Rules 2016 (hereinafter "the Rules").[168] That rule adds flesh to the referral concept as outlined in the Constitution.

"Proceedings" in relation to constitutional matters relates to legal process in any court that is subordinate to the Constitutional Court. In a criminal matter, where a litigant feels that the process or preferred charge infringes a constitutional entitlement or raises a constitutional issue the question may be considered for referral. A referral made *during* proceedings means that the proceedings must have commenced and not yet terminated. This is so because a referral serves the purpose of answering a constitutional question that is critical to the continuance and resolution of prsoceedings that are pending before the subordinate court.

What must trigger the request is the arising of a constitutional matter in the proceedings. As such, the request must indicate how the constitutional question arises.

Section 175(4) of the Constitution stipulates that:

> "If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, **must** refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious."

The provision envisages two instances where the court can refer to the Constitutional Court a constitutional matter that arises during proceedings:

i. The first is framed as a discretion to the court by the use of the word 'may.' It relates to instances where upon realisation that a constitutional issue has arisen and that its resolution has a bearing on the disposition of the issues at hand, the subordinate court *mero motu* decides to refer the constitutional question to the Constitutional Court;

ii. The second instance is mandatory for the person presiding over the lower court. It relates to where a party to the proceedings requests a referral of the constitutional matter. The presiding officer has no discretion in that case. He can only refuse to refer the issue if he

[167] See section 175(4) of the Constitution of Zimbabwe, 2013.
[168] Constitutional Court Rules, 2016.

considers the request to be merely frivolous or vexatious or both.

In every request, the court is enjoined to determine whether the request is frivolous or vexatious or both. In *Rogers* v *Rogers and Anor,* the court at page 9, in defining the phrase "frivolous or vexatious" held as follows:

> "In *S v Cooper & Ors* 1977 (3) SA 475 at 476D Boshoff J said that the word 'frivolous' in its ordinary and natural meaning connotes an action characterised by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense 'frivolous or vexatious' when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation."[169]

From the above definitions, it must immediately occur to any judicial officer that for him to be able to determine whether the request is frivolous or vexatious, he must first know the content of the right he is dealing with or the constitutional provision that needs to be interpreted. After making a finding that the request to refer the question is not frivolous or vexatious, the judicial officer must refer the question to the Constitutional Court. If the finding is made that the request to refer the question is merely frivolous or vexatious, the judicial officer ought to decline the request and continue with the proceedings. Once he has made the decision to refer the matter, the judicial officer must state clearly which question must be determined by the Constitutional Court.

6. WHAT IS A CONSTITUTIONAL MATTER?

The Constitutional Court has no jurisdiction to determine any case which is not a constitutional matter. Judicial officers should know that the Constitutional Court is concerned with determination of matters raising questions of law, the resolution of which requires the interpretation or protection or enforcement of the Constitution. What a constitutional matter is was defined in *Chiite & Ors v The Trustees of The Leonard Cheshire Homes Zimbabwe Central Trust* as follows:

> "A constitutional matter is defined under s 332 of the Constitution to mean a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution. The issue raised before a court will be sufficient evidence of the existence of a constitutional matter to the extent that its determination requires the interpretation, protection or enforcement of the Constitution."[170]

At page 6 of the judgment in *Magurure & Ors* v *Cargo Carriers International Hauliers (Pvt) Ltd*, the Court defined a constitutional matter in the following manner:

---

[169] *Rogers* v *Rogers and Anor* SC 64/07.
[170] *Chiite & Ors v The Trustees of The Leonard Cheshire Homes Zimbabwe Central Trust* CCZ 10/17.

> "A constitutional matter arises when there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality of which is challenged is covered by a law of general application the validity of which is not impugned. The question whether an alleged conduct constitutes the conduct proscribed by a statute requires not only proof that the alleged conduct was committed, it also entails that the statutory provision against which the legality of the conduct is tested be interpreted to establish the content and scope of the conduct proscribed before it is applied to the conduct found proved."[171]

In effect, therefore, where a subordinate court does not take a view of the case that requires it to interpret and apply a constitutional provision to determine the issue raised, the matter does not pass as a constitutional matter. Section 332 must guide a presiding officer on whether or not the issue raised is one envisaged under s 175 (4).

In *Chihava & Ors* v *Principal Magistrate & Anor,*[172] it was held that:

> "… any constitutional issue that arises during proceedings in a lower court ought to and must be brought to this court only upon referral in terms of s 175 (4) of the Constitution …."[173]

It must be borne in the mind of every judicial officer that, irrespective of the format used to make a request, evidence must ultimately be led from the applicant, unless the case is such that there is no need for the leading of evidence.

In this regard, the court in *Tomana and Anor* v *Judicial Service Commission and Anor*[174] stated that the request, whatever form it takes, either a written or an oral application, must not be made from the bar by an applicant's legal practitioner.

In *Mwonzora & Ors* v *The State,* the Court also held as follows at page 5 of the judgment:

> "Further it is insufficient to make a statement from the bar, as the applicants' legal practitioners did in this case. The applicants should have been called to testify under oath in order to substantiate their complaints that their rights had been violated. Had that happened the prosecutor would then have had the opportunity to cross-examine the applicants and, thereafter, to adduce such evidence as he may have considered necessary to contradict the allegations made by the applicants. Only after hearing evidence from both sides would the magistrate have been in a position to make findings of fact, which findings he would have been bound to take into account in deciding whether or not to refer the issues raised to the Supreme Court. In short, it is the responsibility of the court referring a matter to resolve any disputes of fact before making such a referral."[175]

What is clear from this jurisprudence is that leading of evidence is imperative before the referral of a case. It is the basis upon which the referring court decides whether or not the request is frivolous or vexatious. In addition, the Constitutional Court relies

---

[171] *Magurure & Ors* v *Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/16.
[172] *Chihava & Ors* v *Principal Magistrate & Anor* 2015 (2) ZLR 31 (CC).
[173] *See also Captain Ngonidzashe Mugadza* v *Minister of Defence & Ors* CCZ 23/17.
[174] *Tomana and Anor* v *Judicial Service Commission and Anor HH* 281/16.
[175] *Mwonzora & Ors* v *The State* CCZ 9/15.

on the findings made from that evidence to determine the constitutional issues raised. The absence of oral evidence can be fatal to an application of this nature because it completely disables findings to be made on the complaints raised. It is also on the basis of those findings that the court is called upon to deal with the allegations raised and, where necessary, afford appropriate relief.

Furthermore, in any constitutional application, for an applicant to succeed he must show that the constitutional issue raised in the court *a quo* is one which is necessary to dispose of the dispute between the parties. This was succinctly stated in *Director of Public Prosecutions, Transvaal* v *Minister of Justice and Constitutional Development and Others* as follows:

> "A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so."[176](my emphasis)

The determination of the constitutional question has to have a bearing on the resolution of the dispute by the subordinate court in the matter before it.

7. THE CONSTITUTIONAL COURT RULES

In addition to s 175 (4) of the Constitution which provides the framework, the Constitutional Court Rules provide the nuts and bolts for referrals. For that purpose, rule 24 is apposite and provides that:

> "24 REFERRAL OF CONSTITUTIONAL MATTER IN PROCEEDINGS BEFORE A COURT
>
> (1) Where a person presiding over a subordinate court wishes to refer a matter to the Court *mero motu* in terms of subsection (4) of s 175 of the Constitution, he or she shall –
>
> (a) request the parties to make submissions on the constitutional issue or question to be referred for determination; and
>
> (b) state the specific constitutional issue or question he or she considers should be resolved by the Court.
>
> (2) Where the person presiding over a court of lesser jurisdiction is requested by a party to the proceedings to refer the matter to the Court and he or she is satisfied that the request is not frivolous or vexatious, he or she shall refer the matter to the Court.
>
> (3) A referral under subrule (1) or (2) shall be in form CCZ 4 and be accompanied by a copy of the record of proceedings and affidavits or statements from the parties setting out the arguments the parties seek to make before the Court..."

[176] *Director of Public Prosecutions, Transvaal* v *Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222.

Rule 24 mirrors the second part of s 175(4) of the Constitution which deals with a request for referral and mainly reinforces the principle that where a court is satisfied that the request is not frivolous or vexatious it has an obligation in terms of both the Constitution and the Rules to refer the matter to the Constitutional Court. The request may be made orally or through a written application. The request must clearly specify the constitutional question. In addition, it must indicate how the question arises.

In *Nyagura* v *Ncube N.O. and Ors*, the court succinctly held as follows in this regard:

> "If the presiding person is of the view that the determination of the constitutional matter by the Court is necessary for the purposes of the proceedings and that the request for a referral is not frivolous or vexatious, he or she is obliged to refer the matter to the Court for determination. If the presiding person is of the opinion that the request for a referral is frivolous or vexatious, he or she shall refuse the request. … There must be evidence that a request for a referral of a constitutional matter to the Court was made to the presiding person."[177]

Proceedings from which a referral can be requested or made at the instance of a court do not relate to all proceedings before any judicial officer but only those from a court of law.[178] As such, although arbitrators and legal officers constitute judicial officers, the law does not contemplate referrals from proceedings presided over by such adjudicators.

In considering whether a request is frivolous or vexatious, a judicial officer must also be guided by the principles of constitutional avoidance and subsidiarity. These will be discussed in turn as follows.

7.1. CONSTITUTIONAL AVOIDANCE

This doctrine entails that where there are proceedings pending in a lower court, wherein the applicant may obtain relief in that court which he intends to obtain in the Constitutional Court by raising a constitutional matter, the Constitutional Court will not interfere with the unterminated proceedings within the jurisdiction of the lower court. In terms of the doctrine, the court will only deal with a constitutional issue where the remedy sought by the applicant is solely dependent upon the determination of that constitutional issue. In *Chawira and Ors* v *Minister of Justice and Ors,* the Court explained the concept as follows at page 6:

> "Zimbabwe operates a self-correcting hierarchical judicial system where in the ordinary run of things cases start from the lower courts progressing to the highest court of the land. Generally speaking, higher courts are loathe to intervene in unterminated proceedings

[177] *Nyagura* v *Ncube N.O. and Ors* CCZ 7/19.

[178] *Hove v Chairman, Health Professions Council Disciplinary Committee* 2000 (2) ZLR 422 (H); *In Re Gwekwerere* 2003 (1) ZLR 65 (S).

within the jurisdiction of the lower courts, tribunals or administrative authorities."[179]

Where, therefore, a party seeks to refer a constitutional matter to the Constitutional Court when there are proceedings pending in the lower court in terms of which he can obtain the same remedy which he intends to seek before the Constitutional Court, the judicial officer faced with the request to refer must decline to grant such request on the basis of the doctrine of avoidance.

7.2. THE PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity states that a litigant who avers 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. He can only do that if he wishes to attack the constitutional validity or efficacy of the legislation itself. The principle of subsidiarity underlines the fact that there are many disputes of right or interest which do not give rise to constitutional matters. It directs the route to be taken for the protection of the rights allegedly violated.

In *Magurure* v *Cargo Carriers International Hauliers (Pvt) Ltd* (*supra*) the Court explained the principle as follows at page 9:

> "The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorised by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible."[180]

Where a litigant who avers that his right protected by the Constitution has been infringed and seeks to refer that matter to the Constitutional Court, the judicial officer faced with such request must decline to grant the same on the basis that the litigant must first rely on legislation enacted to protect that right and not rely on the underlying constitutional provision directly when bringing an action to protect the right. The request may only be granted where it is shown that the litigant intends to attack the constitutional validity or efficacy of the legislation itself.

[179] *Chawira and Ors* v *Minister of Justice and Ors* CCZ 3/17.
[180] *See note 171 above.*

7.3. JUDICIAL OFFICER TO FORMULATE QUESTION FOR REFERRAL

A referral in terms of s 175 (4) of the Constitution,[181] although requested by the parties, is made by the judicial officer to whom the request is made. It essentially follows that the judicial officer as the one making the referral ought to formulate or state the question for referral. The necessity of formulating or stating the question to be referred was underscored in *S* v *Williams and Ors,* at pages 8-9 where the Court held that:

> "An analysis by the judicial officer of the relevant facts and constitutional provisions is an antecedent to the formulation of the question/s to be referred. Once this has been done, it becomes easy for the judicial officer to formulate and state the constitutional question which he or she considers not to be frivolous and vexatious for the purposes of referral to the Constitutional Court."[182]

Failure to formulate a question is a serious omission on the part of the judicial officer. The Constitutional Court is guided by the constitutional question that is placed before it. The judicial officer knows the issue that has to be answered as it pertains to the proceedings before him or her. Guidance ought to be taken from the wording of s 175(4) which requires that a constitutional matter must arise for it to be referred. Again, it follows that a question to be referred ought to raise a constitutional matter for determination by the Constitutional Court. Where the judicial officer fails to properly formulate a constitutional question for referral, the referral would be improperly before the court because there would be no constitutional question for the court to determine.

8. SECTION 175 (5) OF THE CONSTITUTION

The provision reinforces the need for every order of constitutional validity by a court to be referred to the Constitutional Court. In that regard it states that there should be rules which outline the procedure for a referral to the Constitutional Court relating to orders made by subordinate courts on constitutional invalidity. The Court in *Mupungu v Minister of Justice, Legal and Parliamentary Affairs,* held the following in this regard:

> "There can be no doubt that, in terms of s 175(1) of the Constitution, the High Court, as a subordinate court, is perfectly competent to make an order of constitutional invalidity. However, any such order will have no force or effect unless it is confirmed by this Court. This is because s 167(3) and s 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 this Court makes the final decision as to whether

[181] See section 175(4) of the Constitution of Zimbabwe, 2013.
[182] *S* v *Williams and Ors* CCZ 14/17.

an Act of Parliament or conduct of the President or Parliament is constitutional."[183]

In essence, once a court makes an order concerning constitutional invalidity of any law or conduct, such order must be referred to the Constitutional Court for confirmation or otherwise.

9. SECTION 175 (6) OF THE CONSTITUTION

The provision focuses on the powers of a court to deal with a constitutional matter within its jurisdiction. In particular, the provision speaks to the powers that a court has to declare a law or conduct invalid in as far as it is inconsistent with the Constitution. What is important to note is that a court can only make such an order within its powers. For instance, s 171(1) (c) of the Constitution in dealing with the jurisdiction of the High Court provides as follows:

> "The High Court may decide constitutional matters except those that only the Constitutional Court may decide."

In the case of *Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors*, the court in dealing with the powers of the Supreme Court in constitutional matters held the following:

> "Clearly it (Supreme Court) has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S)"[184]

Once a court within its powers makes a finding that any law or conduct is inconsistent with the Constitution, it is empowered under s 175(6)(b) to make an order that is just and equitable. In essence the court ought to give an effective remedy which satisfies or gives weight to the harm that would have been caused by any law or conduct that is unconstitutional. The phrase "just and equitable" grants the court broad powers to give any appropriate order, that is, the court can grant a *mandamus*, a declarator or even a consequential order. 'Just and equitable' refers to justice objectively and consistently evaluated and applied according to law and established principles, upon definite grounds, but also, to the technique of equity in moulding the application of principle to the particular circumstances and consciences of individual persons. This introduces the element of judicial discretion, but properly understood, this is at the stage of application of the established rules and principles to the particular facts and grounds found or established. See *Manjala*

[183] *Mupungu v Minister of Justice, Legal and Parliamentary Affairs* CCZ 7/21.
[184] *Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors* 1993 (1) ZLR 243 (S).

v Maphosa.[185]

10. CONCLUSION

The principal objective and advantage of proceedings for the confirmation of orders of constitutional invalidity made by subordinate courts is the prevention of disparate rulings on the validity of laws by different courts. It ensures finality and uniformity in constitutional interpretation. This section is thus worthy the knowledge of a Judge to ensure its justiciable application.

[185] *Manjala v Maphosa* SC 213/13.

THE DIFFERENCE BETWEEN APPEALS AND REVIEWS[186]

HONOURABLE RITA TAMBUDZAI MAKARAU

Judge of the Constitutional Court of Zimbabwe

ABSTRACT

In Zimbabwean law, the High Court is vested with the power to review proceedings of all administrative tribunals, both statutory and domestic. In a judicial system, there is always a provision to get redress if a party to a case feels aggrieved by a decision of a law court. There is also a system of appealing against the verdict of a lower court to a higher court, where such verdict is contested and there is also a procedure called review that is concerned with procedural regularity, correctness and maintenance of legality. This presentation outlines the differences between appeals and reviews. The High Court, as will be noted, plays an important role both in review applications and appeals. This presentation is therefore not only relevant but a necessary one for sitting Judges. Both criminal and civil appeals are heard by the High Court whilst reviews are dealt with in different ways depending on whether they are civil or criminal reviews. Automatic criminal reviews are handled by a single Judge in chambers although, if the decision is taken to interfere with either conviction or sentence, the concurrence of another judge must be sought. Where a judge confirms the proceedings as being in accordance with real and substantial justice, the involvement of another judge becomes unnecessary. In the ordinary review application, a Judge sits on his own and must decide on whether or not such application has merit and, if so, what relief should be afforded to the applicant.

1. INTRODUCTION

If a litigant is unhappy with a court's decision or the procedure adopted in reaching that decision he or she has two options; either to challenge it by appealing the verdict of the lower court to a higher court, or have the matter reviewed to determine the legality of the verdict or decision. These procedures might sound similar, but in terms of the law, are very different. The primary function of appeals and reviews is to guard against miscarriage of justice. Both these processes are crucial in ensuring that justice is done. More so, they are a primary way in which Judges, as public officials subject to oversight, are held accountable for their performance as they form part of a Judge's daily functions. It is therefore important for every

[186] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

Judge to know the meaning and difference between, an appeal and a review. This paper will give an overview of appeals and reviews and the procedures for such proceedings.

2. APPEALS IN GENERAL

When the court or tribunal, after hearing the evidence to a dispute, gives a ruling, a party can challenge such ruling on the merits. This happens when a litigant to a decision of the court is not satisfied with the reasoning employed by the court in coming to the decision. The party aggrieved can take the matter to a higher court for that court to overturn or set aside the judgment. In an appeal one will be challenging the court's decision by applying to a higher court for a reversal of the decision of the lower court. An appeal concerns the merits of the judgment. In other words, an appeal is a plea for the merits to be looked at again. The decision of the lower court can stay the same or the higher or superior court can change it or substitute an order, ruling, or judgment that may be incorrect with its judgment.

3. REVIEWS IN GENERAL

In a review, in general, the court is concerned with the procedure followed. This happens when a party to the decision is aggrieved by the process which led to the decision. It is not directed at correcting a decision on the merits, but rather at the maintenance of legality. A decision of the court is subject to review in instances where the other party is unhappy with the procedure adopted by the court and wants to have it reviewed.

4. APPEALS AND REVIEWS DISTINGUISHED

Superior or higher courts do not lightly interfere with the decisions of lower courts. In determining which procedure to use, one should begin by enquiring what one's grounds of complaint are. The decision handed down by a magistrate may be erroneous, because he or she has misconstrued the facts before the court or has misinterpreted the law or applied it incorrectly. A distinction must be made between an appeal and review; as wrong procedures result in miscarriage of justice.

In ***Civil Practice of the Supreme Court of South Africa,*** the distinction is provided for in the following words:-

> *"The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong*

> *conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of the trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."* [187]

In *S* v *Maphosa,*[188] the High Court stated that the essential difference between the review and appeal procedure is that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal.[189] Thus, the matter is usually determined on the record alone, whereas in a review the irregularity may not generally appear from the record. In a review, it is competent for parties to bring extrinsic evidence to prove the irregularity.

In *Maphosa v The State,* the High Court further remarked:

> *"An election to appeal confines the legal practitioner to matters reflected in the record of proceedings. On the other hand, were he to proceed by way of notice of motion seeking a review of the proceedings then counsel would have brought under review other matters which do not appear ex facie the record by way of affidavit."*[190]

From the above, it is clear that, in an appeal, what is in question is the substantive correctness of the original decision whereas in a review, the High Court does not delve into the substantive correctness of the decision, but is only determines whether there were any reviewable procedural irregularities or any action which was reviewable because it was ***ultra vires*** the powers allocated to the tribunal.[191]

MAKARAU J (as she then was) in *Khan v The Provincial Magistrate,* also remarked as follows:

> *"An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited and cannot be prescribed as they relate to the errors in law or by the court whose decision is under attack. On the other hand, grounds of review are limited by law and have to be laid out in the application for review. An error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal."* [192]

[187] Herbstein & van Winsen, "Civil Practice of the Supreme Court of South Africa" 4th (ed) p 932.
[188] *S v Maphosa* HH-323-13.
[189] See also *R v Stephens* 1969(2) RLR 143 (AD).
[190] *S v Maphosa* HH-323-13.
[191] See also *Tselentis v Salisbury City Council* 1965 (4) SA 61 (SRA).
[192] *Khan v The Provincial Magistrate* HH 39/06.

In *S v Machona & Ors,* it was held that where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to substantiate these issues do not appear on the face of the record then the more appropriate course would be to proceed by way of review.[193]

The following is a summary of the main differences between an appeal and a review:

(a) An appeal is based on the argument that the decision appealed against is wrong on the facts or in law; that is, it is an attack on the correctness of the decision itself. A review is based on the argument that the method used to arrive at the decision was wrong. So an appeal is a request to change or modify the decision whilst a review is a request to inquire into the legality of the decision.

(b) An appeal is confined to the facts or law whereas a review is confined to the method of trial.

(c) In an appeal parties, are bound by the four corners of the record whereas a review can be brought on issues or matters which do not appear *ex facie* the record. Where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear on the face of the record, it is permissible for the applicant to prove a ground of review through an affidavit (except in an automatic review.

(d) An appeal may be brought solely at the instance of the parties involved in a matter whereas any other persons may apply for a review.

(e) Subject to a qualification I will touch on shortly, a review can be brought at any stage before the proceedings have been completed whereas an appeal is usually brought after the case has been finalised. However, there are instances where the law permits appeals on interlocutory orders.[194]

(f) Grounds of appeal are unlimited and cannot be prescribed whereas grounds of review are limited by law and have to be laid out in the application for review.

(g) The procedure for appeals and reviews differs. However, both are governed by rules of court. As regards appeals against the decisions of administrative tribunals, the statute or contract may provide for a right of appeal to a higher administrative tribunal.

(h) The time period within which a review case must be initiated is longer than that laid down for the noting of an appeal.[195]

(i) An appeal is final and conclusive unless a statute gives a further right. A review is not final and does not always dispose of the real dispute between the parties.

5. APPEALS AND REVIEWS BEFORE THE HIGH COURT IN TERMS OF THE RULES

Section 26 of the High Court Act provides that, subject to the Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities

[193] *S v Machona & Ors* 1982 (1) ZLR 87 p90.
[194] See also *Masedza v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H).
[195] See *Nyamukapa v Minister of Local Government & Town Planning* HH-363-85.

within Zimbabwe.[196] Pursuant to this provisions, the High Court's powers of review are wider than its appellate powers.

6. GROUNDS FOR REVIEW

Section 27 provides that the grounds for review on which any proceedings or decision may be brought on review before the High Court shall be:

- absence of jurisdiction on the part of the court, tribunal or authority concerned;
- interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
- gross irregularity in the proceedings or the decision. [197]

7. REVIEW OF CIVIL PROCEEDINGS

The High Court, in terms of section 28 of the High Court Act,[198] shall have the power to set aside or correct the proceedings or decisions in any proceedings other than criminal proceedings.

8. REVIEW OF CRIMINAL PROCEEDINGS

The purpose of automatic review is to ensure that every accused person who obtains a sentence above the laid down limit automatically enjoys investigation of his conviction and sentence by a senior judicial officer, who is enjoined to satisfy himself that the proceedings meet the requirement of being in accordance with real and substantial justice.

Part IV of the High Court of Zimbabwe Act, [*Chapter 7:06*][199] enumerates the court's statutory powers of review. As already noted, section 26 provides that, subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals andadministrative authorities. Section 27(1)[200] provides that subject to the provisions of that Act and any other law, the grounds on which any proceeding may be brought on review are absence of jurisdiction, bias and gross irregularity in the proceedings or decision. Section 27(2)[201] provides that nothing in that particular section shall affect the provisions of any other law relating to the review of inferior courts, tribunals or

[196] Section 26 of the High Court Act [*Chapter 7:06*].
[197] Section 27 of the High Court Act [*Chapter 7:06*].
[198] Section 28 of the High Court Act [*Chapter 7:06*].
[199] Part IV of the High Court of Zimbabwe Act, [*Chapter 7:06*].
[200] Section 27(1) of the High Court Act [*Chapter 7:06*].
[201] Section 27(2) of the High Court Act [*Chapter 7:06*].

authorities. Section 29(1)(b) provides that, for purposes of reviewing any criminal proceedings, the High Court may hear any evidence in connection with the proceedings.[202]

When reviewing any criminal proceedings of an inferior court or tribunal, the High Court may direct that any part of the evidence which was taken down in shorthand or recorded by mechanical means be transcribed and that the transcription be forwarded to the Registrar of the High Court. It may hear any evidence in connection with the proceedings, and for that purpose may cause any person to be summoned to appear and give evidence or produce any document or article. Where the proceedings are not being reviewed at the instance of the convicted person, it may direct that any question of law or fact arising from the proceedings be argued before the High Court by the Prosecutor-General or his deputy and a legal practitioner appointed by the High Court.[203]

If the reviewing Judge finds that the proceedings are in accordance with real and substantial justice, he or she shall confirm the proceedings. Section 29(2)(b)[204] states that if on review of any criminal proceedings the High Court considers that the proceedings are not in accordance with real and substantial justice, it has the power to do various things, including the power to alter and quash the conviction or to set aside or correct the proceedings or "generally give such judgment or make such order as the inferior court or tribunal ought, in terms of any law, to have given, imposed or made on any matter which was before it in the proceedings in question." Section 29(3) specifically provides that no conviction or sentence shall be quashed or set aside in terms of section 29 by reason of any irregularity or defect on the record of proceedings unless the High Court considers that a substantial miscarriage of justice has actually occurred.[205]

Section 29(4) of the Act gives the High Court power of review whenever it comes to its attention that proceedings are not in accordance with real and substantial justice.[206]

It should be noted that where a review in a criminal matter takes place as a matter of course, the reviewing Judge or court will examine the merits of the case as well as the propriety of the procedure, though, because of the number of cases that have to be reviewed, the fact that the record will most likely not be a complete transcript, and the lack of argument from either party, the examination will probably be less thorough than would be the case on appeal.

[202] Section 29 (1) (b) of the High Court Act [*Chapter 7:06*].
[203] See section 29 of the High Court Act [*Chapter 7:06*].
[204] Section 29 (2) (b) of the High Court Act [*Chapter 7:06*]
[205] Section 29 (3) of the High Court Act [*Chapter 7:06*].
[206] See section 29 of the High Court Act [*Chapter 7:06*].

9. CIVIL APPEALS

The High Court has jurisdiction to hear and determine an appeal in a civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to it. The High Court has the power to confirm, vary, amend or set aside the judgment appealed against.

Also, if the High Court thinks it is in the best interests of justice, it may order the production of any document or exhibit necessary for the determination of the case, or call or examine any witness who would have been a compellable witness at the trial or proceedings to attend and be examined by the High Court, receive evidence of any competent witness except a compellable witness, or remit the case to the court or tribunal of first instance for further hearing.

Further, where any question arising at the appeal involves prolonged examination of documents or accounts or any scientific or local investigation which cannot, in the opinion of the High Court, be conveniently conducted before it, it may order the reference of the question in terms of the Rules for inquiry and report to a special commissioner appointed by it. The High Court may appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the High Court that such knowledge is required for the proper determination of the case; issue any warrant necessary for enforcing any order or sentence of the High Court; take any other course which may lead to the just, speedy and inexpensive settlement of the case; or make such order as to costs as the it thinks fit.

10. CRIMINAL APPEALS

The High Court has jurisdiction to hear and determine an appeal in any criminal case from the judgment of any court or tribunal from which an appeal lies to the High Court in terms of section 34(1) of the High Court Act.[207] An aggrieved litigant may appeal against, *inter alia*, conviction or sentence, or against both conviction and sentence.

The Prosecutor-General may appeal to the High Court on a point of law or against an acquittal if the Prosecutor-General is dissatisfied with the judgment of a court in a criminal matter in terms of section 61 and 62 of the Magistrates Court Act [*Chapter 7:10*].[208]

[207] Section 34(1) of the High Court Act [*Chapter 7:06*].
[208] Magistrates' Court Act [*Chapter 7:10*].

11. AUTHORITIES DISTINGUISHING REVIEWS FROM APPEALS, PARTICULARLY IN RELATION TO UNCOMPLETED PROCEEDINGS

In *Masedza v Magistrate, Rusape & Anor supra* the court went to great lengths to distinguish an appeal from a review particularly in relation to interlocutory proceedings. The following are excerpts from the judgment:

i. **There is no provision for an appeal to the High Court against an interlocutory decision of the magistrates' court before the proceedings have terminated.**[209]

In the *Masedza case,* the court held that,

> *"Although appeals against conviction in the Magistrates court are now heard by the High Court, there is no provision for an appeal to the High Court against an interlocutory decision in the Magistrates court before the proceedings have terminated. Thus it is only after the proceedings have terminated that an appeal can be brought in which the appellant raises the issue of the correctness of the interlocutory ruling."* [210]

ii. **Power of the High Court to entertain appeals against interlocutory orders**

Although no law provides for interlocutory remedial procedures against decisions of the Magistrates Court, the law however acknowledges the right of appeal against an interlocutory decision of a magistrates' court in limited instances. However, the undesirability of piece meal appeals was underscored by Murray J in *Ellis v Visser & Anor* Murray J stated at p 124:-

> *"If the applicant's contention in this case is correct, then in every one of these cases where a decision is taken by a magistrate there would be just as much reason as in the present case for the accused person to claim that this matter must be decided in limine without awaiting the results of the merits of the case. The result would, I think, create chaos — one envisages a succession of appeals from the Local Division to the Provincial Division and the Appellate Division, whereas it is desirable that the actual merits should be speedily disposed of; and any decisions which are wrong in law should be corrected in the ordinary way by appeal, as there can be no miscarriage of justice, no abuse of process of the court, if the ordinary procedure is followed."* [211]

It is not every irregularity which would amount to a gross irregularity justifying intervention before completion of the matter. A superior court should be slow to intervene in unterminated proceedings in a court below and should confine the exercise of its powers to rare cases where grave injustice must otherwise result or

[209] See *Masedza v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H).
[210] *Masedza v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H).
[211] *Ellis v Visser & Anor* 1956 (2) SA 117 (W).

where justice might not by other means be attained.[212]

In *Ginsberg v Additional Magistrate of Cape Town,* Gardiner JP stated at 360:

> *"Now as a rule the court's power of review is exercised only after termination of the criminal case, but I am not prepared to say that the court would not exercise that power, or, at any rate, a similar power, and grant a mandamus even before the termination of a case, if there were gross irregularity in the proceedings."*[213]

Despite the absence of a provision for an appeal to the High Court against an interlocutory decision of the magistrates' court before the proceedings have terminated, the above authorities speak to the fact that the High Court can, in very circumscribed circumstances, entertain such appeals brought against interlocutory orders.

iii. Power of the Supreme Court to entertain appeals against interlocutory orders

The power of the Supreme Court to entertain an appeal in pending proceedings in the High Court is governed by statute. One should therefore look to the relevant statutory provisions to determine the court's jurisdiction to entertain appeals against interlocutory orders. The High Court Act [*Chapter 7:06]* has made provision for appeals against interlocutory orders in sections 43 and 44.[214] This jurisdiction has been conferred on the Supreme Court, subject to leave being granted, to entertain appeals against interlocutory matters. Section 43(2)(d) of the High Court Act provides as follows:

> "*(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its*
>
> *appellate jurisdiction.*
>
> *(2) No appeal shall lie—*
>
> *…*
>
> *(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases—*
>
> *(i) where the liberty of the subject or the custody of minors is concerned;*
>
> *(ii) where an interdict is granted or refused;*

[212] *Walhaus & Ors v Additional Magistrate, Johannesburg* 1959 (3) SA (A) at p 120.
[213] *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357.
[214] See section 44 & 45 of the High Court Act [*Chapter 7:06*].

(iii) in the case of an order on a special case stated under any law relating to arbitration."

Section 44(5) of the High Court Act provides as follows:

> *"Subject to the rules of court, where a judge of the High Court has made an interlocutory order or given an interlocutory judgment in relation to any criminal proceedings before the High Court —*
>
> *(a) the person against whom the criminal proceedings are being or will be brought; or*
>
> *(b) the* Prosecutor-General*;*
>
> *may, with the leave of a judge of the High Court, or if a judge of that court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against the interlocutory order or interlocutory judgment."*

Pursuant to the above provision, the Supreme Court has the power to hear appeals on interlocutory orders upon leave being granted, with the exception of orders granting the relief of an interdict or where the liberty of an individual or custody of minors is concerned, which orders do not require leave.

iv. REVIEW AGAINST INTERLOCUTORY DECISIONS

a. A decision of the court can be reviewed before proceedings have terminated

The court in the *Masedza case*[215] further held that:-

> "The power of the High Court to review the proceedings in the magistrates' court is exercisable even where the proceedings in question have not yet terminated. However, it is only in exceptional circumstances that the court will review a decision in an interlocutory decision before the termination of the proceedings. It will do so only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not by other means be attained."[216]

Although the law permits a review based on incomplete proceedings, such intervention ought to be done sparingly or as an exception. This position was put across by John Reid Rowland in his book, ***Criminal Procedure in Zimbabwe*** wherein he stated at page 26-12 as follows: -

[215] *Masedza v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H).
[216] See also *Rose v The State* HH 71-12.

"However, in uncompleted cases this power should be sparingly exercised. It would only be appropriate to do so in those rare cases where otherwise grave injustice might result or justice might not be obtained…"[217]

What is clear from the many cases is that the intervention by a superior court in uncompleted proceedings of a lower court should only be entertained in the most exceptional of circumstances.[218]

b. REVIEW POWERS OF THE SUPREME COURT

The exercise of review powers by the Supreme Court is different from that of the other courts. The Supreme Court may exercise review powers whenever it comes to the Court's or judge's notice that an irregularity has occurred in any proceedings of an inferior court. The review powers of the Court are provided for under section 25 of the Supreme Court Act [*Chapter 7:13*] which states:-

"***25 Review powers***

(1) *Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.*

(2) *The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.*

(3) *Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."*[219]

---

[217] Reid – Rowland J, Criminal Procedure in Zimbabwe, *Legal Resources Foundation* 1997 p26. See also the following cases that speak to the same principle. See also *Dombodzvuku & Anor v Sithole NO & Anor* 2004 (2) ZLR 242(H); *Bvunzawabaya & Ors v Commissioner of Prisons & Anor* 2008 (1) ZLR 108(H); *Mashonganyika v Lena NO & Anor* 2001 (2) ZLR 103(H).

[218] *Attorney-General v Makamba* 2005 (2) ZLR 54(S).

[219] See section 25 of the Supreme Court Act [*Chapter 7:13*].

Section 25 of the Supreme Court Act does not give any right to any litigant to institute any review in the first instance before the Supreme Court. In *Nherera v Lilian Kudya N.O and Anor*, the court stated the following with regards to the exercise of review powers by the Supreme Court:

> *"A proper reading of the above section reveals that the section provides for the following:*
>
> (a) *it confers review jurisdiction on the Supreme Court and every Judge of the Supreme Court;*
>
> (b) *the review jurisdiction conferred on the Supreme Court and every Judge of the Supreme Court is of the same level as the High Court or a Judge of the High Court and is over inferior courts, tribunals and administrative authorities;*
>
> (c) *the review jurisdiction is exercisable by the Supreme Court and/or every Judge of the Supreme Court mero motu when an irregularity comes to its/his/her attention;*
>
> (d) *in terms of s 25 of the Act, no person has a right to institute review proceedings in the first instance in the Supreme Court."* [220]

It is quite clear that section 25 of the Supreme Court Act[221] does not confer on an applicant the right to apply to the Supreme Court or a Judge of the Supreme Court for the review of proceedings. Section 25(3) of the Supreme Court Act[222] is very clear in this regard. The Supreme Court or a Judge of the Supreme Court can review such proceedings *mero motu* in terms of s 25(2) of the Act and can set them aside.

12. CONCLUSION

This article sought to highlight the differences between appeals and reviews, in order to give a deeper and clearer understanding of the two procedures, which although confusingly similar are distinctively different. The remedy of a review must not be confused with that of an appeal. As alluded to above, the difference between these two remedies is that in an appeal procedure what is in question is the substantive correctness of the original decision whereas in a review procedure the High Court is not delving into the substantive correctness of the decision, but is only determining whether there were any procedural irregularities in the method applied to arrive at the decision.

---

[220] *Nherera v Lilian Kudya N.O and Anor* SC 45/07.
[221] See section 25 of the Supreme Court Act [*Chapter 7:13*].
[222] See section 25 of the Supreme Court Act [*Chapter 7:13*].

PRE-TRIAL CONFERENCE: FAMILY LAW MATTERS, DELICT AND COMMERCIAL LAW MATTERS

HONOURABLE NICHOLAS MATHONSI

Judge of Appeal, Supreme Court of Zimbabwe

ABSTRACT

Pre-trial conferences are an essential component of the trial procedure in civil proceedings. They should be held not only after close of pleadings but also after discovery, and when statements of witnesses have been recorded. In some instances, they have culminated in settlements thereby curtailing proceedings. They are therefore a fundamental aspect of alternative dispute resolution. In their practicality, pre-trial conferences take the role of mediation. The role of a Judge in a pre-trial conference is identify the triable issues and where possible, to help parties reach a settlement. A Judge does this by stating the position of the law, expressing his or her view point on factual probabilities and where fairness lies.

1. INTRODUCTION

It is now generally accepted the world over that the efficient and speedy determination of legal disputes by courts of law is a sure way of enhancing the ease of doing business. A court system that is inundated with sterile cases and that has slow-moving matters tends not only to be inaccessible to the litigating public, but also drives away business.

Generally, litigation with its conservative, confrontational and adversarial approach to dispute resolution is now regarded as a threat to economic growth. Indeed, it has been said that litigation is an activity that does not contribute to the happiness of mankind.[223]

In the words of Linda Singer, in the "*The Quiet Revolution in Dispute Resolution;*"

> *'Court or administrative action displace litigant's power over their own dispute. The legal*

[223] Per RUSSEL J in *Gallie v Lee* [1969] 1 All ER 1062.

process distorts reality; not only are speed and economy affected, but the real issues in dispute and the treatment of disputants by the professional dispute resolvers escape our control as well. Even top corporate managers feel as if their businesses take on a legal life of their own once they are turned over to the lawyers and courts.'

In the Zimbabwean context, recent developments have shown that there is a deliberate shift from the traditional methods of dispute resolution towards the more dynamic, expeditious, cheap and efficient alternative dispute resolution. For instance, we have seen the introduction of the specialized Commercial Division of the High Court regulated by its own rules steeped towards the efficient and expeditious resolution of disputes.

It is in that spirit that the Judicial Service Commission (JSC) is introducing the Integrated Electronic Case Management System (IECMS), set to be launched in May 2022. The system is about the digitalization of the courts to enhance access to justice.

That is the context in which we discuss the conduct of pre-trial conferences at the moment. Since the introduction of **Practice Direction Number 1 of 1995** which directed that all pre-trial conferences should be held before a judge and that the parties should file summaries of evidence for that purpose, it has become clear that the conduct of pre-trial conferences at the High Court had taken the dimension of mediation. Mediation is the very opposite of litigation and is a softer way of dispute resolution. There has been an introduction of mediation or conciliation at the pre-trial conference stage as an alternative to a trial.

A judge presiding over a pre-trial conference is required to create a less formal environment which allows the parties to engage each other positively with a view to achieving a settlement without the need of a trial. In the sphere of family disputes, most jurisdictions recognize that fully contested trials are not the best way of resolving those disputes.

For that reason, just like in the commercial sphere, separate specialized Family Courts with their own rules and simplified procedures, have been developed in the UK, Australia and USA. On the African content, countries like Kenya, Tanzania, Uganda and South Africa have established administrative structures dealing with family law.

2. DEFINITION OF A PRE-TRIAL CONFERENCE

The term "pre-trial conference" is not defined anywhere in the main rules of the

High Court. The High Court (Commercial Division) Rules, 2020 refer to what is called pre-trial case management by a judge to whom a case is allocated within 3 days after the closure of pleadings, for the purpose of "case management and case mapping."

As the name "pre-trial conference" suggests, this is a conference that is held before a trial takes place. The word "pre" means "before" or "in advance".[224]

3. PURPOSE OF PRE-TRIAL CONFERENCE

Rule 49 of the High Court Rules, 2021 has the heading "Curtailment of Proceedings" which clearly shows that the purpose of a pre-trial conference is to curtail proceedings. If the matter can be settled altogether that would be the first price, but should that fail, at least the conference should be able to narrow the issues for trial thereby reducing legal costs.

What the parties are required to do at the pre-trial conference is set out in r 49 (2) namely;

(a) obtaining admissions of fact and of documents;

(b) holding any inspection or examination;

(c) exchanging reports of experts;

(d) giving further particulars reasonably required for the purposes of trial;

(e) exchanging plans, diagrams, photographs, models etc. to be used at the trial;

(f) consolidation of trials;

(g) agreeing on the quantum of damages;

(h) defining the real issues and the manner in which any particular issue may be proved;

(i) estimating the duration of trial; and

(j) preparation of a bundle of documents for trial.

Critically, rule 49(2) provides that "if it is practicable to do so, the parties shall attempt to reach a settlement of all or any of the matters in dispute between them." Therein lies the importance of a pre-trial conference. Looking at the list of what the parties have to do, there can be no doubt that the parties must be thoroughly prepared for the conference. In fact, a matter should be set down for pre-trial conference not only when the pleadings are closed (r 49 (1), but also when discovery has been effected and statements of witnesses recorded. How else can the parties obtain admissions, hold an inspection or examination, exchange experts' reports and

[224] Pearson Longman, Longman Dictionary of Contemporary English, *Fifth Edition*.

share documents, like plans and diagrams, when discovery has not been effected and statements of witnesses are not in place?

I am saying this because quite often matters are set down for pre-trial conference before discovery has been effected and invariably before summaries of evidence have been filed. It then becomes a useless exercise, if not a formality, to hold a conference under those circumstances.

4. CONDUCT OF PRE-TRIAL CONFERENCE

It is significant to observe that while the procedure for pre-trial conference is judge-driven, the judge does not judge. The judge is an impartial arbiter who has to regulate the discussions in an engaging manner as he or she is in total control of the process. This derives from the provisions of r 49 (8) which reads:

The registrar, acting on the instructions of a judge, may at any time on reasonable notice, notify the parties to an action to appear before a judge in chambers on a date and at a time specified on the notice, for a pre-trial conference, as the case may be, with the object of reaching agreement on or settling the matters referred to in sub rule (2) and the judge may at the same time give directions as to the person who shall attend and the documents to be furnished or exchanged at such conference.

Provided that all the parties to the action shall physically attend the pre-trial conference held before a judge.

I mention in passing that the above proviso was introduced in the new rules. It was not there previously. As a result, parties were sending their lawyers instead of attending the pre-trial conference themselves. It was in consideration of that provision that judges at the High Court formulated the notice to attend pretrial conference which is in use at the moment. It informs the parties what they are required to do, the documents they should file and the consequences for non-compliance. The notice in question now constitutes the initial directions given by the judge the moment the matter is allocated to the judge. This was done deliberately because, in terms of sub rule (12) of r 49, a judge may dismiss a claim or strike out a defence or make any other appropriate order where a party has failed to comply with directions given by a judge in terms of sub rules (8), (10) and (11) or with a notice given in terms of sub rule (8).

In light of the heavy responsibility given to the judge to run the affairs of a pre-trial conference and make it a success, it is imperative that the judge must also be thoroughly prepared if he or she is to produce results. The judge must read

the record in advance and make notes especially of outstanding and defective pleadings. There may also be notices given of applications for amendments, for admissions sought, amongst others, which the judge must attend to. These are often overlooked where the judge has not read the record or is being driven by the parties who normally want to turn the process into a useless formality by asking for referral to trial.

What a judge conducting a pre-trial conference has to do was succinctly spelt out by GILLESPIE J in *Doelcam (Pvt) Ltd v Pichanick and Others,* he said;

> A pre- trial conference has a two – fold purpose. The primary aim is to assist towards the resolution of a dispute without recourse to trial. To this end, the parties are given the benefit of appearing before a judge and engaging off the record in a frank exchange concerning the merits and weight of the respective cases. The judge will not preside at trial and therefore may, indeed is expected to, express a view in the matter. That view, of course, is not binding upon the parties, but is a persuasive indication of how most judges are likely to see the matter. Since that view will not be expressed outside the conference, the parties need not fear the tainting of the trial judge. The secondary aim, in the event that settlement is not achieved, is to ensure that all pleadings and pre-trial procedures are complete and correct; that the issues are limited to the greatest extent achievable and properly defined; and that the case is ready for trial on the merits without further ado. It is the duty of legal practitioners to be ready for trial at the pre-trial conference. … I likewise respectfully consider it to be the duty of the judge to do all that is necessary to achieve the two –fold aim of the conference. He or she ought not meekly to accept the lawyers' say-so that no settlement is possible. He should express a view on the law. He should express an opinion on the factual probabilities. He should attempt to state the competing prospects of success. He should say clearly where fairness lies. He should invite the parties to negotiation and compromise after the clearest indication of the probable consequences of success or failure to each party. Judges who do so with the active participation of lawyers and parties can achieve a settlement rate of an extreme 90% of matters. Where settlement is not achieved, then should the judge insist on procedural completeness and finally refer the matter to trial in a minute properly prepared according to his insistence, defining the issues and giving whatever direction maybe appropriate, and signed by him.[225]

GILLESPIE J so completely sets out what the judge has to do at a pre-trial conference that there is scarcely any need to say more. If all judges were to take the foregoing passages as a template when going into a pre-trial conference, I am almost certain that not only will the backlog of trials be more than halved but also those matters that escape to trial would be disposed of much quicker. Unfortunately, most of the time a trial judge gets extremely disappointed because some judges hardly do anything at the pre-trial conference.

MAKARAU J (as she then was) added some wise words about the procedure of a

[225] *Doelcam (Pvt) Ltd v Pichanick and Others* 1999 (1) ZLR 390 (H).

pre-trial conference in *Marijeni v Mufudze and Others* where she held:

> I respectfully consider it the role of the judge presiding at a pre-trial conference to engage the parties and lawyers meaningfully, and to assist towards a settlement. He or she can give directions in the matter---. Instances when judges request that pleadings be amended, that summaries of evidence be supplemented or that further discovery be effected are all examples of directions given at the pre-trial conference. They are aimed at facilitating a settlement or, where such is not possible, at bringing to the fore the real dispute between the parties. Where the facts in a matter are not in dispute, the judge could direct that a stated case be prepared so that argument could be heard or the law and legal issue could be settled. It appears to me that the judge presiding over a pre- trial conference is not a mere observer. He or she should be an active participant at the conference. Where opportunities to settle arise, he or she must point them out to the parties. [226]

The foregoing remarks demonstrate that the concept of a pre-trial conference before a judge has, as I have stated above, now taken the form of alternative dispute resolution, in particular mediation. What the learned judges set out are not the usual adjudicative functions of a judge. For that reason, judges and legal practitioners must look at pre-trial conferences as a wonderful opportunity for disposal of matters without the necessity of the expensive and invariably vigorous process of a trial.

5. PREPARATION FOR PRESIDING OVER A PRE-TRIAL CONFERENCE

It occurs to me that the success of pre-trial conference proceedings rests squarely on the shoulders of the presiding judge. An effective judge is one who prepares thoroughly for the occasion. An effective judge can be seen by the number of cases he or she refers to trial. What a judge is required to do in order to hold a successful pre-trial conference includes the following:

(a) Thoroughly read the record;

(b) Acquaint yourself with the pleadings and cheek for defects;

(c) Familiarize yourself with the facts of the case;

(d) Identify the real issues between the parties;

(e) Check the law applicable to the case;

(f) Confirm that the pleadings are closed and that discovery has been effected by the parties; and

(g) Ensure that summaries of evidence are filed by the parties and that they contain the list of witnesses to be called and a proper summary of the witnesses' evidence.

[226] *Marijeni v Mufudze and Others* 2000 (2) ZLR 498 (H).

6. CHECK- LIST FOR DIVORCE CASES

Special considerations apply to divorce matters. In preparing for a pre-trial conference for such matters, as it is for the unopposed roll, it is necessary that a judge develops a check list of crucial matters that should be pleaded. These are:

a) Has the jurisdiction of the court been pleaded i.e. the husband's domicile or other additional jurisdiction provided for in section 3 of the Matrimonial Cause Act [*Chapter 5:13*]?

b) Is the type of marriage sought to be dissolved disclosed in the declaration?

c) If there are minor children of the marriage, have the names and dates of birth been set out?

d) Has custody, access and maintenance for the children been catered for?

e) Has a full list of the assets acquired during the marriage been given and how they should be divided?

7. SOME ADDITIONS TO THE PRE-TRIAL CONFERENCE PROCEDURE INTRODUCED BY THE NEW RULES

When the new High Court rules were introduced, there were some additions inserted which were informed by practical experiences in the handling of pre-trial conferences. The intention was to improve on the efficient holding of pre-trial conferences and to speed up the process of resolution of matters.

For instance, the new sub rule (11) of r 49 provides:

> (11) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter including the granting of condonation in respect of this or any other rule.

The above sub rule is designed to enhance the power of a judge presiding over a pre-trial conference to give directions that promote the effective and speedy resolution of matters.

Sub rule (13) of r 49 is also a new provision giving authority to a party prosecuting the matter to prepare a joint minute of a pre-trial conference held before a judge and have it filed with the registrar within a prescribed period of time. It reads:

(13) Unless the judge determines otherwise, the party wishing to have the action brought to trial shall prepare the minutes of the conference held before a judge and file them, duly signed, with the registrar within five days or within such longer period as the judge may determine.

The whole idea behind these interventions is to manage the case such that all bottlenecks and delays which had become rampant as a result of parties playing delaying tactics are removed.

8. PRE-TRIAL PROVISIONS IN THE COMMERCIAL DIVISION

It should be recalled that the introduction of the Commercial Division of the High Court, just like the Integrated Electronic Case Management System, is a response to international best practices. What has gained traction the world over, is the need to cut short the period of determination of cases at the courts and to reduce the attendant costs of litigation.

Only when, as a jurisdiction, we have an efficient case management and disposal of cases system can we enhance the ease of doing business in Zimbabwe. That way there will be an improvement of the country's ranking on the World Bank index where in 2020, Zimbabwe was ranked number 139 out of 188 countries.

Accordingly, it is in that context that the rules of the Commercial Division have been generated. In terms of r 16, within 3 days after the closure of pleadings, the registrar is required to manually or electronically cause a case to be allocated to a specific judge for the purpose of case management and case mapping.

Rule 17 (1) sets out what judicial case management comprises of, namely:

> (a) the allocation of the record of the commercial dispute to a presiding judge.
>
> (b) immediately upon receipt of the record the presiding judge allocates a date for an initial case management conference which deals with -
>
> (i) the scheduling of the matter;
>
> (ii) the setting of deadlines for the filing of any further documents;
>
> (iii) agreement on set down dates for hearing both the main dispute and any interlocutory matters;
>
> (iv) giving of general directions on the dispute.

The purpose of a pre-trial management conference is to try and resolve one or some or all of the issues in dispute before going to trial or a full hearing on applications.

A commercial dispute should be determined with 10 months and in any event not more than 12 months from the date of commencement.

Rule 20 also requires the "physical presence" of the parties at a case management pre-trial conference. They may also appear via video link.

What the judge can do at such a conference is set out in r 19 (2) which provides:

> (2) At such a pre-trial case management hearing, the judge may consider, any matter arising from the pleadings filed of record, including the possibility of a settlement of all or any of the issues in the suit or proceedings and may require the parties to furnish the judge with any such further information as he or she considers necessary and expedient, and may give all such other directions as he or she considers necessary or desirable for securing the just, expeditious and economic disposal or curtailment of the suit or proceedings.

As can be seen from these provisions in the rules, the focus in the Commercial Division is speedy, efficient and inexpensive disposal of commercial disputes. All that is aimed at enhancing the ease of doing business. As judges, we therefore have a very critical role to play in the digitalization of the economy and the turning around of the country's fortunes.

9. PROBLEMS USUALLY ENCOUNTERED

As I dovetail towards a close, let me briefly set out a few problems encountered by judges at pre-trial conferences.

(i) Defective pleadings-these should be identified and amended and where pleadings do not disclose a cause of action, surely the matter should not be allowed to proceed to trial.

ii) Incomplete pleadings-it is the duty of the judge to ensure that pleadings are complete, discovery effected and pre-trial conference documents filed.

iii) Failure to attend pre-trial conference by litigants – quite often parties do not attend a pre-trial conference preferring to send their lawyers. It should be understood that a pre-trial conference is for the parties and a legal practitioner is not a party but an agent of a party. If judges are to discharge their duties as set out above, it is necessary that parties should attend so as to be engaged meaningfully by the judge. Fortunately, the current rules now make it a requirement for parties to attend.

v) Where there is really nothing to be tried- this is another species of delaying tactics. Such parties may want to continue holding meetings while unreasonably holding back in order to prevent progression to trial. Where such conduct is detected, it may be prudent to refer the matter to trial to prevent further unnecessary delays.

10. CONTENTS OF A JOINT PRE-TRIAL CONFERENCE MINUTE

Where the parties have settled, a deed of settlement or consent paper should be prepared, preferably by the plaintiff or the parties prosecuting the matter. It should then be signed by the parties and referred to the judge for endorsement.

Where, despite the judge's endeavors, the parties have not settled, the judge should assist them narrow the issues. What would have been agreed should be recorded in a deed of settlement or consent paper so that there is no confusion. What remains outstanding should be set out in a joint pre-trial conference minute which should be signed by the parties and endorsed by the judge. It is again prudent to assign the responsibility of preparation to the party diligently pursuing the matter.

What should be recorded in the joint pre-trial conference minute is set out in r 49 (10). As the rule is an important one given that it informs the judge what must be contained in the joint minute, I reproduce it hereunder;

> (10). Upon the conclusion of a pre-trial conference held before a judge, the judge –
>
> (a) shall record any decisions taken at the conference and any agreements reached by the parties as to the matters considered; and
>
> (b) may make an order limiting the issues for trial to those not disposed of by admission or agreement; and
>
> (c) may give directions as to any matter referred to in sub rule (2) which the parties have been unable to agree; and
>
> (d) shall record the refusal of any party to make an admission or reach agreement, together with the reasons therefor.

The importance of the joint pre-trial conference minute is that it enables the trial judge to plan effectively for trial as it informs the trial judge what the issues for determination are, the number of witnesses lined up and the duration of the trial. The minute must be signed by the parties and the judge presiding over the pre-trial conference.

11. CONCLUSION

Judges and legal practitioners involved in litigation are urged to take the procedure for pre-trial conferences very seriously and maximize on it. When put to proper use, the procedure contributes immensely, not only to the speedy finalisation of cases, but to the efficient and productive use of the court's time.

Apart from resolving disputes without the need for a trial, narrowing issues should a trial be unavoidable, and cleaning up defective pleadings, the procedure also weeds out those who abuse the process of the court much earlier in the proceedings. The procedure can be a useful case management tool which, in divorce cases for instance, can make the work of a judge presiding over the uncontested divorce cases much easier. A host of benefits abound to the proper use of the pre-trial

conference procedure, including the reduction in the number of judgments which need to be written by the courts. The adage that the best lawyer, and indeed, the best judge, is one who is able to settle the majority of his or her cases without the need for a trial, clearly underscores the importance of the pre-trial procedure.

ORDINARY CHAMBER APPLICATIONS[227]

HONOURABLE ANNE-MARY GOWORA
Judge of the Constitutional Court of Zimbabwe

ABSTRACT

Despite their peculiarity, chamber applications must conform with the requirements governing all applications generally. They must be made in proper form as provided for in the rules of court. They must also have a draft order that must sufficiently inform the parties and the court of the relief being sought. More importantly, they must be supported by one or more affidavits. Like any other application, they are important in that they play an important role in affording litigants their constitutional right to be heard. A Judge should always insist that a chamber application be served upon all interested parties unless if such an application falls under prescribed exceptions. As alluded to above, every application stands or falls on its founding affidavit and a Judge should always remember this rule.

1. INTRODUCTION

The Constitution of Zimbabwe, 2013 provides for the right to a fair trial as a fundamental right. Often times, when judges sit to determine disputes, this very critical and necessary aspect on disputes is lost. The right that I am referring to relates to the determination of civil disputes and is provided for in s 69 as follows:

> **"69 Right to a fair hearing**
>
> (1)…
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute."[228]

In turn s 44 of the Constitution provides:

> **"44 Duty to respect fundamental human rights and freedoms**

[227] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

[228] The Constitution of Zimbabwe, 2013.

> The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter." [229]

The above constitutional provisions are an encapsulation of the common law principle of *audi alteram partem*; meaning that every person has a right to be heard in their own cause. The right is not just that the party be heard, but that they be heard before an impartial tribunal.

In order to achieve fairness and transparency it is necessary that the procedures that tribunals follow be regulated. The way that this is achieved is the promulgation of rules which not only serve as a guide to the parties but to the court as well. In the absence of rules of court there can be no fairness. Parties would not be informed on how their disputes can be resolved. It is therefore fair to say that the rules of court are the judge's bible.

Herbstein & Van Winsen, has the following passage:

> "Legal remedies can be pursued only by recourse to courts of law, whose essential function is to enable people to enforce their rights and obtain their remedies, and also to defend themselves against the claims of others peaceably. Consequently, the task of the legal practitioner who has decided that a client has a good cause of action or defence has only begun. Legal proceedings must be brought and prosecuted, or defended to their conclusion before a judicial order can be obtained. Only then will the state lend its assistance to make the order effective, and only then, through the power of the state, will the litigant be enabled to enforce the right and its corresponding remedy.
>
> A court of law will not entertain legal proceedings unless it is satisfied that it is competent (in other words has jurisdiction) to do so, that the proceedings have been instituted in the proper form and that they are being conducted in the proper manner."[230]

The above is a general statement on the need for the proper procedure to be adopted for the attainment of the intended objective, i.e. to obtain relief for their respective clients on the part of legal practitioners.

This discussion focuses on ordinary chamber applications and urgent chamber applications. In view of the differences between these applications in several material respects, I find it prudent to deal with the applications *seriatim,* beginning with ordinary chamber applications.

2. CHAMBER APPLICATIONS

What is a chamber application? Order 1 of the High Court Rules, 2021 define a chamber application as follows-: "chamber application" means an application to a

[229] Constitution of Zimbabwe, 2013.

[230] Cilliers AC, Loots C and Nel HC, Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed (2009) pp3-4.

judge in terms of para (b) of sub rule (1) of r 57.[231] The process of filing, management, and disposal of chamber applications is provided for in terms of rules 58 and 60.[232] The starting point is r 60 which provides as follows:

> "60. Chamber application
>
> (1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form No 25 duly completed and, except as is provided in sub rule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications.
> (2) Where a chamber application is for default judgment in terms of rule 23 or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit."[233]

See Permanent Secretary; Ministry of Higher and Tertiary Education v College lecturers Association & Ors.[234]

3. REQUIREMENTS FOR A CHAMBER APPLICATION

A chamber application is peculiar in nature by the fact that it is made by entry in the chamber book. It must however conform to the requirements for all applications in terms of the High Court Rules. Rule 57 is pertinent in this regard. Rule 57 (1) and (2) provide as follows:

> "(1) Subject to this rule, all applications made for whatever purpose 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; or
> (b) as a chamber application, that is to say, in writing to a judge.
> (2) An application shall not be made as a 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

[231] High Court Rules, 2021.
[232] See note 231 above.
[233] See note 231 above.
[234] *Permanent Secretary; Ministry of Higher and Tertiary Education v College Lecturers Association & Ors* 2015 (2) ZLR 290.

theapplication."[235]

Regard must therefore be had to r 58[236] which sets out the specific requirements that must attach to an application, whether it be a court application or chamber application.

> "GENERAL PROVISIONS FOR ALL APPLICATIONS
>
> *58. Written applications, notices and affidavits*
>
> (1) Every written application, notice of opposition and supporting and answering affidavit shall—
>
> (*a*) be legibly written on A4 size paper on one side only; and
>
> (*b*) be divided into paragraphs numbered consecutively, each paragraph containing, wherever possible, a separate allegation; and
>
> (*c*) have each page, including every annexure and affidavit, numbered consecutively, the page numbers, in the case of documents filed after the first set, following consecutively from the last page number of the previous set, allowance being made for the page numbers of the proof of service filed for the previous set.
>
> (2) Every written application and notice of opposition shall—
>
> (*a*) state the title of the matter and a description of the document concerned; and
>
> (*b*) be signed by the applicant or respondent, as the case may be, or by his legal practitioner; and
>
> (*c*) give an address for service which shall be within a radius of ten kilometres from the registry in which the document is filed; and
>
> (*d*) where it comprises more than five pages, contain an index clearly describing each document included and showing the page number or numbers at which each such document is to be found.
>
> (3) Every written application shall contain a draft of the order sought.
>
> (4) An affidavit filed with a written application—
>
> (*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and
>
> (*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents.
>
> (5) Where by any law a certificate or other document is required to be attached to or filed with any application, it shall be sufficient to attach or file a photocopy or other facsimile of the certificate or document:
>
> Provided that, if required to do so by the court or a judge at the hearing, the party concerned shall produce the original certificate or document."[237]

4. CHAMBER APPLICATIONS GENERALLY

As pertains to other court process a chamber application must have a draft order. A chamber application that does not have a draft order attached is defective.

[235] See note 231 above.
[236] High Court Rules, 2021.
[237] High Court Rules, 2021.

The relief sought must be set out in the draft order. The draft informs the parties and the court as to the relief being sought. It also serves to alert the court or a judge on issues of jurisdiction. If the relief sought is not within the jurisdiction of the court or a judge, then the court can withhold such jurisdiction. In the absence of a draft order a court or judge cannot grant relief.

The appropriate Form to use is Form No 25. It must be supported by one or more affidavits unless the application falls within the provisions governing r 60 (2) of the Rules,[238] in that it is an application for default judgment where the defendant is barred.

5. AFFIDAVITS IN CHAMBER APPLICATION PROCEEDINGS

It is a trite position of the law that an application whether made on an ordinary or urgent basis, stands or falls on its founding affidavit. This therefore, makes the founding affidavit a fundamental document in application proceedings. In Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa* the position has been enumerated as follows,

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein because these are the facts which the Respondent is called upon either to affirm or deny."[239]

It is therefore imperative to make sure that litigants comply with all the requirements attendant upon the filing of chamber applications. This is a requirement that cuts across applications generally and therefore must be adhered to religiously. As mentioned earlier, in terms of r 60(1) of the High Court Rules it is stated that every chamber application shall be supported by one or more affidavits setting out the facts upon which the applicant relies for relief.[240] While the particular facts deposed to will naturally depend on the circumstances of each case, the affidavits must contain essential averments in support of the relief claimed.

6. REQUIREMENTS FOR AFFIDAVITS

It is important at this juncture to deal with the requisites of affidavits in application proceedings as they constitute one of the major components in any form of application. As earlier noted, an application stands or falls on its founding affidavit,

[238] See note 231 above.
[239] Cilliers AC, Loots C and Nel HC Herbstein and Van Winsen, *The Civil Practice of the Superi or Courts of South Africa*, 3rd ed, (1979) p 80.
[240] High Court Rules, 2021.

this makes the discussion on affidavits paramount.

The general rule is that three sets of affidavits may accompany an application, that is, the founding affidavit, the answering affidavit and the opposing affidavit. However, the principle that each case should be dealt with according to its own circumstances cuts across all cases.

The court may in its discretion permit the filing of further affidavits by either of the parties as the case may be. This however, can only be done in very exceptional circumstances. Special circumstances have been said to exist where there is something unexpected in the applicant's answering affidavit or where a new matter was raised in them. In the South African case of *James Brown & Hamer (Pty) Ltd v Simmons,*[241] Thompson JA stated as follows:

> "It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted."[242]

It is only in instances where the chamber application is for default judgment in terms of r 23 of the Rules[243] (for a claim for debt or liquidated demand) and also where the facts are evident from the record that the filing of supporting affidavits may be dispensed with. This rule provides:

> *"23. Claim for debt or liquidated demand only and no appearance entered*
> In cases where the plaintiff's claim, not being a claim for provisional sentence, is for a debt or liquidated demand only, and the defendant has failed to enter appearance within the period prescribed in the summons for entering appearance, or, having entered appearance, has been duly barred for default of plea, the plaintiff may without notice to the defendant make a chamber application for judgment, and thereupon judgment may be granted or such order may be made as the judge considers the plaintiff is entitled to upon the summons or declaration."[244]

Service of a chamber application must be effected on all interested parties unless the respondent has had due notice of the order sought or (the applicant is the only party to the application as would apply where the application is one for directions and there is no other interested party).

It is significant to note that a chamber application that has to be served on an interested party has to be in Form No. 23 which is the Form in which a court

[241] *James Brown & Hamer (Pty) Ltd v Simmons* 1963(4) SA 656 (A) at 660D-F.
[242] *James Brown & Hamer (Pty) Ltd v Simmons* 1963(4) SA 656 (A) at 660D-F.
[243] High Court Rules, 2021.
[244] See note 243 above.

application is made as provided for in r 59.[245] This Rule also provides that if a court application does not have to be served on any person "it shall be in form of a chamber application with appropriate modifications." The circumstances of the case will therefore determine the course which the case will take. If the application is to be served on an appropriate party a litigant must use Form 23 with appropriate modifications. R 60 provides:

7. SERVICE OF CHAMBER APPLICATIONS

"(3) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following-

(a) the that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;
(b) that the order sought is –
  (i) Aa request for directions; or
  (ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or
(c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;
(d) that the matter is so urgent and the risk or irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;
(e) that there is any other reason, acceptable to the judge, why such notice should not be given.

(4) Where an applicant has not served a chamber application on another party because he or she reasonably believes one or more of the matters referred to in rule 61 (2)(a) to (e) –

(a) he or she shall set out the grounds for his or her belief fully in his or her affidavit; and
unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his or her belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in sub rule (3)(a) to (e)."[246]

It is imperative that a judge before whom a chamber application has been placed insist on the observance of and compliance with this rule. It is a fundamental requirement that a party be given notice of any intended litigation mounted against that party in order for the party to defend his rights. Consequently, where a defendant or respondent, as the case may be, has not been served with an application any determination of such application violates not only the *audi alteram partem* rule but the right to be heard in his own cause as enshrined in the

[245] High Court Rules, 2021.
[246] High Court Rules, 2021.

Constitution.[247] Judges should therefore insist that chamber applications be served on all interested parties.

In the event that the applicant has not served the application due to a belief that the matter is uncontentious or fears that there may be perverse conduct on the part of the respondent if service is effected, then and in that event, there must be filed with the papers a certificate from a legal practitioner stating the reasons why service should be dispensed with. An application which has not been served on interested parties and which does not contain such a certificate cannot be dealt with. R 58(14)[248] requires that, where service is required in terms of the rules, an applicant files proof of service of the application with the Registrar within 5 days of service upon the respondent and all interested parties. Sub rule (15)[249] goes further and provides that if for any reason proof of service is not filed within the time and according to the manner provided, the application shall be deemed as having been abandoned.

8. HEADS OF ARGUMENT

In terms of sub rule (5)[250] a chamber application may be accompanied by heads of argument clearly outlining the submissions relied upon and setting out the authorities which justify the application being made without notice and in support of the order sought. R 60 provides:

> "(5) A chamber application may be accompanied by heads of argument clearly outlining the submissions relied upon and setting out the authorities which justify the application being made without notice and in support of the order sought."[251]

The new Rules have introduced a new dimension to the treatment of a chamber application by a judge. In r 60 (15) provision is made for a judge to raise any query that the judge considers pertinent to the disposal of the matter.[252] Sub rule (16)[253] enjoins the affected litigant, in peremptory terms, to attend to the query promptly and no later than 30 days from the date of the query. In terms of sub rule (17)[254] where a query has not been attended to within the stipulated period, the chamber application shall be dismissed by the Registrar.

Where a chamber application is not accompanied by a certificate of urgency, subrule

[247] See note 231 above.
[248] High Court Rules, 2021.
[249] High Court Rules, 2021.
[250] High Court Rules, 2021.
[251] High Court Rules, 2021.
[252] High Court Rules, 2021.
[253] High Court Rules, 2021.
[254] High Court Rules, 2021.

(7)[255] provides that the Registrar shall submit it to a judge without undue delay.

> "(6)Where a chamber application is accompanied by a certificate from a legal practitioner in sub rule (4)(b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith."[256]

9. CONSIDERATION OF APPLICATIONS

The rules give the judge the discretion in the manner that he or she consider best and appropriate in the disposal of both ordinary and urgent chamber application. This is found in sub rule (8) which reads:

> A judge to whom papers are submitted in terms of sub rule (6) or (7) may:
> (a) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;
> (b) require either party's legal practitioner to appear before him to present such further argument as the judge may require.[257]

It appears from a perusal of the rules as if provision of opposing papers has been omitted. The view I take is that if the rules have not excluded the filing of opposing papers, by implication there is available to the respondent the right to file such opposing papers as may advance its cause.

Provided that rule 59 shall apply to the prosecution of the application after it is deemed not to be urgent. From a reading of the rules governing chamber applications cited above, the important points can be summarised as follows:

i. That in terms of r 60[258] every chamber application save where excepted in terms of r 60(3)(a-e) should be served on all interested parties. Where the applicant in a chamber application has not served the application on all interested parties, such applicant shall in terms of sub-rule (4) of r 60 justify his decision not to serve in the affidavit which in terms of r 60(3) should support every chamber application. Additionally, in terms of sub-rule (4)(b) of the said r 60, where the applicant in a chamber application which has not been served on any of the grounds set out in paragraphs (a), (b), (c), (d) or (e) of r 242(1) *supra* is legally represented such applicants' legal practitioner is required to file a certificate with reasons supporting such legal practitioner's belief of the existence of the matters aforesaid.

[255] High Court Rules, 2021.
[256] High Court Rules, 2021.
[257] High Court Rules, 2021.
[258] IHigh Court Rules, 2021.

ii. the proviso to r 60(1)[259] that where a chamber application is to be served on interested parties it should be in "form 23 with appropriate modifications" is not to be construed as then seeking to turn to a chamber application into a court application but to advise the interested parties of the need to file opposing affidavits if they wish to oppose the relief sought in the chamber application.

iii. in terms of rule 60, sub rules (6) and (7), the process of the disposal of the chamber application is initiated by the Registrar, who should " in the normal course of events, but without undue delay", submit the chamber application to the judge who should consider the papers without undue delay".

iv. Rule 60[260] sub rules (8), (9), (10), (15) through to (18) in my view are the pertinent rules on how the chamber application should be dealt with by the judge to whom it has been referred. Critically the rule allows for the judge to conduct a hearing in chambers or where it is not convenient for the judge to hear the chamber application in chambers, he can at his option assign a court where he will hear the argument or such other information he may enquire on the chamber application. The judge has wide powers to exercise in determining a chamber application whether it is an ordinary one referred to the judge under sub-rule (7).

v. the judge can require any of the deponents to the affidavits before him or any person who in his opinion may be able to assist in resolving the matter to appear in chambers at a time convenient to the judge to provide any information on oath or otherwise as the judge may require. Additionally, the judge may require "either party's" legal practitioner to appear before the judge and present arguments.

It appears that once a chamber application is opposed, the judge must set it down for hearing. It therefore becomes an opposed application. The rules therefore require that parties to the application file heads of argument. There are no justifiable circumstances wherein an opposed chamber application can be disposed of without the parties filing heads of argument and seeking a set down of the matter on the opposed roll. That would infringe the *audi alteram partem* rule.

10. **EXAMPLES OF CHAMBER APPLICATIONS**

I) Applications for default judgment in terms of r 23.[261] It is noteworthy that under this rule there is no requirement for a plaintiff to file an affidavit.

II) Applications for dismissal of a claim for want of prosecution under r 26.[262]

III) Application under r 84 for the removal of a bar effected in accordance with the provisions of rules 80 and 81.

IV) Application for joinder or substitution of a party in terms of r 32[263] following the death, marriage or other change in status of one of the parties to a dispute.

V) Applications for directions under r 46 specifically provided for in respect of matters involving a claim and matters ancillary thereto as regards the proceedings relating tothe

[259] High Court Rules, 2021.
[260] High Court Rules, 2021.
[261] High Court Rules, 2021.
[262] High Court Rules, 2021.
[263] High Court Rules, 2021.

dispute. These applications must be served.[264]

Notwithstanding the requirements for service as provided for in r 60,[265] there are occasions when applicants file applications which from the face of it are made without having service effected on interested parties. I proceed to discuss hereunder the applications which are permissible under the rules.

11. *EX PARTE* APPLICATIONS

Ex parte applications fall under urgent applications. An *ex parte* application is an application brought to court without notice, either because no relief of a final nature is sought against any person or because notice might defeat the object of the application as the matter will be one that requires extreme urgency in order prevent prejudice on the part of the applicant.[266] It has been stated that the order granted *ex parte* is by its nature provisional, irrespective of the form which it takes. Although service may not be effected on the other party the application ought always to be addressed to that party.

Just like all the other applications an *ex parte* application must be supported by an affidavit as to the facts upon which the applicant relies for relief. The notice of motion in this application is addressed to the registrar. The notice must set forth the form of order sought, specify the affidavit filed in support of the application, request the registrar to place the matter on the roll for hearing. An *ex parte* application is made in terms of Form 25 as it is a form of an urgent chamber application. Therefore, the requirements for an urgent chamber application apply to *ex parte* applications *mutatis mutandis.*

Any person having an interest that may be affected by a decision on an application being brought *ex parte* may deliver notice of an application for leave to oppose, supported by an affidavit setting forth the nature of the interest and the ground upon which he desires to be heard.

Rule 60 (3) sets out the circumstances under which *an ex parte* application is made:

i. If the matter is uncontentious in that the applicant is the only person who can be reasonably affected by the order sought;
ii. If the order sought is either a request for directions or an order to enforce any provisions of the rule in circumstances where no other person is likely to object;
iii. Where there is a risk of perverse conduct in that any other person who would otherwise be entitled to the notice of opposition is likely to act so as to defeat wholly or partly the purpose of the application prior to an order being granted or served;

[264] High Court Rules, 2021.
[265] High Court Rules, 2021.
[266] High Court Rules, 2021.

iv. Where the matter is so urgent and the risks of irreparable damage to the applicant is so great so that there is insufficient time to give notice to other parties;

v. Where there is any other reason acceptable to the judge why notice should not be given to parties entitled to.[267]

Ex parte applications require utmost good faith. The applicant should not mislead the court by giving information which is inaccurate. Rule 60 (4) requires the applicant to set out the reasons why he believes the matter should be heard *ex parte*.[268] If the applicant is legally represented a certificate from a Legal Practitioner` is required which also sets out the reasons that the matter falls within the provisions of Rule 242(1).[269]

In *Zimdef (Pvt) Ltd v Minister & Anor* Smith J made reference to the case of *Republic Motors v Lytton Road Service Station*[270] where Beck J summarised the circumstances under which the procedure for an *ex parte* application should be adopted as follows:

> "The procedure of approaching the court *ex parte* for relief that affects the rights of the other person is one which, in my opinion, is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of the *audi alteram partem*. It is, accordingly, a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of the a respondent who is informed beforehand that resort will be had to the assistance of the court, that the course of justice stands a danger of frustration unless temporary crucial intervention can be unilaterally obtained."[271]

The liability to make full disclosure in ex *parte* applications was discussed in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348-9 where Le Roux J stated the following:

> "Before dealing with the facts, it would in my opinion be advisable to examine the principle of full disclosure in *ex parte* applications more closely, and, especially, when a Court should exercise its discretion in favour of a party who has been guilty of non-disclosure or misstatement. Counsel for the applicant (Mr Kriegler) has referred me to a number of South African and English authorities which support the statement found in the excellent work of Herbstein and Van Winsen on The Civil Practice of the Superior Courts in South Africa 2nd ed at 94, to the following effect:
>
> 'Although, on one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts, which might affect the granting or otherwise of an ex parte order.
>
> The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court; so much so that if an order has been made

[267] High Court Rules, 2021.
[268] High Court Rules, 2021.
[269] High Court Rules, 2021.
[270] *Republic Motors v Lytton Road Service Station* 1971 (1) RLR 129 (GD) at 132B-D.
[271] *Zimdef (Pvt) Ltd v Minister & Anor* 1985 (1) ZLR 146 (H).

upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fides* or negligently, which might have influenced the decision of the court whether to make an order or not, the court has discretion to set the order aside with costs on the ground of non-disclosure. It should, however, be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings.'"[272]

Smith J in *Zimdef (Pvt) Ltd v Minister of Defence,* went on to say that the above synopsis is supported by venerable authority and it appears quite clear from those authorities that:

1. In *ex parte* applications all material facts must be disclosed which might influence a Court in coming to a decision;
2. The non-disclosure or suppression of facts need not be a wilful or *mala fide* to incur the penalty of rescission; and
3. The Court, apprised of the true facts, has a discretion to set aside the former order or preserve it.[273]

12. EXAMPLES OF *EX PARTE* APPLICATIONS

Applications have been generally said to be an effective means of resolving disputes as they offer an expeditious dispute resolution mechanism. Therefore, there are various *ex parte* applications that litigants can make to enable a speedy resolution of their matter depending on the circumstances of their case. Examples of such applications are:

i. Attachment of property to found or confirm jurisdiction.
ii. Arrest *tamquam suspectus de fuga*

i. ATTACHMENT OF PROPERTY TO FOUND OR CONFIRM JURISDICTION

An attachment to found or confirm jurisdiction is an attachment, in Zimbabwe, of the property of a *peregrinus* (a person who is domiciled and resident in a foreign country) in order to make that person amenable to the jurisdiction of our courts. The exercise of jurisdiction by the High Court to found and confirm jurisdiction is provided for in the High Court Act [*Chapter 7:06*] as follows:

"15 Exercise of jurisdiction founded on or confirmed by arrest or attachment

In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either

[272] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).
[273] *Zimdef (Pvt) Ltd v Minister of Defence* 1985 (1) ZLR 146 (H).

in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."[274]

Attachment to found and confirm jurisdiction is an exceptional remedy, and can be justified only on the ground that *prima facie* the applicant has a cause of action. The requirement of a *prima facie* cause of action is satisfied when there is evidence which, if accepted, will disclose a cause of action. According to Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edn, Vol. 1, Juta & Co, Cape Town) at page 111,[275] the mere fact that the evidence is contradicted will not disentitle the applicant to the remedy, even when the probabilities are against him or her.[276] It is only when it is clear that the applicant has no action or cannot succeed that attachment should be refused or discharged on the ground that there is no *prima facie* cause of action.

In *Ex parte Acrow Engineers (Pty) Ltd,* it was held that the remedy to found or confirm jurisdiction is an exceptional remedy, which should be applied with care and caution, and the court will not grant the order if *prima facie* the applicant has not made out a case.[277] In this case an application for leave to sue by edictal citation and for attachment of goods to found jurisdiction was refused because a *prima facie* cause of action had not been made out.

The court has jurisdiction to order attachment of property of a *peregrinus* at the instance of an *incola* if the latter makes out a *prima facie* claim which is *bona fide* and is not reckless and unreasonably advanced.

13. CONTENTS OF SUPPORTING AFFIDAVIT

The supporting affidavit to the application to found or confirm jurisdiction must set out the following:

i. The name, address and occupation of the applicant;
ii. The full name, address and occupation of the respondent;
iii. Sufficient detail as to the amount and nature of the claim which the applicant has against the respondent to enable the court to judge whether there is a *prima facie* case;

[274] High Court Act [*Chapter 7:06*].
[275] Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edn, Vol. 1, Juta & Co, Cape Town) at page 111.
[276] *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) AT 228C it was held that, "the burden of proof is on the applicant for attachment to prove, not that a reasonable might draw the inference that the wrong complained of had been committed, but that, if the evidence adduced by the applicant be believed, the court would find for him.
[277] *Ex parte Acrow Engineers* (Pty) Ltd 1953 (2) SA 39 (T).

iv. Facts relevant to the court's jurisdiction which indicate why the attachment is necessary and whether it is to found or confirm jurisdiction.
v. Details of the property sought to be attached, its value and situation; and
vi. Facts indicating that the proposed respondent is the owner of the property.

If it can be established on the return date that there is no basis on which the court can assume jurisdiction, the court will discharge the writ. Or if the respondent shows that he or she is not a *peregrinus* but an *incola* of the court out of which the applicant sues, the goods attached will be released. Further, if the respondent is able to show that the applicant has no *prima facie* case, or that the property attached is not actually his, the application will be set aside.

14. **PROCEDURE**

An application for attachment of property to found or confirm jurisdiction is generally made *ex parte* without giving notice to the other party. However, if the *peregrinus* is in Zimbabwe at the time when the application is brought and where there is no danger of notice defeating the purpose of the application, then notice should be given. Where the *peregrinus* is not in Zimbabwe, then the application will of necessity be *ex parte,* because proceedings cannot be instituted in a Zimbabwean court against a person who is outside the country without first obtaining permission. Such permission is referred to as 'leave to sue by edictal citation' and is itself obtained by way of application. The permission for leave to sue by edictal citation and the attachment to found or confirm jurisdiction are usually claimed in the same application.

The application can be set down in open court in the usual way, but if there is danger in delay, then application can be made to a judge. If the application is granted, a writ is drawn up and handed to the sheriff, who will thereupon proceed to attach the property specified in the writ.

If the application was made *ex parte,* the order should specify a return date on which the respondent may anticipate the return day upon delivery of not less that twenty-four hours' notice.

ii. **ARREST *TAMQUAM SUSPECTUS DE FUGA***

An order *tamquam suspectus de fuga* is a relief available to a creditor who has reasonable grounds to suspect that a debtor against whom he has instituted or intends instituting an action for the recovery of a debt is about to leave the

jurisdiction of the court in order to escape responsibility for the debt. The court will thus, accordingly assist the creditor to keep the debtor within its jurisdiction until such a time as it has given judgment.

Rule 76 provides:

(1) "Where a plaintiff proves to the satisfaction of a judge or the registrar that-
   (a) He or she has a good cause of action against a defendant to the amount of level 10 or more; and
   (b) There is good ground for believing that the defendant is about to remove from Zimbabwe; and
   (c) The absence of the defendant from Zimbabwe will materially prejudice the plaintiff in the prosecution of his or her claim;

   the judge or the registrar, as the case may be, may issue a writ of arrest directing the defendant to be arrested and holden to bail to answer the plaintiff's claim.

(2) Before the issue of any such writ, the plaintiff shall file with his or her application or, where the writ is to be issued by the registrar, shall lodge with the registrar an affidavit sworn to by the plaintiff, or his or her agent, or his or her employee, in which shall be set forth all facts which would justify with the judge or the registrar, as the case may be, in issuing or refusing to issue the writ, and in particular the following-
   (a) Whether or not the plaintiff holds any security for the alleged debt, and if he or she does, the nature and value thereof;
   (b) That the deponent believes that the defendant is about to remove from Zimbabwe, and the grounds for such belief;
   (c) The steps, if any, which the plaintiff has already taken to enforce his or her claim.

(3) The judge or the registrar shall before issuing a writ of arrest require the plaintiff to give security for any damages which may be caused by such writ of arrest and may require such additional evidence as he or she may think fit."[278]

15. CONTENTS OF THE ACCOMPANYING AFFIDAVIT

The affidavit must contain a true description of the person making it and place of residence. Omission of the particulars is fatal. *See Smith v David*.[279]

The affidavit must also set forth a statement of the sum due to the applicant, the cause of the claim and where it was incurred.

Great care should be exercised in setting out the cause of the claim fully and clearly.

Should the affidavit be signed by the applicant's agent, the information required to be set out in the affidavit must be within the personal knowledge of the agent.

[278] High Court Rules, 2021.
[279] *Smith v David* (1832) Menz 544.

The court will not allow the applicant to supply missing details in subsequent affidavits. The applicant must stand or fall by the affidavit upon which the writ is granted.

Where the applicant sues as executor or administrator of any deceased person, or as a trustee of an insolvent estate, or in any similar representative capacity, it shall be sufficient to aver it in the affidavit accompanying the writ that the respondent is indebted as stated, as appears by the books or documents in the possession of the deponent.

The affidavit must contain an allegation that the applicant has no, or has insufficient security for the demand, specifying the nature and extent of the security, if any.

The rules also require that in all cases the accompanying affidavit shall contain an allegation that the deponent believes that the respondent is about to depart, or is making preparations to depart the country and shall state the grounds for such belief. It is not enough to merely state that the debtor intends to depart from the country to evade payment of debts or to state that there are good grounds for the belief that that is the debtor's intention.

The affidavit must set out the circumstances from which the inference can reasonably be drawn that this is the intention of the debtor. Thus, the statements by the debtor to the applicant or other people about the intention to leave, acts of preparation for departure such as the closing down of a business, the selling of a home and household furniture, and the booking by the debtor of an air ticket bound for a foreign country are all indications of an intention to depart.

If the debtor has indicated to a third party of his intention to depart, it is important to obtain an affidavit from that person.

In *Getaz v Stephen* it was stated that:

> "The procedure of arrest was not devised to prevent a debtor's departure from the court's jurisdiction but to prevent his flight, that is to prevent his departure with the intention of evading or delaying payment… we are not primarily concerned with the effect of the respondent's departure but with the intention of that departure."[280]

Consequently, if the departure is only temporary and not undertaken with the intention of evading payment of debts due, the debtor cannot be arrested, but the fact that a departure will defeat or delay a creditor's claim is a circumstance to be taken into account with all the other circumstances in deciding whether an intention to defeat or delay may reasonably be inferred.

Where there is no such intention and the departure is only temporary, the fact

[280] *Getaz v Stephen* 1956 (4) SA 751 (D) at 755D-F.

that the debtor has property in the jurisdiction of the court to satisfy the debt is an important factor that will weigh with the court in deciding whether or not to discharge the writ issued. Where however, a debtor is about to depart permanently from the jurisdiction of the court, the fact that he owns sufficient property within the jurisdiction to defray the debt will entitle a claim to immunity from arrest.

The applicant must allege in the affidavit and give reasons of the allegation that the debtor has an immediate intention of leaving the country. If the debtor has no such intention, arrest cannot be effected. What constitutes an immediate intention is not always easy to determine.

16. **PROCEDURE**

An application for an order *tamquam suspectus de fuga* is also brought *ex parte* without giving notice to the other party. However, where there is no danger of notice defeating the purpose of the application, then notice should be given to the other party.

17. **CONCLUSION**

Ordinary chamber applications ensure that the right to a fair trial is not compromised. They must be made in terms of the provisions of the law to ensure that they serve the purpose for which they exist. A Judge must thus properly understand the applicable procedure and thus ensure that the law is correctly applied and that all the requirements are fully met. As it is said, applications stand or fall on the basis of the founding affidavit, this is equally true of chamber applications.

THE DISPOSAL OF URGENT CHAMBER APPLICATIONS[281]

HONOURABLE ANNE-MARY GOWORA

Judge of the Constitutional Court of Zimbabwe

ABSTRACT

An urgent matter is a matter which cannot wait in the sense that if not dealt with immediately irreparable prejudice will result to the applicant. Once an urgent matter finds its way in to a court, the only remaining issue is its fate. Urgent matters are not concerned with self-created urgency. Where an applicant fails to act timeously, he or she must give reasons for doing so. A Judge, faced with an urgent application, must first consider whether or not the application is urgent. If he or she finds out that it is urgent, he must then turn to the merits of the case. If the case is found to be not urgent, then such a matter should not be dismissed, rather it must be put in the ordinary role. An urgent application must always be accompanied by a certificate of urgency, in the case of an applicant represented by a legal practitioner, or an affidavit stating the reasons why the matter is urgent, in the case of an unrepresented applicant.

1. INTRODUCTION

In *Documents Support Centre P/L v Mapuvire*, MAKARAU JP, (as she then was) said the following in relation to urgent chamber applications:

> *"…urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible to the prejudice of the applicant."*[282]

In my view these remarks capture the essence of this discussion, not only in terms of the need by the courts to give due weight to the urgency attendant upon a matter placed before a judge as urgent, but also the manner of disposal of such urgent applications. The first port of call would be a discussion on what constitutes urgency.

---

[281] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

[282] *Documents Support Centre P/L v Mapuvire* 2006 (2) ZLR 240 (H).

2. WHAT CONSTITUTES URGENCY?

The law on urgency is well settled. It was succinctly laid out in *Kuvarega v Registrar-General & Anor*[283] by CHATIKOBO J at p 193 F –G where he stated that:

> "***What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait.*** *Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay." (my emphasis)*[284]

The Court further stated that:

> *"For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately* ***irreparable prejudice*** *will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the* ***applicant did on his own part treat the matter as urgent****. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" (my emphasis)*[285]

Makarau JP (as she then was) in *Documents Support Center (Pvt) Ltd v Mapuvire*, stated her understanding of Chatikobo J in *Kuvarega case (supra)* as follows:

> *"I understand CHATIKOBO J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant.*[286]

The *Kuvarega case (supra)* also answers the question: **How does a Judge determine urgency? Is it the time limit or it is a matter of harm?** Based on the above, what constitutes urgency is based mainly on the fact that when the need to act arises, the applicant takes the requisite action because if he does not do so, irreparable prejudice would be suffered. It has also been aptly stated above that urgency must not be a self-created urgency where a party awaits the imminent arrival of the day of reckoning to take action. In my view urgency is a matter of both time limit and

[283] *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 H.
[284] *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 H.
[285] *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 H.
[286] *Documents Support Center (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H).

harm. One cannot separate the two as shown in the *Kuvarega case (supra)*.

Over and above these requirements, the issue of determining whether or not an application is urgent is also a matter of discretion. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd* Garwe JA also had the following to say:

> *"It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge.* ***The decision is one therefore that involves the exercise of a discretion.****(my emphasis)*[287]

Our courts are called upon in rare situations to determine matters where the urgency alluded to is that of a commercial nature. In *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise*, SMITH J was convinced that commercial interests under threat can also be considered on an urgent basis. This is what the learned judge had to say:

> *"Fortunately in Harare at the present the hearing of an application as a matter of urgency does not result in the hearing of ordinary applications being delayed.*[288]
>
> *However, in the latter case, GOLDSTONE J at p 586 said:*
>
> > *'The respondent's counsel submitted that there was no urgency in the absence of some serious threat to life or liberty and that the only urgency here was of a commercial nature. It was because of this factor that the applicants' attorney in fact decided to set the matter down on a Tuesday when the Chamber Court was in any event in session during the court recess to dispose of unopposed applications.*
> >
> > *In my opinion the urgency of commercial interests may justify the innovation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter, I assumed, as I have to do, that the applicants' case was a good one and that the respondent was unlawfully infringing the applicants' copyright in the films in question.'*
>
> *Having regard to the probable consequences to the applicants and their employees if the application is not dealt with without further delay, I consider the certificate of urgency is justified."*

It is settled in our jurisdiction what factors constitute urgency. In *Sibanda v Sibanda & Ors* the court stated that:

> *"In summary, the applicant must act promptly when the need to act arose and must show that if the court does not hear the matter urgently he/she will suffer irreparable harm. Where the applicant fails to act timeously, he/she has a duty to give a reasonable explanation for the delay. In my view, it is insufficient to merely show that irreparable harm will be suffered. The applicant must treat the matter as urgent and this can be discerned from the action taken vis-à-vis the time when the apprehension of harm is realized."*[289]

[287] *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary)* Ltd SC 41/13.
[288] *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999 (1) ZLR 490.
[289] *Sibanda v Sibanda & Ors* HH 198/21.

Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.

In addition to the above, issues relating to the access and custody of minor children may also justify the court dealing with such on an urgent basis. A case in point is that of *Pissas v Pissas*[290], wherein the applicant sought and obtained an interim interdict preventing the respondent from removing the minor children of the parties from the jurisdiction pending the determination of an appeal against an order authorising their removal from the same.[291]

The above list is not exhaustive and as stated by GARWE JA in the *Econet Wireless case* referred to above the issue of determining urgency is always one of an exercise of discretion by the judge before whom the papers are placed.[292]

3. WHAT IS AN URGENT CHAMBER APPLICATION?

In the High Court, urgent chamber applications are provided for in terms of rule 60 (6) as follows:

> Where a chamber application is accompanied by a certificate from a legal practitioner in terms of sub rule (4) (b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.[293]

I start this discussion on a consideration of sub rule (8) of the rule. The judge before whom is placed an urgent chamber application is given a discretion to hear any interested party as who can assist in the resolution of the matter. In the repealed rules the judge was given the discretion to call any party on whether the application should be treated as urgent. This was provided in a proviso to rule 244. The new rules have clarified the manner in which the judge ought to deal with the application. He or she is required to set the matter down. Further to this he is given the discretion to call any party who might assist with the resolution of the matter.

What makes this application peculiar is the term 'urgent' which connotes that the application should be dealt with expediently. As correctly noted in the case of *Gwarada* v *Johnson & Ors*

> *"Urgency arises when an event occurs which requires* ***contemporaneous resolution****, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of –the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be."* [294]

[290] *Pissas v Pissas* 2008 (1) ZLR 261.
[291] *Pissas v Pissas* 2008(1) ZLR 261.
[292] See note 287 above.
[293] High Court Rules, 2021.
[294] *Gwarada v Johnson & Ors* 2009 (2) ZLR 159 (H) at p 160D-E.

A perusal of the rule suggests that the first consideration is the decision as to whether or not the matter ought to be treated as urgent. Kindly note the word "treated". The treatment of the matter leads to it being heard on the merits if urgency is present. If not, then it should not be heard under the rule in question.

4. DISPOSAL OF THE URGENT CHAMBER APPLICATIONS

The disposal of the application happens after the presiding Judge having satisfied himself of the requirements stated in the *Kuvarega case (supra*), comes to any one of the two conclusions, *i.e.* either that the matter is urgent or is not urgent.

It has become apparent from a consideration of decided cases that our courts are hearing issues pertaining to urgency as opposed to hearing disputes. The question of urgency is one that allows the judge to hear the matter outside the time limits set in the rules and in addition on the urgent roll instead of the Registrar's ordinary roll. The issue of urgency is not dispositive of the dispute. An urgent chamber application is merely an application wherein the applicant has by way of a certificate of urgency implored the court to be permitted to jump the queue. If it lacks urgency, it must perforce join the queue.

The only thing that differentiates an urgent application from an ordinary application is the certificate of urgency. A certificate of urgency is a statement from a legal practitioner who has knowledge of the facts pertaining to the dispute. The legal practitioner is enjoined to take the court into his confidence and furnish details as to the urgency of the chamber application. In this exercise, he is required to express his opinion as to why he considers the matter to be urgent. It is upon this certificate of urgency that the Judge then formulates an opinion as to whether or not the matter is urgent. It is important to note at this juncture that the substantive issues would not have been determined yet. In *Chidawu & Ors* v *Sha & Ors*, the Supreme Court held at page 264D as follows:

> *"It follows that a certificate of urgency is the sine qua non for the placement of an urgent chamber application before a Judge. In turn the judge is required to consider the papers forthwith and has the discretion to hear the matter if he forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the Judge is guided by the statements in the certificate by the legal practitioner as to its urgency in certifying the matter as urgent."*[295]

[295] *Chidawu & Ors v Sha & Ors* 2013 (1) ZLR 260 (S).

In the absence of the urgency the application, like any other application is placed on the ordinary roll. Therefore, as highlighted above the urgency or otherwise of an application does not take away from the substantive issues before the Court.

A practice has now evolved where judges dismiss a matter on the basis that it is not urgent. A few examples are set out hereunder: -

Motsi v Elzont & Anor[296]

The Judge therein was faced with an urgent chamber application wherein the applicant was claiming fees as a *curator bonis*. The 1st respondent challenged the claim on the basis that the fees claimed by the applicant were too excessive. Before determining the issue of urgency, the Judge dealt with the merits wherein he took the respondent's view on the issue of costs highlighting that if the applicant was to be awarded the fees claimed this would deprive the beneficiaries thereof of any financial benefit. In my view, the Judge conflated issues in this case. The judge dealt with the merits of the dispute first and then dismissed the application on the basis that it was not urgent.

Mutanda & Anor v The President & Ors[297]

The applicants challenged on an urgent basis the constitutional validity of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations, 2016. The respondents opposed the application by raising several preliminary issues, chief among them was the issue of urgency. The Court considered all the requirements for urgency and found that the matter was not urgent and proceeded to dismiss the application. The court made the following order:

> *"In my view, the fact that the applicants chose to proceed in the ordinary course is testimony to the fact that there is no urgency on their part. Accordingly, I uphold the second point in limine that this matter is not urgent. I will not deal with the arguments on the merits.In the result, it is ordered that the application is dismissed."*[298]

Anderson v The Administrator, SMM Holdings (Pvt) Ltd & Anor[299]

[296] *Motsi v Elzont & Anor* HB 329/16.
[297] *Mutanda & Anor v The President & Ors* HH 747/16.
[298] *Mutanda & Anor v The President & Ors* HH 747/16.
[299] *Anderson v The Administrator, SMM Holdings (Pvt) Ltd & Anor* HB 106/18.

The applicant filed an urgent chamber application for an order interdicting the respondents from evicting the applicant from certain premises. The application was opposed primarily on the basis that the application was not urgent. The Court also took the same view and indicated that the certificate of urgency did not disclose any urgency. After making a finding that the matter was not urgent the Judge went on to dismiss the application.

Mukwasangombe & Anor v Vice Chancellor, University of Zimbabwe N.O & Anor[300]

The applicants brought an urgent chamber application to the effect that the court application for review which they had filed in the same court under a different case number be reviewed urgently. The application was opposed by the respondents who among other issues argued that the matter was not urgent. In the result the court ordered as follows:

> *"Accordingly I uphold the second point in limine that this matter is not urgent. I will not deal with the arguments on the merits. In the result, it is ordered that the application is dismissed."*[301]

Movement for Democratic Change v Khupe & Ors[302]

The applicant filed an urgent chamber application seeking an interim interdict to bar the respondents from the alleged unauthorised use or exploitation of the applicant's registered trademark being its name "Movement for Democratic Change". The respondents opposed the application on the basis that it was not urgent and that the applicant was not properly before the Court. The Court dismissed the application on the basis that the matter was not urgent and that the applicant was not properly before it.

All the above cases show instances where Judges faced with urgent chamber applications dismissed the applications upon finding that the matter was not urgent.

> ***NB:*** *It is important to note that at this juncture the Judge has not heard the merits of the matter therefore he/she ought not to "dismiss" the application as that would bring finality to the matter when in actual fact it has not even started yet. Also it is very critical that the Judge clearly lays out his/her reasons for concluding that the matter is not urgent without getting into the merits of the matter.*

---

[300] *Anderson v The Administrator, SMM Holdings (Pvt) Ltd & Anor* HB 106/18.
[301] *Mukwasangombe & Anor v Vice Chancellor, University of Zimbabwe N.O & Anor* HH 773/15.
[302] *Anderson v The Administrator, SMM Holdings (Pvt) Ltd & Anor* HB 106/18.

***Kuvarega v Registrar-General & Anor*[303]**

This is the *locus classicus* on urgency within this jurisdiction. The facts as set out in the judgment are the following.

> *"The applicant was the councillor for ward 5 in Chitungwiza. She is a candidate in the by-election for the vacant parliamentary seat in the St Mary's constituency. The election, which was set out to take place on 23 and 24 February 1998, is being contested by two other candidates, one of whom is sponsored by the ruling party ZANU (PF). In the recent past an election for the position of mayor was held in Chitungwiza. The applicant claims to have observed that during the course of that election ZANU (PF) supporters were wearing T-shirts with election slogans and/or their candidate's picture adorned on thereon. These supporters patrolled the perimeters of the polling stations and queued and voted wearing these offending T-shirts. This, so the applicant contends, eroded the secrecy of the ballot.*
>
> *During the run-up to the by-election now underway, the applicant's house has been attacked and so have the houses of some of her supporters. Although she stops short of naming the alleged assailants, the inescapable implication is that this was done by ZANU (PF) supporters. She therefore fears that the presence of ZANU (PF) supporters in labelled attire at the polling stations will scare away her supporters as they will feel intimidated. She does not say that she harbours any reasonable apprehension that ZANU (PF) supporters or any other persons will disrupt the proceedings at the polling stations. She simply fears that the mere presence of people wearing labelled attire will intimidate her supporters. Had there been a reasonable apprehension that some people might try to disrupt the elections and had there been room for arguing that she is entitled to protection. Even then her prospects of success would have been pretty dim, bearing in mind that the duty to ensure that the orderliness of an election lies on the State under the watchful eye of the Electoral Supervisory Commission. Her application is based squarely on the premise that the conduct she complains of is outlawed by s 118(1) (c) of the Act."*[304]

What distinguishes *Kuvarega* from the cases mentioned above is that the learned judge had before him a provisional order in which the terms of the interim relief and final relief were exactly the same. At p 192-193E, he criticised the applicant for the manner in which the relief sought had been crafted (read from judgment).

In 9 out of 10 judgments that come before SC, the authority quoted is *Kuvarega*. The question is whether or not the legal practitioners appearing before the courts are misreading the tenor of the judgment. The assumption is made that *Kuvarega* is authority for the view that a judge can dismiss an application on the grounds that the matter is not urgent. The learned judge made his determination based on the peculiar facts of that case and the relief being sought. We need to look at *Kuvarega* and discuss where we are going wrong in applying the principles set out therein.

---

[303] *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H.
[304] *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H).

4.1. *EFFECT OF A JUDGE'S DECISION TO DISMISS A CHAMBER APPLICATION AFTER FINDING THAT IT IS NOT URGENT*

In certain instances, Judges faced with urgent chamber applications commit an error, in that they dismiss an urgent chamber application after finding that the matter is not urgent. This cannot be correct. An order dismissing a matter which has not been determined on the merits has final effect. It disposes of a matter which has not been heard.

It appears that when faced with urgent chamber applications Judges tend to focus more on the term "urgent" rather than the "application" itself. They forget that the term urgent is just a descriptive word which has little effect ons the substantive issues that are before the Court. When a Judge makes a finding that the matter is not urgent he/she ought to set it down before the ordinary roll instead of dismissing it. The determination of urgency only speaks to the time frame within which the matter ought to be heard. It is a preliminary issue which must be determined prior to a determination on the merits and like in any other matters where preliminary points are raised, a Judge does not order a dismissal, but rather strikes the matter off the roll. The same approach is to be adopted in applications of this nature.

As indicated above, an order of dismissal of a matter has an effect of bringing the matter to finality. Once such an order is made before the substantive issues are heard the Court would have breached the rights of the parties in terms of both common law and the Constitution. In terms of common law litigants have a right to be heard which emanates from the common law maxim *audi alteram partem* rule. This common law right was succinctly encapsulated in *Attorney General v Mudisi & Ors* where it was stated that:

> *"One of the fundamental precepts of natural justice, encapsulated in the maxim audi alteram partem, is the right of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his rights, interests or legitimate expectations." (my underlining)*[305]

The Court also expressed similar sentiments in *University of Zimbabwe v Mugumbate & Ors*[306] where it stated as follows:"

> *"In Taylor v Minister of Education and Another 1996 (2) ZLR 772 (S) at 780 A-B, the following was stated:*
>
> > *'The maxim audi alteram partem expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes*

[305] *Attorney General v Mudisi & Ors* SC 48/15.
[306] *University of Zimbabwe v Mugumbate & Ors* SC 63/17.

that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken, see Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S) at 333 B-F.'"[307]

Our Constitution also enshrines the right to a fair hearing as a fundamental right. It is provided for under section 69 of the Constitution, of importance is subsection (3) which states that every person has a right of access to the Courts, or some other tribunal or forum established by law for the resolution of any dispute. It might appear to be a small issue when a Judge issues an order of dismissal after making a finding that the chamber application is not urgent but the consequences thereof are grave and this is an error that should not be taken lightly as it is one that also affect the public confidence in our Court system and access to justice by litigants.

As a consequence, one can say that a dismissal such as this may be a dereliction of duty in addition to the denial of the litigant(s) of their fundamental right to be heard in their own cause.

It becomes pertinent to consider what a judge faced with an urgent chamber application must do. This is set out in r 60[308] which reads:

Consideration of applications

60 (8) A judge to whom papers are submitted in terms of sub rules (6) or (7) may—

(a) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;

(b) require either party's legal practitioner to appear before him to present such further argument as the judge may require.

(9) Where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case he shall grant a provisional order either in terms of the draft filed or as varied.

(10) Before granting a provisional order a judge may require the applicant to give security for any loss or damage which may be caused by the order and may order such additional evidence or information to be given as he thinks fit.[309]

A judge must consider the matter before him or her. That matter is by no stretch of the imagination the question of urgency. The rule deals with the manner in which a judge should proceed to achieve a resolution of the matter. It gives a judge

[307] *University of Zimbabwe v Mugumbate & Ors* SC 63/17.
[308] High Court Rules, 2021.
[309] High Court Rules, 2021.

the discretion to call any person before him and may require a party to give oral evidence on oath. The rule actually enjoins a judge to hear the application placed before him or her. It is cast in peremptory terms.

What is critical is that it is the application which must be heard. An application is heard on the merits after hearing the parties and the judge thereafter makes a determination in the resolution of the dispute. It could not have been the intention of the legislature to have a matter dismissed for want of urgency which is a procedural step for having a matter jump the court roll.

If one removes the adjective urgent from the appellation of urgent chamber applications, one is left with ordinary chamber applications. These are provided for under which provides as follows:

> ***D. CHAMBER APPLICATIONS***
>
> ***60. Form of chamber applications***
>
> *(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 25 duly completed and, except as is provided in sub rule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.*
>
> *Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications.*[310]

The point I wish to make is that the term urgent is merely a word describing the particular form of the application which does not take away from the substantive issues that have necessitated the making of the application. Therefore, Judges should not be misled by the term "urgent" to think that, that is all the application is concerned with whilst overlooking the real issues that has brought the applicant before the Court.

To further buttress the point that urgency is only but a word that explains the immediate hearing of a matter, I turn to the rules of service in chamber applications under sub rule (3). The same rules that apply in an ordinary chamber application also apply in the case of urgent chamber applications.

> ***Service of chamber applications***
>
> *(3) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following—*

[310] High Court Rules, 2021.

(a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;

(b) that the order sought is—

(i) a request for directions; or

(ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or

(c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;

(d) that the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;

(e) that there is any other reason, acceptable to the judge, why such notice should not be given.

(4) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in rule 60(3) (a)—(e)

(a) he shall set out the grounds for his belief fully in his affidavit; and

(b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in sub-rule (3) (a) to (e).[311]

The requirement for service of the application on all interested parties must act as a guide to the chamber application. Implicit in that rule is that the judge must hear the application. The Court can only do away with the rules of service on interested parties if satisfied that the applicant has satisfied the requirements under rule 60 (3).

On the basis of the rules referred above if the presiding Judge satisfies himself that the matter is urgent, he can then deal with the substantive issues, if not, he ought to remove the matter from the urgent roll and place it on the ordinary roll. As stated earlier the matter before the Court is not about urgency, as a result a finding that it is not urgent does not do away with the substantive issues that brought the applicant to court, therefore legally the court is not supposed to dismiss the application on the basis that the matter is not urgent as this puts the applicant completely out of Court.

[311] High Court Rules, 2021.

4.2. *THE CERTIFICATE OF SERVICE AND FOUNDING AFFIDAVIT MUST EXPRESS THE URGENCY OF THE MATTER*

It is trite that an application stands or falls by its founding affidavit. The founding affidavit sets the tone of an application. In an urgent chamber application, a certificate of urgency from a legal practitioner, as provided in r 60(6) of the new rules, is a further requirement in support of why the applicant requires urgent relief.

In *Mahudu & Anor v Gwishiri & Ors,* the court commenting on the inadequacy of a founding affidavit and a certificate of service, had this to say:

> *"The certificate of urgency, the founding affidavit and the heads of argument do not show how the mere unlawfulness of the injunction raises urgency. The legal practitioner who certified this matter as urgent clearly did not address his mind fully to this issue. A matter cannot be urgent because some unlawful conduct has taken place otherwise classified as all matters would be urgent. Courts exist to deal with matters perceived to be unlawful by litigants. There must be something more besides the unlawfulness for a matter to be urgent. That is the part that is lacking in this case."* [312]

Also in *Knife v Riverside College & Anor,* the court expressed that:

> *"Further compounding the applicants' problems is the fact that the certificate of urgency which in terms of r 244 is a condition precedent to an urgent chamber application requires a lawyer who certifies a matter as urgent to do so from an informed position having applied his mind to the matter. See General Transport and Engineering (Pvt) Ltd and Ors v Zimbabwe Banking Corporation (Pvt) Ltd 1998 (2) ZLR 30. See also Oliver Mandishona Chidawu and Ors v Jayesh Shah and Ors SC 12/3."* [313]

It is imperative for the founding affidavit, more so the certificate of urgency, to clearly establish why the matter ought to be dealt with on an urgent basis. In Kunaka v Minister of Health and Child Care HH 46/21, the court held that:

> *"A properly executed certificate of urgency is the sine qua non for an urgent chamber application being heard on an urgent basis. A legal practitioner applies his or her mind to the matter as an officer of the court and certifies it as one of urgency. Even though the judge dealing with the matter will still decide whether or not the matter is urgent, he or she is entitled to rely on the opinion of the legal practitioner who certifies the matter to be urgent.*

[312] *Mahudu & Anor v Gwishiri & Ors* HH 64/21.
[313] *Knife v Riverside College & Anor* HMT 9/21.

> *Mr Obey Shava is an experienced litigation practitioner. The certificate of urgency in this matter has been furnished by him. But the document is anything but a certificate of urgency as contemplated by the Rules. It regurgitates the facts. It regurgitates the central argument. Hardly anything is said on why the matter should be treated as one of urgency and therefore, be allowed to jump the queue of all other equally important matters awaiting determination…* [314]
>
> *It is largely because of the defective certificate of urgency that I have declined to deal with this application on the merits. Furthermore, as I have adverted to briefly above, the aspect of urgency, which is integral to a matter being given preferential treatment ahead of all others, is not self-evident from the papers."*[315]

See also *Hunyani Forests Limited v Buywest Investments (Pvt) Ltd* HH 105/21,

> *"A court greatly relies on the founding affidavit and the certificate of urgency from a legal practitioner in ascertaining whether a matter is urgent and should be allowed to jump the que and be heard expeditiously. Therefore, great care ought to be taken when crafting these pleadings."* [316]

4.3. *HOW SHOULD A JUDGE WHO FINDS THAT AN URGENT CHAMBER APPLICATION IS NOT URGENT DISPOSE OF THAT CHAMBER APPLICATION?*

After assessing the facts presented on record and coming to a conclusion that the chamber application is not urgent, the next stage for the presiding Judge is to then remove the matter on the urgent roll and place it on the ordinary roll so that it follows the normal course of litigation.

4.4. *HOW SHOULD A JUDGE WHO MAKES A FINDING THAT THE URGENT CHAMBER APPLICATION PLACED BEFORE HIM/HER IS INDEED URGENT OUGHT TO PROCEED?*

It must be emphasised that the manner in which an urgent chamber application that is found to be urgent is disposed of is completely different from that which is found not to be urgent. When the presiding Judge comes to the conclusion that the application is urgent, only then can he/she delve into the merits because he is now seized with the matter. It is only this Judge who can issue an order of dismissal

[314] *Kunaka v Minister of Health and Child Care* HH 46/21.
[315] *Knife v Riverside College & Anor* HMT 9/21.
[316] *Hunyani Forests Limited v Buywest Investments* (Pvt) Ltd HH 105/21.

if it is so warranted because he would have dealt with the substantive issues of the application. However, the reasons for concluding that the matter was urgent in the first must be clearly enunciated in his judgment or ruling. It should not be an issue that is left unsaid so that parties may infer that the matter could only have been heard because the presiding judge considered it urgent. The reasons for concluding that the matter was urgent must therefore appear *ex facie* the judgment of the Court.

4.5. *DOES A JUDGE FACED WITH AN URGENT CHAMBER APPLICATION REQUEST OPPOSING PAPERS FROM THE RESPONDENT(S)?*

On whether the judge is required to address this issue recourse must be had to rule 60 (8) the High Court Rules, which governs urgent chamber applications.[317]

In terms of service, the rules provide a degree of flexibility. The proviso to rule 60 (12) states that if there is a certificate to the effect that the matter is urgent the Court may direct that the matter be set down for hearing at any time and additionally, or alternatively may hear the matter at any time and place and in such event the ordinary periods of notice to the registrar and any other party shall not apply to the matter.

The Court can only do away with the rules of service on interested parties if satisfied that the applicant has satisfied the requirements under rule 60 (3). In my view, it is always important for the Judge to hear the other side as this assists him in formulating an objective opinion on the matter.

In the Labour Court urgent chamber applications are provided for in terms of rule 18 of the Labour Court Rules 2017[318] which states that:

> "***18. Urgent chamber applications***
>
> *(5) If the Judge considers that the application should be treated as an urgent application, he or she* ***may*** *issue a directive dispensing with the forms and service provided for in these rules and* ***may*** *give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall, as far as is practicable, be in accordance with these rules, as he or she considers appropriate."*[319]

It seems to me that the rules of the Labour Court have an advantage over the High Court Rules. The rule makes it clear that the judge, after considering that the matter is urgent, can dispense with forms and service and determines the application. It is devoid of any ambiguity. What must be considered is the application as opposed to the urgency attendant upon the matter. It simplifies the disposal of disputes by judges.

[317] High Court Rules, 2021.
[318] Labour Court Rules, 2017.
[319] Labour Court Rules, 2017.

4.6. *FAILING TO MAKE A DETERMINATION ON ISSUES PLACED BEFORE THE COURT*

In *Motsamai (Pvt) Ltd t/a Tuli Limpopo v Gwanda Rural District Council,* the Court was faced with a matter in which the court *a quo* had failed to make a pronouncement of the issue of whether or not the matter was urgent and the validity of the founding affidavit. The Court expressed the following remarks in relation to that matter:

> *"It is a settled position of the law that failure by a court to address issues placed before it constitutes a gross irregularity which vitiates the proceedings… In casu, there is no doubt that the learned judge in the court a quo left the two preliminary objections regarding the validity of the founding affidavit and urgency of the matter unresolved when it dealt with the application for interim protection placed before it. No reasons were advanced for that non-inclusion. Such is tantamount to an omission to consider and give reasons, a gross irregularity which vitiates the entire proceedings a quo – S v Makawa & Anor 1991 (1) ZLR 142."* [320]

In general, a Judge who is faced with an urgent chamber application is faced with an 'extra ordinary' application in which circumstances he ought to act expediently. However, it must be noted that the veracity of the applicant's claim should be assessed before the Court makes a decision and that can only be done upon requesting papers from the respondents. The Judge however has the discretion to adjust the timelines for service in light of the fact that the application before him would be urgent.

4.7. DOES A JUDGE WHO MAKES A DETERMINATION THAT THE URGENT CHAMBER APPLICATION IS NOT URGENT BECOME *FUNCTUS OFFICIO?*

The answer to this question is yes. Once a Judge makes a finding to the effect that the urgent application is not urgent, he/she should then remove the matter from the urgent roll for it to be heard on the ordinary roll. The moment that the Judge makes a determination that the matter is not urgent, he/she will no longer be seized with the matter, therefore, he/she ought not to delve into the substantive issues of that application.

In the past there has been quite a lot of confusion on the fate of a chamber application, filed as an urgent chamber application but which a judge finds not to be urgent. The rules have now in no uncertain terms stated what a judge ought to do upon a finding that the matter is not urgent. Sub rules (18) and (19) to r 60 are pertinent and read as following:

> *(18) Where upon hearing an application which is supported by a certificate from a legal practitioner in terms of sub rule (6) the Judge is of the view that the application is not*

[320] *Motsamai (Pvt) Ltd t/a Tuli Limpopo v Gwanda Rural District Council* SC 131/20.

urgent within the meaning of this rule; the Judge shall strike the application from the roll of urgent applications.

(19) An application that has been struck off the roll by reason that is not urgent shall be transferred to the roll of ordinary court applications and it shall not be necessary for the applicant to file a fresh court application:

Similarly, in circumstances where a court declines jurisdiction to hear a matter, it is not supposed to delve into the merits of that matter, it only assumes jurisdiction over the dispute if it makes a finding that the application is urgent. This issue falls under some of the errors that Judges make in dealing with urgent applications thus I saw the need to address it.

In *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust & Ors*, the court said:

"If on perusal of the papers the Judge comes to the conclusion that the matter is urgent enough to merit an urgent hearing, then he or she conducts a hearing and gives such order as he or she thinks fit. But if the conclusion is reached, however, that the matter is not urgent, he or she must refuse to hear the application and remove it from the roll, in which event the applicant has the option of enrolling his matter for hearing on the ordinary roll of court applications.

It is a contradiction in terms to dismiss a matter on the twin bases that it is not urgent and that the applicant has no locus standi for the later basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing.

The Learned Judge, in giving his reasons for finding that the matter was not urgent, made certain findings of fact which involved the merits. For example, he found that the appellants' Board was dissolved on July 12, a fact of which the appellants claim they were unaware, and that the appellants had not established locus standi to act for the Board or seek remedy sought in the draft provisional order. Those issues went to the heart of the matter. In proceeding to determine them and to make those findings of fact, the court misdirected itself."[321]

In *Portland Holdings Ltd v Tupelostep Investments (Proprietary Ltd & Anor* the appellant filed an urgent chamber application in the High Court seeking in the interim the release of its cement by the 1st and 2nd respondents. The application was opposed by the respondents. The High Court heard the parties on the question of urgency and decided that the application was not urgent.[322] The court then dismissed the application with costs on the basis that it was not urgent. On appeal

[321] *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust & Ors* SC71/14.
[322] *Portland Holdings Ltd v Tupelostep Investments (Proprietary Ltd & Anor* SC 3/2015.

the Supreme Court held that the court *a quo* determined on facts which were not before it because having found the application not to be urgent the matter ceased to be before it for hearing on the urgent roll.[323] The Court also echoed the sentiments by Ziyambi JA in *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust (supra)* it stated as follows:

> *"I respectfully associate myself with the dicta by her Ladyship. It follows that the dismissal of the application for want of urgency is improper.*
>
> *It is also contended on behalf of Portland that, in addition to this, the court fell into further error by commenting on the merits of the case. It is contended that even if this court were to remit the matter for hearing before the High Court a plea of res judicata could be successfully raised by the respondents. I agree, in Purchase v Purchase 1960 (3) SA 383, CANEY J had this to say:*[324]
>
> > *"… He submitted that that dismissal of an application had the effect of an absolution; he likened that to dismissal of an action, which is an absolution from the instance. Becker v Wertheim, Becker and Leveson, 1943 (1) P.H. F 34 (A.D.). I am disinclined to agree with him, for I think that dismissal and refusal have the same effect, namely a decision in favour of the respondent."*

The above authority also brings to the fore the effect of dismissal of an application merely on the grounds of lack of urgency. It is an order that places the applicant completely out of court and should be avoided at all costs especially in instances where the substantive issues of a matter have not been heard.

In *Air Zimbabwe (Pvt) Ltd & Anor v Nhuta & Ors,*[325] the Court said the following:

> *Indeed, having found that the matter was not urgent it nevertheless proceeded to hear and determine it on an urgent basis. In so doing the court a quo contradicted itself. What it should have done once a finding of lack of urgency was made, was to strike or remove the matter from the roll of urgent matters and not proceed to hear the merits for, once a hearing has taken place and a decision made on the merits, the question of urgency becomes irrelevant.*[326]

The above authorities spell out in clear and unambiguous terms the procedure that should obtain once a finding is made that the matter is not urgent.

Below are examples of matters where the Court after making a determination that the matter was not urgent, went on to deal with the merits.

***Dongo v Matengambiri*[327]**

The applicant in this matter filed an urgent chamber application seeking the court

[323] *Portland Holdings Ltd v Tupelostep Investments (Proprietary Ltd & Anor* SC 3/2015.
[324] See note 321above.
[325] *Air Zimbabwe (Pvt) Ltd & Anor v Nhuta & Ors* SC 65/14.
[326] *Air Zimbabwe (Pvt) Ltd & Anor v Nhuta & Ors* SC 65/14.
[327] *Dongo v Matengambiri* HH 551/17.

to suspend the writ of execution against the applicant so ensure his peaceful possession of certain premises. Respondent opposed the application on the basis that the matter was not urgent. The also Court found that the matter was not urgent but went on to deal with the merits and found that the applicant had no prospects of success and went on to issue an order of perpetual silence against the applicant.

Dongo v Babnik Investments[328]

The applicant filed an urgent chamber application for a provisional stay of eviction so that he would remain in peaceful occupation of a certain immovable property. The Court held that the applicant had not properly laid the basis for seeking that the matter be heard on an urgent basis or established his *locus standi* to bring the application. After that determination the Judge then ventured into the merits where he made a finding that the matter had no prospects of success and thus dismissed the application.

All the above cases depict what could amount to a dereliction of duty by Judges faced with urgent chamber applications. The inquiry into the matter ends the moment that the Judge finds the matter to be not urgent.

As earlier alluded to there might a misconception within the judiciary that *Kuvarega*[329] is authority for an order dismissing an application on the basis of lack of urgency. In my view the facts in *Kuvarega* were very peculiar. In addition, the nature of the relief being sought was such that an order to the effect that the matter was not urgent would not have stood the applicant in good stead in any event. Let's re-examine what his lordship said about the relief being sought:

At 192H-193D the Court stated as follows:

> *"There was nothing interim about the provisional relief sought. It would have provided the applicant with the relief she sought on the day of the election. The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. This is so because interim relief is normally granted on the mere showing of a prima facie case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a prima facie case. This, to my understanding, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it in another way. If, by way of interim relief, the applicant had asked for a postponement of the election pending the discharge or confirmation of the provisional order she would not in that event gain an advantage over the respondents, because the point she wanted decided would have been resolved before the election was held. But, if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election would be conducted*

[328] *Dongo v Babnik Investments* HH 384/17.
[329] See note 303 above.

on the basis that it is unlawful to wear T-shirts emblazoned with party symbols and slogans. Thereafter it would be fruitless for the respondents to establish their entitlements to wear such T-shirts. Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities."[330]

4.8. *IN DETERMINING THE ISSUE OF URGENCY, DOES A JUDGE GO INTO THE MERITS OF THE MATTER? IF SO TO WHAT EXTENT?*

You start by indicating that the issue of urgency is not an issue in abstract. It is mainly a factual issue and therefore for a Judge to be in a position to ascertain whether or not the urgent application satisfies the requirements for urgency, he/she has to measure those requirements against the facts that are on record. The Judge does not go into the legal issues before the Court but his/her inquiry should be limited to those facts that assist him in ascertaining the presence or absence of urgency in a matter. The legal issues (merits) can only be determined after the issue of urgency has been finalised *i.e.* after finding that the matter is urgent otherwise, if it is not urgent, there will be no need to determine the merits.

In ***Mbatha & Anor v Ncube & Anor***[331]

The applicant approached the court via an urgent chamber book seeking stay of the eviction pending the finalisation of their application for review. It was opposed by the respondent on the basis of urgency. In disposing the matter before him the Judge stated as follows:

"The conduct of the applicant does not clothe the application with urgency but borders on abuse of court process. Approaching the court more than once to try and stop execution which is imminent does not make a matter urgent. The applicant appears to have waited till the day of reckoning and sought to seek redress on more than one occasion on the same facts involving the same parties on an urgent basis. The fact that the urgency is self-created militates against the granting of the application. In any event there are no prospects of success on the pending review such that the balance of convenience does not favour the granting of the application."

Commenting on the misdirection Makarau JA stated the following

"In passing I wish to comment on the wording of the above finding. I find it ambivalent and seeming to suggest that after finding that the application was not urgent, the court a quo nevertheless went ahead to assess the merits of the matter. I however take no issue on this lack of clarity by the court a quo for the purposes of determining this application."

In *CAPS United Football Club (Pvt) Ltd v CAPS Holdings Limited & Ors* the appellant filed an urgent chamber application in the High Court, in dealing with the application the learned Judge held that the matter was not urgent, and that there

[330] *Dongo v Babnik Investments* HH 384/17.
[331] *Mbatha & Anor v Ncube & Anor* SC 19/18.

were disputes of facts which could not be resolved on the papers.[332] On appeal Sandura JA stated the following:

> *"Having concluded that the matter was not urgent, the learned Judge went on to deal with the issue as to whether the matter could be resolved on the papers, although it was not necessary for him to do so.*[333]

5. CONCLUSION

Where a Judge is faced with an urgent chamber application, the first requirement is the determination of whether or not the application is urgent. This must produce either of the following two conclusions i.e., whether the matter is urgent or the matter is not urgent. Secondly, if the judge finds the matter to be urgent he or she is obliged to get into the merits but if not he/she ought to remove the matter from urgent roll and place it on the ordinary roll (this is as far as he/she can go) because he/she is now functus officio. A Judge who finds that the matter is not urgent should not dismiss the matter as this would be tantamount to a breach of the litigants' common law right to be heard (audi alteram partem principle), their constitutional right to fair hearing as well as their confidence in the judiciary.

[332] *CAPS United Football Club (Pvt) Ltd v CAPS Holdings Limited & Ors* SC 11/09.
[333] *CAPS United Football Club (Pvt) Ltd v CAPS Holdings Limited & Ors* SC 11/09.

INTERDICTS[334]

HONOURABLE PADDINGTON SHADRECK GARWE
Judge of the Constitutional Court of Zimbabwe

ABSTRACT

An interdict is an order compelling or prohibiting the doing of a particular act to avoid prejudice or injustice. An interdict is usually brought on an urgent basis. There are two types of interdicts namely a prohibitory and a compelling interdict. An interdict can either be final or interim. An interim order has the purpose of maintaining the status quo pending the final determination of the matter. A Court should look at the substance as opposed to form in order to determine whether or not the relief being sought is interim or final. When dealing with interdicts, a person should be able to understand the concepts of a rule nisi and that of a provisional order since the former is closely related to the latter. To be granted either an interim interdict or a final interdict, a party should satisfy all the requirements as provided for by the law.

1. INTRODUCTION

An interdict is an authoritative prohibition. According to Herbstein and Van Winsen,[335] interdicts are orders of the court which normally prohibit (prohibitory interdicts) or compel (mandatory interdicts) the doing of a particular act to avoid injustice and hardship. Another purpose of a mandatory interdict is to remedy the effects of unlawful action already taken. The procedure is usually resorted to when other remedies are not available or when the delays associated with the use of other remedies could cause irreparable harm. It is a procedure that has its origins in Roman Law.[336] An interdict can either be final if the order is based on a final determination of the rights of the parties to the litigation or interim, pending the outcome of proceedings between them.

[334] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls on 11 November 2021.
[335] The Civil Practice of the Supreme Court of South Africa, 5th Ed, 2009.
[336] See note 335 above.

It is a settled principle that for a party to be entitled to an interdict, he or she has to satisfy the requirements for the granting of the interdict. An interdict can be taken to be a summary court order, usually issued upon urgent application, by which a person is ordered either to do something, stop doing something, or refrain from doing something to stop or prevent an infringement of a right.

2. WHAT IS A PROVISIONAL ORDER?

According to the author C.B. Prest,[337] a provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature, it is both temporary and provisional, providing relief that serves to guard the applicant against irreparable harm which may befall him, her or it should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully disclose his, her, or its entitlement to a final order that the interim relief sought was ancillary to. Having defined what a provisional order is, the next step is to explain the purpose of interim relief *vis-à-vis* the rule *nisi*.

3. WHAT IS THE PURPOSE OF A PROVISIONAL ORDER *Vis-À-Vis* THE RULE *NISI*?

The purpose of a provisional order has been set out in an array of case law. The court in the South African case of *Development Bank of Southern Africa (Ltd)* v *Van Rensburg No and Ors*[338] stated that its purpose is to preserve the *status quo* pending the return day.

The purpose remains the same under English law, as was confirmed in the case of *Attorney General* v *Punch Limited and Anor* [2002] UKHL 50. In that case, the court articulated the purpose of a provisional order referred to in that jurisdiction as an "interlocutory injunction" as follows:

> *The purpose for which the court grants an interlocutory injunction can be stated quite simply. In American Cyanamid Co v Ethicon Ltd [1975] AC 396, 405D*[339] *LORD DIPLOCK described it as a remedy that is both temporary and discretionary. Its purpose is to regulate, and where possible to preserve, the rights of the parties pending the final determination of the matter which is in issue by the court.*[340]

---

[337] The Law and Practice of Interdicts 9 ed Juta & Co (Pty) Ltd 2014.
[338] *Development Bank of Southern Africa (Ltd) v Van Rensburg No and Ors* [2002] 3 All SA 669 (SCA).
[339] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 405D.
[340] *Attorney General v Punch Limited and Anor* [2002] UKHL 50.

The purpose of an interlocutory injunction in Australia is also defined as follows:

> *Relevantly, the purpose of an interlocutory injunction is to preserve the position until the rights of the parties can be determined at the hearing of the suit. A plaintiff seeking an interlocutory injunction must be able to show a sufficiently arguable claim to a right to the final relief in aid of which the interlocutory relief is sought. (Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199 [9] - [11] (GLEESON CJ).) If the application for an injunction cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears. (ABC v Lenah Game Meats Pty Ltd supra (GLEESON CJ).)*
>
> *To put the same point another way, an interlocutory injunction aims to prevent the injustice to the plaintiff of the refusal of an injunction in support of relief to which the plaintiff may ultimately be held to be entitled. (Twinside Pty Ltd v Venetian Nominees Pty Ltd [2008] WASC 110; Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533, 535; Appleton Papers Inc v Tomasetti Paper Pty Ltd (1983) 3 NSWLR 208, 216.) As LORD DIPLOCK explained in American Cyanamid Co v Ethicon Ltd [1975] UKHL 1 'the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial'. As was said in Minister for Immigration v VFAD [2002] FCAFC 390; (2002) 125 FCR 269 [124] the stream (interlocutory relief) cannot rise higher than its source (rights claimed at the final hearing).*[341]

Incidental to the purpose of a provisional order as defined above is the term rule *nisi*. In explaining what the rule *nisi* is, the court in the *Development Bank of Southern Africa (Ltd)* case *supra* went on to hold as follows:

> *…Thus it was said by CORBETT CJ in Shoba v Officer Commanding, Temporary Police Camp, Wagendrift and Another; Maphanga v Officer Commanding, South African Police and Murder and Robbery Unit, Pietermaritzburg and Others [1995] ZASCA 49; 1995 (4) SA 1 (A) at 18J-19B:*
>
> > *'The term "rule nisi" is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the*
> >
> > *relief applied for should not be granted (see Van Zyl's Judicial Practice 3 ed 450 et seq; Tollman v Tollman 1963 (4) SA 44 (C) at 46H). Walker's Oxford Companion to Law, states that a decree, rule or order is made nisi when it is not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As Van Zyl points out, our common law knew the temporary interdict and a curious mixture of our practice with the practice of England took place and the practice arose of asking the Court for a rule nisi, returnable on a certain day, but in the meantime to operate as a temporary interdict.'*

[341] *Re Brian Charles Gluestein; Ex Parte Anthony* [2014] WASC 381.

(See too, Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A) at 674H-675C.)

From the above case law, it is clear and must be emphasized that an order for interim relief must be confirmed or discharged on a certain future date should the parties be so willing. Even the terms of the mandatory Form 26 of the Rules[342] contemplate that it is only on a certain return date that a final order can be made. Resultantly therefore, an order for interim relief can never be final in effect because, should it be final, the confirmation or discharge of the provisional order will no longer be possible. Once informed on what the purpose of a provisional order is, one has to be guided by the principles surrounding an application for interim relief.

4. GENERAL GUIDING PRINCIPLES IN AN APPLICATION FOR INTERIM RELIEF

The following four principles have been applied in Zimbabwe and are widely accepted as applicable in South Africa, England and Australia. The principles, which are in effect requirements to be met by an applicant when seeking interim relief, are as follows -

i. that the right which is the subject matter of the main action and which he, she or it seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;

ii. that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he, she or it ultimately succeeds in establishing his, her or its right;

iii. that the balance of convenience favours the granting of interim relief; and

iv. that the applicant has no other satisfactory remedy.[343]

Zoning in on the principle that a *prima facie* case must be shown, the court in the *Beecham Group Ltd* case *supra* held that the phrase "*prima facie* case" does not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify, in the circumstances, the preservation of the *status quo* pending the trial. How strong the probability needs to depend upon the nature of the rights

[342] High Court Rules, 2021.

[343] *Rudolph and Anor v Commissioner for Inland Revenue and Ors 1994 (3) SA 771 (W): L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C): *Airfield Investments (Pvt) Ltd supra: Twinside Pty Ltd v Venetian Nominees Pty Ltd* [2008] WASC 110: *Re Brian Charles Gluestein; Ex Parte Anthony* [2014] WASC 381: *Castlemaine Tooheys Ltd v The State of South Australia* [1986] HCA 58; (1986) 161 CLR 148: *Heugh v Central Petroleum Ltd* [2012] WASC 155 [17] [22]: *ABC v Lenah Game Meats Pty Ltd supra*: *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618.

the plaintiff asserts and the practical consequences likely to flow from the orders the plaintiff seeks.

The point was further made in other two Australian cases, where it was held that the grant of an injunction involves balancing the injustice which might be suffered by the defendant if the injunction is granted and the plaintiff later fails at trial, against the injustice which might be suffered by the plaintiff if the injunction is not granted and the plaintiff later succeeds at trial.[344]

It must also be highlighted that in considering the balance the court must, as a matter of principle, take into account the nature and consequences of the particular injunction sought.[345]

Fully equipped and knowledgeable on the true essence of a proper provisional order which is valid at law, the next stage is to look at the form of provisional orders.

5. WHAT IS THE FORM OF A PROPER PROVISIONAL ORDER?

Imperative to highlight first is the language of the provisional order itself. Like any other order of the court, a provisional order must speak for itself. It must be clear and exact as to what it is that is prohibited pending its finalization/confirmation/ discharge on the retune date. LORD NICHOLLS OF BIRKENHEAD in *Attorney General* v *Punch Limited and Anor supra* emphasized the point by stating as follows:

> *An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly-based principle. A person should not be put at*
>
> *risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. … An interlocutory order ought not to be drawn in terms where it is apparent that such a dispute may arise over its scope.*

Having explained that the language in a provisional order must be clear as to what exactly it is that it prohibits pending the return date, I will in turn deal with the most important aspect of a provisional order. What substance ought to be in a provisional order?

The late retired CHIDYAUSIKU CJ also stated as follows:

> *Where the relief sought as interim relief is essentially the same as the relief sought on the*

[344] *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670: *Madaffari v Labenai Nominees Pty Ltd* [2002] WASC 67.

[345] *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, at 54 55: T*odd v Novotny* [2001] WASC 171.

return day, the court's correct approach should be to proceed by way of an urgent court application seeking final relief – see Econet v Mujuru HH-58-97.[346]

In *Kuvarega* v *Registrar General and Anor,* CHATIKOBO J aired the following sentiments with regards to the form of a provisional order:

The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. … If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a prima facie case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. … Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities.[347]

In simpler terms, therefore, an order for interim relief must be temporary in effect. It must be temporary such that a return date must become a necessity. Furthermore, the terms of an interim relief order must speak to its title. The term "provisional order" must not only be given lip service, for it is supposed to communicate its true nature to be a proper and valid provisional order at law.

5.1. *WHAT A COURT FACED WITH AN APPLICATION FOR INTERIM RELIEF MUST CONSIDER BEFORE GRANTING OR DISMISSING THE APPLICATION*

The role of the court in an application for interim relief is of extreme importance. It is not to be undermined. In the case of *Attorney General* v *Punch Limited and Anor supra* the court stated that the purpose of interim relief should not be confused with the court's reasons for deciding that it would be appropriate to grant an interlocutory injunction. It was stated as follows:

The court must of course have a good reason for granting an order of this kind. It must be satisfied in the first place that a sufficient ground has been stated to show that there is a real dispute between the parties. As LORD DIPLOCK put it in American Cynamid Co v Ethicon

Ltd supra at p 407, the court must be satisfied that there is a serious question to be tried. It must then consider whether the balance of convenience lies in favour of granting or refusing an interlocutory injunction. But it is in no position to reach a final decision at the interlocutory stage on the matters which are in dispute between the parties. It is no part of the court's function at that stage to resolve conflicts of evidence or questions of law that require detailed argument. All it can do is preserve the status quo in the meantime until these matters can be determined at the trial.

In the celebrated English case of *American Cyanamid Co supra*, the court's duty when faced with an application for a provisional order was also outlined as follows:

[346] *The Registrar General of Elections v Combined Harare Residents Association and Anor* SC 7/02.
[347] *Attorney General v Punch Limited and Anor* 1998 (1) ZLR 188 (H).

> *The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which*
>
> *the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.*

Indeed, a person drafting an order for interim relief has to make the terms of that order reflect the true nature of the interim relief sought. The duty does not mean, however, that all the applications for an interim relief placed before a judge under the title "interim relief" or "provisional order" are exactly so. It has been noted that most of the interim orders placed before the High Court are in fact final in nature, which has seen most of them being appealed against.

5.2. ***WHAT THEN DOES THAT MEAN TO A JUDGE BEFORE WHOM AN APPLICATION FOR INTERIM RELIEF IS MADE?***

It means that a Judge approached with an application for interim relief must not allow himself or herself to be misled by the mere title of a provisional order. The Judge has the onerous and unassailable duty to go a step further and ensure that indeed the substance of the terms of the interim relief placed before him or her has an interlocutory effect on the rights of the parties. The Judge has to make sure that the applicant is not granted what he, she or it is not entitled to in a final order couched as a provisional order. The court has to protect a defendant from an applicant who disguises a relief for a final order in the form of a provisional order. The Judge must be satisfied that should he or she grant the interim relief sought as it is placed before him or her, there remains an issue to deliberate upon on the return date. The point made in essence is that an application for interim relief is not for the asking.

The court in the case of *Attorney General* v *Punch Limited and Anor supra* further went on to state as follows:

> *When proceedings come before a court the plaintiff typically asserts that he has a legal right which has been or is about to be infringed by the defendant. The claim having come before the court, it is then for the court, not the parties to the proceedings or third parties, to determine the way justice is best administered in the proceedings. It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the court's determination on what interim protection is needed and is appropriate. … The reason why the court grants interim protection is to protect the plaintiff's asserted right. But the manner in which this protection is afforded depends upon*

> *the terms of the interlocutory injunction. The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done.*

As highlighted earlier, interim relief is granted by a court in the exercise of its discretion. However, that discretion must not be abused by way of a court granting a final order couched in the form of a provisional order simply because it has come in the name of a provisional order. The discretion has to be exercised only after a court has fully applied its mind to and scrutinized the substance of the interim relief sought and its subsequent effect on the rights of the parties in the event that it is granted.

THE FOLLOWING THREE QUESTIONS MAY BE ASKED BEFORE MAKING THE ORDER -

1. Would there be anything to confirm/discharge on the return date if the interim relief sought as placed before the court is granted?
2. Will the defendant be condemned to that provisional order because there remains nothing to determine on the return date due to the finality in the order granted?
3. If the interim relief sought is granted, will the aggrieved defendant almost obviously succeed in either setting aside that interim order on appeal or in an application to rescind the order on the basis that it was erroneously sought and granted?

Where the provisional order is granted *ex parte* the same principles apply. The court in *Phillips and Ors* v *National Director of Public Prosecutions,* stated as follows:

> *It is trite that an ex parte* applicant must disclose all material facts which might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion, when given the full facts, to set aside the *provisional order or confirm it.* [348]

5.3. *CRITERION FOR DECIDING WHETHER THE INTERDICT SOUGHT IS TEMPORARY OR FINAL*

In deciding whether the interdict sought is temporary or final, the court will look at the substance rather than form. In the case of ***Mayor Logistics v ZIMRA***, the court said the following:

> *The applicant seeks an order suspending the statutory obligation to pay the amount of the tax it was assessed to be liable to pay to the Fiscus, pending the hearing and finalization of the appeal in the Fiscal Appeal Court. It is in the heads of argument that the applicant reveals that the relief sought is an interim interdict. There is need to have regard to the*

[348] *Phillips and Ors v National Director of Public Prosecutions* [2003] 4 All SA 16 (SCA).

substance and not the form of the relief sought. The fact that the applicant calls the order sought, an interim interdict does not make it one.

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

It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a prima facie right. It is also axiomatic that the prima facie right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct. Airfield investments (Pvt) Ltd v Minister of Lands & Ors 2004(1) ZLR 511(S); Stauffer Chemicals v Monsato Company 1988(1) SA 895; Rudolph & Anor v Commissioner for Inland Revenue & Ors 1994(3) SA 771.[349]

In dealing with a similar issue in ***Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications*** ADAM J had this to say:

Also it has to be mentioned that the terms of the interim relief sought and the final order are identical. It has been stated that the proper approach in such matters is for the court to look at the substance rather than at the form of the application. Although here interim relief is prayed for which is to prevail pending the return day, in fact it would appear that the actual relief being sought is really in the nature of a final order Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) at 529-30. Therefore, proceedings ought to have been commenced by way of a court application for a final or absolute interdict. Be that as it may, for a temporary or interim interdict the requisites are: (1) that the right which is sought to be protected is clear; or (2) (a) if it is not clear, it is prima facie established, though open to some doubt and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that the balance of convenience (-balance of justice -Francome v Mirror Group Newspapers Ltd [1984] 2 All ER 408 (CA) at 413) favours the granting of interim relief; and (4) the absence of any other satisfactory remedy: LF Boshoff Invstms (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267." [Emphasis added] [350]

6. PURPOSE OF AN INTERIM INTERDICT

The purpose of an interim interdict (also referred to as an interlocutory or temporary interdict or an interdict *pendente lite*) is to preserve or restore the *status quo* pending the final determination of the rights of the parties. It does not affect or involve the

[349] *Mayor Logistics v Zimra* CCZ-7-14.
[350] *Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342 at 344-345.

final determination of such rights[351] and does not involve their final determination.

The object of interdicts is the protection of alleged existing rights and is not a remedy for the past invasion of rights. An interdict freezes the position until the court, or other body or person such as an arbitrator decides where the right lies.[352]

7. CHARACTERISTICS OF THE REMEDY

It is important to highlight the characteristics of the remedy of an interlocutory or interim interdict/provisional order/interlocutory injunction, which were neatly summarised by C.B. Prest at pages 4 to 5 as follows:

a) *It is an order of a court;*
b) *It is an interim order of court pending the final determination of the principal dispute between the parties;*
c) *It is directed at the maintenance of the status quo pending final determination of the matter;*
d) *It is a remedy of an extraordinary nature which is not available to a litigant who is possessed of another alternative remedy;*
e) *It does not involve a final determination of rights and does not affect their final determination;*
f) *It is not a remedy for the past invasion of rights;*
g) *It is a discretionary remedy dependent upon the weighing up of the balance of convenience between the parties where the right relied upon is a prima facie right established though open to some doubt;*
h) *It is granted in almost any kind of circumstance where there is a well-grounded apprehension of irreparable harm.*[353]

8. REQUIREMENTS FOR AN INTERDICT

8.1. *FINAL INTERDICT*

Unlike an interim interdict, which does not involve a final determination of rights of the parties, a final interdict affects such a final determination of rights. It is granted to secure a permanent cessation of an unlawful course of conduct or state of affairs.[354] For one to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an applicant must establish:

(a) a clear right;

[351] CB Prest, The law & Practice of Interdicts, p2.
[352] See note 351 above.
[353] See note 337 above.
[354] CB Prest, The Law & Practice of Interdicts, p 42.

(b) an injury actually committed or reasonably apprehended; and

(c) the absence of similar or adequate protection by any other ordinary remedy.

8.2. *THE TEMPORARY OR INTERIM INTERDICT*

The requirements for an interim interdict were set out in the *locus classicus* case of *Setlogelo v Setlogelo* as follows;

a. a *prima facie* right, even if it be open to some doubt;
b. a well-grounded apprehension of irreparable harm if the relief is not granted;
c. that the balance of convenience favours the granting of an interim interdict;
d. that there is no other satisfactory remedy."[355]

If the above conditions are met, then a court can grant the provisional order sought and provide a return date for the parties to then make arguments on the merits on whether or not the final order sought can be granted. An applicant for a temporary interdict will succeed if able to satisfy the above requirements, but the court has the discretion to grant the interdict as enunciated above.

9. THE REQUISITES FOR INTERDICTS IN DETAIL

9.1. *THE RIGHT*

Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probabilities the facts and evidence which prove a clear and definite right in terms of substantive law.[356] The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common law or statutory law. The right that forms the subject matter of a claim for an interdict must thus be a legal right. A financial or commercial interest alone will not suffice. The right must be one that is enforceable in law.

To decide whether a right has been established, one must look to the branch of substantive law concerned. When the right arises automatically in law it is not necessary for the applicant to allege any facts to establish the right. If, however, the right depends for its existence on certain facts, such as contract or ownership of property, then the applicant must allege those facts that, according to substantive law, will justify the conclusion that he has a legally enforceable right.

[355] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[356] Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 5th Ed 2009 ch44-p1458.

9.2. ***CLEAR RIGHT***

What is meant by the phrase is 'a right clearly established', that 'the word ''clear'' relates to the degree of proof required to establish the right and should strictly not be used to qualify ''right'' at all'.[357] The existence of a right is a matter of evidence. To establish a clear right the applicant has to prove on a balance of probabilities the right which he seeks to protect.[358]

9.3. ***PRIMA FACIE RIGHT***

Interdicts are based upon rights, that is, rights which in terms of substantive law are sufficient to sustain a cause of action.[359] The applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed, and if he does not do so, the application must fail.[360] The term '*prima facie* right', used concerning temporary interdicts, has also been the subject of judicial interpretation. In *Setlogelo v Setlogelo*[361] Innes JA referred to a right which 'though *prima facie* established is open to some doubt. The court, in that case, said that the court must take into account the allegations made by both the applicant and the respondent in deciding whether a *prima facie* right has been established. It is not sufficient that the applicant has in affidavits, taken alone, made out a *prima facie* case. In *Webster v Mitchell,*[362] *Clayden* J said the following:

> *The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is a mere contradiction or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the*

[357] Jones & Buckle Civil Practice 85 and 607.
[358] CB Prest, The Law & Practice of Interdicts, p43.
[359] See note 358 above.
[360] See note 355 above.
[361] See note 355 above.
[362] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

respective prejudice in the grant or refusal of interim relief.[363]

In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict—it has discretion, to be exercised judicially upon consideration of all the facts. Usually, this will resolve itself into a nice consideration of the prospects of success and the balance of convenience--the stronger the prospects of success, the less need for such balance to favor the applicant:[364] the weaker the prospects of success, the greater the need for the balance of convenience to favor him. I need hardly add that by a balance of convenience is meant the prejudice to the applicant if the interdict is refused, weighed against the prejudice to the respondent if it is granted. Thus, it has been held that provided that there is a prospect of success in the claim for final relief, there is no further threshold which must be crossed before the court proceeds to a consideration of the other elements of an interim interdict, that the strength of one element may make up for the frailty of another, and that the process of measuring each element requires a holistic approach to the affidavits in the case.[365]

9.4. ***ONUS OF PROOF***

The onus upon an applicant is to establish that there exists an actual or well-grounded apprehension of injury. It is for the court to decide whether, from the circumstances, such apprehension is well-grounded.

9.5. ***NO OTHER ADEQUATE REMEDY***

The other requisite for the grant of an interdict is proof that there is no other satisfactory remedy available to the applicant. The applicant for an interdict must establish that there is no other alternative remedy available. The alternative remedy postulated in this context must —

(a) be adequate in the circumstances;

(b) be ordinary and reasonable;

(c) be a legal remedy;

(d) grant similar protection.[366]

[363] Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 5th Ed 2009 ch44-p1461.
[364] See note 363 above.
[365] See note 363 above.
[366] See note 363 above.

According to *Herbstein and Van Winsen,*[367] the absence of an adequate alternative remedy cannot be both an essential requirement and a factor to be taken into account by the court in the exercise of its discretion. It must be one or the other. The requirement is a fact which must be established on a balance of probabilities when the claim is for a final interdict, and a fact relevant to the exercise of the court's discretion when the claim is for an interim interdict.[368]

The alternative remedy that most frequently arises for consideration is damages. The general rule is that the courts will not grant an interdict if the applicant can be adequately compensated for the injury complained of by an award of damages. Damages will not be considered to be an adequate remedy when there is a continuing violation of the applicant's rights; when the damages will be difficult or impossible to assess; when the applicant is not likely to be able to recover damages from the respondent, for example, because the respondent is a person of straw; or when the value of an award of damages in several years will be of questionable adequacy because of inflation and the claimant's inability to obtain pre-judgment interest on the damages.

9.6. ***THE INJURY***

Another requirement for the grant of an interdict is an act of interference with the rights of the applicant or a reasonable apprehension that such an act will be committed. The applicant must show that there is a well-grounded apprehension of irreparable harm if the relief sought is not granted. The word 'injury' must be understood in a wide sense to include any prejudice suffered by an applicant as a result of the infringement of his rights. The injury does not have to be capable of pecuniary evaluation. In *Setlogelo v Setlogelo,* the words 'injury actually committed or reasonably apprehended' are used.[369]

An interdict is appropriate only when the future injury is feared. This means that the wrongful act giving rise to the injury has already occurred, either it must be continuing or there must be a reasonable apprehension that it will be repeated. When there is a threatened infringement of an applicant's clear right he need not wait for the actual infringement to occur but may approach the court to restrain the threatened conduct. If the infringement is one that *prima facie* appears to have 'occurred once and for all and is finished and done with, then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to

[367] See note 363 above.
[368] See note 363 above.
[369] See note 363 above.

be repeated. When the respondent has given an unequivocal undertaking that the wrongful act will not be continued or repeated the court will usually refuse to grant an interdict.[370] Such an undertaking is, however, not necessarily decisive, particularly when the respondent declines to have the undertaking made an order of a court. The harm must be caused by the respondent, alternatively, the prevention of the harm must be within the respondent's power.

The applicant doesn't need to establish on a balance of probabilities that the injury will occur: he must simply establish on a balance of probabilities that there are grounds for reasonable apprehension that his rights will be detrimentally affected.

An applicant who has not succeeded in establishing a clear right but who has established a *prima facie* right will be entitled to a temporary interdict if the court finds a reasonable apprehension of irreparable injury.[371] When, on the other hand, the applicant has shown a clear right it is not necessary to establish that the harm feared will be irreparable. When the wrongful act impairs the applicant's right or makes it impossible to exercise the right the injury will be considered to be irreparable. The injury does not, however, have to be irreparable. The applicant will probably succeed if he can establish that it will be more difficult and costly to restore the status quo at a later stage.

10. THE COURT'S DISCRETION

10.1. *FINAL INTERDICT*

There is some uncertainty as to whether a court has the discretion to refuse to grant a final interdict when the applicant has established a clear right, reasonable apprehension of harm, and the absence of an adequate alternative remedy. In *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll en 'n ander*[372] it was held that the court has a general discretion to refuse an interdict even if all the requisites for the grant of a final interdict are present.[373] According to CB Prest,[374] a final interdict is a drastic remedy and at the court's discretion. The court will not, in general, grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief e.g. an award of damages.[375]

---

[370] See note 363 above.
[371] See note 363 above.
[372] *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll en 'n ander* 1986 (1) SA 673F-H.
[373] See note 363 above.
[374] See note 363 above.
[375] See note 358 above.

10.1. INTERIM INTERDICT — THE BALANCE OF CONVENIENCE

Questions of the balance of convenience arise only if an applicant for an interdict has not established a clear right, but only a right which, though *prima facie* established, is open to doubt. The court weighs up the likely prejudice to the applicant if the temporary interdict is refused and the refusal is later shown to have been wrong (in the sense that the applicant's disputed contentions are ultimately upheld) against the likely prejudice to the respondent if the temporary interdict is granted and the grant of the interdict is later shown to have been wrong (in the sense that the applicant's disputed contentions are ultimately dismissed).[376]

The court must also have regard to the applicant's prospects of ultimate success. The stronger the applicant's prospects of success, the less the need for the balance of convenience to favour the applicant; conversely, the weaker the applicant's prospects of success, the greater the need for the balance of convenience to favour him. It may be proper to grant an interim interdict when the balance of convenience is strongly in favour of doing so even though there may be no balance of probabilities that the applicant will ultimately succeed, just as it may be proper to refuse the application for an interim interdict even though the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief.

The balance of convenience is normally weighed up only as between the parties to the action, but on occasion, the courts have taken into account prejudice to third persons and even to the public generally.[377]

10.2. LOCUS STANDI IN JUDICIO

At common law the applicant will have *locus standi in judicio* if the right on which the claim for an interdict is based is one that the applicant personally enjoys, or if he has a sufficient interest in the person or persons whose rights are sought to be protected and it is impossible or impractical for those persons to approach the court themselves.

11. PROCEDURE

[376] See note 363 above.
[377] See note 363 above.

11.1. *TYPE OF PROCEDURE*

A final interdict may be claimed by way of application provided that the applicant does not foresee a material dispute of fact, in which event trial procedure should be used. If the matter is urgent, proceedings may be commenced by way of application even though a dispute of fact is foreseen. A temporary interdict is always claimed on motion.

i. **Dispute of fact arising in application proceedings**

When a dispute of fact relevant to the proof of one of the essential requirements for an interdict arises and cannot be resolved by referral to oral evidence the court may dismiss the application. Time and again the courts have warned legal practitioners not to bring to court cases on motion well knowing that there is a material dispute of facts which was aptly defined by Makarau J (as she then was) in *Supa Plant Investment (pvt) Ltd* v *Chidavaenzi* as follows:

> *A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.*[378]

In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd,*[379] it was held that when there is a dispute as to the facts a final interdict should be granted in motion proceedings only if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order, or when it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted.

In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* Corbett JA said that this rule required clarification and perhaps qualification. The court held that in certain cases the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine, or *bona fide* dispute of fact.[380]

When a dispute of fact arises in an application for a final interdict the court can refer the matter to oral evidence and grant an interim interdict to protect the rights

[378] *Supa Plant Investment (pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H).
[379] *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C).
[380] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984] (3) SA 623 (A).

of the applicant pending final determination of the issues.[381]

Temporary interdicts are always claimed by way of application and will be granted despite the existence of a dispute of fact, provided that the applicant has satisfied the requirements set out above and that the court finds the balance of convenience to be in the applicant's favour.[382]

ii. Prayer

It is necessary to define with reasonable precision, in a prayer for an interdict, those activities that infringe or threaten to infringe the rights of the applicant and that are to be restrained by the interdict. The vague or general language that will tend to leave the ambit of the interdict uncertain should be avoided. An interdict in terms that leave the person restrained uncertain as to what he may or may not do will in some cases secure an unjustifiable advantage for the applicant and in others fail to resolve the dispute between the parties, resulting in further litigation.[383]

12. APPEALS

i. FINAL INTERDICT

The grant or refusal of a final interdict is appealable. The discharge or refusal of an interim interdict is appealable as it cannot be reversed on the same facts and as such it is final.

ii. INTERIM INTERDICT

The grant of an interim order is not appealable. An interim order is appealable only if it is final in effect. In determining whether an order is final, it is important to bear in mind that not only merely the form of the order must be considered but also, and predominantly, its effect.

However, the High Court Act [*Chapter 7:06*] provides for an exception in section 43 which includes interdicts. Section 43 of the High Court Act provides for instances where an appeal cannot lie to the Supreme Court in interim proceedings, it provides

[381] See note 363 above.
[382] See note 363 above.
[383] See note 363 above.

as follows:

> *43 Right of appeal from High Court in civil cases*
>
> *(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.*
>
> *(2) No appeal shall lie—*
>
> *(a) from an order allowing an extension of time for appealing from a judgment;*
>
> *(b) from an order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action;*
>
> *(c) from—*
>
> *(i) an order of the High Court or any judge thereof made with the consent of the parties; or*
>
> *(ii) an order as to costs only which by law is left to the discretion of the court, without the leave of the High Court or of the judge who made the order or, if that has been refused, without the leave of a judge of the Supreme Court;*
>
> *(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases—*
>
> *(i) where the liberty of the subject or the custody of minors is concerned;*
>
> *(ii) where an interdict is granted or refused;*
>
> *(iii) in the case of an order on a special case stated under any law relating to arbitration.*
>
> *(3) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of subsection (2).*

The above is authority for the position that the grant or refusal of an interdict can lie to the Supreme Court on appeal.

On appeal, the Court is not confined to deciding whether the court *a quo* exercised its discretion properly. In the context of an interim interdict, the word 'discretion' is not used in the strict sense. It means no more than that the court is entitled to have regard to several disparate and incommensurable features in reaching a decision.[384]

13. **POINTS DRAWN FROM CASE LAW ON INTERDICTS**

[384] See note 363 above.

13.1. *AIRFIELD INVESTMENTS (PVT) LTD v THE MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT AND 4 ORS 2004(1) ZLR 511(S)*

Principles regarding provisional orders as established by the decision in Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture & Rural Resettlement & Ors *supra*.

1. An interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief;
2. In an application for interim relief, the applicant has to prove a *prima facie* right not a clear right, if proof of that clear right at that stage entitled the applicant to a final order;
3. The *prima facie* right to be established at the time that the interim relief is applied for cannot be on the probability that existing legislation which the applicant has contravened may be altered at some undetermined future time or on the possibility that such existing legislation would be held unconstitutional;
4. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he, she or it makes an application for interim relief. In other words, the *prima facie* right must be in existence at the time that the application for interim relief is made;
5. A court faced with an application for interim relief must consider whether or not the applicant is likely to succeed in getting a confirmation of the provisional order on the return day. Where a final order is likely to be made as a provisional order, then there would be no return day. It should follow that interim relief which is likely to have final effect ought not to be granted;
6. An interim interdict is not a remedy for prohibiting lawful conduct; [385] and
7. An interim interdict as a remedy for the prohibition of unlawful conduct cannot be granted for the protection of the illegal activities of the applicant who wishes to continue to commit an offence at law.[386]

Principles regarding provisional orders as established by the decision in *Jamal Ahmed and 3 Ors v Russel Goreraza and 2 Ors supra:*

1. Once an order is deemed final, the court granting it becomes *functus officio* and the remedy of any party aggrieved by such order lies in an appeal to the Supreme Court or the appropriate intermediate appeal court;
2. Once a court on the return date of a "provisional order" with final effect realises that the provisional order with final effect was granted by another Judge, that court if properly informed is compelled to *mero motu* rescind the erroneously granted provisional order. The aggrieved party in that situation, in addition to the right to appeal, may also apply for rescission of judgment in terms of rule 29(1) of the High Court Rules, 2021;
3. If an order is deemed to be interlocutory or provisional, it remains subject to confirmation or discharge by the same court;

[385] *Judicial Service Commission v Zibani* SC 68/17.
[386] *Jamal Ahmed & 3 Ors v Russel Goreraza & 2 Ors* HH- 402-17.

4. Where an order is in the form of a provisional order, /+-that in itself does not mean that the order *per se* is necessarily provisional. If the order has the effect of finally determining "the issue or cause of action between the parties" it is a final order, regardless of the misleading form in which it is cast, and may not be subject to confirmation or discharge.

14. **CONCLUSION**

A party seeking relief through an interdict should first satisfy the requisites, otherwise he or she will not be entitled to any relief. An interdict is an extraordinary remedy and should only be given in circumstances where there are no other remedies available to the aggrieved party. Care must be taken to ensure that the terms of a provisional order are not similar in effect to those of a final order to avoid the applicant obtaining a final order before affording the other party the right to be heard. In proving a clear or *prima facie* right, a litigant should point to a legal right emanating from substantive law, be it common or statutory. In addition, the terms of either an interim or final interdict should be clear and exact as to what is being compelled or prohibited. Also, an interdict cannot be used against a lawful conduct. An interim interdict is generally not appealable unless if it is, in effect, final.

SOME PRACTICAL ASPECTS OF ASSESSMENT OF DAMAGES[387]

HONOURABLE MARY DUBE

Judge President of the High Court of Zimbabwe

ABSTRACT

Damages serve the purpose of affording a remedy and consolation to a wronged party, either in contract or in delict, where patrimonial or non-patrimonial loss is incurred and proved. Based on this, a proper award of damages achieves real justice between the parties by affording commensurate reparation and sufficiently assuaging the feelings of the injured party. Damages are awarded where they are proved on the basis of either contract or delict.

1. INTRODUCTION

Damages refers to the sum of money that the law imposes for a breach of some duty or violation of some right. According to Visser & Potgieter, Law of Damages:

> *"Damage refers to the diminution, as a result of damage – causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved."*[388]

The Black's Law Dictionary, Fifth Edition, West Publishing Co. 1979, further defines damages as:

> *"A pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury whether to his person, property or rights through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Damages may be compensatory or punitive according to whether they are awarded as a measure of actual loss suffered or as punishment for outrageous conduct and to deter future transgression."*[389]

This paper seeks to re-sensitize the new judges on what damages are. It also seeks to highlight the rationale for damages and the principles governing assessment of damages. More importantly, the paper seeks to instill in the new judges the technique of assessing damages by giving them a practical perspective to damages assessment.

---

[387] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls on 11 November 2021.

[388] J M Potgieter; L Steynberg; T B Floyd: "Visser & Potgieter, law of damages", Claremont: Juta, 2012.

[389] The Black's Law Dictionary, Fifth Edition, West Publishing Co. 1979.

2. TYPES OF DAMAGES

There are six main types of damages awarded depending on the nature of the case before a given court. These are:

i) Compensatory Damages
ii) Incidental damages
iii) Punitive/ exemplary damages
iv) Nominal damages
v) Consequential damages
vi) Liquidated damage

2.1. *COMPENSATORY DAMAGES*

The general aim of compensatory damages is compensation. The compensatory principle states that the plaintiff must, by way of compensatory damages, be put into as good a position as he or she would have been had the injury or loss not occurred. According to Professor G Feltoe:

> *Most wrongs … are dealt with by extracting compensatory damages. The primary emphasis is upon the correction of the upset equilibrium and the restoration of social harmony.*[390]

It is known as the principle of *restitutio in intergrum* and applies to both delict and contract. The purpose of compensatory damages is to compensate the injured party for loss, rather than to punish the wrongdoer and place the claimant in the same position as if the contract had been performed or the delict not been committed. Compensatory damages are restitutive in nature.

2.2. *INCIDENTAL DAMAGES*

In addition to compensatory damages, a party may be able to recover incidental damages. They are claimable where the plaintiff incurs loss in an attempt to minimise the loss stemming from the breach e.g. where he or she hires another car in place of the damaged car in order to continue running his business.

[390] G Feltoe, (2018) A Guide to the Zimbabwean Law of Delict.

2.3. *PUNITIVE/ EXEMPLARY DAMAGES*

There are cases where a party may be ordered to pay punitive damages. Punitive Damages originated in England. They are punitive in nature or exemplary in nature. Their aim is to punish the wrongdoer. They are awarded not as compensation, rather usually in cases of willful, wanton, malicious, vindictive or oppressive conduct. They are also awarded in order to reform, deter or punish persistent conduct of a wrongdoer. In addition, they are awarded only in special cases, for example, in a defamation case where a defendant continues to defame a plaintiff after a complaint. Accordingly, the court may in its discretion decide to impose punitive damages. It must however be noted that they are not ordinarily available for breach of contract unless it is shown that the breach is wanton, willful or deliberate.

2.4. *NOMINAL DAMAGES*

These damages are awarded where a plaintiff has suffered loss or injury as a result of the wrongful conduct of a defendant and where the plaintiff cannot prove a

loss that can be compensated for example where a plaintiff fails to submit medical records to show the extent of the injury. Another example is when **A** buys a car from a car dealer who fails to deliver the car and he buys the same car elsewhere at the same price. He is awarded a nominal, small amount, which is symbolic.

2.5. *CONSEQUENTIAL DAMAGES*

These damages flow from the injury suffered or incurred. The purpose of the damages is to reimburse for indirect loss other than contractual loss. They compensate for the foreseeable consequences of breach. The damages must be foreseeable.

2.6. *LIQUIDATED DAMAGE*

The damages are awarded in cases where a contract specifies the damages to be paid in the event of breach. These damages are classified into two main categories, Contractual damages and delictual damages. Contractual damages are awarded in the following instances:

i) Where there is in existence a valid contract;
ii) That has been breached –cause of action;

iii) The breach must have caused financial loss.

The rationale for contractual damages for breach is that the sufferer by such breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. For the plaintiff to be awarded contractual damages the Plaintiff must prove:

i) Breach by the other party;
ii) Patrimonial loss (in relation to performance, consequential loss, loss of profits or wasted expense);
iii) Damages must not be too remote;
iv) A causal connection between the breach and the loss complained of; damages must flow directly from the breach and not be too remote. The test for remoteness is whether "the loss was reasonably foreseeable as liable to result from the breach.''
v) damages must have been reasonably contemplated by both parties when they made the contract as being a probable result of the breach;
vi) If, the damages are proximate and not too remote, they are recoverable;
vii) Damages for breach of contract are to be assessed as at the time of breach, time of performance or time of cancellation;
viii) There are times when it becomes necessary to assess damages at the time of trial in order to do justice between the parties, e.g. in cases involving values of property;
ix) Court should take account of the effect of subsequent events on the claimant's loss;
x) The plaintiff is required to mitigate his or her losses;
xi) He or she must take reasonable and proper steps to minimize (mitigate) his or her damages when faced with breach- *Hazis v Transvaal & Delagoa Bay Investment Co Ltd*.[391]

2.7. ***DELICTUAL DAMAGES***

A delict is an unlawful, blameworthy act or omission (i.e. intentional or negligent) which causes damage to person or property or injury to personality and for which a civil remedy for recovery of damage is permissible.[392] The purpose of an award is to put the plaintiff into the position he or she was before the delict. Accordingly, the plaintiff is entitled to claim the difference between his or her estate after the wrong or injury and its original value, as if the wrong had not occurred. The general rule however, is that damages are assessed as at the time of the delict.

Exceptions to the general rule alluded to above, include cases involving property

[391] *Hazis v Transvaal & Delagoa Bay Investment Co Ltd* 1939 AD 372.
[392] Burchell, JM, Principles of Delict 1st Edition, 1993.

values where damages are determined as at the time of judgment. The objective being to award the value of the loss. In assessing these damages, courts must assess an amount that is fair and reasonable.

Damages in personal injury cases are awarded under the following two categories: -

i) General Damages;
ii) Special Damages.

i. General Damages

General damages compensate the plaintiff for the direct effects of the damage to the injured party or for loss for example pain and suffering, loss of amenities of life, mental pain, lower quality of life loss of companionship and loss of earnings. In the case of *Nyandoro v Minister of Home Affairs & Anor,* it was held that:

> *"…the broad purpose of an award for non-patrimonial loss is to enable the claimant to overcome the effects of his injuries and to provide psychological satisfaction for the injustice done to him. Since pain and suffering cannot be accurately measured, the quantum of compensation to be awarded can only be measured by the broadest general considerations. The compensation awarded should be assessed so as to place the injured party, as far as is possible, in the position he would have been in if the wrongful act causing him injury had not been committed."*[393]

General damages are for non-pecuniary loss and are assessed by the court based on precedents and on the basis of a particular case. They cannot be quantified with precision and are measured by the broadest general considerations.

They are also not capable of mathematical or precise calculation. They are not easily ascertainable. The injured party must provide as much evidence as possible of the injuries and its effects to enable the court to assess the award due. Where a party fails to give the exact nature of injuries, the court should use the best evidence available and estimate an award where it can.

These damages are not claimable in cases of breach of contract. The objective of general damages is to enable a claimant to overcome the effects of his or her injuries, compensate the plaintiff and not to penalize the defendant. Plaintiff must be put in a position he or she would have been had the injury not occurred. Damages must flow naturally from the defendant's breach of contract or unlawful act such as pain and suffering, loss of limbs etc. They too, must be within the contemplation of the parties and must be specifically pleaded and proved.

[393] *Nyandoro v Minister of Home Affairs & Anor* HHC 196/2010.

Special damages are awarded to compensate for actual out of pocket expenses incurred as a direct result of the defendant's actions or behavior. Examples of special damages include medical expenses, transport costs, loss of income and loss of earning capacity. They are claimable in personal injury cases. Special damages will not be presumed by law as they can be precisely calculated. This is because they are damages that have already occurred and can thus be precisely calculated at the date of the trial. In case of *Mdlongwa v Ngwenya,* it was held that:

> *"It is an elementary proposition of law that a claim for special damages must not only be specially alleged and claimed, but also be strictly proved."*[394]

In *Mungate v City of Harare & Ors*[395] the court said that:

> *legal practitioners should know that general damages are not a penalty, but compensation. They are meant to compensate the victim and not to punish the wrong doer. Awards that are granted by the courts, apart from compensating the victim, should also reflect the state of economic development and the current economic conditions of the country. In making claims for general damages, litigants should claim reasonable and realistic amounts and they should be guided by previous decided cases.*[396]

In the *locus classicus* of *Roberts v. HW IVEY CONST. CO., INC.,* the court stated that:

> *To ensure that undue hardship is not imposed on the defaulting party [...] the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach.*[397]

Special damages are expenses that a party has incurred up to the date of hearing. They are capable of mathematical calculation or with precision because they are verifiable and provable for example transport costs, medical costs, lost earnings and bills. These damages can be proved by way of receipts, invoices and bills. It must be proved that the damages were in actual fact foreseen. They are easier to determine than general damages. They should be specifically pleaded, particularized and proved.

[394] *Mdlongwa v Ngwenya* HB-54-13.
[395] *Mungate v City of Harare & Ors* HH-328-16.
[396] See note 395 above.
[397] *Roberts v. HW IVEY CONST. CO., INC.,* 408 F. Supp. 622 (N.D. Ga. 1975).

3. *DAMAGES IN PERSONAL INJURIES AND FATAL ACCIDENT CASES*

These are assessed either as special damages or general damages. The case of The *Minister of Defence & Anor v Jackson*[398] is instructive on considerations for assessing damages. Guidelines enunciated therein include:

1. That since there is no scale to measure pain and suffering the quantum of compensation can only be determined by the broadest consideration;
2. That the court has a duty to heed the effect the decision may have upon awards in future;
3. That no regard is paid to the subjective value of money to the injured person;
4. Considerations of awards in other jurisdiction may not be an appropriate guides.[399]

In the case of *Mathew Mbundire v Tyrone Sim Buttress*[400] the learned judge Garwe JA, as he then was, cited the book "The Quantum of Damages in Bodily and Fatal Injury Cases, *op cit*, at pp 7–8 "as follows:

> *It is correct, as the court a quo found, that in general terms damages should be assessed as at the time of the delict. The basic principle underlying an award of damages in the aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have occupied had the wrongful act causing him injury not been committed. It is also established that the fall in the value of money is to be taken into account in considering comparable awards. The allowance for inflation is a rough one and should incline towards conservation which is authority for the position that in claims for future damages, the court must have regard to the best available evidence.*[401]

5. WHAT IS ASSESSMENT OF DAMAGES?

Assessment of damages is the process whereby the court sits to assess an award over a loss or injury. Court looks at the position of plaintiff before and after the conduct complained of. The focus is on the loss or injury and not the millionaire status or pauper status of the plaintiff. The damages assessment process is different from the fine assessment process which focuses on the offender.

The responsibility of the plaintiff is firstly to prove the liability of the defendant. Provide evidence and facts enabling a court to carry out an assessment. He must prove his financial loss or injury. The plaintiff must prove damages on the papers or at the trial. When assessing damages, the court should take account of the effect of subsequent events on the claimant's loss. The general rule is that damages are assessed as at the date of breach, save where justice requires a departure from that rule. It is necessary to consider post-breach events known at the date of assessing

[398] *Minister of Defence & Anor v Jackson* 1990(2) ZLR (1) SC 708.
[399] *Minister of Defence & Anor v Jackson* 1990(2) ZLR (1) SC 708.
[400] *Mathew Mbundire v Tyrone Sim Buttress* SC 13/11.
[401] *Mathew Mbundire v Tyrone Sim Buttress* SC 13/11.

damages, to the extent that they are relevant to and affect the claimant's loss.

6. LEGAL PRINCIPLES TO CONSIDER GENERALLY IN ASSESSING DAMAGES

Consider the effect the award will have on future awards, hence there is need to exercise restraint. Have regard to previous awards as these are useful as general guides. However, care must be taken to consider each case on its own circumstances. There are unavoidable difficulties posed by relying on previous awards as a result of changes in currencies and rates of inflation. As an example, the effect of s 4(1) (d) of S.I 33 of 2019[402] on all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars *per* the *Zambezi Gas case*[403] is a case in point. It must be repeated that the purpose of an award of damages is not to punish the wrongdoer. As a result, the courts should neither over-compensate nor under-compensate the injured parties.

A balance should be struck between the need to compensate the plaintiff and the wrong done. Likely damages must be mitigated by the plaintiff as the defendant has a defence available where the plaintiff does not mitigate the loss by taking reasonable steps.

To that end, the steps taken to mitigate must be reasonable and the damages awarded must be equally fair and reasonable. A claim for damages is limited to those damages which the defendant foresaw or could reasonably have foreseen at the time that the contract was concluded as being likely to occur as a result of the non- performance of the contract, based on the principle of foreseeability.

7. EFFECT OF CHANGES IN VALUE OF MONEY

The principle of currency nominalism dictates that a debt sounding in money must be paid in its nominal value irrespective of any fluctuations in the purchasing power of the currency. It is based on the principle that damages are calculated as at the time the harm or injury occurred.

> *"The essence of nominalism of currency, in the field of obligations, was that a debt sounding in money had to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency"*[404]

---

[402] Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019.
[403] *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC-3-20.
[404] *Chanakira v Manyeza & Anor* (HC 363/ 2017) [HH/44/2009].

8. IS INFLATION RELEVANT IN ASSESSING DAMAGES?

Where damages are assessed at the time of loss, inflation is not relevant. Plaintiff becomes entitled to interest only. In *SA Eagle Ins co Ltd v Hartley* held that:

> *"…the effects of inflation are relevant especially in claims for damages for future loss of earnings or loss of support and loss of purchasing power."*[405]

As such inflation is not relevant where damages are assessed at the time of loss. The court is usually called upon to assess damages in motion court and at trial.

9. DOES THE COURT ASSESS DAMAGES AT PRE-TRIAL CONFERENCE STAGE?

The issue of damages is a triable issue, however where a defendant defaults at Pre-Trial Conference stage, the court may assess the damages. Damages remain an issue requiring quantification. The practice is to refer the matter to the unopposed roll for quantification of damages. Where evidence on quantification is availed on affidavit by plaintiff, the court should not quantify at the PTC hearing.

It is imperative to remember that a court at PTC stage can only grant an order by consent or a default order. It is also prudent for the court not force an order on the parties at PTC stage.

10. ASSESSMENT OF DAMAGES IN MOTION COURT

On default, where a matter has been referred for quantification of damages on the unopposed roll/ motion court, the court must satisfy itself that the plaintiff has a cause of action. The court should not simply rubberstamp a plaintiff's claim simply because the matter is not defended.

The plaintiff is still required to prove and quantify his claim. The plaintiff must accordingly produce evidence in support of his or her claim. There must be placed before the court sufficient evidence to enable it to carry out an assessment. The court must not pluck awards from the air. Heads of argument may be necessary. In such an instance the responsibility of the court is more onerous because the other party is not present. It is prudent for the court to remember that it has a responsibility to ensure that the award is proved and merited.

[405] *SA Eagle Ins co Ltd v Hartley* 1990 (4) SA 833 AD.

11. ASSESSMENT AT TRIAL

11.1. *WHAT MUST A PLAINTIFF PROVE AT TRIAL?*

At trial plaintiff must first show that he has a cause of action. The plaintiff should also show that he or she was harmed and that the defendant caused the damages suffered. In addition, the plaintiff must prove his or her case/ a case for damages. The plaintiff must also lead evidence warranting the award of damages and must provide the court with facts that assist the judge in assessing the damages claimed.

Where the defendant defaults at trial, the court can still lead oral evidence on quantification at the trial. There is no need for referral to the motion court for quantification.

11.2. *STEP BY STEP PROCESS*

Generally, the following step by step process in awarding damages is useful. The court must consider: -

i. The court should be satisfied whether or not liability has been established;
ii. If the breach or delict caused the loss;
iii. Consider the appropriateness of the category of damages the court is being asked to award. In *Delta Beverages v Rutsito*[406] a litigant claimed damages for distress and anxiety, it was held that it is not every harm that constitutes an award of damages and that the plaintiff must lead evidence of a recognized medical condition;
iv. Look at the quantum of damages claimed;
v. Juxtapose the facts/ nature and extent of damages against the amounts claimed;
vi. Is the claim within the range of awards made in similar cases/ distinguish award if necessary;
vii. The court should not rubberstamp the order;
viii. The court should justify its award;
ix. If the court applied the correct legal principles?
x. Seek guidance from case law authority particularly from the apex court;
xi. Sound a colleague, if necessary;
xii. Have you awarded the plaintiff value for his or her loss?
xiii. Is the award fair and reasonable?

12. CONCLUSION

A Judge must be sufficiently informed in relation to the determination, quantification and award of damages, be they delictual or contractual. This will help him or her to

[406] *Delta Beverages v Rutsito* SC 42/13.

deliver justice between the parties. A plaintiff or applicant should neither be over-compensated nor under-compensated. It goes without saying that the award of damages that do not inspire public trust and confidence in the judiciary galvanizes, as a matter of fact, private justice, based on such archaic principles like an *eye for an eye*, a tooth for a tooth. The monetary system provides a convenient method of settling disputes hence the need for a Judge to have a good grasp of the law of damages.

JUDGMENT WRITING[407]

HONOURABLE LUKE MALABA

Chief Justice of the Republic of Zimbabwe

ABSTRACT

A judgment can be understood in a narrow or wider sense. The wider sense of a judgment is concerned with a full-dress judgment. Judgment writing is fundamental in that it is at the heart of judicial adjudication. This makes it mandatory for a Judge to grasp the significance of judgment writing. A judgment is the last word of a court concerning a matter brought before it. It is not in all matters that a Judge is required to write a judgment and the question whether or not a particular matter deserves a written one is a matter of discretion exercised after considering all relevant circumstances. Every judgment should be able to serve its purpose, which is to communicate its decision, in full, to the parties concerned and to the world as a whole. Judgment writing should be done in a logical way to enable the audience to understand the premises of its reasons. Far more important is the need to cite authorities supporting the decision reached.

1. INTRODUCTION

Judges often engage in the activity of putting on paper, or entering into computer databases, products of their thinking on the legal meaning of the facts of cases they preside over. Every Judge knows what judgment writing involves. He or she will have produced a written judgment in the exercise of judicial power. Some Judges may feel that judgment writing is a subject they have mastered and they need not be addressed on it.

Rarely does a Judge have time and cause to sit back to reflect on the theory and importance of judgment writing. That does not, however, detract from the fact that in judgment writing a Judge is engaged in a professional activity. He or she writes as he or she does because of the demands of the office. Judgment writing is therefore a subject so relevant to a Judge that he or she has to directly or indirectly concentrate on it throughout his or her service career. It is because judgment writing goes to the very heart of the judicial function that it is a subject

[407] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.

worth discussing.[408]

A written judgment is supposed to deliver justice. There has to be a standard by which readers are able to measure the written product to distinguish a good judgment from a bad one. What is clear is that judgment writing is an expression of a product of a mental process as a result of which a decision and reasons thereof on issues or points for determination are reproduced to take an existence of their own independent of the decision maker. A judgment must not be discovered as one is writing.

2. WHAT IS A JUDGMENT?

A judgment is a decision given by a court or tribunal on the relief claimed, which resolves a controversy and determines the rights and obligations of the parties in accordance with the applicable law. It is the final act in a case by which a court accomplishes the purpose of its creation. A valid judgment resolves or settles the contested issues submitted to the court in an action or proceeding, and fixes the rights and liabilities of the parties. The lawsuit is ended by a judgment, since it is regarded as the court's official pronouncement of the law on the action that was pending before it. It states who wins the case, and what remedies the winner is awarded. In other words, it is a determination by a court that on matters submitted to it for decision, a legal duty or liability does, or does not, exist, or that, with respect to a claim in suit, no cause of action exists or that no defence exists. In that sense, a judgment signifies the end of the court's jurisdiction in the case. It is a means of achieving an objective that is universal: the just resolution of conflict which is the core business of every court of law.[409]

The comprehensive definition of judgment shows that the concept can be used in a narrow and broad sense. In the narrow sense, judgment refers to the decision on the question for determination and the order issued. In the broad sense, a judgment includes the reasons for the decision, consisting of the considerations, findings and conclusions of both law and fact, stated by the court in substantiation of its judgment.[410] It is in the wide sense that the concept is used here.

The definition is also important for the fact that it shows that not every judgment has to be written. In our case, the law does not require that a judgment be in writing at the time it is pronounced, although orders are ordinarily reduced to writing at the time they are pronounced. In other words, a judgment does not derive its quality of being a judgment from the form in which it is presented to the audience. A

[408] The Right Hon. Sir Harry Gibbs: "Judgment Writing" (1993) 67 *Australian Law Journal* 494 @ 495.
[409] Mr. Justice Muhammad Bashir Jehangiri: "Judgment Writing". www.fja.gov.pk/judgment.htm
[410] Mr. Justice Huhammad Bashir Jehangiri: "Judgment Writing".

judgment can be given by a court immediately after the evidence and argument have been presented on the facts and the applicable law by the parties or by their legal representatives. The reasons for the decision made by the court on the legal meaning of the facts found proved are given orally. It is not an order without reasons on its grounds.

Ex tempore judgments are indeed a common feature of court proceedings. They are encouraged in the light of the increasing pressure of work Judges have to bear. The principle that decisions should, where it is reasonably practicable, be rendered expeditiously justifies the use of *ex tempore* judgments. They are addressed to the parties and their legal practitioners.

This address is concerned with the case where a Judge, either out of exercise of discretion, or for the reason of the complexity of the factual and legal issues raised by a case, decides to put the judgment into writing. What one has in mind, in discussing the subject of judgment writing, is a full–dress judgment a Judge has to write. A full–dressed judgment is one that requires structured discussion of the facts, legal principles and governing authorities in some detail. The significance, or number of the issues presented, the novelty of the questions, and the complexity of the facts, are among the factors that determine whether a judgment requires full–dress treatment.

3. WHY WRITE THE JUDGMENT?

Judgment writing, like any other human endeavour, is influenced by the purpose or object the writer seeks to achieve. The overriding purpose of a written judgment is to persuade the reader to accept, on the basis of the reasoning, the correctness of the finding of facts in issues; the analysis of the legal principles and the application of the law to the facts. Judgment writing is a creation of a permanent record subject to confirmation, variation or setting aside by an appellate court. Every judgment is case-based. As such, the sole concern for a Judge in writing a judgment may be to inform the parties to the proceedings and their legal practitioners of the outcome of the case. Reasons ought to be given for legal decisions, otherwise the parties cannot feel that their cases have had serious attention. They must understand why the judgment went the way it did.

In *Strategic Liquor Services v Mvumbi N.O.*[411] at 96G it is stated:

> "It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing and, when a judgment is appealed, written reasons are indispensable.

[411] *Strategic Liquor Services v Mvumbi N.O.* 2010 (2) SA 92 (CC).

> Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process."[412]

See also *Botes* v *Nedbank Ltd* 1983 (3) SA 27A-28A.

In *S v Makawa and Anor*[413] at 146D-E it was held that:

> "Although there are indications in this case that the magistrate may have considered the case, a large portion of those considerations remain shared in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons. See *R* v *Joko Nya* 1964 RLR 236G."[414]

Fox & Carney (Pvt) Ltd v *Sibindi*.[415]

The purpose of writing a judgment may be influenced and defined by the extent to which the decisions of the court and the legal principles on which the judgment is based have binding effect on readers other than the parties. The judgment of a Labour Court, for example, may provide guidance to disciplinary committees and arbitrators by articulating the legal principles on which disputes may be resolved. So a judgment of a Labour Court may be written with the agencies whose decisions the court reviews in mind.

A judgment may require additional factual development, and legal analysis if it has something to say to others besides the parties. How much analysis is required, and how detailed it should be, would depend on the subject matter, and the probable audience.

When writing a judgment for the parties and their legal practitioners only, the Judge may confine himself or herself to giving reasons that show why the losing party lost the case. It is natural for someone who loses to feel disenchanted with the legal process. It is, therefore, important that the reasons for a judgment show that the losing party was listened to, and his or her or its submissions seriously considered.[416]

When a decision involves novel issues and the Judge is aware of the fact that the judgment he or she is writing is likely to develop the law in the area, it is appropriate to trace the prior development of the law and develop the legal and policy

[412] *Strategic Liquor Services v Mvumbi N.O.* 2010 (2) SA 92 (CC).
[413] *S v Makawa and Anor* 1991 (1) ZLR 142 (S).
[414] *R v Joko Nya* 1964 RLR 236G.
[415] *Fox & Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173.
[416] The Hon. Justice Roslyn Atkinson, Supreme Court of Queensland: "Judgment Writing" (Paper delivered at Magistrates Conference, Gold Coast, March 21, 2002).

rationale at some length.[417]

Judges of lower courts need not worry about getting it right when writing a judgment with the appellate court in mind. It takes an immense burden from a Judge of a lower court to know that there is some other body to correct his or her decision if it is found to have been wrong. What the Judge needs to do is to consider, at the time of writing a judgment, whether a statement of facts and legal analysis to explain the decision to the parties, will suffice also for the appellate court to understand the basis for the decision. When, the decision turns on complex facts, a more elaborate explanation than is necessary for the parties may be helpful to the appellate court.[418] Without reasons for legal decisions, court of appeal would have nothing to upset or confirm.

A written judgment is the only means by which a court can engage in a discourse with the public on matters relating to how it decided a case. Members of the general public do not ordinarily read the actual text of the judgment. They rely on the reports communicated by the media on what they believe to be of public interest. When writing a judgment that addresses an issue of general public interest, or is likely to attract media attention, a Judge must ensure that what is written will be understood and not misunderstood. The mark of a well-written judgment, in any event, is that it is comprehensible to an intelligible layperson.

The foreword to the *Judicial Writing Manual* prepared by the Federal Judicial Centre in the United States of America in 1991 highlights the importance of judicial writing by stating that: -

> "The link between courts and the public is the written word. With rare exception, it is through judicial opinion that courts communicate with litigants, lawyers, other courts and the community. Whatever the court's statutory and constitutional status, the written word, in the end, is the source and the measure of the court's authority."[419]

4. PREPARING TO WRITE

The decision the Judge makes and what he or she says to explain it are products of the Judge's thinking process. In the writing lies the test of the thinking underlying it. As Ambrose Bierce said: "good writing, essentially, is clear thinking made visible."

---

[417] Judicial Writing Manual, Federal Judicial Centre in the United States of America in 1991 p 6.
[418] See note 417 above.
[419] See note 417 above.

Before starting to write a judgment, a Judge should have in his or her mind the decision and the reasons for arriving at it. The Judge should think through all the stages of the case relevant to arriving at the decision. This is what is referred to as the process of discovery. It is the process by which the Judge arrives in his or her mind at the conclusion of the case constituting the judgment. That involves considering the scope to the judgment, the prospective audience, and whether the judgment will be published. He or she should marshal the material facts, formulate the issues, identify the applicable rules of law, and determine the appropriate form of judicial relief. The procedure by which the conclusion is justified is referred to as the "process of justification."[420]

The fact that a Judge should have completed the process of discovery, and reached a conclusion, before starting to write, does not mean that he or she may not change his or her mind. A Judge may discover, in the process of writing that he or she cannot get where he or she wanted to go.

The point being made is that Judges, like all other good writers, must organise their thought before starting to write. What a Judge must never do is to write a judgment, even in draft form, before hearing the case because a judgment is a product of the determination which follows the hearing. A Judge must approach every case with an open mind. Approaching a case with a draft judgment is not only evidence of possible bias, it can be a ground for challenging the fairness of the decision of the court if discovered by the losing party. A judgment is, in fact, evidence that the writer was involved in the hearing proceedings, as it must address the questions raised during the proceedings and the answers given to those questions. It is, therefore, essential to the existence and validity of a judgment that the decision shall have been rendered in an action or proceedings before the court.

5. STARTING TO WRITE

Judgment writing is a process characterised by stages with different considerations. It has organisational, structural and stylistic techniques. Clear and logical organisation of a written judgment is very important. It helps the reader to understand the judgment. Headings and subheadings, or other means of disclosing the organisation to the reader, provide road signs for the reader. They also help to organise the writer's thoughts and test the logic of the judgment. There should be coherence in the judgment.

[420] R.A. Wasserstrom; "The Judicial Decision: Towards a Theory of Legal Justification" (1961) referred to in the "Judicial Writing Manual" p 9.

In an "*Address to the Canadian Institute for the Administration of Justice Seminar, on Judgment Writing: July 2, 1981*" Canadian CHIEF JUSTICE BRIAN DICKSON stressed the importance of organisation in judgment writing. Explaining the point that poor judgment writing is often a product of careless judicial thinking he said: -

> "Thoughts straggle across the printed page like a gaggle of geese, without form, without beginning or end, lacking in coherence, conciseness and convincingness."[421]

There is, of course, no one way of writing a judgment in a democracy with a free and vibrant judiciary. For us, the basic and broad requirements of a written judgment are not prescribed and formalised, as is the case with other jurisdictions where the structure of a judgment is indicated by statutory provision. Recognition of the fact that there are different ways to write a judgment is also a recognition of the fact that some ways are better than others. The point being made is that a sound judgment is the reflection of a logical process of reasoning, from premises through principles to conclusions. The framework in which that process takes place should be visible to the reader from the organisation of the judgment. That organisation will be a road map, enabling the reader to follow from the beginning to the end without being lost.

To Judges who face many choices about their judgments and how to write them, the organisational format suggested here is reflective of the elements of the process. Every legal argument can be distilled to the same simple structure of facts, the law (contract, regulation, precedent, section of a statute or Constitution) in the context of which they are viewed, and the conclusion (relief sought) they lead to.

The logic never varies. It is called "the universal logic of the law". The credibility of a judgment will depend on the ability of a Judge to convey the reasoning of the court in a form that reflects this universal logic of jurisprudence.[422]

6. **STRUCTURE**

A full-dress judgment should contain the following:

(1) An introduction;

(2) A statement of the issues;

---

[421] Address to the Canadian Institute for the Administration of Justice Seminar, on Judgment Writing: July 2, 1981.

[422] James C. Raymond Ph. D. (2002): "The Architecture of Argument: Seven Easy Steps to Effective Organisation". www.fja.gov.pk/judgment.htm

(3) A description of the material facts;

(4) A discussion of the legal principles;

(5) The application of the law to the facts; and

(6) The conclusion and the necessary orders.

6.1. *INTRODUCTION*

A Judge cannot be in a position to write an introduction of a judgment until he or she knows what it is that he or she is going to introduce. The purpose of an introduction is to orient the reader to the case. A good beginning makes the reader **want** to read more. The introduction and conclusion are possibly the only parts in a judgment where a Judge can count on the reader's attention. The introduction should state briefly what the case is about. The parties should be identified at this stage, preferably by proper names. Begin by giving a sketch of facts, telling a brief story of what happened to the party who brought the grievance to the court.

Relating the facts as they affect a party brings out the human significance of the case and avoids making the beginning read like an abstract problem.[423] Write in a manner that makes the reader see the human being with his or her problems and not the writing. All the reader needs in an opening paragraph is a generic description of who did what to whom – just enough detail to provide a context in which the issues will make sense.

It is at this stage that the issues to be determined can be set out unless they are so complex that they are better treated in a separate section. Every case is about issues. So issues should be stated at the beginning of the judgment. In fact, a perfect introduction provides two things: a synopsis of the facts and a brief statement of the questions (the issues) that the court needs to decide. The brief combination of facts and issues provides the context in which the analysis and the reasoning underpinning the judgment will make sense and be worth reading. By delineating the issues in a few lines, the Judge foreshadows the structure of the whole judgment.

Stating the issues effectively requires steering a course midway between too much detail and too little. Too much detail overwhelms the reader and predicts what follows in specificity not just in structure. The issues as stated at this stage should contain sufficient information to give the reader a glimpse of the grounds on which each side bases its case. The issues should, therefore, not provide too little by not

[423] James C. Raymond (2002) 33/46.

explaining what is at stake.[424]

The introduction should not contain too much reference to the sections of the statutes. It should be attractive to a layperson who just wants to know what the case is about.

The Judge may indicate the decision of the court at this stage, particularly if there is one issue to decide.

Giving a summary of the holding at the outset is important when regard is had to the fact that some of the audience for whom the judgment is written may not have the interest and time to go through the whole judgment. It saves time for researchers who would be able to decide immediately whether to read the rest of the judgment. Providing a summary holding at the introductory stage helps the Judge to state the decision precisely and succinctly.

6.2. ***STATEMENT OF ISSUES***

This is the cornerstone of the judgment. Every judgment has a factual or legal question it decides. How the issues are framed determines which facts are material. They form a context in which individual facts have meaning, as facts have no significance until they are placed in the context of an issue. It also determines which legal principles are to govern the resolution of the issues. A Judge should state the issues in the manner he or she considers material to the determination. He or she is not bound to adopt the issues as stated by the legal practitioners. Issues do not arise from the facts with a logical inevitability. Even when opposing legal practitioners agree on the issues, they can frame them differently to gain an advantage.

The fact that an issue has been stated by the legal practitioners does not mean that the Judge has to address it. The test is whether the resolution of the facts covered by the issue is material to the decision. A statement of issues should be brief.

Issues must be phrased with neutrality. They should not show bias toward any side. The issues should not contain too much detail. Too much detail overwhelms the reader. Issues should be raised in a logical order. Issues relating to service of process, *locus standi*, jurisdiction and prescription should be dealt with first.

[424] James C. Raymond (2002) 33/46.

6.3. *FACTS*

The most frequent cause of obscurity in judgment writing is haphazard organisation compounded by facts and allegations that have no bearing on any of the issues.

In a single–issue case, facts can be set out in one statement early in the judgment. Where there are a series of issues raised, the statement may be limited to stating common cause facts, leaving the specific decisional facts to be covered when the individual issues are discussed.

Some Judges have the habit of repeating what each witness said, before rounding out the narrative by declaring that they find witness so and so credible. This approach reveals the apparent fear of being accused of not having understood the evidence presented. There is also fear of being accused of having omitted material facts. The more fundamental fear is that of analysis. Quite often, Judges are unwilling to grapple with the problems of evaluating and assessing evidence,

and arguments presented by the parties, in accordance with the competent rules of analysis, to make findings of fact. A judgment should avoid repetition, especially with reference to the evidence of witnesses.

The proper way of dealing with the facts, in the writing of a judgment, is based on the presumption that the Judge has read the transcript of the evidence of witnesses, and understood the facts, together with their contradictory and corroborative effects.

A Judge who has fully comprehended the case will do the following: -

(a) He or she will set out, in chronological order, all the facts that are common cause. These facts do not show themselves up in every case. It is for the Judge to extract them from the case. The Judge should set out the common cause facts in a story-telling manner, covering the beginning, middle and end of the dispute. These are facts that cut across the stories of the parties in dispute such that, by stating them honestly and accurately, the Judge avoids the temptation of reciting verbatim the evidence given by each witness.

(b) Accurately stated, common cause facts tend to clear the mind to see the fact in issue. The Judge will then take each issue in turn. He or she analyses the evidence adduced on the facts in issue separately, and decides whether or not the facts have been proved or not. The rules of credibility and probability in the assessment of evidence are applied. In other words, the determination of facts also involves the problems of admissibility, cogency and effect of evidence.

Treating each issue separately enables the Judge to focus his or her analysis on

each one individually. It also enables the reader to move from one issue to the next with a sense of orderly progression.[425]

On each issue the Judge should state briefly what the plaintiff's position is, then state the defendant's position, and made a definite finding of the fact in issue.

A Judge should offer a clear explanation of findings of fact. Findings should never be recorded without the necessary discussion of evidence and reasons for the findings. It generally makes sense to begin with the position of the party with the burden of proof whether that party loses or wins. He or she must say why facts contained in some pieces of evidence are found to be the truth of what happened and not those allegations contained in other pieces of evidence. The expression of reasons for every decision made on the facts in issue is a demonstration that justice is done and that the Judge applied his or her mind to the evidence and arguments presented by the parties.

Appreciation of evidence is a cardinal principle of the administration of justice. The evidence must be evaluated and assessed logically on the basis of well-known and well-settled principles of analysis. When discussing the credibility of witnesses strong or superlative language and disparaging remarks should be avoided. The Judge should criticise a witness only to the extent it is necessary to decide the issues. Such criticism should be made in dignified language.[426] Once all the facts in issue have been determined, they may be briefly brought together and stated to complete the chronological order of the common cause facts.

Only the facts necessary to explain the decision should be included. Excessive factual detail may be distracting. Dates should be left out unless they are material to the decision or helpful to its understanding. A statement of facts must be full and fair to the extent it is necessary to the decision. Facts significant to the losing side should not be ignored. Above all, the statement of facts must be accurate. Judges cannot decide cases objectively if the facts are inaccurate. The Judge should not assume that the facts recited by a legal practitioner in the heads of argument are correctly stated. He or she must read the record. A judgment should be based on the evidence on record. It should not be based on matters within the personal knowledge of the Judge. It must be based on legal facts and not on suspicion.

6.4. ***DISCUSSION OF LEGAL PRINCIPLES***

Every court is established by law and is therefore a court of law. A court of law

[425] The Hon. Justice Roslyn Atkinson: "Judgment Writing" p 3.
[426] Mr. Justice Shafiur Rahman " JUDGMENT – WHAT AND HOW TO WRITE": 25/46 www.fja.gov.pk/judgment.htm

is given, by the statute establishing it, powers to determine disputes over rights the law gives to people in general, or to specific classes of people who enter into specific relationships. The court is then given powers to determine and enforce the prescriptions of the law. The power of a Judge is to decide, according to law, which is to be found in the Constitution or in the Statutes or in the doctrines laid down by his or her predecessors over the years.

The discussion of legal principles is the heart of the judgment. It must demonstrate that the court's conclusion is based on reason and logic. It should persuade the reader of the correctness of the result by the power of its reasoning. It is essential to the validity of a judgment that it be based on, and be in conformity with, recognised principles and fundamentals of law. Where the mode of exercising the powers conferred on the court is prescribed, the course pointed out must be substantially pursued otherwise the judgment is invalid.[427]

This part of the judgment will involve the question of which law governs the facts. It may involve the question of whether a court has jurisdiction or whether the cause of action has prescribed. It may also involve an inquiry into the question of the meaning of the law to be applied to the facts. In jurisprudence, only three arguments can occur: one about facts, the other two about the law -

1. The litigants may contest factual allegations;
2. Or they may claim that the other side has cited the wrong law;
3. Or they may concede that the other side has cited the right law but misinterpreted it.

Every case boils down to some combination of these three basic disputes. There are no others.[428]

What the Judge should bear in mind is that every law is a rule of some conduct or other consistent with the value system prescribed and envisioned by the society. It prohibits some specific conduct under threat of sanctions for disobedience whilst permitting other conduct. The description of the conduct prohibited or permitted by law is what is referred to as the essential elements of what is provided for.

Once the nature and scope of the conduct provided for by the law is determined, it becomes easy to determine whether the facts found proved constitute the prohibited or permitted conduct under the applicable law. In other words, the task of the Judge, at this stage of the judgment, is to find and declare the rule which is

[427] See note 426 above.
[428] James C. Raymond (2002) 27/46.

applicable to the facts. The manner of application of the judicial mind is the same as in discussing issues of fact. The important questions of law involved in the case must be stated and analysed, the contending rules compared and the correct rule selected. In other words, the points for determination are stated, the decision on them made and reasons for the decision given. In that way, the court is able to show that is conscientiously applied its mind to all the points in controversy. The following are some of the things to watch for in the discussion: -

6.5. ***STANDARD/GROUND***

Identify the standard contended for by the parties on which the decision is sought to be based, or if the proceeding is an appeal or review the grounds on which the decision of the court *a quo* or tribunal is sought to be impugned. For example, is the question one of lack of jurisdiction, one of failure to exercise jurisdiction, one of applicability of the law to the facts, or is it purely one of interpretation (finding the meaning of the law).

6.6. ***ORDER OF DISCUSSION***

The court is not bound to discuss the legal issues in the order they have been stated or presented by counsel. The order in which the issues are discussed should be dictated by the organisation of the judgment. Generally, dispositive or preliminary issues must be discussed first. Non-dispositive issues should not be discussed at all.

6.7. ***WHICH ISSUES TO ADDRESS***

A judgment should address the issues that need to be resolved to decide the case. If an issue has not been raised, but the court considers that it is dispositive of the case, the Judge should notify counsel and provide them with an opportunity to address on the issue. Issues not necessary to the decision but seriously urged by the losing party should be discussed only to the extent of showing that they have been considered.

6.8. *CASE CITATION*

Most points of law are adequately supported by citation of decisions on the point. There are some Judges who have the habit of quoting judgments by reproducing the headnotes of the law reports. These headnotes are sometimes misleading and do not convey what has been decided. Such quotations give the impression that the Judge has not taken the trouble to read the relevant portion of the authority. It must be said, though, that headnotes may explain the *ratio decidendi* of a case in clearer and more precise terms than one is able to extract from the judgment itself. If a headnote has to be used, the Judge should state that he or she is quoting from the headnote. When the matter is settled and the legal principle clear, citation of a string of cases on the point adds no value to the decision. A dissertation on the history of the rules only succeeds to create the impression that the Judge is showing off his or her erudition. If the judgment is breaking new ground, the Judge must marshal existing authority, analyse the evolution of the law in the area, and show how the extension of the existing principles supports the formulation of the new rule.[429]

6.9. *SECONDARY SOURCES*

Law review articles, texts and non-legal sources are not primary authority. They should be cited sparingly. Some authors are so well respected in their fields that in the absence of a case in point their word is persuasive.

6.10. *QUOTATION*

It is more effective to quote directly from a case to support a point than to paraphrase or cite. The impact of a quote on the reader is inversely proportional to its length. The shorter the quote the more effective is its impact on the reader. Quotes should be fair. They must be in context and accurately reflect the tenor of their source. If you trust your ability to paraphrase, go ahead and paraphrase the passage from the authority before passing it on as a quotation. If you think the reader trusts your ability to paraphrase, you need not quote.[430]

[429] Judicial Writing Manual, p 18.
[430] James C. Raymond (2002) 39/46.

6.11. *AVOID ADVOCACY*

In justifying a decision, a Judge is required to explain why the contrary arguments were rejected. In addressing this point the judgment should not be an argument against the legal practitioner whose views of the law are rejected.

A Judge should be able to reject the losing argument without being contentious. Put aside emotions and personal feelings. If necessary, avoid the use of adjectives and adverbs when discussing points of view of the law submitted by legal practitioners or the parties.

6.12. *TREATMENT OF THE COURT BELOW*

Appellate judgments should be able to correct a decision of the court or tribunal below without criticising the court or tribunal. The appellate judgment need not attack the wisdom or attitude of the court or tribunal below in order to reverse its decision. Humility is the mark of fairness and objectivity. Collegiality is a hallmark of civility and professionalism, qualities Judges must themselves possess and encourage in others.

6.13. *APPLICATION*

The purpose of discussing the legal principles would have been the finding of the applicable rule. The analysis would have been aimed at establishing the nature and scope of the acts which, under the rule, can be done as a matter of right or obligation.

Once the juristic facts or the legal facts have been ascertained from the meaning of the law, the next task for the Judge is to place the mirror of the juristic facts over the facts of the conduct found to have been committed by the party, the legality of whose conduct is impugned.

The test is whether or not the facts of the conduct found proved fall completely or partially within or outside the definition of the legal facts. The application of the law to the facts must be accompanied by close analysis, characteristic of the judicial mind, to arrive at the correct decision. Reasons for the decision must be given. The legal effects of the facts should flow from the application of the law to the facts. The legal effect of the facts would be that when the acts were committed they were or they were not in violation of the governing rule as it existed at the time. In

other words, this part of judgment writing contains the grounds of judgment which are the reasons on which the decision of the court is based.

It is clear that justice, the reasons for a decision and the writing process are closely linked. The application of legal principles to the facts produces interpretations of the law which would be applicable to solve disputes in cases based on similar sets of facts in future.

Those who apply the particular law in doing business or resolving disputes would be entitled to act in accordance with the ruling of the court in similar circumstances. Judges should therefore create narrow propositions that relate to the particular facts of the case. A definitive judgment helps legal practitioners to determine in similar cases in future whether they have a case or not, and whether they should advise their clients to settle rather than enter into litigation they are likely to lose. Nothing can be more frustrating to the legal profession and to the public than a high profile decision that is not supported by a clear and logical application of law to facts. The propositions should not be too narrow because an impression may be created that the Judge hurried the decision and the dispute will likely continue. Judges must also state workable rules – both theoretically correct and easy to apply.

7. CONCLUSION

The conclusion flows from the answer to the application of the law to the facts. The application procedure would have decided whether the conduct committed by the defendant was right or wrong. This part contains the enacting terms of the judgment by which the measures taken by the court are expressed. The enactment terms, which are the essential part of the judgment, must also be as precise as the grounds of the decision. When all is said and done, a well written judgment should reflect an orderly sequence of the treatment of the subject matter, driven by an engine of logic in which a result emerges from an application of law to fact. The goal of jurisprudence, which is to pluck the essential issues, the relevant facts and controlling laws from the maelstrom of arguments, allegations, precedents and principles, would have been achieved.[431] What is decided should be clearly and specifically stated.

If the plaintiff is successful, the decision would be that the defendant acted in violation of the plaintiff's rights, entitling the latter to the relief sought. If the plaintiff has not succeeded, the decision would be that the defendant did not act unlawfully, entitling him or her or it to dismissal of the action or claim. Either way,

[431] James C. Raymond (2002) 28/46.

a decision brings a case to an end. The judgment should be delivered within a reasonable time after the conclusion of the hearing. The court becomes *functus officio* after rendering judgment.

8. ORDERS

An order must specify in clear and concise language what the party against whom the order is made must do. It must be enforceable. An order must be drafted in precise terms, naming specifically the parties, their duties, the deadlines, the amounts of money, the interest rates to be paid.

An order must not be ambiguous. It must not leave the party at whom it is directed guessing as to what it requires. It must be clear for the enforcing court or the enforcement agents, without further discussion, what obligations the parties have to fulfill according to the decision of the court. Any vague formulation of an execution order could cause the parties to start a new dispute about the execution, and the contents of the order.

This requires a high degree of care. The Judge has to choose terms that accurately express the substance and intention of the order. A badly drafted order reflects confusion in the Judge's thinking process. It shows that he or she has not fully grasped the nature of the relief sought and its legal basis. It is important for the Judge to ensure that what is demanded in the draft order is not only specifically stated but also that it can properly be granted in the exercise of the court's jurisdiction.

If the proceeding before the court is an appeal, the order must reflect that. It must state whether the appeal succeeds or not with or without costs. The order of the court *a quo* must then be addressed. It must be set aside if the appeal is allowed. Regard must be had to the notice of appeal. If the notice of appeal states that only part of the judgment is appealed against, the order should not set aside the whole judgment. If a Judge does that he or she is granting an order nobody wants to have.

Once the whole or part of the judgment of the court *a quo* has been set aside it must be substituted with something. There cannot be a vacuum. It must not be substituted with the appellate court's judgment. It must be substituted with the order the lower court ought to have granted had it acted in accordance with the law.

9. LANGUAGE, STYLE AND SELF-EDITING

Every Judge has a style of writing judgments, whether he or she knows it or not. At the end of the day, it is how a Judge has written a judgment that decides whether there has been good judgment writing. Whilst accommodating the individualistic variations, there are rules of writing which guarantee good judgment writing. The corollary statement is that there are ways of writing that guarantee bad judgment writing. The idea is to do everything possible in improving your judgment writing style so that your writing does not fall into the bad judgment writing category.

10. CLARITY

The rule is not to start to write a judgment until you are clear in your mind about what you want to write and how you want to write. You must say what you want to say and nothing else. The word is no better than the thought from which it springs. If you start writing about something about which you have a vague idea, the chances are that the words chosen to express what you want to say will be vague. A judgment should not be ambiguous, resulting in every party thinking that it is in his or her or its favour.

Even complex ideas can be expressed in simple language understandable by the general reader. The Judge should understand the idea expressed fully. That enables him or her to break it into its essential components. It should not be necessary for the reader to have a dictionary at hand while reading the judgment.

The judgment must be free of technical jargon. Judgments are never written exclusively for lawyers who know the jargon so well that they hardly notice it. Non-lawyers are expected to understand and abide by the law. Archaic or opaque English or Latin expressions which have English equivalency should be avoided.[432] Where there is an English equivalent to a Latin phrase the Judge should use it. For example, use "among other things" instead of "*inter alia*". Use "Will" instead of "Testament".

Judges' thoughts should be conveyed to their readers in clear, ordinary language, not the language that lawyers use to dominate the less educated. For example, a lawyer is likely to use the words "prior to" instead of "before" or "earlier". Clear thinking is the key to clear writing. A clearly expressed judgment demonstrates interest in the subject matter and the exposition of legal reasoning. Legal writing has, of course, a few legitimate terms of art. These are words or phrases that either

[432] Chief Justice Beverly McLachlin: "Legal Writing: Some Tools" (2001) 39 *Alberta Law Review* 695.

cannot be easily translated or perhaps **should** not be translated because the original language triggers a doctrine that lawyers might not recognize by any other name (e.g. *habeas corpus*, *estoppel*).

11. CONCISENESS

Precision is the main concern of good writing. Some legal writers lack the ability to write simple, straightforward prose. Precision in judicial writing is important not simply as a matter of style but also because judicial officers write for posterity. Once a judgment is distributed or reported, legal practitioners and others will read it with an eye to how they can use it to serve their particular purpose no matter how remote that may be from what the writer had in mind.[433] It is well for judicial officers to think how the words they choose might be used by others and write to forestall their abuse.

You do not have to be as precise as JUDGE MURDOCH sitting in the US Tax Court. It is reputed that a taxpayer testified: "As God is my judge, I do not owe this tax". JUDGE MURDOCH replied: "He is not, I am; you do".[434]

Concision issues often result from lawyerisms. Lawyers love to repeat themselves.

Judges should not use words with overlapping meaning in the same sentence. For example, it is incorrect to write: "Brief summary", "could possibly", "rest residue" and "remainder" and "advance planning" and "null and void".

Judges should avoid sexist language because it degrades and obscures content. They should use "he or she". They should use gender neutral language like "husband and wife", not "man and wife". Gender-neutral language keeps readers focused on the content of the decision rather than on a discriminatory style.

In the book titled "*The Elements of Style 23*" (3 ed) (1979)[435] co-authored with E.B. White, Professor W. Strunk says:

> "Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short or that he avoid all detail and treat his subjects only in outline but that every word tell".[436]

[433] Judicial Writing Manual, p 21.
[434] Hon. Justice Roslyn Atkinson: "Judgment Writing."
[435] The Elements of Style 23" (3 ed) (1979) co-authored with E.B. White, Professor W. Strunk.
[436] The Elements of Style 23" (3 ed) (1979) co-authored with E.B. White, Professor W. Strunk.

12. BREVITY

Good judgment writing is not only concise. It is also succinct. The longer the judgment, the more mistakes, the less read and remembered. A judgment should not necessarily be lengthy, as long as it is intelligible and to the point. To be succinct is, however, not an excuse for leaving out full facts and principles of law. A judgment is succinct to the extent that it contains all that is necessary to a decision. If because of the complexity of the factual and legal issues a judgment has to cover more pages, it is not a long judgment in the sense of not being short. To be concise is to make every word count. It is, therefore, important to remember that while brevity is desirable, Judges should elaborate their reasoning sufficiently so that the reader can follow.

A judgment that omits steps in the reasoning essential to understanding its content will fail to serve its purposes. The point is that a Judge should avoid writing in such a manner that he or she gets entangled in syntax so knotty that he or she cannot understand it. The judgment should avoid metadiscourse.[437] Metadiscourse consists of announcing what the writer is going to write before he or she writes it. Examples are: "Having heard all the testimony, the court concludes that ...; "It is clear that ..."; "After careful consideration this court finds that ...". Metadiscourse takes up unnecessary space in the judgment.

Judicial writing should be direct. Short declaration sentences are preferable. Good judgment writing is characterised partly by absence of tangled sentence structure. Every word must count. The sentence length and structure may, however, be varied from time to time for emphasis and reader interest. A more accurate rule would be, "If you don't know how to write a good long sentence, stick to short ones."

Another concision technique is the use of the active voice rather than the passive. The active is usually more direct and forceful that the passive. In the active voice, the subject performs the action. In passive voice, the grammatical subject receives the action. It is incorrect to write "The Judge was contradicted by the lawyer". It should be: "The lawyer contradicted the Judge". "I shall always remember my first day as a Judge", should not be "My first day as a Judge will always be remembered by me."

Avoid overuse of adjectives and adverbs. They are verbose. Avoid "it" and "there" when used as dummy subjects where they stand in for words that might be the real subjects of the sentence. Instead of this: "It was submitted by counsel for the plaintiff that the extension was not qualified by the proviso", say: "Plaintiff's counsel

[437] The Hon. Gerald Lebovits: "Judgment Writing in Kenya and the Common-Law World" (2009). www.kenyalaw.org/kl/fileadmin

submitted that the extension was not qualified by the proviso". Adverbial excesses like "clearly" and "obviously" exaggerate. They are conclusory and raise the bar by requiring the court to explain why something is obvious rather why it is merely so.[438] They cover for lazy writing.

13. HUMOUR

The community relies on Judges to settle disputes in a fair manner. Parties take issues between them seriously. They are unlikely to see anything funny in the litigation. Litigants may interpret a joke in a record of judgment as a sign of judicial arrogance and lack of sensitivity. The reaction of litigants to humour in a judgment is always unpredictable. It is unfair, in any case, for a Judge to take advantage of the exercise of judicial power, which is retaliation proof, to indulge in humour at the expense of parties or their legal representatives or witnesses.

Judges should share the view of W Prossere in the "*Judicial Humorist*" 1952 that:

> *"… the bench is not an appropriate placed for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."*[439]

Considering the permanency of the record of a judgment, the unpredictability of the reaction of litigants to humour in judicial writing, the potential harm to the reputation of the subject of the humour, the difficulty of affording an adequate answer or correction and the attention given to the comment because of its humorous expression, humour is better kept out of judgment writing.

14. GRAMMAR AND PUNCTUATION

Grammar and punctuation are the invisible elements of style. Using proper grammar and punctuation shows professionalism and make writing easier to understand.[440] The rules of grammar and punctuation are often invoked in the determination of the meaning of clauses in contracts, provisions in statutes or precedents on the

[438] Judicial Writing Manual, p 22.
[439] The Hon. Justice Michael Kirby: "On The Writing of Judgments" (1990) 64 *Australian Law Journal* 691.
[440] The Hon. Gerald Lebovits: "Judgment Writing in Kenya and the Common-Law World" (2009).

presumption that the Legislature or Judge actually knew of the rules. What is set out here covers those situations that seem to be common problems in judgment writing.

14.1. *GRAMMAR*

14.1.1. **Pronouns**

Pronouns substitute for nouns. Examples include "he", "she", "it", "me", "our", "their", "us".

Pronouns may be reflective: "I said that to myself". They may also be intensive: "I myself said that". Reflexive and intensive pronouns only refer back to a pronoun.

When a judge is not sure whether to use "I" or "me" in a sentence, he or she should delete the first part and leave the part of the sentence beginning with "me". Example: "The lawyer and me discussed the issue". The Judge should delete: "the lawyer and". The part remaining is "me discussed the issue". This makes no sense. So the correct pronoun to use is "I". "I discussed the issue". The sentence should therefore be: "The lawyer and I discussed the issue".

Pronouns should agree with their antecedents in gender, person and number. Example: "John (singular antecedent) brought a case against his (singular, male pronoun) landlord." "John and Jane (plural antecedents) brought a case against their (plural pronoun) landlord."

Indefinite pronouns do not refer to a specific person or thing. Examples include "all", "everybody", "each", "someone". These indefinite pronouns are singular. Incorrect: "Someone submitted their brief". Correct: "Someone submitted his brief". To eliminate sexist language write: "Someone submitted the brief". Some indefinite pronouns can be plural. Incorrect: "All Judges hears arguments". Correct: "All Judges hear arguments".

14.2. *MODIFIERS*

A modifier is a word such as an adjective or adverb that qualifies the sense of another word. A modifier is misplaced if it seems to describe the wrong word. When a modifier is misplaced, it can change the meaning of the sentence.

Examples:

"The Constable, based on previous experience with the defendant, felt it best to contain him in the vehicle". (WRONG). "Based on the foregoing testimony the Judge finds that the defendant intentionally concealed the dagga". (WRONG). The words beginning with based qualify "Constable" in the first sentence and "the Judge" in the second. These sentences suggest that the Constable and the Judge were themselves somehow based on what they observed. The phrases are intended to qualify the feeling the Constable had and the finding the Judge made. They should follow the word felt in the first sentence and find in the second.

"He wrote notes for the Judge on a legal pad". The phrase "on a legal pad" is misplaced to qualify the word "Judge". The writer is not trying to say; "The Judge is on a legal pad". **Correct**: "He wrote notes on a legal pad for the Judge". The phrase "on a legal pad" is meant to qualify the word "notes".

Squinting modifiers cause confusion. They may qualify a preceding or following word. Squinting modifier problems often arise with adverbs, which modify a verb, adjective or another adverb. Examples include "slowly", "badly", "already", "often", "only", "too", "where", "almost". The solution is to place the adverb next to the word it modifies.

Example:

Incorrect: "He almost argued all his points". **Correct:** "He argued almost all his points".

A dangling modifier is one in a sentence from which a noun or pronoun to which the phrase refers is missing or is in the wrong places. This can occur at the beginning or end of a sentence.

Example:

Incorrect: "After editing for two hours, the judgment was finished".

This sentence suggests that the judgment was editing for two hours. The pronoun that is missing is "I". **Correct**: "After I edited the judgment for two hours, the judgment was finished".

14.3. ***AGREEMENT***

The Judge should make sure that subjects and verbs agree even if they are separated in a sentence by intervening words.

Example:

Incorrect: "The limits of police powers to stop a vehicle on a road are not entirely clear and has been debated for some time".

The subject is limits and the verb is has been.

Correct: "The limits of police powers to stop a vehicle on a road are not entirely clear and have been debated for some time".

Incorrect: "The length of the papers are important".

The subject is length, not papers.

Correct: "The length of the papers is important.

When a judge is using "neither … nor", "either … or", or "not only … but also", the verb must agree with its nearest subject.

Example:

Incorrect: "Neither the lawyer nor his client was in court".

The nearest subject to the verb is "client" not lawyer.

Correct: "Neither the lawyer nor his client were in court".

14.4. ***PARALLELISM***

For a sentence, especially one with a list, to be parallel, nouns should match nouns, verbs should match verbs, and so on.

Example:

Incorrect: "The Judge called for the lawyer, litigants and for the Registrar of the Court".

The use of the word "for" breaks the matching of the nouns.

Correct: "The Judge called for the lawyer, litigants and the Registrar of the Court".

Parallel coordinates should form matching pairs.

Examples are "although/yet", "both/and", "neither/nor", "not only/but also".

Example:

Incorrect: "The lawyer was neither on time or prepared".

Correct: "The lawyer was neither on time nor prepared".

14.5. *RUN-ON-SENTENCES*

Run-on sentences are ungrammatical and hard to read. There are three types of run-on-sentences:

The first forms when a conjunctive adverb separates two clauses and when a semicolon or full stop does not precede the adverb.

Example:

Incorrect: "The Judge liked the style of the brief, on the other hand, he did not like the content".

Correct: "The Judge liked the style of the brief; on the other hand, he did not like the content" or "The judge liked the style of the brief. On the other hand, he did not like the content".

The second type of run-on sentence forms when no punctuation separates two clauses.

Example:

Incorrect: "I read the judgment I should understand the case".

Correct: "I read the judgment. I should understand the case" or "I read the judgment; I should understand the case" or "I read the judgment. Therefore, I should understand the case" or "I read the judgment; therefore, I should understand the case".

The third type of run-on sentence forms when a comma splices two independent clauses.

Example:

Incorrect: "I read the opinion, I should understand the case".

Correct: "I read the opinion. I should understand the case".

"THAT" versus "WHICH"

"That" is a demonstrative pronoun. ("That paper"). "That" introduces a restrictive clause. A restrictive clause is necessary to the sentence's meaning.

Example:

"The document "that" proved innocence was missing. Remove "that", the sentence loses its meaning.

"Which" is an interrogative pronoun ("which paper"). "Which" introduces a nonrestrictive clause. A nonrestrictive clause is not necessary to the sentence's meaning. "Which" is used to define, add to, or limit information. "Which" is usually set off with a comma. When a judge cannot put a comma before a "which" he or she probably should have written "that".

Example:

"The agreement satisfied all claims, which either party might have against the other under the Matrimonial Causes Act" (WRONG).

The comma cannot be put before "which" in this sentence. So, "that" should have been written.

"Which" is normally used to insert non-essential information into a sentence. That is why "which" clauses are normally set off by parenthetical commas.

Use "which" if you can drop the clause without losing the meaning of the sentence.

Example:

"The document, which was printed on white paper, was missing". If you delete "which was printed on white paper" the sentence's meaning remains intact.

14.6. *ELLIPSIS DOTS*

A judge should not put ellipsis dots at the beginning of quoted material.

Example:

"According to the police officer's report, the defendant's motor vehicle" … would

have been travelling at 80k/hr" (WRONG)

The ellipsis dots are unnecessary because the initial lower case "w" in "would" indicates that words have been omitted at the beginning of the quoted sentence.

14.7. *POSSESSIVES BEFORE GERUNDS*

A gerund is the "… ing" form of a verb used as a noun. It is different from a present participle, which is the "… ing" form of a verb used as an adjective or part of a compound verb.

Example:

Incorrect: "This agreement was conditional upon the plaintiff securing suitable premises in First Street, Harare". (WRONG)

Constable John remained on the property despite the defendant telling him to leave (WRONG).

Correct: This agreement was conditional upon the plaintiff's securing suitable premises in First Street, Harare".

Constable John remained on the property despite the defendant's telling him to leave.

14.8. *INFINITIVES*

A Judge should not split infinitives. An infinitive is the form of a verb preceded by "to" e.g. "to file", "to argue", "to grant", "to deny" etc.

Example:

Incorrect: "Was there a lawful basis to initially search the defendant's residence?" (WRONG)

Correct: "Was there a lawful basis to search the defendant's residence?"

Infinitives consist of one word. They are impossible to split.

14.9. *ENDING SENTENCES WITH PREPOSITIONS*

Do not end sentences with prepositions. Prepositions are words that show relationships including relationships in time, space or agency: e.g. "by", "before",

"on", "upon" etc. Prepositions are a group of words that just do not make any sense unless they have a noun after them. That is why these words are called "pre-positions". They must have another word after them.

15. PUNCTUATION

15.1. *FULL STOPS*

Do not use full stops for degrees or metric abbreviations.

Examples:

"cm" for "centimeter" and "c" for "centigrade".

Do not use full stops for acronyms.

Examples:

"NATO" stands for "North Atlantic Treaty Organisation". SADC stands for "Southern African Development Community".

Use full stops for abbreviations, which are different from acronyms. When using abbreviations, you pronounce each individual letter.

Examples:

U.S.A., A.U.

15.2. *COLONS*

Colons push readers forward. Use a colon after a formal solution.

Example:

"Dear Mr Smith".

Use a comma for an informal salutation.

Example:

"Dear John,"

Use a colon to tell time.

Example:

12:00 p.m.

Use a colon to separate book titles from subtitles.

Use a colon to introduce a definition.

Example:

"colon: a sign used in a sentence".

Use a colon after an independent clause to introduce a list or quotation or to show that something will follow.

Example:

"The court considered three factors: injury, causation, and redressability".

If there is no independent clause appearing before the list no colon is needed.

Example:

"The factors the court considered were injury, causation, and redressability".

15.2. *SEMICOLONS*

Semicolons have the opposite function to colons. They slow readers down.

Use a semicolon to avoid run-on sentences.

Use a semicolon to separate independent clauses if the second independent clause starts with a conjunctive verb e.g. "accordingly", "also", "furthermore", "however", "on the other hand".

Use a semicolon in a list with internal commas or an "and" or "or".

Example:

"On the first day of trial, please bring the original bills and receipts; copies of time cards and stubs; and pictures of the house and yard".

Use a semicolon to replace commas and conjunctions.

Example:

"The client asked the lawyer to listen, but the lawyer was busy".

Becomes: "The client asked the lawyer to listen; the lawyer was busy".

15.3. *COMMAS*

Do not use commas unless you need them. This rule presumes that the Judge knows where he or she needs commas. Commas are another way to slow down readers. Adding a comma creates a pause.

Use a comma to separate dates and parts of addresses.

Examples:

"The court date is Monday, October 12, 2009". "Send inquiries to Mr James P.O. Box CY 870, Causeway, Harare, Zimbabwe."

Use a comma before a title. Example: "John Doe, Esq.".

Use a comma to separate digits.

Example:

100,000

Use a comma to set off interruptive phrases or transitions. These are phrases tucked within a sentence.

Examples:

"The accused, who had twice escaped from custody, was escorted into the court with chains on his hands and feet".

"The legal practitioner tried, for example, to raise a question".

Use a comma after an introductory word or clause.

Examples:

"Fortunately, it was time to begin".

"Although her argument was strong, she lost the case".

Use a comma to set off a tag question.

Example:

"He understood the question, did he not?"

Use a comma to separate coordinate adjectives.

Example:

"She was a smart, hardworking legal practitioner".

Use a comma to separate independent clauses joined by "and", "or", "but".

Use a comma before the coordinating conjunction.

Example:

"He worked hard and he won the case".

"The accident happened in Bulawayo, but the suit was filed in Harare".

Use a comma to enclose appositives. Appositives are nouns or pronouns that rename or explain the nouns or pronouns that follow.

Example:

"Joe, the plaintiff, argued that Anne, the defendant, caused the accident".

Use a comma to separate a series of three or more words or phrases.

Example:

"The legal practitioner represented John, Joe, and Jane".

Use a comma to set off nonrestrictive clauses, clauses unessential to the sentence's meaning.

Example:

"The photographs, which were black and white, showed evidence at the crime scene".

Use a comma before "because" only when a sentence is long.

Example:

"The legal practitioner wanted to end the case before lunch, because he knew that he needed to be back at the office for a meeting".

Put commas around clauses beginning with "which".

Example:

"The report, which was filed at this hearing, indicated a value of $13 000".

One comma is enough if the "which" clause occurs at the end of a sentence.

Example:

"The wife signed the agreement, which was then signed by the husband".

When you cannot put a comma before a "which", you probably should have written that".

16. EDITING AND PROOFREADING

Judges should critically edit what they have written. Editing what one has written is not an easy task. Writers reading their own works are prone to read what they meant to write rather than what they actually wrote.[441]

It is important for Judges to strive to be objective about their writing. They should be prepared to read every paragraph carefully instead of sliding over the text because it is familiar. A judge editing his or her work should ask these questions:

Have I said precisely what I intended to say?

Is there a better way to say it?

Does thought flow clearly and logically?

Will the reader understand it?

In revising and editing his or her work the Judge seeks to ensure that the final product meets the requirements of all the rules of good judgment writing.

Editing is the essence of the revision process. It involves striking out needless words and unnecessary facts, rewriting unclear and sloppy sentences, eliminating repetition, reorganizing and making the reasoning clearer, sharper and tighter.

Editing addresses large issues like content. It assures readability. It also enables the Judge to identify areas in which he or she can improve coherence to ensure that each part of the judgment fulfills its intended purpose. In that sense the Judge should check for internal consistency. He or she should go back to the introduction to see whether the judgment has addressed all the issues and answered the questions as they were initially formulated.

The Judge should re-read the statement of facts to see whether it covers all the facts found significant to the decision. He or she should review the discussion of legal principles to see whether the judgment has addressed, in logical order, the issues that needed to be addressed. He or she should consider whether the conclusion follows logically from the discussion.

The revision process continues with proofreading. Proofreading involves correcting typographical errors, grammar, and format, whilst double checking citations and quotations. Sometimes it is easier to divide proofreading into stages: first grammar,

[441] Judicial Writing Manual, p 24.

then spelling, then formatting, then cite-checking.[442]

Revision requires patience. Judges revise their work for the only one who counts: the reader. The revision and editing processes may take a Judge through many drafts before a polished judgment emerges. It may even be necessary to put the draft aside for a few hours or even a few days and return to it with a fresh state of mind. The Judge should, however, let too much time pass lest he or she become lazy and forgetful.

The pride Judges take in their written work should encourage self-evaluation. Professor Robert Leftar in an article entitled "*Some Observations Concerning Judicial Opinions*" 61 Columbia Law Review 810 (1961 at 813 states:

> "Pride of authorship is by no means an unmitigated evil. … This can drive a man to hard work and with meticulous effort. The poorest opinions are apt to be written by Judges who take no pride in them, who regard the preparation of them as mere chores. Pride in work well done is a proper incident of good craftsmanship in any field of work, including law. An opinion in which the author takes no pride is not likely to be much good".

17. **CONCLUSION**

Judgments are a fundamental form of communication between the courts and the public and judgment writing is an indispensable skill to all Judges, which skill must be thoroughly mastered and continuously refined. Judgment writing involves adopting and using a logic and clear communication. Equally important in judgment writing, is the need to revise and proof read every judgment to ensure that the end results carries the pride of the author. The pride Judges take in their written work should encourage self-evaluation.

[442] The Hon. Gerald Lebovits: "Judgment Writing in Kenya and the Common-Law World" 2009.

ORGANISING YOUR COURT ROLL[443]

HONOURABLE ANTONIA GUVAVA
Judge of the Supreme Court of Zimbabwe

ABSTRACT

It is an indispensable requirement of judicial office that Judges should have sufficient jurisprudence to competently and correctly apply legal rules and procedures to the different facts and circumstances that characterise their judicial function. Additionally, there should be no doubt about the judicial officer's personal or professional ethics. Moral rectitude is an intrinsic element of judicial office. Being organised means being able to focus on specific and identified tasks so that one can become more efficient and effective in their roles and responsibilities. This means that one must have clarity of their tasks, which ones are urgent and which ones are important or a combination of both and thus schedule them accordingly. Such an approach makes it easier to achieve set targets and deadlines. The aim of this paper is ensure that Judges develop the skills in the areas of planning, organising, managing people, decision making and problem solving.

1. INTRODUCTION

The High Court is a superior court with original jurisdiction over all civil and criminal matters throughout Zimbabwe.[444] It also has inherent powers to protect and regulate its own processes.[445] Previously, it was constituted as a general division, divided into four administrative divisions namely Criminal, Civil, Family Law and Appeals. Section 171 (3) of the Constitution[446] made provision for the formalisation of these divisions through an Act of Parliament. The Act of Parliament, The Judicial Laws

[443] A paper presented at the Judicial Orientation of newly appointed High Court Judges held at A' Zambezi Hotel, Victoria Falls in November 2021.
[444] The High Court consists of the Chief Justice, Deputy Chief Justice, the Judge President of the High Court and such other judges as many be appointed from time to time.
[445] See sections 170, 171 and 176 of the Constitution of Zimbabwe, 2013.
[446] Section 171 (3) of the Constitution of Zimbabwe, 2013.

Amendment(Ease of Setting Commercial and Other Disputes)[447] was promulgated on 27 June 2017. It amended the High Court Act [*Chapter 7:06*] by inserting section46A[448] which makes provision of the creation of specialised divisions of the High Court.

We have created the following Divisions: -

1. Criminal Division;
2. Civil Division;
3. Family Court Division;
4. Electoral Court Division;
5. Fiscal Court Division;
6. Income Tax Appeals Court Division;
7. Intellectual Property Division;
8. Commercial Court Division;[449]and
9. Anti-Corruption Court.

The judiciary plays an important role in our society and it is important that it functions effectively. For this to occur, judicial officers must work efficiently. This paper will cover some aspects which are considered as essential to the efficient and effective functioning of a judicial officer.

2. JUDGESHIP

The Constitution of Zimbabwe, 2013 and the Judicial Code of Ethics contain some of the aspects of proper judicial temperance. It is pertinent that the below mentioned qualities be demonstrated consistently to all court stakeholders interacting with a judicial officer. A good judicial officer must be:

- dedicated to the pursuit of justice;
- diligent, disciplined and organised in his or her approach of work;
- fair and completely impartial when hearing cases;
- dignified, neat and tidy in his or her appearance;
- patient and polite but able to command respect and to exercise firm control over the proceedings either in the courtroom or in chambers;
- attentive and observant when listening to evidence;
- logical and able to use common sense in reasoning out a case and arriving

[447] Judicial Laws Amendment (Ease of Setting Commercial and Other Disputes) Act No.7 of 2017.
[448] Section 46A of the High Court Act [*Chapter 7:06*].
[449] In terms of Government Notice 645 of 2017 which, was gazetted on 27 October 2017, the Commercial Court Division was created.

at a judgement;

- able to make up his or her mind and reach decisions; and
- have some sense of humour.

A bad judicial officer, on the other hand, will have at least some of the following characteristics: -

> *"He or she will be lazy, badly disciplined, disorganised, sloppy in appearance, impatient and ill-tempered, partisan in favour of the prosecution and against accused , undignified, too weak to exert control over the proceedings, confused and illogical in his or her reasoning processes, indecisive and unable to make his or her mind to arrive at decisions."*[450]

Good judicial officers must also have excellent time management; namely, the ability to efficiently utilise one's time and to effectively manage one's workload. This is mainly important when it comes to court work. Court work is categorised as follows: -

CRIMINAL		CIVIL	
(i)	Criminal Trials	(i)	Civil trials
(ii)	Bails	(ii)	Opposed motions
(iii)	Referral sentences	(iii)	Unopposed motions
(iv)	Appeals	(iv)	Appeals

3. GENERAL PRINCIPLES

3.1. *PREPARATION*

This is a common principle applicable to all types of court work and it forms a key ingredient in the work of a Judge. Judge Kudya detailed the elements of a prepared judge,[451] where he stated that:

> *"In executing his duties, a Judge should always have adequate knowledge of the matters before him or her. This will assist a Judge to take full control of the matters before him, the pace of the proceedings and curtail unnecessary postponements. Preparation also involves research and consultation with fellow Judges. It must be emphasised that consulting other Judges does not take away the decision making from you. It only assists in coming up with an informed decision."*

[450] This has been elaborated in Prof G. Feltoe Judges' Handbook for Criminal Cases 1st Ed (2009).
[451] Judge Kudya presented on a paper on the 5th of April 2019, wherein he discussed the essential elements of a prepared judge.

Being prepared might entail having a meeting with the counsel and the golden rule is that never meet counsel for one side in the absence of the other.

3.2. *TIME MANAGEMENT*

Judges have to divide their time between court and chamber work. Chamber work is done during those periods when a Judge is not in court.

3.3. *COURT HOURS*

All trial courts, civil and criminal start at **1000 hours** save where a Judge, with the consent of the parties, directs otherwise. Ideally, opposed motions are set down at **0900 hours**. Due to shortage of courtrooms, Judges might have to set their matters down at different times, depending on the availability of courtrooms.

(i) ***Unopposed Motion Court***
It starts at 1000 hours.

(ii) ***Bail Court***
It starts at 0900 hours. In Bulawayo bails are dealt with in chambers at such times as the judge/registrar may determine.

(iii) ***Appeals Court***
It starts at 1000 hours

(iv) **Referrals for sentence** start at 1000 hours.

A Judge must organise his or her work around the institutional framework. However, because of the inflow of work, judges will invariably have to work after hours, during weekends, public holidays and during vacation. Unless a Judge is able to effectively manage his or her time, no meaningful progress can be made towards achieving the intended goal of achieving efficient justice delivery.

3.4. *CRIMINAL TRIALS*

A Judge presiding over criminal trials ought to have inter alia:

(i) The Criminal Procedure and **Evidence** Act [*Chapter 9:07*];
(ii) Criminal Procedure in Zimbabwe by Reid Rowland;
(iii) Judges' Handbook for Criminal Cases by Prof G. Feltoe;
(iv) The Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

It is imperative that a Judge reads the record before the trial to familiarise himself or herself with the case and issues of fact and law that may arise. One should

ascertain whether the accused has been indicted and witnesses subpoenaed. One must then read the charge sheet, summary of case and the defence outline. Where no defence outline has been filed, the Judge must give directions regarding the filing of the defence outline.

Judges must also ensure the availability of the assessors for the duration of the trial. A criminal trial will not take off in the absence of assessors.

Where it is prudent to meet counsel for the state and the defence, the Judge should arrange for such a meeting. This will give one an idea of how the parties intend to proceed with the trial, anticipate sticking points and areas of convergence/ divergence. You may also give directions or guidance at that stage.

Before commencement of trial, a Judge should be knowledgeable about the criminal procedure and the substantive law applicable in the matters before him or her. He must familiarise oneself, in advance, on the authorities on any point of law. This will assist in being able to deal with preliminary points and objections without the need to adjourn. This will also result in one making an informed decision at the end of the trial without delay.

At the end of the trial, you must consult with the assessors and agree on the facts before you deliver judgment. One should familiarise oneself with the legal principles such as the law on the question of intent and the defences available.

3.5. *BAIL APPLICATIONS*

Bails come in four forms:

(i) An application for bail arising from a scheduled offence that commences in the High Court;
(ii) An application for bail pending appeal;
(iii) An appeal against denial of bail by a magistrate; and
(iv) An application for bail based on changed circumstances.

The Judge dealing with bails must get the files a day before, familiarise himself or herself and, appreciate the nature of the case before him or her and be alive to the dictates of Bail Rules. The Judge must understand the relief sought and know the applicable legal principles. He or she must be in a position to deliver his or her decision at the end of the hearing unless it is a complicated case. By their very nature, bails must be dealt with expeditiously as they involve the liberty of the

applicants.

In respect of applications for bail pending appeal and appeal against the denial of bail by a magistrate, the Judge must read the entire record of proceedings, as in determining whether or not to grant bail, the judge must assess the prospects of success on appeal.

The Judge must ensure that the prosecution files responses timeously. There might be need to place the prosecution on terms to avoid unnecessary postponements which prejudice the applicant's rights.

3.6. *SENTENCES REFERRED IN TERMS OF SECTION 54(2) OF THE MAGISTRATES COURT ACT*

These are matters in terms of section 54 (2) of the Magistrate Court Act.[452] In instances where a magistrate is of the opinion that the likely sentence is in excess of his or her jurisdiction, he therefore refers the matter to the High Court for sentence. These days such matters rarely come. Such matters are heard in court by the Judge dealing with the unopposed roll for that week. Traditionally, they are set down on a Friday at 1000 hours. The Judge is given the file well in advance. He or she must familiarise himself or herself with the facts of the matter, the case law on sentencing and the positions of the Criminal Procedure and Evidence Act [*Chapter 9;07*][453] regarding the appropriate sentences. The Judge can also consult other Judges regarding the appropriate sentence. The tearoom is the best place to consult.

4. CRIMINAL APPEALS

These are determined by two or more Judges. They are essentially an assessment of the correctness of the conviction and the sentence by the lower court. The Judges are given the files well in advance of the hearing date. At that stage they must apportion the files amongst themselves for purposes of writing the judgment. The tradition is that the one who sets the original record writes the judgment. They must read the entire record, which can be bulky. Before the hearing, preferably a day before, the two Judges must meet and discuss the files, the case law and any other relevant information.

Preparation for the appeals assist in the speedy resolution of the matters. One will be in a position to ask meaningful questions and refer counsel to relevant case law

[452] Section 54 (2) of the Magistrate Court Act [*Chapter 7:10*].
[453] Criminal Procedure and Evidence Act [*Chapter 9:07*].

for or against any points raised in the Heads of Argument. Where the bench is well prepared it might result it concessions and/or withdrawal of cases. The court may also be in a position to deliver *extempore* judgments.

5. CIVIL TRIALS (CONTINUOUS CIVIL ROLL)

Judges are allocated dates for hearing civil trials through the duty roaster. Files are then allocated to a Judge.

5.1. *SET DOWN*

i. Before the matters are set down, it is desirable for the Judge to read all the files first. One might be able to pick out any issues that might need to be attended to. A judge can then decide whether to use the Pre-Trial Consultation procedure to deal with such issues or not.

ii. Matters should be set down in advance, generally, in the order in which they were received. Ideally, a period of at least **4 weeks** ought to be allowed between notification and the trial date.

iii. Currently, Judges are allocated **5 weeks** to deal with trials. Thereafter they are given a period of **3 weeks** in chambers to complete outstanding matters and write judgments.

iv. When the trial date approaches, the clerk should check the returns of service so as to ascertain which cases, listed for hearing, are likely to commence.

6. COURT PREPARATION

As with criminal trials, thorough reading of the record is required so that one may acquaint himself with the issues and the law. The current position is that the pleadings are bound together in the sequence in which they were filed for the convenience of the court and the litigants.

The Judge must read the relevant statutes, and authorities that have a bearing on the matter. He or she must also check whether the papers comply with Rules of Court.

7. IN COURT

You commence by calling each of the cases listed on the roll to enable you to

arrange your roll. In doing so you determine:

i) the availability of the legal practitioners and the parties;

ii) the availability of the witnesses; and

iii) problems / difficulties with the commencement and finalisation of each of the cases enrolled.

The Judge then advises the legal practitioners of the order in which it is proposed to hear each of the cases. This approach minimises inconveniences to the legal practitioners and their clients. Those whose matters are to be heard later can be excused.

The successful conclusion of any trial depends *inter alia* on the preparedness of the Judge. One must appreciate and anticipate procedural, factual and legal issues to be determined. This will make one better placed to direct the proceedings. The Judge must avoid unnecessary postponements. Judges must be firm but respectful to all persons appearing before them and ensure punctuality of legal practitioners. The Judge must keep the PTC minute on hand during the course of the trial and refer to it now and then. As the trial progresses, a Judge can summarise the evidence at the end of each hearing. One can also read around the authorities on the subject matter. The result is that, depending on the complexity of the matter, a Judge can be able to deliver judgment expeditiously.

A judge can consult other Judges as the trial progresses if he or she encounters any challenges.

8. OPPOSED MOTION

As with civil trials, Judges are allocated dates for hearing opposed matters on the duty roaster. A Judge is then allocated files to set down on those dates. It is advisable to read the files before they are set down to check on issues such as returns of service and heads of argument. Allow a period of 2 weeks between the date of set down and the date of hearing.

9. COURT PREPARATION

(i) Read the entire file carefully in advance and acquaint oneself with the facts and the law applicable. If there are reference files, call for them and read them as well. Make a summary of facts and a commentary of the legal issues to be determined;

(ii) Check the appropriateness of the orders sought;
(iii) Check whether the High Court Rules have been complied with as regards time limits and other procedural matters; and
(iv) You may prepare a draft judgement.

10. IN COURT

Each of the matters set down should be called in accordance with the roll except in circumstances where there is a senior Advocate in court. The established tradition is that you start with such matters.

In most of the opposed matters, the issues are narrow. One should be able to formulate a judgement and to deliver same except in complex cases. Avoid allowing unnecessary postponements. Bear in mind that once a matter is allocated to you it is yours until you finalise it.

11. UNOPPOSED MOTIONS

There are three characteristics of the motion roll.

(1) Most of the matters are unopposed except for provisional sentences.
(2) There are, invariably, large numbers of cases. On average they range between **60-80** for the General Division and **30-40** for the Family Law Division matters on the roll each week.
(3) There is a large number of legal practitioners in attendance, listening and watching how you handle the roll.

A Judge receives his or her files on a Thursday or Friday for the General Division unopposed roll and Family law motion court, respectively. One must read each file in advance checking, *inter alia:*

(i) Compliance with the rules;
(ii) Cause of action;
(iii) Service of process;
(iv) The *dies inducie;*
(v) Terms of the order sought.

It is important that a Judge checks the terms of the draft order, for once granted, such orders, become orders of the High Court. Each Judge must have a copy of Draft Orders handbook compiled by the Rules Committee.

11.1. *IN COURT*

The matters are called out in accordance with the court roll. They will be categorised into: -

(i) Handing down of judgement;
(ii) Registration of legal practitioners;
(iii) Provisional orders;
(iv) Provisional sentences;
(v) Civil Imprisonment;
(vi) Default judgements; and
(vii) Court applications.

If the papers are in order the order that is being sought can be granted. If not, it is permissible for the Judge to raise the query or queries with the legal practitioner or self- actor concerned. It is advisable to record the query on the file cover so that the next judge will appreciate what happened in court previously.

12. CIVIL APPEALS

They are done by two or more judges. The approach in civil appeals closely mirrors that in criminal appeals. A judge who thoroughly prepares understands the real issues for determination, controls the proceedings, engages counsel into making proper concessions and directs counsel to real issues. Such a Judge will be able to deliver judgement immediately either *extempore* or written when all facts and the law are still fresh in his or her mind.

13. CHAMBER WORK

It also falls under the two main categories i.e. Civil and Criminal: -

	CIVIL DIVISION		CRIMINAL DIVISION
i.	Urgent Chamber applications.	i.	Criminal reviews.
ii.	Ordinary Chamber applications.	ii.	Chamber applications for condonation.
iii.	Pre-Trial Conferences.	iii.	Judgment writing.
iv.	Judgment writing.	iv.	Bail applications.

14. URGENT CHAMBER APPLICATIONS

These are matters where if the court fails to act, an applicant will suffer irreversible harm. Such matters are allocated by the Judge President on a rotational basis. Upon receipt of such a matter, a Judge 'must drop everything'. Read the file to determine whether the matter is indeed urgent. If it is not urgent, direct that it joins the queue on the ordinary roll. If it is urgent, the Judge immediately instructs the registrar to set the matter down at the earliest available opportunity but in any case, within one or two days of receipt of the file. One must make provision for time for service and preparation for hearing.

In complicated matters you give the parties directions to file the necessary papers including Heads of Argument. The matter must still be heard within the time frames indicated above.

After hearing the parties, you can simply issue an order or do an *extempore* judgment indicating that written reasons would follow.

Avoid granting *ex parte* applications unless there are compelling circumstances justifying so. Hear both parties first, *audi alteram partem*. Like in all other matters familiarise yourself with the authorities and guidelines as to when a matter may be considered urgent.

15. ORDINARY CHAMBER APPLICATIONS

Currently a Judge receives chamber applications every week. These are mainly default judgments and are generally straightforward. It is advisable to peruse them as soon as they are placed in your tray. Those that you can grant do so immediately. Where you need to read, research further or consult set them aside but strive to ensure that they leave your chambers before the end of the week. Check *inter alia* whether the cause of action is available at law, that the *dies induciae* has expired and the order must be one that may, at law, be granted.

16. PRE-TRIAL CONFERENCES

The purpose is to curtail trial proceedings. These are subject of another presentation at this induction programme. I will not pre-empt that presentation save to say that you set the matters down to suit your main duties.

17. CHAMBER APPLICATION FOR CONDONATION

There are applications where the applicant is seeking for condonation for late noting of an appeal, or re-instatement of an appeal. Ensure that the respondent was served with the process. You might require the National Prosecuting Authority (NPA) to file papers depending on the complexity of the matter.

Deal with the matters expeditiously as they are interlocutory. If a Judge delays in dealing with the matter then determination of the main matter will also be delayed. Once again familiarise yourself on the principles of law and procedure applicable in such matters.

18. CONCLUSION

As has been demonstrated above, there is a huge workload that passes through a Judge's desk. A Judge has no control over the amount and the manner of work that comes his or her way. As set out in this resentation there is no substitute for hard work, adequate preparation and proper panning. A Judge must therefore formulate a way to manage the caseload. It is hoped that this presentation will assist the Judges to effectively manage their workload.