REPORTABLE (8)

(1) INNOCENT GONESE (2) JESSIE MAJOME
v
(1) PRESIDENT OF ZIMBABWE (2) PARLIAMENT OF ZIMBABWE (3) MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS AND NATIONAL HOUSING N.O.

CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC,
MAVANGIRA JCC, UCHENA JCC & BHUNU JCC
HARARE, 14 FEBRUARY & 31 OCTOBER 2018

L. Madhuku, for the applicants

M. Chimombe for the 1st & 3rd respondents

L. Uriri, for the 2nd respondent

PATEL JCC: This is an application in terms of s 167(2)(d) of the Constitution of Zimbabwe for the Court to determine whether Parliament or the President has failed to fulfil a constitutional obligation. The applicants aver that the respondents have failed to do so in respect of the presentation and passage of the Local Government Amendment Act No. 8 of 2016 in Parliament. It is further averred that presenting and passing a Bill in contravention of the Constitution amounts to a failure to fulfil a constitutional obligation.

The applicants contend that Act No. 8 of 2016 was passed and assented to contrary to the procedure sanctioned under the Constitution for the enactment of Bills. Furthermore, they contend that Act No. 8 of 2016 does not provide for the establishment of independent tribunals as enjoined by s 278(2) of the Constitution. The bodies created under the Act are subject to the whims of the third respondent (the Minister). This again constitutes a serious failure on the part of Parliament and the President to fulfil a constitutional obligation.

The applicants have approached this Court under s 85(1) of the Constitution in their own interests as citizens of Zimbabwe and as members of Parliament and of the Parliamentary Legal Committee (the PLC). They aver on this basis that their *locus standi* is beyond dispute.

As regards the merits of the application, the applicants assert that the Local Government Amendment Bill was passed in contravention of the Constitution in three material respects. Firstly, it was not published in the *Gazette* fourteen days before it was introduced in Parliament contrary to Standing Order 134. Secondly, it was not presented to the PLC in accordance with s 152(3)(a) as read with s 139(3) and (4) of the Constitution and Standing Orders 29-33. And thirdly, the requirement of s 141 of the Constitution to provide public access to and public hearings in the process of the passage of the Bill was not complied with in respect of Harare Province. It is contended that Parliament colluded with the Minister to render the requisite parliamentary process a farce so as to enable him to dismiss the Mayor of Harare. The second applicant also avers that she received a petition

from Harare residents concerning the violent intimidation at the public hearings and requesting that they be allowed to air their views on the Bill. She duly presented this petition to the Speaker, but Parliament proceeded with the passage of the Bill despite this protest.

As regards the alleged violation of s 278(2) of the Constitution, the applicants aver that the amendments effected by Act No. 8 of 2016 to the relevant provisions of the Rural District Councils Act [*Chapter 29:13*] and the Urban Councils Act [*Chapter 29:15*] create tribunals whose members are beholden to the Minister. Moreover, the procedures for their operation are not conducive to their independence as required by the Constitution.

The order sought by the applicants seeks various declarators and consequential relief. In particular, they seek a declarator that the respondents failed in their constitutional obligations in the enactment of Act No. 8 of 2016. Accordingly, the Act was not lawfully enacted and is therefore invalid and of no force or effect. Alternatively, they pray for a declarator that the amended sections of the Rural District Councils Act and the Urban Councils Act relative to the tribunals are inconsistent with s 278(2) of the Constitution and are therefore invalid and of no force or effect. The applicants also claim costs against all the respondents.

The first respondent (the President) filed an opposing affidavit deposed to by the Minister. In that affidavit, the President abides by the second respondent's averments in its notice of opposition.

The second respondent (Parliament) is opposed to the relief sought by the applicants. In its affidavit deposed to by the Speaker, it is averred that on 28 June 2016, at the second reading stage, the National Assembly resolved that the text of the impugned Bill be replaced with a new text incorporating amendments which addressed various issues raised by the PLC concerning the initial text of the Bill. The new text is the basis on which the PLC gave its non-adverse report on the Bill. The motion agreed by the National Assembly was taken in accordance with Standing Order 134(1) which allows waiver of the requirement to publish every Bill fourteen days before it is introduced in Parliament.

The Speaker avers that, following this resolution, the first applicant raised objections to the motion and called for a division, but lost dismally by 134 to 46 votes. Accordingly, having requested a division and participated in the voting process, the applicants abandoned their right to challenge the decision adopted by the National Assembly to replace the Bill with a new text as requested by the Minister. Furthermore, at the third reading stage, the applicants and others had walked out of the House. By so abandoning their rights, they have no *locus standi* before this Court because they participated in the enactment of the Act but then wrongfully walked out of the House.

As for the Bill itself, there was no new Bill that was introduced but simply an amendment of the initial Bill with the approval of the National Assembly. Additionally, the Bill was duly examined, revised and approved by the PLC. Although the applicants were not part of the final meeting of the PLC, all of its members were given due notice of the meeting and three-fifths of the PLC constituted its quorum. What was agreed by the PLC was in accordance with what was agreed at its earlier meetings.

As regards the requirement of public hearings, Parliament conducted two public hearings in Harare and requested the police to maintain peace and security together with the security personnel of the hearing Committee itself. Consequently, the Harare public was given full opportunity to air its view on the Bill.

The third respondent (the Minister) is also opposed to the application. He avers that both Parliament and the President fulfilled their constitutional obligations in the enactment of the Act. Moreover, the Act provides for the independent tribunals envisioned by the Constitution. As regards the public hearing procedures, the requisite processes were duly followed in the enactment of the Act. The Minister did not intimidate or block the residents of Harare from attending the public hearings that were duly convened. The Bill was not enacted to remove the Mayor of Harare from office and he still remains in office. The residents of Harare were given full opportunity to air their views. The requisite processes were duly adhered to and were therefore entirely legitimate.

The Minister also avers that the members of the new tribunals created by the Act are nominated by bodies that are independent of the Minister, for example, the Public Service Commission and the Law Society of Zimbabwe. The Minister simply appoints those persons who have been nominated by those entities. The procedure relating to the operation of the tribunals are indicative of their independent nature.

Failure to Comply with Section 278(2) of the Constitution

Section 278 of the Constitution governs the tenure of seats of members of local authorities. Subsection (2) of this provision dictates that an Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing mayors, chairpersons and councillors from office on the grounds of, *inter alia*, inability or incapacity, gross incompetence, or gross misconduct.

In their founding papers, as I have indicated above, the applicants averred that Act No. 8 of 2016 does not provide for the establishment of an independent tribunal as enjoined by s 278(2) of the Constitution and that this constitutes a serious failure on the part of Parliament and the President to fulfil a constitutional obligation. However, at the hearing of this matter, Mr. *Madhuku*, for the applicants, stated that the applicants were not persisting with the alternative argument that the provisions introduced by Act No. 8 of 2016 are inconsistent with s 278(2) of the Constitution. In the event, the consequent declaration of invalidity in this particular respect, in para. 3 of the draft order, was abandoned. Accordingly, it is not necessary for the Court to consider this aspect of the matter.

Jurisdiction of the Court

The present application has been mounted in terms of s 167(2)(d) of the Constitution. As is expressly stipulated in that provision, this Court is endowed with exclusive jurisdiction to determine whether the President or Parliament has failed to fulfil a constitutional obligation.

Mr *Madhuku*, for the applicants, submits that the merits of the matter have no bearing on whether a constitutional question has been raised to found the jurisdiction of this Court. All that the applicants need to do is to demonstrate the existence of a constitutional obligation and to allege that the obligation in question has not been fulfilled. The merits of the application fall into an entirely different sphere. In this regard, s 167(2)(d) does not differentiate between procedural and substantive obligations.

Mr *Uriri*, for the second respondent, accepts that the applicants have raised a constitutional question. He contends, however, that it does not fall within the exclusive jurisdiction of this Court. The applicants have challenged the manner in which the impugned Act was passed. Relying on pronouncements in *King & Ors* v *Attorneys Fidelity Fund Board of Control & Anor* 2006 (1) SA 474 (SCA) at 15-17, to the effect that procedural requirements that are prerequisites to validity do not impose constitutional obligations, Mr *Uriri* submits that the manner of enacting legislation falls within the doctrine of legality in relation to which the High Court enjoys review jurisdiction. It is therefore that court that the applicants should have approached in the first instance.

What must be determined in order to found the jurisdiction of this Court is whether the proceedings *in casu* raise a constitutional question within the exclusive jurisdiction of the Court. The first aspect is not disputed. The applicants allege that three specific constitutional obligations were breached in the passage of the impugned legislation: the Bill in question was not gazetted; the Bill was not examined by the PLC; and there was no public participation as required by the Constitution before the Bill was passed by Parliament. There can be no doubt that these are constitutional questions pertaining to the fulfilment or otherwise of constitutional requirements.

The next critical aspect is whether these constitutional questions fall within the exclusive jurisdiction of this Court. Do they revolve around the fulfilment of purely procedural requisites that are susceptible to the review jurisdiction of the High Court, or possibly the Supreme Court, and therefore outside the sole domain of this Court? Or do they concern the failure to fulfil constitutional obligations within the contemplation of s 167(2)(d) so as to render them amenable to the exclusive jurisdiction of this Court?

In *King's* case (*supra*), which is strenuously relied upon by Mr *Uriri*, the Supreme Court of Appeal drew a clear distinction between procedural prerequisites and constitutional duties. The court contrasted:

> "legal limitations that arise from procedural prerequisites and from other limitations of legislative power with those that derive from the imposition of duties." [my emphasis]

In *Doctors for Life International* v *Speaker of the National Assembly & Ors* 2006 (6) SA 416 (CC), the Constitutional Court of South Africa was seized with the

complaint that, during the legislative process leading to the enactment of certain health legislation, the National Council of Provinces and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes. The court proceeded, at para 19, on the premise that the phrase "a constitutional obligation" in s 167(4)(e) of the Constitution – the equivalent of our s 167(2)(d) – should be given a narrow meaning. In any event, only the Constitutional Court could intrude into the domain of Parliament. As was held *per* Ncgobo J:

> "The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court." [at para 24]
>
> "A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only." [at para 26]
>
> "A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle [*sic*] legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power." [at para 27]
>
> "The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution." [at para 28]

I now turn to the relevant provisions of the Constitution of Zimbabwe. Section 139(1) deals with the regulation of the proceedings of the Senate and the National Assembly by rules known as Standing Orders. In terms of s 139(2):

> "Standing Orders may provide for—
> (*a*) the passing of Bills;
> (*b*) ….;
> (*c*) ….;
> (*d*) ….;
> (*e*) ….;
> (*f*) ….; and
> (*g*) generally, the regulation and orderly conduct of business and proceedings in and between the Houses."

The broad objectives of Standing Orders are lucidly spelt out in s 139(3) as follows:

> "The procedures and processes of Parliament and its committees, as provided for in Standing Orders, must promote transparency, must encourage the involvement of members of all political parties in Parliament and the public, and must be fair and just."

Section 141 of the Constitution makes provision for public access to and involvement in Parliament. It declares that:

> "Parliament must—
> (*a*) facilitate public involvement in its legislative and other processes and in the processes of its committees;
> (*b*) ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable; and
> (*c*) conduct its business in a transparent manner and hold its sittings, and those of its committees, in public, though measures may be taken—
> (i) to preserve order in parliamentary proceedings;
> (ii) to regulate public access, including access of the media, to Parliament and its committees;
> (iii) to exclude the public, including the media, from sittings of committees; and
> (iv) to provide for the searching of persons and, where appropriate, the refusal of entry to Parliament or the removal of any person from Parliament;

> but those measures must be fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."

Section 152 of the Constitution governs the formation, composition and functions of the PLC. In terms of s 152(3)(a):

> "The Parliamentary Legal Committee must examine …. every Bill, other than a Constitutional Bill, before it receives its final vote in the Senate or the National Assembly …. and must report to Parliament …. whether it considers any provision in the Bill …. contravenes or, if enacted, would contravene any provision of this Constitution."

Having regard to the decisions in *King's* case (*supra*) and the *Doctors for Life* case (*supra*), I have no doubt that the obligation of Parliament to secure public access to and involvement in its legislative and other processes, as enjoined by s 141 of the Constitution, is not merely a procedural prerequisite pertaining to form and manner. Rather, it is a substantive constitutional obligation, within the contemplation of s 167(2)(d), which is fundamental to the lawful passage of every legislative enactment. It is a constitutional duty that must be complied with by Parliament in a fair, reasonable and justifiable manner.

By the same token, the duty vested in the PLC by the peremptory provisions of s 152(3) to examine every Bill, for the purpose of considering whether it contravenes or would, if enacted, contravene any provision of the Constitution, is not a mere procedural prerequisite. In my view, it is a critical substantive obligation imposed upon the PLC to ensure that Parliament is fully apprised of any constitutional defect in proposed legislation to enable it to rectify such defect in order to secure due conformity with the Constitution.

Similarly, while it might be argued that the requirements of Standing Orders made under s 139 are primarily designed to regulate the procedural aspects of parliamentary business, I do not think that they are solely concerned with purely procedural matters. Insofar as they regulate the gazetting of Bills and the attendant dissemination of proposed legislation in pursuit of participatory democracy, they implicate the involvement of all political parties represented in Parliament as well as the general public, as is explicitly recognised in s 139(3). They therefore necessarily impact upon the constitutional obligations envisaged in s 141.

In the premises, I am satisfied that the three constitutional questions raised for determination in this matter call for the adjudication of primarily political questions that intrude into the domain of Parliament and thus impinge upon the separation of powers between the judiciary and the legislature. Accordingly, I take the view that these questions relate to the fulfilment of constitutional obligations that are subject to the exclusive jurisdiction of this Court within the contemplation of s 167(2)(d) of the Constitution.

Locus Standi of the Applicants

The second respondent contests the legal standing of the applicants in instituting this application on the basis that they both participated in the process of enacting the impugned Bill. They had called for a division on the Bill in the National Assembly and had lost that vote. Thus, so it is argued, the decision that they seek to overturn is also their decision and they cannot challenge their own process. They therefore have no standing to attack legislation that they themselves were involved in passing.

In the *Doctors for Life* case (*supra*), at para 218, Ncgobo J recognised the need to find a proper balance between avoiding improper intrusions into the domain of Parliament and ensuring that constitutional provisions are sufficiently justiciable so as not to be rendered nugatory. The latter consideration, in my view, behoves this Court to adopt a liberal and generous approach to *locus standi* in matters involving constitutional rights and obligations. This is so notwithstanding the constitutional and statutory independence enjoyed by Parliament in the control of its own affairs. See *Smith* v *Mutasa N.O. & Anor* 1989 (3) ZLR 183 (SC) at 208 & 209. See also *Mudzuru & Anor* v *Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* CCZ 12/2015, at pp. 13-15, where this Court, *per* Malaba DCJ (as he then was), eschewed the narrow traditional conception of *locus standi* in favour of a broad and generous approach to standing in constitutional matters.

In casu, both applicants are not only citizens of Zimbabwe but also members of Parliament. They have a general right, *qua* citizens, to be involved in the proceedings of Parliament. They also have a specific and special right, *qua* members of Parliament, to ensure that parliamentary procedures are duly adhered to and that constitutional obligations are not flouted, particularly where they relate to the passage of proposed legislation. This is clearly recognised by s 119(1) of the Constitution which enjoins Parliament and, by necessary implication, its constituent members to protect the Constitution and to promote democratic governance in Zimbabwe.

In my view, the applicants have an unquestionable right, both as citizens and as legislators, to vindicate any perceived violation of the Constitution. The fact that

they only participated in the challenged proceedings under protest means that they cannot be held to have waived their right to approach this Court for appropriate relief. In any event, any such alleged waiver cannot be lightly presumed given the overarching supremacy of the Constitution and the invalidity of any law, practice, custom or conduct inconsistent with the Constitution. In short, there can be no doubt that the applicants are endowed with ample *locus standi* to institute this application.

Whether Bill Lawfully Gazetted

In terms of Standing Order 134, every Bill must be published in the *Gazette* at least fourteen days before it is introduced in Parliament. The applicants contend that a second Bill was introduced in Parliament after the first Bill was gazetted and then subsequently abandoned. The second Bill was totally different from the first Bill but was not duly gazetted. It was not, as is averred by the respondents, simply an amendment of the first Bill, which amendment could only have been put forward at the Committee stage.

In *Biti & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Anor* SC 10/2002, at P. 13, Ebrahim JA underscored the point that a Bill must be introduced and dealt with in terms of the Constitution and that the procedures relating to the introduction or reintroduction of Bills must follow the procedures stipulated in Standing Orders. The learned judge further emphasised, at p. 18, that:

> "…. this Court has not only the power, but also the duty, to determine whether or not legislation has been enacted as required by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution."

It is common cause, as the record shows, that there were two versions of the Local Government Laws Amendment Bill, *i.e.* HB 1. 2016 and HB 1A. 2016. However, the record also shows that there were two notices of amendments to the original draft of the Bill, the first relating to clause 2 of the Bill as put forward by the PLC, and the second pertaining to clause 3 of the Bill as proposed by the third respondent (the Minister). Thereafter, as is reflected in the minutes of the PLC meeting held on 23 June 2016, the business of the day before the PLC was to consider HB 1. 2016 and its notice of amendments. According to the minutes:

> "Counsel to Parliament advised the Committee that a new text of the Bill was to be brought before the House on Tuesday the 28th of June and that the new text would be a consolidation of the Bill and the Notice of Amendments."

This position was subsequently confirmed in the National Assembly on 28 June 2016 by the Minister who presented a motion to replace the original text. As recorded in Hansard, the Minister moved that:

> "the present text of the Local Government Laws Amendment Bill (HB 1. 2016) which is currently at Second Reading Stage be replaced with a new text. The new text has incorporated the amendments which address the issues raised by the Parliamentary Legal Committee on the initial text of the Bill. The new text is the basis upon which the Parliamentary Legal Committee issued a Non Adverse Report on the Bill."

What emerges reasonably clearly from the foregoing is that what was presented to the National Assembly on 28 June 2016 was a consolidated and amended text of the original version of the Bill. Contrary to the submissions of the applicants, there was no new second Bill involved in this process. It follows that there was no need for Parliament to gazette the amended text of the Bill fourteen days before it was presented, as would have

been required by Standing Order 134 had it involved the introduction of an entirely new Bill. The first ground of challenge to the passage of the Bill must accordingly fail.

Whether Bill Duly Considered by Parliamentary Legal Committee

As I have already stated, s 152(3)(a) of the Constitution requires the PLC to examine every Bill before it receives its final vote in the Senate or the National Assembly. The PLC must then report to Parliament whether it considers that any provision in the Bill contravenes or, if enacted, would contravene any provision of the Constitution. In terms of Standing Order 32, any report of the PLC must be based on the "collective knowledge" of all of its members.

It is argued for the applicants that the non-adverse report on the Bill was furnished by only three members of the PLC at its final meeting to consider the Bill. All five members of the PLC were not consulted to submit their opinions on the consolidated text presented to the PLC. This was contrary not only to the express provisions of Standing Order 32 but also to the requirements of s 139(3) of the Constitution in terms of which the procedures and processes of parliamentary committees, as provided for in Standing Orders, must encourage the involvement of members of all political parties in Parliament. In short, Parliament must hear the views of all members of the PLC. As this did not happen *in casu*, the impugned Bill was not properly examined by the PLC.

The factual conspectus that appears from the documents filed of record is as follows. According to the minutes of the PLC meeting held on 9 June 2016, all five

members of the PLC were in attendance to consider the original Bill (HB 1. 2016). Several issues were raised in discussion, including the procedure for the removal from office of mayors and councillors and the appointment of the envisaged independent tribunals. The PLC then resolved to invite the third respondent (the Minister) and the Attorney-General for discussion before it issued its certificate of approval.

The next meeting was scheduled to be held on 13 June 2016. This meeting was duly attended by all five members of the PLC as well as the Minister, the Deputy Attorney-General and other officials. The members of the PLC aired their views and concerns surrounding the Bill. At the conclusion of the meeting, the PLC resolved that various amendments be made to the Bill relating to the clauses discussed and be circulated amongst the members of the PLC before the issuance of its certificate. The date of the next meeting of the PLC was to be announced.

Thereafter, a further meeting was convened on 23 June 2016. Three members were present, being the ZANU-PF contingent, while the applicants were recorded as having tendered their apologies. The meeting considered the Bill together with the notice of amendments that I have earlier alluded to. The PLC then resolved that:

> "the Minister had responded adequately to their concerns as raised in the previous meeting and that a non-adverse certificate would be issued accordingly".

As appears in the Hansard of 28 June 2016, the first applicant protested that the last PLC meeting "was nicodemously held" and should be deemed a nullity. He explained that all five members of the PLC were part of a WhatsApp group and that notice

of the PLC meeting was communicated by Counsel to Parliament through that medium. He further explained that both he and the second applicant had previously indicated that they would not be available during the period in question. Thereafter, the second applicant also voiced her concerns that the PLC had not made any "pre-emptive commitment to issue a Non Adverse Report".

There can be no doubt that the protestations of the applicants in Parliament are at variance with the minutes of the three PLC meetings that I have referred to. It is evident that they were given notice of the final meeting, albeit through their WhatsApp group. However, the specific reason for their non-attendance at the meeting is not entirely clear. More importantly, the minutes of the three PLC meetings in question indicate that the views and concerns of all five members of the PLC were duly ventilated and that the Bill was consequently amended to take those views and concerns into account. The applicants have not challenged the authenticity or accuracy of those minutes nor have they particularised the precise manner in which their views were disregarded in the formulation of the final version of the Bill that was presented to Parliament. These deficiencies are compounded by the abandonment, at the hearing of this matter, of their alternative argument that the provisions introduced by Act No. 8 of 2016 are inconsistent with s 278(2) of the Constitution. In effect, they have conceded that their concerns regarding the amended version of the Bill are no longer an issue for contestation before this Court.

In the event, I am satisfied that the PLC did take into account the collective objections of all five of its members. It follows that the non-adverse report on the Bill

submitted to Parliament was prepared on the basis of the collective knowledge of all the members of the PLC in accordance with the requirements of Standing Order 32. This is so notwithstanding that the final meeting of the PLC was attended by only three of its members. By virtue of s 344(2) of the Constitution, those three members, being more than half of the total membership of the PLC, clearly constituted the requisite quorum for the purpose of conducting its proceedings.

Whether Public Hearings Properly Conducted

As already stated above, the applicants aver that the constitutional requirement of public access to and public hearings in the passage of the impugned Bill was not complied with in respect of Harare Province. They further aver that there was a petition from concerned Harare residents alleging violent intimidation at the public hearings and requesting that they be allowed to properly air their views on the Bill.

It is common cause that the petition was duly presented to the Speaker and that Parliament proceeded with the passage of the Bill despite this protest. It is also common cause that on 28 June 2016 the Speaker declared that "the matter will be tabled before the appropriate Committee and that investigations will be done". However, no such investigations appear to have been undertaken and, even if they had been, the findings of the appropriate committee have not been availed, either to the National Assembly or to this Court.

I have already cited s 141 of the Constitution in terms of which Parliament is enjoined, *inter alia*, to facilitate public involvement in its legislative and other processes and in the processes of its committees. The paramount importance of participatory democracy and public participation in the law-making process was aptly emphasised in the *Doctors for Life* case (*supra*). In the words of Ncgobo J:

> "Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy." [at para 116]
>
> "It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy." [at para 135]
>
> "In my judgment, public participation in the law-making processes of the NCOP is the goal of the duty to facilitate public involvement comprehended in section 72(1)(a). Participation is the end to be achieved. To hold otherwise would be contrary to the participative nature of our democracy and the Constitution's commitment to the principles of accountability, responsiveness and openness. Parliament and all nine provinces therefore, in my view, properly conceded that the duty to facilitate public involvement contemplates public participation in the law-making process." [at para 141]
>
> "In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less." [at para 145]

In her founding affidavit, the second applicant refers to several instances of violent disruption of the public hearings conducted in Harare Province. These allegations have been cursorily traversed but not adequately refuted by the respondents. Counsel for

the second respondent quite correctly concedes that there is a dispute of fact as to what transpired and that the question to be determined cannot be answered on the facts availed. In any event, as I have indicated, there is no report from Parliament or any of its committees on the findings, if any, of the investigations that were declared would be undertaken in due course. This was, in my view, a critical omission. In that regard, I am inclined to agree with Mr *Madhuku* that, once the Speaker had received and accepted the report from the second applicant, Parliament should not have proceeded with the Bill but should have awaited the findings of its own investigations.

What emerges from the foregoing is that there are material disputes of fact pertaining to the conduct of the public hearings carried out in Harare Province. These disputes are irresoluble on the papers before the Court and need to be determined by way of *viva voce* and other relevant evidence before a court of competent jurisdiction. It seems to me that the most appropriate forum for this purpose would be the High Court, acting in terms of its own Rules.

Disposition

In terms of r 5(1)(b) of the Constitutional Court Rules 2016, this Court may give such directions as to procedure, in respect of any matter not expressly provided for in the Rules, as appear to it to be just and expedient. Furthermore, and more particularly, r 6 empowers this Court to refer to the Judge President of the High Court any allegations that require further investigation, in which event the Judge President shall arrange for a judge of that court to conduct a hearing within a specified period and thereafter to report back to

this Court. In the instant case, it is just and expedient that the material disputes of fact concerning the conduct of the public hearings in question be referred to the High Court for that court to investigate the matter and thereafter to submit its findings to this Court.

It is accordingly ordered as follows:

1. The following question be and is hereby referred to the Judge President of the High Court for investigation and determination:

   Whether the public hearings undertaken by the parliamentary Local Government and Rural Development Portfolio Committee in Harare Province during June 2016, in respect of the Local Government Laws Amendment Bill 2016, were conducted in such manner and in such circumstances as to enable members of the public attending those hearings to reasonably and adequately express their views on the provisions of the aforesaid Bill.

2. In investigating and determining the aforesaid question, the High Court shall adopt and apply such rules of procedure and evidence as the court may deem best suited for that purpose in terms of the High Court Rules 1971.
3. After concluding its investigation, the High Court shall prepare a report incorporating its findings and determination for submission to this Court.
4. The costs of the aforesaid proceedings before the High Court shall be costs in the cause in the present matter.

GWAUNZA JCC: I agree.

GARWE JCC: I agree.

GOWORA JCC: I agree.

HLATSHWAYO JCC: I agree.

GUVAVA JCC: I agree.

MAVANGIRA JCC: I agree.

UCHENA JCC: I agree.

BHUNU JCC: I agree.

Mupanga Bhatasara Attorneys, applicants' legal practitioners

Civil Division of the A-G's Office, 1st & 3rd respondents' legal practitioners

Chihambakwe, Mutizwa & Partners, 2nd respondent's legal practitioners