REPORTABLE (20)

Judgment No. SC 28/10
Civil Appeal No. 62/10

(1) JONATHAN NATHANIEL MOYO
(2) MOSES MZILA NDLOVU (3) PATRICK DUBE
(4) SIYABONGA NCUBE v

(1) AUSTIN ZVOMA NO, CLERK OF PARLIAMENT
(2) LOVEMORE MOYO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, SEPTEMBER 21, 2010 & MARCH 10, 2011

T Hussein, for the appellants

Ms C Damiso, for the first respondent

M Chaskalson SC, for the second respondent

CHIDYAUSIKU CJ: This is an appeal against the judgment of the High Court wherein PATEL J dismissed the appellants' application to have set aside the election of the second respondent as the Speaker of Parliament (hereinafter referred to as "the Speaker"). The appellants, as the applicants in the court *a quo*, sought the following relief set out in the draft order:

> "WHEREUPON after perusing the documents filed of record and hearing counsel, it is hereby declared that:-
>
> 1. The election of (the) second respondent as the Speaker of the Parliament of Zimbabwe on 25 August 2008 is null and void and set aside.
>
> 2. …

3. That the respondents jointly and severally pay the costs of suit."

(The applicants abandoned the relief set out in paragraph 2.)

The appellants' main contention in the court *a quo* and in this Court is that the election of the Speaker was null and void because it was not conducted in terms of s 39 of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution"), as read with Standing Order 6 of the Standing Orders of Parliament of Zimbabwe (hereinafter referred to as "the Standing Orders"). PATEL J dismissed the application. The appellants now appeal against that judgment.

The grounds of appeal are set out in the Notice of Appeal, which, in relevant part, reads as follows:

"**Grounds of Appeal**

1. The learned Judge *a quo* erred in finding that a proper election of Speaker of Parliament was conducted in terms of the Constitution and the law.

2. The learned Judge erred in condoning the first respondent's failure to implement and enforce his own procedures for the election.

3. The learned Judge *a quo* erred in finding that the participants' exposure of their completed ballot papers was not a violation of the secret ballot.

4. The learned Judge *a quo* erred in finding that a secret ballot took place.

5. The learned Judge *a quo* erred in interpreting section 39(2) of the Constitution as read with Ordinance 6 of the House of Assembly Standing Orders as directory and not peremptory."

The grounds of appeal set out in the Notice of Appeal, as read with the record and submissions by counsel, raise essentially the following two issues for determination in this appeal –

(a) whether the exposure of the secret ballot before the depositing of the ballot papers in the ballot box by some Members of Parliament amounts to a violation of the voting by secret ballot and, if so, whether that rendered the election of the Speaker null and void; and

(b) whether the failure by the Clerk of Parliament of Zimbabwe (hereinafter referred to as "the Clerk") to control the voting process and the consequent chaotic conditions constitute a failure by the Clerk to conduct an election in terms of s 39 of the Constitution, as read with the Standing Orders.

The background facts of this case are as follows. The first respondent is the Clerk of the Parliament of Zimbabwe. Pursuant to Proclamation No. 7 of 2008, the Clerk convened the first meeting of Parliament on 25 August 2008 for the purposes of swearing in the Members of Parliament and electing the presiding officers. The Clerk's mandate to conduct these elections is derived from the Standing Orders – in the case of the House of Assembly Standing Order No. 6. Two candidates were nominated for the office of Speaker, namely Mr Paul Themba-Nyathi (hereinafter referred to as "Nyathi") and the second respondent (hereinafter referred to as "Moyo"). Standing Order No. 6 provides that if more than one person is proposed as Speaker of Parliament, the Clerk shall conduct an election of the Speaker by ballot box. The election took place and the Clerk announced that Nyathi had garnered

ninety-eight votes and Moyo had garnered one hundred and ten votes. The Clerk accordingly declared Moyo the winner. Moyo assumed the office of Speaker. The appellants want the election of Moyo as Speaker set aside.

I now wish to deal with the issue of whether the election was conducted by secret ballot as is required by s 39 of the Constitution, as read with Standing Order No. 6 of the Standing Orders.

The appellants contend that some Members of Parliament from the MDC-T party, having marked their ballot papers in the secrecy of the polling booths, openly displayed their marked ballot papers before depositing them in the ballot box. The appellants contend that the majority of the Members of Parliament from the MDC-T party did this, while the respondents' position is equivocal.

The court *a quo*, however, concluded that of the two hundred and eight Members of Parliament who voted most probably only six Members of Parliament displayed their votes in the manner alleged by the appellants. The Members of Parliament who are named as having done this are the Honourable Biti, the Honourable Khupe, the Honourable Chambati, the Honourable Chibaya, the Honourable Denga and the Honourable Moyo, the second respondent. In this regard, the court *a quo* concluded as follows at p 11 of the cyclostyled judgment (judgment no. HH 28-2010):

> "It is fairly clear that Hon. Biti took the lead in brandishing his vote and that several of his colleagues were then emboldened into emulating his possibly impolitic example. However, they did so of their own free will and, more significantly, they did so after having cast their votes in secret."

The conclusion of the court *a quo* that at least the six Members of Parliament named displayed their ballot papers after marking them but before depositing the ballot papers in the ballot box cannot be faulted. This conclusion is fortified by the following factors. It is specifically alleged by the appellants that Moyo displayed his ballot paper before depositing it. Moyo filed an affidavit in this case in which he does not deny this allegation. Five other Members of Parliament are named as having displayed their ballot papers before depositing them in the ballot box. None of these five Members of Parliament have deposed to affidavits denying the allegation. In my view, it would have been easy for Moyo to secure such affidavits from the named Members of Parliament denying the conduct alleged. Moyo instead filed an affidavit from a Member of Parliament, the Honourable Mpariwa, in respect of whom no such allegation was made. The Honourable Mpariwa does not deny that the named Members of Parliament had conducted themselves in the manner alleged by the appellants. Indeed, if anything, she appears to concede that that in fact did occur.

In the result, I agree with the conclusion of the court *a quo* that at least six Members of Parliament displayed their ballot papers after marking them but before depositing them in the ballot box.

Having concluded that at least six Members of Parliament displayed their ballot papers before depositing them in the ballot box, the issue that falls for determination is the legal consequences of such conduct.

Section 39 of the Constitution provides as follows:

"(2) The Speaker shall be elected in accordance with Standing Orders from among persons who are or have been members of the House of Assembly and who are not members of the Cabinet, Ministers or Deputy Ministers:

Provided that a person who is not a member of the House of Assembly shall not be elected as the Speaker unless he is qualified in accordance with Schedule 3 for election to the House of Assembly."

Standing Order 6 of the Standing Orders provides as follows:

"If more than one person is proposed as Speaker, the Clerk shall conduct the election of Speaker by a secret ballot." (the emphasis is mine)

The Clerk issued specific instructions on how the secret ballot was to be conducted. According to the second respondent, Moses Mliza Ndlovu, the Clerk issued the following instructions:

"4. The first respondent announced the procedure to the effect that according to the Standing Rules, an election would be held by secret ballot. To this extent, he assured the Honourable Members present that all necessary provisions had been made to guarantee the secrecy of the ballot.

5. The first respondent then explained that in terms of the procedure, he would issue a ballot paper to each Member present. Thereafter, the Member would put a mark against the name of the candidate the Member would wish to be the Speaker of Parliament.

6. The ballot paper had two candidates for Speaker of Parliament, namely the second respondent nominated by the Movement for Democratic Change (Tsvangirai) (MDC-T) and Mr Paul Themba-Nyathi nominated by the Movement for Democratic Change (MDC).

7. The first respondent then explained that the ballot paper, having been duly marked in secret in a booth, would be folded by the voting Member and deposited in a ballot box.

8. The first respondent then explained that, having cast the vote, the Honourable Member would then leave the House."

The Clerk does not deny that the above accurately reflects the instructions he gave. From the above, three essential elements of the secret ballot emerge –

(a) each Member of Parliament was to be issued with a ballot paper;

(b) each Member of Parliament was to mark the ballot paper in the privacy or secrecy of the polling booth; and

(c) having marked the ballot paper in secret, the Member of Parliament was to fold the ballot paper to maintain the secrecy of the vote and deposit it in the ballot box, thus completing the process of secret voting.

It admits of no debate that the Clerk would then be required to count the vote to complete the process. In my view, the counting of the votes cast is an essential part of the process of the election by secret ballot. I shall revert to this aspect of the matter later.

The appellants' case is that Standing Order 6 is peremptory and enjoins the Clerk to conduct an election of the Speaker by secret ballot. Mr *Hussein*, for the appellants, submitted that the display of the ballot papers before depositing them in the ballot box by some Members of Parliament is an aberration from the provisions s 39 of the Constitution, as read with Standing Order 6 of the Standing Orders. He argued that such aberration rendered the election of the Speaker null and void.

Ms *Damiso and* Mr *Chaskalson*, for the respondents, submitted that the appellants' complaint is based on a fundamental misconception relating to the nature of a secret ballot. They submitted that when an election takes place by secret ballot each voter has the right to have his or her vote kept secret. This right to secrecy, like any other right, can freely be waived by a voter who chooses to make known how he or she voted. The fact that any voter chooses to disclose how he or she voted cannot in itself compromise the secrecy of the ballot. They submitted that it is only when a voter is factually prevented from maintaining the secrecy of his or her vote that there is a violation of the secrecy of the ballot. On this basis they argued that the display by six Members of Parliament of their ballot papers before depositing the ballot papers in the ballot box is not a violation of the principle of a secret ballot.

This argument found favour with the learned Judge in the court *a quo*. In this regard he had this to say at p 11 of the cyclostyled judgment:

> "Having regard to the dictionary definitions and the case authorities cited by counsel, the gravamen of a secret ballot, in my view, is that each voter is enabled to cast his vote privately and in secret, without fear of having his voting choice identified or ascertained by others. In this respect, it is incumbent upon the regulating authority to provide the requisite wherewithal for that purpose. The courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation, and howsoever his conduct might influence other voters, this cannot detract from the secrecy of his vote or vitiate the secrecy of the ballot as a whole."

It was further argued that all that was required of the Clerk was for him to provide the guarantee that Members of Parliament voted in secret if they so wished.

Those who wished to penetrate the veil of secrecy, as did the six Members of Parliament, were entitled to do so without contaminating the process.

In support of the above contention, both counsel for the respondents placed reliance on the case of *Steel and Engineering Industries Federation and Ors v National Union of Metalworkers of South Africa (2)* 1993 (4) SA 196 (T) at 200J and on the case of *J Jenkins v State Board of Elections of North Carolina & Ors* 180 NC 169 (1920) at 171-172, 104 SE 346. Mr *Chaskalson* in particular submitted that the right to secrecy of the ballot, like any other right, can freely be waived by any voter who chooses to make known how he or she voted. He further submitted that this point has been made clear by United States judgments dealing with unsuccessful challenges to electoral laws. For this submission he relied on the following remarks of BROWN J in the *Jenkins* case *supra* at pp 171-172:

> "… this privilege of voting a secret ballot has been held to be entirely a personal one. The provision has been generally adopted in this country for the protection of the voter, and for the preservation of his independence, in the exercise of this most important franchise. But he has the right to waive his privilege and testify to the contents of his ballot. The voter has the right at the time of voting voluntarily to make public his ballot, and its contents in such case may be proven by the testimony of those who are present. Public policy requires that the veil of secrecy shall be impenetrable *unless the voter himself voluntarily determines to lift it*."

Mr *Chaskalson* also relied on the following passage from *State ex rel. Hutchins v Tucker et al* 106 Fla 905 (1932) at 908, 143 So 754:

> "… it has been uniformly held that under such provisions as that contained in section 6 of Article VI of our Constitution the elector cannot be compelled to violate the right of secrecy of his ballot but the great weight of authority is to the effect that such constitutional provision guarantees a personal privilege which might be waived. In *State vs Anderson* 26 Fla 240, 8 So 1, this Court, speaking through MR CHIEF JUSTICE RAINEY, said:

> 'The Constitution provides, section 6, Article VI, that in all elections by the people the vote shall be by ballot, and in those by the Legislature it shall be *viva voce*. The material guarantee of this constitutional mandate of vote by ballot is inviolable secrecy as to the person for whom an elector shall vote. The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases, and that no one else shall be in position (*sic*) to know for whom he has voted, or shall know *unless the voter shall of his own free will inform him*.' Cooley's *Constitutional Limitations* m.p. 604 *et seq.* (Italics ours)"

Further reliance was placed on the following passage from Cooley's work *Constitutional Limitations* 7 ed 912:

> "The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases and that no one is to have the right or be in position (*sic*) to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in case (*sic*) of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged, …".

Mr *Chaskalson* further submitted that the fact that any voter chooses to disclose how he or she voted cannot compromise the secrecy of the ballot. He argued that if this were the case secret ballots would be open to abuse by voters who, fearing that their candidates were at risk of losing the election, could invalidate a vote by merely waving their ballots about. It is only when a voter is factually prevented from maintaining the secrecy of his vote or her vote that there is a violation of the secrecy of the ballot. He further argued that on the facts of this case there is no suggestion of any such violation of the secrecy of the ballot. Consequently, the primary complaint of the appellants must be rejected.

The two cases cited by Mr *Chaskalson*, namely the *Jenkins* case *supra* and the *State ex rel. Hutchins* case *supra*, were concerned with the constitutionality of statutory provisions that permitted voting by absentee voters such as soldiers serving abroad. The basis of challenging the constitutionality of the Statutes providing for the absentee voters was that they violated the secrecy of the ballot guaranteed by the State Constitution, Article VI section 6. Section 6 of Article VI declared that all elections by the people shall be by ballot, and all elections by the General Assembly shall be *viva voce* (the emphasis is mine). The contention, which was dismissed in the above American cases in respect of which the above cited passages were made, was that Statutes allowing absentee votes would of necessity lead to the identification of the voter, thereby violating the secrecy of the ballot guaranteed by the Constitution of the State of North Carolina. The *ratio decidendi* of the court in dismissing the challenge was that the impugned Statutes, by allowing voters to vote by postal ballot, did not compel voters to disclose their votes leading to a breach of their right to voting in secrecy. The courts held that the impugned Statutes simply provided the voter with a choice either to vote secretly by presenting himself or herself at the polling booth or vote by postal ballot if he so wished, thereby compromising the secrecy of his or her vote. The court held in both cases that a secret ballot is not compulsory so far as the voter is concerned, for the Statute provides that the ballot may be deposited for the voter by the registrar or by one of the judges of the election or by the voter himself if he so chooses.

I wish to make the following observations regarding the above cases. The judgments cited above are judgments of foreign courts. They are not binding but they are persuasive. The higher the courts are in their jurisdictions the more

persuasive are their judgments. The cited judgments are not from the highest courts in North Carolina. The second observation I wish to make is that the courts in the cited cases were interpreting Statutes in their jurisdictions. They were not making pronouncements on general jurisprudential principles. When interpreting Statutes, courts are guided primarily by the wording and the context of the Statutes. A court should not simply translocate one court's interpretation of a Statute in that court's jurisdiction to an interpretation of a Statute differently worded in its own jurisdiction. In the above judgments, the courts of North Carolina were interpreting Article VI section 6 of the Constitution of North Carolina, which provided that: "in all elections by the people the vote shall be by ballot, and in those by the Legislature it shall be *viva voce*". The courts in both the *Jenkins* case *supra* and the *State ex rel. Hutchins* case *supra* interpreted Article VI section 6 as conferring a right to vote in secret, which can be waived. They ascribed this meaning to Article VI section 6 despite the use of the peremptory word "shall" in the section. I have some doubts about the correctness of this interpretation.

Be that as it may, I accept the conclusion in those two cases that where a constitutional provision confers on the voter the right to vote by secret ballot that right is intended to protect the voter and the voter has the right to waive that right without violating the secrecy of the ballot. I also accept the proposition that public policy requires that the veil of secrecy shall be impenetrable unless the voter himself voluntarily determines to lift it. See also *Boyer v Teague* 106 NC 625; *McRary on Elections* 3 ed at 305-306; and *Crolly Con. Lim.* 7 ed at 912.

However, s 39 of the Constitution, as read with Standing Order 6, is not a constitutional or statutory provision conferring the right to vote on a voter in the form of the Member of Parliament. Section 39 of the Constitution, as read with Standing Order 6, prescribes how a particular officer in Parliament, namely the Speaker, is to be elected. It expressly provides that if more than one person is proposed as Speaker the Clerk of Parliament shall conduct the election of the Speaker by a secret ballot. In other words, the use of the words "by a secret ballot" in the Statute is prescribing the method by which a Speaker is to be elected. The language is peremptory language. It would be a different story if the wording of Standing Order 6 were to the effect "If more than one Member is proposed Members of Parliament may vote by secret ballot to elect the Speaker".

The golden rule of interpretation is that one has to give the words of a Statute their primary meaning. If that rule is applied to Order 6 of the Standing Orders then the inescapable inference is that the Order is addressing the Clerk and is dictating to him the manner by which a Speaker should be elected. In view of the explicit language of the Statute, it is not open to the Clerk or any Member of Parliament to substitute the method of electing a Speaker with another method of their own choice, such as by open ballot. Put differently, it was not open, for instance, to Members of Parliament to tell the Clerk that they were waiving their right to vote for the Speaker by secret ballot or that they wished to vote for the Speaker by open ballot either individually or as a group. That option was not open to the Members of Parliament as a whole or to individual Members of Parliament.

Voting by secret ballot, as I have already stated, involves the following three essential procedures. Firstly, that each Member of Parliament receives a ballot paper. Secondly, that each Member of Parliament indicates on that ballot paper the candidate of his choice in private and to the exclusion of the public. And, thirdly, that, having done so, the Member of Parliament deposits his or her ballot paper into the ballot box privately without disclosing his or her ballot paper to the world. Once the ballot paper has been deposited into the ballot box the process of voting by secret ballot so far as the voter is concerned is completed. It would not be a violation of voting by secret ballot if the person discloses whom he has voted for at that stage. The voting by secret ballot by the voter is complete. See *Steel and Engineering Industries Federation and Ors v National Union of Metalworkers of South Africa (2) supra*.

The next stage to complete the process provided for in terms of s 39 of the Constitution, as read with Standing Order 6, is for the Clerk to count the votes cast to determine the winner. This stage, in my view, is an essential process in the election of the Speaker of Parliament by secret ballot. Because of the peremptory language of s 39 of the Constitution, as read with Standing Order 6, the Clerk has no discretion over what procedure is to be followed when electing the Speaker. It has to be by secret ballot. The use of any other method to elect the Speaker would be a failure to comply with the provisions of s 39 of the Constitution, as read with Standing Order 6.

In casu, the appellants alleged that some Members of Parliament received ballot papers, marked the ballot papers in the privacy of the polling booth

and then, instead of folding the ballot papers to maintain the secrecy of their vote and before depositing them in the ballot box, they displayed them to fellow Members of Parliament to show them how they voted. Thereafter they deposited the ballot papers in the ballot box. The court *a quo* concluded that six Members of Parliament conducted themselves in this manner. The conclusion that only six out of the two hundred and eight voters voted in this manner is supported by the evidence and it cannot be faulted.

The learned Judge in the court *a quo* also concluded that the six Members of Parliament who displayed their votes complied with the requirement of a secret ballot because they were entitled to pierce the veil of secrecy without falling foul of s 39 of the Constitution, as read with Standing Order 6. I respectfully disagree with the learned Judge in this regard. The six Members of Parliament, by displaying their ballot papers before depositing them in the ballot box, violated the secrecy of their ballots, thereby rendering their votes invalid for the purposes of s 39 of the Constitution, as read with Standing Order 6. This rendered their votes ineligible for counting for the purpose of determining the election of the Speaker. The Clerk proceeded to count these six votes as valid votes in determining the outcome of the election. This contaminated the process. Put differently, he counted oranges and apples in a process where the law provides that only oranges be counted. In short, the Clerk failed to act as directed by s 39 of the Constitution, as read with Standing Order 6, namely to conduct an election by secret ballot. He conducted a cross-breed election, in that it was partly secret and partly open. That is not what the law provides for. In this regard I am satisfied that the Clerk failed to comply with the provisions of s 39 of the Constitution, as read with Standing Order 6.

Having concluded that the Clerk did not comply with the statutory requirements in his conduct of the election, the issue that falls for determination is, what are the legal consequences that flow from the failure to comply with the statutory provisions?

Section 39 of the Constitution, as read with Standing Order 6, has directed that the Clerk shall conduct an election of a Speaker by secret ballot but has not provided what should be the consequence of the non-compliance with this peremptory direction by Parliament.

This Court recently had occasion to deal with the issue of interpreting a Statute that does not prescribe the consequences of non-compliance with a statutory provision in the case of *Doctor Daniel Shumba and Anor v The Zimbabwe Electoral Commission and Anor* Judgment No. SC 11/08. In that case I cited with approval a passage from Bennion *Statutory Interpretation* at pp 21-22, which sets out how courts should approach that issue. The learned author states that a court charged with the enforcement of a Statute that does not state the consequences of non-compliance needs to decide what consequence Parliament intended should follow from such failure to comply. In that case I had this to say at pp 21-23 of the cyclostyled judgment:

> "It is the generally accepted rule of interpretation that the use of peremptory words such as 'shall' as opposed to 'may' is indicative of the legislature's intention to make the provision peremptory. The use of the word 'may' as opposed to 'shall' is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is

not fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not.

In the present case, the consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the Courts to determine what the consequences of failure to comply should be.

The learned author Francis Bennion in his work *Statutory Interpretation* suggests that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:

> 'Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from breach of the duty.
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> This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing "shall" be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.
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> It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts' answer has been to devise a distinction between mandatory and directory duties. Terms used instead of "mandatory" include "absolute", "obligatory", "imperative" and "strict". In place of "directory", the term "permissive" is sometimes used. Use of the term "directory" in the sense of permissive has been justly criticised. {See Craies *Statute Law* (7th edn, 1971) p 61 n 74.} However it is now firmly rooted.
>
> Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound). {As to sanctions for breach of statutory duty see s 13 of this Code (criminal sanctions) and s 14 (civil sanctions).}'

Thereafter the learned author sets out some guiding principles for the determination of whether failure to comply with a statutory provision is fatal or a mere irregularity.

One of these guiding principles is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory

> provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory."

Maxwell on *The Interpretation of Statutes* 12 ed at 314 says much the same as the above cited excerpt from *Bennion.*

Thus the issue before this Court is to determine what Parliament intended to be the consequence of the Clerk's breach of the statutory requirement to count only regular votes in determining the outcome of the election of the Speaker.

I have come to the conclusion that Parliament intended to render invalid an election wherein the Clerk fails to comply with the provisions of s 39 of the Constitution, as read with Standing Order 6. I have come to this conclusion for two reasons - firstly, because of the peremptory language of the provision in question, and secondly because of the use of different language from the one used by Parliament when it legislated on the same subject matter in another Statute, namely s 177 of the Electoral Act [*Chapter 2:13*].

Dealing with the issue of the use of peremptory language in s 39 of the Constitution, as read with Standing Order 6, there can be no doubt that the language of the relevant section is peremptory, having regard to the use of the word "shall". I accept that there has been movement from the principle of strict exaction of compliance with the wording of the Statute to avoid invalidity to a more flexible approach giving the courts some latitude in determining the consequences of non-compliance. My understanding of the new approach is that, while the use of the word "shall" is no longer conclusive of the intention of Parliament to render invalid non-

compliance, it certainly still remains cogent evidence of such intention. This Court has, in a number of recent cases, held that failure to comply with the peremptory direction of a Statute leads to invalidity. In this regard, r 29 of the Supreme Court Rules provides as follows:

> "**29 Entry of appeal**
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> (1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state –
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> (a) the date on which, and the court by which, the judgment appealed against was given;
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> (b) if leave to appeal was granted, the date of such grant;
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> (c) whether the whole or part only of the judgment is appealed against;
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> (d) the grounds of appeal in accordance with the provisions of rule 32;
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> (e) the exact nature of the relief which is sought;
>
> (f) the address for service of the appellant or his legal practitioner." (the underlining is mine)

In *Jensen v Acavalos* 1993 (1) ZLR 216 this Court held that by use of the word "shall" compliance with the requirement of r 29 was peremptory and that failure to comply with the rule rendered the Notice of Appeal a nullity and that such a notice cannot be condoned or amended. KORSAH JA at 219D had this to say about the Notice of Appeal that did not comply with r 29 of the Supreme Court Rules:

> "This notice of appeal was defective for non-compliance with the mandatory provisions of Rule 29, subrules (c), (d) and (e) which require the applicant or his legal representative to state: (i) whether the whole or only part of the judgment is appealed against; (ii) the ground of appeal to be set forth concisely and in separately numbered paragraphs; and (iii) the exact nature of the relief which is sought."

The learned JUDGE OF APPEAL further stated at pp 219H-220D:

"The notice of appeal, being bad for non-compliance with the rules, was not cured by the filing on 3 January 1990, of grounds of appeal without a prayer. Indeed, even if the grounds of appeal filed on 3 January 1990 had contained a prayer for relief, it would not have been effectual in validating the defective notice of appeal.

The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574 C-D.

In *Hattingh v Pienaar* 1977 (2) SA 182 (O) … at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *McFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I, 'every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse'."

GUBBAY CJ and MANYARARA JA concurred.

In *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) MALABA JA (as he then was) expressed the same sentiments when he stated at 149 E-G:

"A nullity cannot be amended. In *Jensen v Acavalos* 1993 (1) ZLR 216 (S) KORSAH JA at 220B said that the reason why a fatally defective notice of appeal could not be amended was that:

'… it is not only bad but incurably bad'.

Citing *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183 for authority, the learned JUDGE OF APPEAL said that what should actually be applied for is an extension of time within which to comply with the relevant rule and condonation of non-compliance.

In *Business Equipment Corp v Baines Imaging Group* 2002 (2) ZLR 354 (S) a Notice of Appeal which did not state the date on which the judgment appealed against was given, in contravention of s 29(1)(a) of the Rules of the Supreme Court, was held to be fatally defective, and the procedure stated in

> *Jensen's* case *supra* was approved as the appropriate remedy in having a proper Notice of Appeal placed before the court. See also *Talbert v Yeoman Products (Pvt) Ltd* S-111-99."

The learned JUDGE OF APPEAL further stated at p 150 B-C:

> "As no valid notice of appeal was delivered and filed within fifteen days of the date when the decision of the Labour Court was given, there was no appeal before the court and to merely insert the relevant date in the defective notice of appeal, as suggested by Mr *Muskwe*, without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with the Rules of Court, would be grossly irregular. The matter had to be struck off the roll."

It is quite clear from the above authorities that failure to comply with peremptory language of a Statute can lead to a nullity.

Equally, there are decisions of this Court wherein it has been held that non-compliance with peremptory statutory provisions does not necessarily lead to a nullity. See *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S) and the cases referred to therein.

The above authorities can be reconciled on the basis that the use of peremptory language is one of a number of indicators of the legislative intent where such intent is not explicitly stated. This obviously is a departure from the principle of strict exaction of compliance with the wording of the Statute that I referred to earlier. In my view, the use of peremptory language, such as the words "shall" or "must" in a Statute is no longer conclusive evidence of the intention of Parliament, but remains cogent evidence of such intention.

As I have already stated, I concluded that Parliament intended to render null and void an election in which irregular or invalid votes were counted together with valid votes to determine the outcome of the election of the Speaker for two reasons, namely the peremptory language of the section and the use of different language from the one used by the Legislature on the same subject matter in a different Statute.

The proposition that generally speaking Parliament, just like an individual, uses the same words or language to evince the same intent and different words or language to evince a different intent is grounded in elementary common sense. Maxwell on *The Interpretation of Statutes* 12 ed devotes a whole chapter on the presumptions arising from the change of language in statutory interpretation (see pp 282-289). His opening paragraph of this subject matter reads:

> "From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning (*Ricket v Metropolitan Railway Co.* (1867) L.R. 2 H.L. 175, *per* LORD WESTBURY; *ex p. Haines* [1945] K.B 183; *Evans v Evans* [1948] 1 K.B. 175). 'Where the Legislature,' said LORD TENTERDEN CJ, 'in the same sentence uses different words, we must presume that they were used in order to express different ideas' (*R. v Inhabitants of Great Bolton* (1828) 8 B. & C. 71, at p. 74)."

For the presumption to arise the change of words does not necessarily have to be in the same section or the same Act. It can be from one Statute to another. See Maxwell on *The Interpretation of Statutes* at p 283, where the learned author states that:

> "There are many modern cases on change of wording, and they fall roughly into three groups, according to whether the language alters (i) within the same section, (ii) within the same Act, (iii) from one statute to another."

For authority for the third category, which bears resemblance to the facts *in casu*, the learned author cites the following authorities - *Att.-Gen. for Northern Ireland v Gallagher* [1963] AC 349; *B. v B. and H. (L. intervening)* [1962] 1 All ER 29; *Re P. (infants)* [1962] 1 WLR 1296; *Irwin v White, Tomkins and Courage, Ltd* [1964] 1 WLR 387; *Att.-Gen. of the Duchy of Lancaster v Simcock* [1966] Ch. 1; *Seabridge v H. Cox & Sons (Plant Hire), Ltd* [1968] 2 QB 46; *Wild v Wild* [1968] 3 WLR 1148.

While the authorities cited by Maxwell relate mainly to historically connected Statutes, I see nothing in principle that should limit the presumption to preceding Statutes to the exclusion of Statutes on the same subject matter but not historically connected. After all, Parliament is presumed to be familiar with its own Acts. The corollary, that Parliament is ignorant of its own Acts, is simply untenable. Thus, at the time of enacting Standing Order 6 in 2005, in terms of which the Clerk acted, Parliament was familiar with the provisions of s 177 of the Electoral Act, which was enacted earlier. This particular provision has been included in no less than nine electoral Acts in this country since 1928.

In my view, it is permissible for a court to look at the language of another Statute on similar or the same subject matter in the exercise to ascertain the intention of Parliament. Section 177 of the Electoral Act, as appears from its heading, deals with the subject of the consequences of non-compliance with the Electoral Act. It provides as follows:

"**177 When non-compliance with this Act invalidates election**

> An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that –
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; and
>
> (b) such mistake or non-compliance did affect the result of the election."

Section 177 of the Electoral Act clearly provides that it is only when non-compliance with the Act affects the result of the election that the election should be set aside. In effect, this section incorporates into the Electoral Act the doctrine of substantial compliance. Section 39 of the Constitution, as read with Standing Order 6, provides for the election of the Speaker, but does not incorporate the principle of substantial compliance. In my view, if Parliament had intended that only non-compliance that affected the outcome of the election of the Speaker would render invalid such an election it would have used the same or similar language.

Also in determining the intention of Parliament, I took into account the fact that no draconian consequences would flow from a declaration of invalidity of the election. Parliament consists of a little over two hundred Members and ordering a re-election of the Speaker does not pose financial or logistical problems of any magnitude. If properly organised, as it should be, I do not see the election of the Speaker taking more than an hour and it should require only a minimum of resources.

I am also mindful of the fact that Parliament is one of the most revered institutions in our, or any, society. It consists of the highest concentration of political leadership of the country. Parliament makes the laws that we all obey. Parliament should, therefore, lead by example and should scrupulously obey its own laws. The

election of the Speaker should be an example of how an election should be conducted. This is particularly so in Zimbabwe which is plagued by contestation of election results. Parliament should use the election of the Speaker to set the best example to the rest of the country. It is unacceptable that Parliament should seek to salvage a shambolic and chaotic election of a Speaker through the doctrine of substantial compliance.

I do not wish to be understood as setting aside the election of the Speaker on the ground that it was chaotic. I am satisfied that the chaos and the conduct of Members of Parliament generally did not on their own affect the election to the extent that it can be concluded that the Clerk did not conduct an election. I am merely expressing concern that the Clerk failed to stamp his authority on the election and insist that Members of Parliament conduct themselves in accordance with his instructions. I, however, do not think that conduct alone is sufficient on its own to constitute a basis for setting aside the election of the Speaker.

Before concluding, I feel constrained to make the following observation in the interests of clarity. I have read the judgment of SANDURA JA. It is a misinterpretation of this judgment to conclude that it seeks to reinstate the old principle of strict compliance with the letter of the statute to avoid invalidity. This judgment is based on what I considered to be the intention of Parliament as evinced by the language of the Statute, and by contrasting the language of s 39 of the Constitution, as read with Standing Order 6, with the language of s 177 of the Electoral Act.

I also do not agree that the principle that a peremptory enactment must be obeyed was abandoned in the case of *Sterling Products International Ltd supra*. My understanding of *Sterling's* case *supra* is that it modified the principle by endorsing the movement away from strict compliance to a more flexible application of the principle. This is the only basis on which one can reconcile GUBBAY CJ's concurrence with the judgment of KORSAH JA in *Jensen's* case *supra* and his judgment in *Sterling's* case *supra*. MANYARARA JA concurred with both judgments. This Court reaffirmed the modification of the principle in *Shumba's* case *supra*.

In the result, I have come to the conclusion that the six named Members of Parliament did not vote by secret ballot and therefore their votes were irregular. The inclusion of the irregular votes in the determination of the final outcome of the election of the Speaker constitutes a failure to comply with s 39 of the Constitution, as read with Standing Order 6, providing for the election of the Speaker of Parliament by secret ballot, thereby rendering it invalid.

For the foregoing reasons I would allow the appeal. In the result, I make the following order –

1. The appeal is allowed with costs, to be paid by the respondents jointly and severally the one paying the other to be absolved.

2. The order made by the court *a quo* is set aside and the following substituted –

"The application succeeds and the election of the second respondent as Speaker is hereby set aside."

ZIYAMBI JA: I agree

GARWE JA: I agree

MALABA DCJ: I have read the opinion expressed by the learned CHIEF JUSTICE. I regret that I am unable to agree with the decision that s 39(2) of the Constitution, as read with Standing Order No. 6 of the House of Assembly Standing Orders ("Standing Order 6"), by implication compels the nullification of the election upon proof that the Clerk of Parliament ("the Clerk"), who was under the obligation to conduct the election of the Speaker of the House of Assembly ("the Speaker") by a secret ballot, unlawfully counted invalid votes as secret ballots.

This case came to the Supreme Court by way of an appeal against the judgment of the High Court. The court *a quo* dismissed with costs an application for

an order declaring that the election of the second respondent as the Speaker of the House of Assembly ("the House") on 25 August 2008 is null and void and set aside. The applicants, who are members of the House who had taken part in the election of the Speaker, disavowed the application as an application for review. The substance of the relief sought and the reliance on the provisions of s 4(1) of the Administration of Justice Act [*Chapter 10:28*], however, show that it was an application for review. The applicants alleged in effect that the Clerk who, as the administrative authority, was given the power to conduct the election of the Speaker by a secret ballot, in accordance with the machinery prescribed under s 39(2) of the Constitution, as read with Standing Order 6, failed to act in accordance with the requirements of the rule against counting invalid votes as secret ballots and as a result affected their rights or legitimate expectation in the election.

A perusal of the papers filed in support of the application shows that the relief was sought on two grounds. The first ground was that there was "noise, utter chaos and disorder" in the Chamber of the House at the time appointed by the Clerk for the holding of the election of the Speaker such that the environment never became conducive for conducting the election by a secret ballot. The second ground was that, in violation of the secrecy of the ballot, and in defiance of the procedure laid down by the Clerk, some members of the MDC-T party came out of the polling booth with ballot papers on which they had marked their votes unfolded. The allegation was that they displayed the ballot papers to others to disclose for whom they had voted before folding the ballot papers and depositing them in the ballot boxes. As part of the second ground it was alleged that the Clerk was under a duty to stop or

prevent the members of the MDC-T party from doing what they did, but in disobedience of his duty failed to do so.

It was not the applicants' case that the election of the second respondent as the Speaker of the House should be declared null and void because the Clerk counted invalid votes as secret ballots, thereby distorting the result of the election. The reason is that to do so would have involved an admission by the applicants of the fact that there was counting of secret ballots produced by the electoral process the applicants alleged had not taken place. As the learned CHIEF JUSTICE arrived at the conclusion, with which I disagree, on the ground that the Clerk counted invalid votes as secret ballots, I will deal with the question whether in the machinery for the election of the Speaker prescribed under s 39(2) of the Constitution, as read with Standing Order 6, the unlawful conduct of the Clerk in counting invalid votes as secret ballots automatically nullifies the election.

My view of the case is that the application ought to have been dismissed or granted on the grounds on which the applicants made it. Before determining the question whether the applicants established the grounds on which they sought the relief from the court *a quo*, I set out and construe the law in terms of which the election of the Speaker by a secret ballot was required to be conducted. It is for the Legislature to make provision by legislation for matters relating to elections to office in institutions of a democratic government. All matters relating to the organisation and procedure for election to the office of the Speaker of the House must be determined on the construction of the broad terms of the legislation enacted for the purpose by Parliament.

Section 39(1) of the Constitution imposes on the House an obligation to elect a presiding officer, to be known as the Speaker, at its first meeting after dissolution of Parliament and before proceeding to transact any other business. The election must therefore be held at the time prescribed under s 39(1) of the Constitution. It is required to be an election by a secret ballot. Only a secret ballot under the statute can give rise to a "result of the election". The right to vote in the election of the Speaker where more than one person is proposed for the post is given to members of the House who would have subscribed the oath of loyalty and are present in the Chamber of the House at the time the election is called by the Clerk. By section 39(2) of the Constitution, as read with Standing Order 6, the Clerk is appointed as the official to conduct the election required by s 39(1) where more than one person is proposed as Speaker. By the same provisions the Clerk is enjoined to conduct the election of the Speaker by a secret ballot. When the members elect a Speaker from candidates nominated they do so in their individual capacity. They are not acting as representatives of the people who elected them to the House.

Where the words "conduct the election" are used as they are used in s 39(2) of the Constitution, as read with Standing Order 6, in respect of a situation where more than one person is proposed for election for a post, it is clear that the word "election" is used with the intention that it should be understood to mean the whole combined and continuous process for bringing about the result of the election. It is a process consisting of a number of material steps prescribed by law, beginning with the call for the election and ending in the declaration of the result of the election. For the purposes of s 39(2) of the Constitution, as read with Standing Order 6, all

these steps were driven by the free exercise of the right to vote by the electors directed by the Clerk entrusted with the responsibility of conducting the election by a secret ballot. The words "conduct the election" compendiously describe the number of duties the Clerk would be expected to carry out to ensure that members who were desirous to elect the Speaker by means of a secret ballot did so freely. So to "conduct the election" in the context of s 39(2) of the Constitution, as read with Standing Order 6, denotes the concept of legality, in the sense that it contemplates the making of decisions or the taking of actions in the performance of duties, the effect of which is to direct or manage the activities of the voters according to the prescribed requirements of the law to achieve the object or purpose of ensuring the election of the Speaker based on universal, equal, direct and personal vote freely expressed by a secret ballot.

In construing s 39(2) of the Constitution, as read with Standing Order 6, it is important to bear in mind that the right to vote vested in the members present and voting at the first meeting of the House is not affected by the requirement that the election should be conducted by a secret ballot. The statute relates to procedure alone and directs the mode in which the right to vote is to be exercised by the electors. The Legislature chose the secret ballot for its optimum benefits and prescribed it as the only method by which the elector would validly exercise his or her right to vote for the Speaker. At the same time, it imposed on the Clerk the general obligation to provide the mechanisms and procedures for the recording, processing and protection of the secret ballot to bring about the election of the Speaker.

Every voter was entitled to express his or her will on the candidates by voting "for" or "against" through the legally permitted form of voting. As s 39(2) of the Constitution, as read with Standing Order 6, prescribes a secret ballot and its attendant requirements as a condition the elector has to perform if he or she is desirous to give a valid vote for a candidate in the election of the Speaker, it is addressed to both the voter and the Clerk who has to conduct the election by a secret ballot. The validity of a vote and of any act performed by the Clerk must be measured in terms of its conformity with the requirements of a secret ballot prescribed as the essence of the election of the Speaker. In my view, it is wrong to place on s 39(2) of the Constitution, as read with Standing Order 6, a narrow construction which views it as directed at the Clerk only. The Clerk does not vote. He does not produce the result of the election. His functions are managerial. The elector is the driver of the election by a secret ballot. The Clerk and the voter must be viewed in the context of the legal relationship of the rights and duties they have to exercise or discharge to achieve the statutory objective or purpose.

The prescription of a secret ballot as the method for the election of the Speaker is based on the acceptance of the principle that it promotes and protects freedom of expression of choice of a preferred candidate without undue influence, intimidation and fear of disapproval by others. The elector is given the right to mark the choice of one candidate from another or others in secret. The words "secret ballot" are used in the wide and narrow sense to mean the process by which the ballot is recorded, processed and protected, as well as the ballot in which there is complete and inviolable secrecy designed to drive away the fear of disclosure and secure to the voter freedom from undue influence, intimidation and fear of disapproval by others.

A "secret ballot" is therefore a ballot cast freely by a voter in secret when no other person is present and aware of what is happening. The ballot is secret to the voter, in the sense that he or she is the only person who knows for whom he or she is voting. Whilst the caster of the vote remains unknown the secrecy of the ballot is maintained and the vote has been effectively cast in the election of the Speaker. It is the valid vote to be counted to ascertain the result of the election of the Speaker by a secret ballot.

To maintain the secrecy, made to be extremely material as the foundation to the validity of the vote itself, the voter must meet certain conditions. He or she is required not to put on the ballot paper on which the vote is given any writing or mark by which his or her identity as the voter can be known by any other person looking at the ballot paper. The voter is also required not to display or expose the ballot paper after he or she has given the vote so as to disclose to any other person for whom he or she voted before depositing the ballot paper in the ballot box. So essential is the secrecy of the ballot to its validity that any departure by the voter from these conditions designed for the purpose of ensuring the maintenance thereof must render the vote void.

The mandatory obligation imposed on the Clerk was to perform the duties put on him to provide the mechanisms and procedures that enabled the voter who was desirous to exercise the right to vote by a secret ballot to do so. The duties he had to perform were to ensure that the vote given in secret was recorded, processed, protected and counted, to bring about the election of the Speaker. The

primary object of any act performed by the Clerk in the discharge of the obligation to conduct the election of the Speaker by a secret ballot would have been the maintenance of the secrecy of the ballot given by the voter, unless the voter himself or herself failed to observe strictly the conditions essential to the validity of the vote as a secret ballot. The Clerk, as the official appointed by the Legislature and given the responsibility of conducting the election of the Speaker by means of a secret ballot, was under an absolute duty not to do anything in the execution of his duties that would have the effect of compelling the voter to violate the secrecy of the ballot.

Although it does not say in express terms that the Clerk cannot record the vote in some other way, it is clear that s 39(2) of the Constitution, as read with Standing Order 6, makes the prescribed manner of recording the ballot by means of a ballot paper, properly drawn up and with the names of the candidates and the appropriate spaces where the mark by which the vote would be given, the only manner in which a secret ballot was to be given. The Clerk has no discretion as to how the election should be conducted. He must conduct it by a secret ballot. The valid vote in an election had to be one given for a candidate by means of a secret ballot. It was, therefore, the duty of the Clerk to provide the official ballot papers. It was his duty to put in place the polling booth in which the voters would mark the ballot papers, screened from observation by other potential voters. It was his duty to provide sealed and translucent ballot boxes in which the voters would deposit the marked ballot papers for safekeeping before counting. The Clerk discharged these duties in accordance with the requirements of the law. He put in the Chamber of the House the polling booth and two ballot boxes and provided the ballot papers.

It was also the Clerk's duty to provide the procedure by which the secret ballot was to be recorded, processed, protected, counted and results of the election based on it declared. He again complied with this requirement. The Clerk explained to the members that the voter would only mark his or her vote on a ballot paper delivered by him just before proceeding to the polling booth and that the ballot paper had to have an official stamp marked on the back. Upon receipt of the ballot paper, the member was to go immediately into the polling booth and there mark his or her ballot paper to express his or her choice. The voter was then required to fold the ballot paper up whilst in the polling booth so as to conceal the vote and then go and deposit the ballot paper so folded up into the ballot box. The voter was required to exhibit to the Clerk the official stamp on the back of the folded ballot paper before dropping it into the ballot box. The procedure met the purpose of the legislation of ensuring equality of conditions for election to the office of Speaker for the candidates and the occurrence of an election based on universal equal, direct and personal suffrage freely expressed by a secret ballot.

It was the duty of the Clerk to monitor the proceedings and keep a continuous oversight of the actions of the voter as he or she moved from the polling booth to drop the ballot paper into the ballot box. In that way he would be able to detect conduct inconsistent with the exercise by the voter of the right to elect the Speaker in accordance with the procedure prescribed to ensure the maintenance of the secrecy of the ballot. Once he detected such conduct, it was the Clerk's duty to act judicially and determine that the conduct of the voter had stripped the ballot of secrecy and declare the vote invalid and not to be counted.

At the end of the poll the Clerk was required to open the ballot box in the presence of the agents of the candidates. It was his duty to empty the ballot box and open each and every folded ballot paper and inspect it to ensure that only those ballot papers which were not contrary to the provisions and spirit of s 39(2) of the Constitution, as read with Standing Order 6, as to secrecy were counted in the election of the Speaker. Before counting the valid ballot papers the Clerk was required to group and arrange them under the names of the respective candidates by placing in separate parcels those which were secret ballots opposite the name of the same candidate and rejecting all invalid ballot papers.

The results of the election to be declared by the Clerk in an election of the Speaker conducted in terms of s 39(2) of the Constitution, as read with Standing Order 6, would not be the number of votes cast. The reason is that some of the votes would have lost their secrecy as they moved through the process from the time they were given on the ballot paper in the polling booth to the time they were canvassed after the opening of the ballot box. The result of the election under s 39(2) of the Constitution, as read with Standing Order 6, is the outcome of secret ballots counted as such. The result of an election cannot include invalid votes because it is unlawful to count invalid votes as secret ballots. Courts do not ordinarily nullify that which has been done lawfully. Nullification is a remedy intended to be used to redress a wrong.

There is yet another important aspect of the right to secrecy of the ballot which needs to be considered before the determination of the question whether the applicants established the grounds on which they sought relief in the court *a quo*.

It is that the right to secrecy of the ballot protected under s 39(2) of the Constitution, as read with Standing Order 6, is subject to the principle that everyone has a right to waive an advantage of a law made solely for his or her benefit and protection in his or her private capacity. He or she may dispense with the benefit or advantage, provided he or she does so without infringing any public right or public policy. See Maxwell on *The Interpretation of Statutes* 12 ed p 328.

There is no legal obligation that a voter must vote by secret ballot. The requirement of a vote by a secret ballot is justified on the principle which, without unacceptably encroaching on the rights of the persons concerned to stay out of the prescribed system of election, fosters the values of honesty, freedom and reliability that should characterise electoral choice. As the voter must exercise the right to vote for the Speaker by a secret ballot given on the ballot paper freely, he or she can waive the right to the secrecy of the ballot at the time the vote is cast or at any time before he or she deposits the ballot paper in the ballot box.

The right to vote by a secret ballot includes the right of the voter to disclose to any other person for whom he or she voted. He or she can in the exercise of that freedom decide to put a writing or mark on the ballot paper at the time he or she casts the vote by which he or she can be identified as the voter and for whom he or she voted. He or she may decide to display to others the ballot paper so as to share the knowledge for whom he or she voted. So a voter can of his or her own free will inform whomsoever he or she chooses for whom he or she voted. A secret ballot is not compulsory insofar as the voter who is not desirous of taking part in the election by a secret ballot is concerned.

The rule that there should be no writing or mark put by the voter on the ballot paper by which his or her identity as the voter can be revealed, and that the ballot paper should not be displayed to any other person so as to disclose for whom the vote was given, prescribes a condition of the validity of the vote. The question whether there is a secret ballot for the purposes of the validity of the vote will depend for its answer on the actions of the individual voter.

In *Jenkins v Board of Elections* 180 NC 169 (1920), cited by Mr *Chaskalson*, it is correctly stated by BROWN J that:

> "… voting by ballot, as distinguished from *viva voce* voting, means a secret ballot, and … the elector in casting his ballot has the right to put it in the box and to refuse to disclose for whom he voted and that he cannot be compelled to do so. But this privilege of voting a secret ballot has been held to be entirely a personal one. The provision has been generally adopted … for the protection of the voter and for the preservation of his independence in the exercise of this most important franchise. But he has the right to waive his privilege and testify to the contents of his ballot."

In *State Ex Rel. Hutchins v Tucker et al* 106 Fla 905 (1932), also cited by Mr *Chaskalson* in argument, BUFORD CJ quoted from Cooley *Constitutional Limitations* 7 ed p 912 where the learned author states:

> "The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases and that no one is to have the right or be in a position to question his independent action either then or at any subsequent time. The courts have held that a voter even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally or by trick or artifice have acquired knowledge on the subject should not be allowed to testify to such knowledge or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it, his ballot is absolutely privileged."

I turn now to determine the question whether the applicants established the grounds on which they based the application for the relief sought.

On the first ground, the first applicant in the founding affidavit said that there was "too much noise in the House" at the beginning of the process for the election of the Speaker. The intention was to show that the Clerk was unable to manage the activities of the members according to the prescribed procedure for the achievement of the purpose of the electoral law. He said the noise was caused by members belonging to MDC-T party who were pacing up and down the Chamber conferring noisily with each other in support of the second respondent. He said that was done "in a manner that created utter disorder and raised very serious tensions in the House". After describing how the Honourable Biti displayed the ballot paper, after he had cast his vote in the polling booth, so as to disclose to others for whom he had voted, before folding the ballot paper up and depositing it into the ballot box, the first applicant said in para 32 of the founding affidavit:

> "Honourable Biti's shocking and unprecedented conduct caused more than a fracas in the House as Honourable Members started shouting objections and counter objections, including trading insults, at the top of their voices while the voting process degenerated into total disorder …."

In paras 3.9, 3.10, 3.15, 5, 6, and 11 of the opposing affidavit the Clerk said:

> "3.9 The mood and atmosphere in the House of Assembly on the occasion was neither unique nor unprecedented. Members of the House of Assembly were meeting together for the first time after a fiercely contested general election. As can be expected under the circumstances the conversation was lively and the exchanges exuberant. There was a fair amount of good-humoured raillery, including political taunting, verbal sparring and bantering, all done by Members from all the political parties represented in what appeared to

be a good spirit of joviality. This kind of conduct is not unusual in our Parliament or any other Parliament for that matter and accordingly, I did not consider it a cause for concern on this occasion.

3.10 It is my submission that what has been described by (the) applicant as 'gross disorder, chaos or fracas' in the House was actually nothing more sinister than increased hustle and bustle in the House, in turn the result of the increase in number of Members of the House (an increase in the membership from 150 to 210 as a result of Constitutional Amendment No. 18). …

3.15 Notwithstanding the environment in the House that I have described in paragraphs 3.9 and 3.10 of this affidavit I was able to manage the entire proceedings of the day according to my present programme without a hitch of any kind. It is, therefore, my submission that quite contrary to (the) applicants' allegations of 'utter disorder and fracas' the proceedings progressed exceptionally smoothly. …

5 I deny that at the time immediately before the elections took place there was too much noise and there existed a state of utter disorder in the House. I also totally deny witnessing any manifestation of serious tensions. What I did witness in the House was the atmosphere that I have described in paragraphs 3.9 and 3.10 of this affidavit.

6 Save to confirm that I did call the House to order whenever I deemed it necessary and by so doing achieved a continuing level of order which enabled me to discharge my obligation and safeguard the progress and integrity of the voting process as well as all other proceedings of that day the contents of this paragraph (25 of the founding affidavit) warrant no comment. …

11 I totally deny that there was total disorder in the House which I failed to control. If such a state of disorder had existed the process of voting would have been impossible which it was not. Generally, Members remained in their places, heard their names being called, followed the order on the list, approached, took possession of the ballot papers and proceeded to vote privately. After voting they resumed their places without impediment in an exceptionally orderly manner given their numbers and the congestion in the Chamber."

The court *a quo* found on the facts that there was not so much noise as to cause chaos or utter disorder, as described by the first applicant. The finding was justified by the evidence. The relevance of raising the issue of noise was to show that the Clerk was disabled from performing his duties to conduct the election of the Speaker by a secret ballot. The applicants did not refer to specific duties the Clerk

failed to perform because of the noise. To the contrary, the facts showed that all the Members who were present and desirous to vote did so.

Each of the two hundred and eight members received a ballot paper from the Clerk and went into the polling booth where he or she marked his or her vote on the ballot paper in secret. Some of the members came out of the polling booth with their ballot papers folded to conceal the vote and dropped the ballot papers into the ballot boxes after exhibiting the official stamp on the back to the Clerk. Other members came out of the polling booth with their ballot papers unfolded and displayed them to others so as to disclose for whom they had voted before folding them and dropping the ballot papers into the ballot box.

All the members responded to the alphabetical order in which their surnames were called. They could not have done that in the context of the environment of chaos or utter disorder described by the applicants. The first applicant conceded in para 25 of the founding affidavit that the Clerk occasionally intervened to restore order when it was necessary to do so. It was indeed the duty of the Clerk to maintain order during the electoral process. By that admission the first applicant corroborated the Clerk, who said that he was able to act and control the situation when he considered that the noise would interfere with his ability to conduct the election by a secret ballot as required by the law. The Clerk was not a mere moderator. He was the governor of the electoral process for the purposes of securing the proper conduct of the election. As such his evidence had to be accorded appropriate weight, where it was supported by that given by the applicants.

It is of interest to note that the Minister of Youth Development, Indigenisation and Empowerment, the Honourable Kasukuwere, and the Honourable member, Mr Zhuwawo, admit in the affidavits filed in support of the applicants that when they called out to draw the attention of the Clerk to the objections they were raising to what they considered was a violation of the requirements of a secret ballot by members of the MDC-T party, who displayed their ballot papers to others so as to disclose for whom they had voted, the Clerk told them not to make noise. According to the two members, what was shouted were objections to the conduct of displaying ballot papers. The objections were not intended to obstruct the Clerk in the conduct of the election. They were not the confused and undesirable sounds characteristic of noise. The environment cannot be accurately described as characterised by complete absence of order.

In view of the fact that all the two hundred and eight members went through the process by which they gave their votes on the ballot papers and dropped them into the ballot boxes, with some displaying their ballots to others so as to show for whom they had voted, the allegation that there was so much noise that the atmosphere was not conducive for conducting the election of the Speaker by a secret ballot was not substantiated. The atmosphere was characterised by the factors described by the Clerk, which enabled him to conduct the election of the Speaker fairly and efficiently.

The first ground on which the application for relief was based was not proved.

The second ground was based on the allegation that it was unlawful for the members of the MDC-T party who displayed their ballot papers to do so and for the Clerk not to stop or prevent them from doing what they did. The intention was to show that the actions of the voters concerned and the failure to act by the Clerk undermined the process by which the object of the electoral law was to be achieved, thereby violating the rights of the applicants to elect the Speaker or be elected as the Speaker by a secret ballot. In that regard the first applicant said in the answering affidavit:

> "100: It is particularly notable that (the) second respondent himself was one of the Honourable Members from the MDC-T party that unlawfully opened and displayed their marked ballot papers and this fact alone, which is captured in the DVD evidence, is enough to show that his claim to be Speaker is legally vacuous. …
>
> 103. The fact that some Honourable Members, actually most of them belonging to (the) second respondent's MDC-T party including (the) second respondent, defiantly opened and displayed their marked ballot papers simply means that there was no lawful election and (the) second respondent is wishfully wrong to claim that he was lawfully elected from an election that was in fact unlawful." (the underlining is mine for emphasis)

The applicants invariably described the conduct of the members of the MDC-T party in displaying their ballot papers to others so as to disclose for whom they had voted in terms which show that they considered the conduct unlawful. They said it was "shocking behaviour", "a brazen violation of the secret ballot", a "deliberate and defiant violation of the election procedure", "open and defiant violation of the secret ballot", "blatant misconduct", "the failure to observe and respect a fundamental parliamentary rule in the election of (the) Speaker", "the rampant and systematic violation of the secret ballot", "the failure to conduct the votes in secret as required" and "an irregularity which is a grave breach of the Rules of

Parliament". The effect of the contention advanced by Mr *Hussein* on appeal was that the members of the MDC-T party who displayed the ballot papers to others so as to disclose for whom they had voted had no right to do so.

In para 6 of the answering affidavit, the first applicant emphasised the fact that he considered the failure by the Clerk to stop or prevent the members of the MDC-T party who displayed their ballots from doing so as unlawful. He said:

> "6. His failure principally arose from his inability or unwillingness for whatever reasons to ensure that no Member left the polling booth after voting with an unfolded ballot paper and that no Member openly displayed his or her marked ballot paper to any other Member for whatever reason."

In para 178 of the answering affidavit, the first applicant summarised the issue for determination by the Court as follows:

> "At issue is only the unchallenged fact in the papers, namely that unfolded and marked ballot papers were displayed by many Honourable Members of the MDC-T party including (the) second respondent outside the polling booth during the election and that this was in violation of the procedure that marked ballot papers should be folded in the polling booth and (the) first respondent did nothing to stop this violation."

Mr *Hussein* argued on appeal that the failure by the Clerk to prevent or stop the members of the MDC-T party from displaying their ballot papers was evidence of breach by him of the duty to conduct the election of the Speaker by a secret ballot.

The court *a quo* found on the facts that only six members of the MDC-T party were shown to have come out of the polling booth with unfolded ballot papers and to have displayed the ballot papers to others so as to disclose for whom they had

voted. The finding was again justified. Although the first and second applicants had alleged in their affidavits that "many" members of the MDC-T party had displayed their ballots, no evidence was produced to support the allegation. The use of the word "many", in a case in which they were not able to state the number of the members of the MDC-T party who acted in the manner alleged, suggests that there was an element of exaggeration. This is particularly so when regard is had to the fact that the applicants also said "some" members of the MDC-T party displayed their ballot papers so as to disclose to others for whom they had voted. Given the fact that the applicants were seeking an order of nullification of the election, it was necessary that their case be based on clear evidence of the number of voters who displayed their ballot papers. The legal consequence would have been that the voters concerned had disenfranchised themselves by their own conduct.

Proceeding as the parties did on appeal on the basis that six members displayed their ballots so as to disclose for whom they had voted, did the applicants show that those voters acted unlawfully? Did they *ipso facto* show that the Clerk acted unlawfully in failing to stop or prevent those voters from behaving in the manner they did? I must add that the only reasonable inference from the circumstances of the case is that the six members displayed their ballot papers to other members of the MDC-T party to disclose to them that they had voted for the second respondent.

All members, including the six who displayed their ballot papers, had the right to waive the right to the secrecy of their votes. In displaying the ballot papers to others, the six members exercised their right to share with any other person

the knowledge for whom they voted. As long as they were not coerced or compelled to expose their ballot papers to others, the voters acted lawfully. The power conferred on the Clerk to conduct the election of the Speaker by a secret ballot is limited by the right of the voter not to maintain the secrecy of his or her ballot.

The Clerk was not under any duty to stop or prevent the voters from voluntarily displaying their ballot papers to others so as to disclose for whom they had voted. Whilst the duty on the Clerk to maintain the secrecy of the ballot given by the voter requires that he should refrain from doing anything that would compel the voter to disclose to any other person how he or she voted, it cannot be relied upon to justify conduct by which the voter would be prevented from freely exercising the right to disclose to whomsoever he or she chooses for whom he or she voted because the secrecy of the ballot is protected under the law for the benefit of the voter. The Clerk owed the duty not to do anything to compel the voter to disclose for whom he or she voted to the voter. He cannot discharge the duty to the detriment of the interests of the voter by preventing or stopping him or her from exercising the right of disclosure of information as to how he or she voted.

It is clear that the duty on the Clerk was not to interfere with the recording, processing and protection of a secret ballot as long as the voter maintained the secrecy of the ballot. The applicants did not show that the Clerk acted unlawfully by not stopping or preventing the six members from displaying their ballot papers to others so as to disclose that they had voted for the second respondent. His duty was to manage and direct the activities of the electors in accordance with the rules designed to ensure a free and fair election by a secret ballot.

The applicants failed to establish the two grounds on which they sought the relief from the High Court by way of an order declaring the election of the second respondent as the Speaker of the House null and void and set aside. The application ought to have been dismissed at that stage of the proceedings.

As I disagree with the learned Judge, on the comments he made on the legal consequences of the conduct of the six members in displaying their ballot papers to others so as to disclose for whom they voted and also disagree with the learned CHIEF JUSTICE on the conclusion he reached that the counting by the Clerk of invalid votes cast by the six members as secret ballots nullified the election of the second respondent as the Speaker of the House and not just the affected votes, I proceed to express my opinion on these matters.

The words "shall conduct the election of Speaker by a secret ballot" are placed in a statute by the provisions of which the Legislature recognised the possession by the members of the House present at its first meeting of the right to vote for the Speaker by a secret ballot. The rule of law is that a right to vote must be exercised strictly according to the terms of the statute which confers it. What this means, on the facts of this case, is that when the six members displayed their ballot papers to others, so as to disclose for whom they had voted, they voluntarily took their votes out of the system of the election by a secret ballot prescribed under s 39(2) of the Constitution, as read with Standing Order 6. By the same conduct by which they waived the right to the secrecy of their ballots, the voters lifted the veil of secrecy from the ballots rendering them void and of no value in the election of the Speaker.

I do not accept as a correct statement of the law the contention advanced by Mr *Chaskalson* and Ms *Damiso* on behalf of the respondents, and accepted by the learned Judge in the court *a quo*, that the six ballots remained valid votes, notwithstanding the fact that they had been displayed by the voters concerned to others so as to disclose for whom they had been given. The learned Judge at p 11 of the cyclostyled judgment said:

> "The courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation and howsoever his conduct might influence other voters, this cannot detract from the secrecy of his vote or vitiate the secrecy of the ballot as a whole." (the underlining is mine)

The statement that a voluntary display by a voter of the ballot paper so as to disclose to other people for whom he or she voted does not "detract from the secrecy" of the vote cannot be a correct statement of the legal effect of such conduct on the secrecy of the ballot affected. The object of the ballot prescribed under s 39(2) of the Constitution, as read with Standing Order 6, is to secure complete secrecy as a condition of its validity, to be maintained not only by the voter desirous to elect the Speaker but by the official entrusted with the responsibility of conducting the election by a secret ballot during the electoral process, including the time when the counting of the votes takes place. How can the official be able to maintain complete secrecy of a ballot in the face of conduct by the voter which removes the secrecy from the ballot? How the ballot can retain its secrecy thereafter I cannot imagine.

The secrecy is conferred on the ballot at the time the vote is given on the ballot paper in the polling booth. It must, however, be maintained thereafter to ensure the validity of the vote in the election of the Speaker. It is clear from the object of the statute and the procedure for voting, that a ballot paper which has a writing or mark made on it by which the identity of the voter can be known or one that is displayed to other people so as to disclose for whom the vote was cast gets stripped of the secrecy of the ballot. The secret as a secret ceases to exist. The ballot becomes void and cannot be counted in the election by a secret ballot.

The view expressed by the learned Judge did not take into account the effect of the requirement of the procedure provided by the Clerk for voting by a secret ballot. The duty put on the voter desirous of maintaining the validity of his or her ballot in the election of the Speaker was that, after marking the ballot paper in the privacy of the polling booth, he or she would fold the ballot paper so as to conceal the ballot and keep it so folded until he or she deposited the ballot paper in the ballot box for safekeeping. The rule was to ensure the preservation of the secrecy of the ballot for the purpose of its validity in the election.

The direct effect of the voter displaying the ballot paper to other people so as to disclose to them for whom he or she voted is the invalidation of the ballot as a secret ballot. Without pretending that there was no criterion by which a secret ballot had to be identified, I think the conclusion that the ballots displayed by the six voters to others so as to disclose to them for whom they had voted did not lose their secrecy, does not accord with what seems to have been the intention of the Legislature. The proposition that the invalidity of the votes does not occur at the time the ballot papers

are displayed so as to disclose for whom the vote was given would create a situation which would be quite unclear and to a certain extent even illogical. Every exercise of a right has a direct consequence. The exercise of the right to vote which removes the secrecy of the ballot cannot have the same consequence as the exercise of the right which maintains the secrecy of the vote.

Failure by the Clerk to respond to the actions of the six voters and formally declare the ballots void did not change the fact that the ballots had been rendered invalid by the very actions of the voters. The votes remained invalid at the time the Clerk counted them as secret ballots. He was not under any duty to count invalid votes as secret ballots. The statute is in effect clear that in no case will votes be allowed which are in any form other than the form of a secret ballot.

The result of the election of the Speaker by a secret ballot was not the number of votes cast, as some of them would have lost the essential element of secrecy as they travelled in their journey from the time they were cast to the time of counting. The result of the election was who was elected by a secret ballot. The counting of invalid votes that had lost their secrecy affected two classes of voters. The first class is of voters who deliberately exercised their right to waive the benefits of the secrecy of the ballot by displaying the ballot papers to others so as to disclose for whom they had voted. The second class is that of voters who kept the knowledge for whom they voted to themselves.

The first class of voters had no right or legitimate expectation that their votes would be counted as valid votes. In this case they did not, as a matter of fact,

seek to enforce any such right or legitimate expectation. They appreciated the fact that they did not have such a protection. If anything, the legitimate expectation would have been that the votes they had voluntarily stripped of secrecy be not counted as secret ballots.

The second class of voters had the right or legitimate expectation that their votes and the election based on them be declared lawful. The applicants belonged to this class of voters. It appears that they are acting against their own interests and those of other voters in this class. What right did they seek to protect or enforce by an order of nullification of the election? If it is the right to a fair and free election by a secret ballot, they had to first show that it was violated by the respondents. They failed to show that violation. Where there is proof of violation of electoral rights, such as the right to vote or to stand for election, the need to enforce the rights under judicial protection may require that the election be set aside if it was shown that the violation had undue influence on the result of the election. There cannot be a remedy without proof of violation of a right.

The learned CHIEF JUSTICE reached the conclusion that nullification of the election was the only remedy for the unlawful conduct by the Clerk of counting invalid votes as secret ballots. The reason was that, whilst imposing on the Clerk the mandatory obligation to conduct the election of the Speaker by a secret ballot, s 39(2) of the Constitution, as read with Standing Order 6, did not provide a remedy for the disobedience of the command. The conclusion that nullification of the election was the only remedy for what, in reality, was a nullity in respect of the six votes could only have been reached by implication of what is the intention of Parliament. It

would be based on a construction of s 39(2) of the Constitution, as read with Standing Order 6, which presumes that it is the intention of the Legislature that voters who had complied strictly with the law and voted by a secret ballot for the Speaker should lose their valid votes on account of a failure by an official to discharge his duty not to count invalid votes as secret ballots.

The principle of law to be applied is that where an enactment imposes an obligation but is silent as to the remedy to be awarded for disobedience, a court must ascertain from the language by which the obligation is imposed whether it is the intention of the Legislature that nullification of the offending conduct should be the remedy to be awarded without any limit as to the scope of its operation or application. Maxwell on *The Interpretation of Statutes* 12 ed at p 314 summarises the principles to be applied as follows:

> "… when a statute requires that something shall be done or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases the conditions or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it and their omission has been held fatal to its validity. In others such prescriptions have been considered as merely directory, the regard to them involving nothing more than liability to a penalty if any were imposed for breach of the enactment. 'An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.' *Woodward v Sarsons* (1875) L.R. 10 C.P. 733.
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> It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said LORD CAMPBELL LC, 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' *Liverpool Borough Bank v Turner* (1860) 2 De. G. F & J 502 at pp 507, 508. And LORD PENZANCE said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-

> matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.' *Howard v Bodington* (1877) 2 PD 203 at p 211."

See also *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S).

There is no question that s 39(2) of the Constitution, as read with Standing Order 6, is a mandatory enactment, the subject-matter of which is the election of the Speaker of the House. The object of the statute is to secure an election of the Speaker by members of the House qualified to vote by a secret ballot. The object is also to ensure by the imposition of the obligation on the Clerk to conduct the election of the Speaker by a secret ballot that there is provided mechanisms and procedures for the recording, processing, protecting and counting of the secret ballot. In other words, it is to ensure the establishment of an effective system for the election of the Speaker by a secret ballot conducted fairly, efficiently and impartially.

The Clerk did put in place the mechanisms and procedures for the recording, processing, protection and counting of secret ballots. Of the two hundred and eight members who voted, two hundred and two complied strictly with the requirements of the law for the exercise of their right to vote for the Speaker by a secret ballot. That is the main object for the achievement of which the provisions of s 39(2) of the Constitution, as read with Standing Order 6, were enacted. He had assembled together all the necessary mechanisms which were required by the law governing the election to be put in place at the time prescribed to ensure delivery of the election of the Speaker by a secret ballot. The six members who displayed their ballot papers to others so as to disclose for whom they had voted did so in the context

of the mechanisms and procedures. The failure committed by the Clerk was not to declare the invalid ballots void. It was the unlawful conduct of counting invalid ballots as secret ballots that has been used as a justification for the proposed award of the order of nullification of the election of the Speaker.

The disobedience did not relate to a secret ballot. In other words, it is not a case of the Clerk failing to record, process or count a secret ballot or declaring a secret ballot to be an invalid vote. Had that been the case, the result of the election of the Speaker would have been affected by the disobedience of the Clerk to the duty to conduct the election of the Speaker by a secret ballot. He had no power to decide what should be counted to ascertain the result of the election. He was told by the law what to count and for what purpose. In this case, the Clerk counted what was at law a nullity as a secret ballot. His conduct did not give value to the invalid votes and did not in any way affect the result of the election of the Speaker. The discounting of the invalid votes as well as the declaration of the conduct of the Clerk to be unlawful would not give rise to any difficulty in the determination of who the winner of the election of the Speaker was. The result of the election would not change. The nullification of the election based on a secret ballot would subvert the purpose of the statute.

The general rule is that a declaration of nullity must be confined to the conduct in respect of a particular vote or class of votes, the invalidity of which has been established, unless the non-observance of the requirements of the law governing the specific duty is of a character which is contrary to the principle of an election by a secret ballot and is so great that it might have permeated the process and affected the

result of the election. *Phillips v Goff* (1886) 17 QB 805. There are numerous cases in which courts have struck off the invalid votes and declared conduct in respect of them void without affecting the election. The principle applied has been that to nullify the results of the election based on votes given by a secret ballot in strict compliance with the requirements of the law governing the election would imply that the provisions of the law complied with are misleading.

Had the Clerk declared the invalidity of the six votes at the appropriate stage in the election process, the declaration would have affected those votes only and not the other votes validly cast. Why should the court, upon review of his conduct in failing to do the right thing at the right time, go farther than the remedy the law had placed at his disposal had he acted lawfully?

The purpose of voting is not only the differentiation of the electorate and the expression of the will of the individual voters but also the ability to accept such decisions based on the will of the majority.

In my view, the principle of majority rule on the basis of which results of democratic elections are determined, requires that courts should refrain from interfering with the will of the majority of voters expressed in accordance with the requirements of the law, on the ground that the official entrusted with the responsibility of conducting the election by a secret ballot unlawfully counted non secret ballots as secret ballots, especially where there would be no confusion at all as to who is the winner following the discounting of the invalid votes. An election may be set aside if it is not clear upon determination of the conduct forming the ground on

which the validity of the election is impugned who was the winner. In this case there is clear evidence of the election of the Speaker of the House in accordance with the mode of voting prescribed by the law governing the election concerned.

The general principles of the law on which I have based my decision in this case and believe are applicable in the resolution of the questions raised were stated by LORD COLERIDGE CJ in *Woodward v Sarsons* (1875) LR 10 CP, referred to with approval in *Chanter v Blackwood* (1904) 1 CLR 39 at 58-59. He said:

> "As the first point, we are of opinion that the true statement is that an election is to be declared void by the Common Law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation or to be prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not open or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a Returning Officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void …".

I am of the view that the construction of s 39(2) of the Constitution, as read with Standing Order 6, for the purpose of establishing the intention of the

Legislature regarding the nullification of the election for the unlawful conduct of the Clerk in counting invalid votes as secret ballots, does not justify the conclusion that it is the intention of the Legislature that breach of any of the numerous duties imposed on the Clerk under the general obligation to conduct the election of the Speaker by a secret ballot, should attract an order of nullification of the election regardless of the nature of the neglect of duty and its effect on the "result of the election".

There can be no doubt that the majority of the voters freely expressed their preference of the candidate they wished to be the Speaker in the secrecy of the polling booth and exercised their right to maintain the secrecy of the ballot in accordance with the requirements of s 39(2) of the Constitution, as read with Standing Order 6. The majority of the voters were enabled by the process conducted by the Clerk to freely elect by a secret ballot the Speaker from the two candidates. To declare such an election void would be to declare void what is lawful. The remedy awarded would be wholly disproportionate to the wrong committed. There was, in fact, no failure by the Clerk to conduct the election by a secret ballot within the meaning of the statute. The ballots which were effectively cast decided who was elected as the Speaker of the House.

The fact that the Clerk counted invalid votes as secret ballots because he had not seen the conduct by which they were rendered void did not change their invalid status. The question is whether the purpose for which the powers to conduct the election of the Speaker by a secret ballot were conferred on the Clerk was fulfilled. A close interpretation of the facts leads to the conclusion that the purpose of the statute was accomplished. An appropriate remedy is one which accords with

the intention of the Legislature. In this case, it is the one that upholds the result of the election of the Speaker by a secret ballot. The valid result is that the second respondent was elected the Speaker of the House by a majority of voters who cast secret ballots. It would, in my view, be contrary to fairness and justice to say as a matter of principle that the Legislature intended that the election of the Speaker conducted by a secret ballot in terms of the law be nullified on account of, say, a single invalid vote counted by the official conducting the election as a secret ballot. The intention of the Legislature must be that only irregularities which undermined the achievement of the object or purpose of the legislation of ensuring an election of the Speaker based on universal, equal, direct and personal vote freely expressed by a secret ballot should vitiate the election.

In the exercise of review powers the court *a quo* came to the conclusion that the improper counting of invalid votes as secret ballots was not an irregularity of the class the Legislature intended would vitiate the election. The conclusion is, in my view, not evidence of a misdirection on the part of the court *a quo*. It is when the irregularity affected the actual discharge of the positive duty to conduct the election by a secret ballot and not by any other type of vote that it may be used as a ground for challenging the validity of the election by a secret ballot.

The Legislature prescribed the standard which had to be used by everyone including the court as an accurate and reliable criterion for determining the ballot papers which had to be counted to ascertain the result of the election. Applying the test, the Clerk came to a wrong conclusion in respect of the six ballots cast for the second respondent. They were not secret ballots qualified to be counted.

The court *a quo* was on the facts in a position to apply the criterion to the ballot papers and arrive at the conclusion the Clerk ought to have reached in respect of the invalidity of the six ballots had he properly applied the prescribed test. If it had to set aside anything, the court *a quo* should have set aside the counting of the ballot papers made by the Clerk and not the election itself. The legality of the election was dependent upon the will of the electorate having been freely expressed by a secret ballot reflected by accurate and reliable results. The unlawful act of counting six invalid votes as secret ballots because of the wrong application of the prescribed standards of differentiating secret ballots from non secret ballots did not disable the court which had jurisdiction to do so from objectively scrutinising the facts and obtaining a reliable result of the election. The court would be acting within the bounds and limits of the requirement that there should have been brought about an election of the Speaker by secret ballot on the basis of universal, equal, direct and personal right to vote freely expressed according to the principle of majority rule.

I would therefore dismiss the appeal.

Although I would dismiss the appeal, I think that the respondents should not get their costs from the applicants. The respondents used language in their affidavits which was insultive of the first applicant and added nothing to the determination of the questions before the courts. It offended its sense of fairness and justice for the Court to be put in a position in which it had to read through all the papers containing some of the impolite and discourteous language.

The affidavit deposed to by Paurina Mpariwa in support of the second respondent covered some thirty-four pages, most of which dealt with the history of the formation of the MDC party, the conflicts which developed in its leadership and the split into the MDC-T and MDC-M formations, blamed on people who were not party to the proceedings. One wonders, for example, what point the first respondent intended to make if not to offend when he said the application by the first applicant was "the result of a contrived afterthought: the manifestation of a mischievous and dissentious character". Paurina Mpariwa's use of words like "foolish", "sell-out" and "turncoat" against another litigant in an application to be placed before a court of law reveals a serious lack of respect for judicial proceedings. There is need to discourage the use of such invective language in court proceedings.

The appeal is dismissed with no order for costs.

SANDURA JA: I have read the judgment prepared by CHIDYAUSIKU CJ, but respectfully disagree with it. The judgment is based on the principle that a peremptory enactment must be obeyed or fulfilled exactly, and that in respect of a directory enactment substantial compliance therewith will suffice. That principle was disapproved of and abandoned by this Court about twenty-two years ago in *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (SC). At 301B-302B GUBBAY JA (as he then was), with the concurrence of McNALLY JA and MANYARARA JA, said the following:

"The categorisation of an enactment as 'peremptory' or 'directory', with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by VAN DEN HEEVER J (as he then was) in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words of the enactment, its general plan and objects. The same sentiment was expressed by MILNE J in *J.E.M. Motors Ltd v Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fine* – 328B. This approach received the *imprimatur* of the South African Appellate Division in *Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A) where, after concluding that the provision with which he was concerned was imperative, VAN WINSEN AJA went on to enquire whether the failure in strict compliance therewith was fatal. He propounded the following test at 646 C-E:

> 'The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction, but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.' (emphasis added)

See also *Shalala v Klerksdorp Town Council & Anor* 1969 (1) SA 582 (T) at 587H-588B; *Nkisimane & Ors v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434E; and more recently, *Ex p Dow* 1987 (3) SA 829 (D) at 831 B-D.

Judges in this country also have not been slow to move away from the traditionally strict approach. See *Swift Transport Services (Pvt) Ltd v Pittman NO & Ors* 1975 (2) RLR 226 (GD) at 228C-229C, 1976 (1) SA 827 at 828; *Macara v Minister of Information, Immigration and Tourism & Anor* 1977 (1) RLR 67 (GD) at 70H; *Ex p Ndlovu* 1981 ZLR 216 (GD) at 217 F-G.

Testing the matter then in the manner approved by these authorities, one is constrained to discover the object of s 3(1) of the Regulations to determine whether that object is fundamental to the policy of the enactment and, if it is, to decide whether it is defeated or frustrated by the non-compliance complained of. The degree of observance and non-compliance is another relevant consideration."

In that case GUBBAY JA was considering whether s 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, ("the Regulations") (now repealed) had been complied with. The facts in that case are set out in the headnote which, in relevant part, reads as follows:

> "In July 1987 the appellant, the respondent's employer, suspended the respondent from her employment without pay, pending the outcome of the appellant's request to the Ministry of Labour for her dismissal on the grounds of having stolen a confidential document from the company. The relevant section of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations required that (the) application be made to a labour relations officer, but the appellant applied to an acting regional hearing officer in the Ministry ..".

Having found that the object of the requirement of s 3(1) of the Regulations (i.e. that upon suspension of an employee without pay and other benefits the employer was to apply forthwith to a labour relations officer for an order or determination terminating the contract of employment) was predominantly the protection of the interests of the employee, that that object was not frustrated or materially impaired by the employer proceeding in the manner it did, and that the degree of non-compliance was by no means great, the Court held that s 3(1) of the Regulations had been complied with.

In my view, the principles set out in the above authorities are the principles which should be applied in the present case in order to determine whether Standing Order No. 6 ("the Standing Order") was complied with in the election of the Speaker.

In this regard, the following questions arise for consideration –

1. What is the object sought to be achieved by the Standing Order?; and

2. Was that object achieved in the election of the Speaker?

I shall deal with the questions in turn.

What is the object sought to be achieved by the Standing Order?

The Standing Order reads as follows:

> "If more than one person is proposed as Speaker, the Clerk shall conduct the election of the Speaker by a secret ballot."

In my view, the object sought to be achieved by this Standing Order is the same as the object sought to be achieved by the secret ballot system all over the world. It is to protect the voter, mainly against intimidation and victimisation, by enabling him or her to vote freely and in secret for the candidate of his or her choice, without fearing that other people would know for which candidate he or she has voted.

The secret ballot system in this country has its origin in the Ballot Act, 1872, which introduced a secret system of voting in parliamentary and municipal elections in Great Britain. Before the Ballot Act was enacted in 1872, Britain had an open system of voting in parliamentary and municipal elections. In parliamentary elections, the voter would go onto a platform at the polling station and announce his choice of candidate to an officer, who then recorded it in what was called a poll book. Intimidation and victimisation were rife. Employees were required by their employers to vote for particular candidates or lose their employment. The same applied to tenants. If they did not vote as the landlord wanted them to vote, they were evicted from the premises they occupied. In the circumstances, there was a

growing demand for the protection of the voter against intimidation and victimisation by enabling him to vote freely and in secret. As a result, the Ballot Act 1872, which introduced a secret system of voting, was enacted in order to meet that demand. The Act required that parliamentary and municipal elections be by secret ballot. Subsequently, when this country became a colony of Great Britain the secret ballot system was introduced in the country.

In my view, the object sought to be achieved by the secret ballot system in Great Britain is the same as the object sought to be achieved by the Standing Order. That object is fundamental to the policy of the Standing Order.

Was the object sought to be achieved by the Standing Order achieved in the election of the Speaker?

In my view, there can be no doubt whatsoever that the answer to that question is in the affirmative. All the two hundred and eight Members of Parliament ("MPs") present marked their ballot papers in the secrecy of the polling booths. Each MP was protected against intimidation and victimisation, and was enabled to vote freely and in secret for the candidate of his or her choice, without fearing that other people would know for which candidate he or she had voted.

Some MPs emerged from the polling booths with their ballot papers folded, whilst others emerged from the polling booths not having folded their ballot papers. However, there was no evidence suggesting that any MP who had wanted to keep his or her ballot paper folded at all times outside the polling booth had been prevented from doing so. In addition, no MP ever complained to the Clerk of

Parliament that he or she had been compelled to display his or her marked ballot paper to any other person.

However, assuming that it is correct that the six MPs who displayed their marked ballot papers did not comply with the Standing Order, the object sought to be achieved by the Standing Order was, nevertheless, not defeated or frustrated by the non-compliance complained of. Of the two hundred and eight MPs who voted, only six (i.e. about 2.9 percent of the total) displayed their marked ballot papers before depositing them in the ballot boxes, whilst two hundred and two (i.e. about 97.1 percent of the total) voted in accordance with the provisions of the Standing Order.

Quite clearly, the degree of non-compliance was insignificant, whereas the degree of compliance was nearly one hundred percent.

In the circumstances, as the object sought to be achieved by the Standing Order was achieved and not defeated or frustrated by the non-compliance complained of, and as the degree of the alleged non-compliance was insignificant, it follows that the Standing Order was complied with in the election of the Speaker.

Finally, I would like to comment on s 177 of the Electoral Act [*Chapter 2:13*] ("s 177 of the Act"). It reads as follows:

> "An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that –

(a) the election was not conducted in accordance with the principles laid down in this Act; and

(b) such mistake or non-compliance did affect the result of the election."

Section 177 of the Act has its origin in the Ballot Act, 1872 ("the Ballot Act"), which introduced the secret ballot system in Britain. Section 13 of the Ballot Act provided as follows:

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Subsequently, s 13 of the Ballot Act was reproduced, in almost identical language, by the Legislature of the Colony of Southern Rhodesia, in the Electoral Act, 1928. Section 60 of that Act read as follows:

> "No election shall be set aside by the court by reason of any mistake or non-compliance with the provisions of this Chapter, if it appears to the court that the election was conducted in accordance with the principles laid down in this Chapter, and that such mistake or non-compliance did not affect the result of the election."

Thereafter, s 60 of the Electoral Act, 1928, was reproduced, in almost identical terms, in every Electoral Act enacted in this country, as can be seen from the following provisions –

1. s 85 of the Electoral Act, 1938;
2. s 85 of the Electoral Act [*Chapter 2*];
3. s 88 of the Electoral Act, 1951;
4. s 182 of the Electoral Act, 1969;

5. s 156 of the Electoral Act, 1979;

6. s 38 of the Electoral Amendment Act, 1987;

7. s 142 of the Electoral Act, 1990;

8. s 149 of the Electoral Act [*Chapter 2:01*]; and

9. s 177 of the Electoral Act [*Chapter 2:13*].

Thus, the principle that an election will not be set aside by the court for non-compliance with the provisions of the electoral law if the election was conducted in accordance with the principles of the electoral law, and the non-compliance did not affect the result of the election, is well-established and has been part of the electoral law of this country for at least eighty-two years. It is based on common sense, for there would be no good reason for setting aside an election on the basis of an irregularity which did not affect the result of the election.

However, as I have already determined that the election of the Speaker was conducted in accordance with the principles of the Standing Order, and as it was common cause that the non-compliance complained of did not affect the result of the election, the only remaining issue for me to determine is whether the principle that the court would not set aside an election on the basis of an irregularity which did not affect the result of the election, applies to the election of the Speaker. I have no doubt in my mind that it does. In fact, there is no logical reason whatsoever why it should not apply.

In my view, the fact that the Standing Order does not state the principle is of no significance. The principle is based on common sense, and common sense

dictates that if an irregularity does not affect the result of the election, it cannot form a basis for the nullification of the election.

In addition, when the Standing Order was drafted, Parliament must have been aware that the principle had been part of the electoral law of this country for a very long time, and must have felt that there was no need to include in the Standing Order an obvious principle based on common sense. In any event, one would not expect the sort of details which usually appear in a statute to be set out in a Standing Order.

Finally, I would like to comment on the following statement in the majority judgment:

> "It is unacceptable that Parliament should seek to salvage a shambolic and chaotic election of a Speaker through the doctrine of substantial compliance."

In my view, the description of the election as "shambolic and chaotic" is not borne out by the finding made by the learned Judge in the court *a quo*, which was as follows:

> "As regards the conduct of the election *in casu* generally, the papers before the Court evince several conflicts of fact as to what transpired at the time. The applicants' assertions that the proceedings were brazenly unruly are squarely rebutted by the averments of the first respondent. In this situation, the approach to be adopted was explained by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339, as follows:
>
> > 'It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy *onus* upon

> an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact.'
>
> Having regard to the overall scenario prevailing in the House on the day in question, it seems reasonably clear that the election proceedings under review were not conducted in an ideal manner. Nevertheless, despite the imperfections alluded to above, it cannot be said that the process was so disorderly as to be utterly chaotic. On the contrary, all the Members in the House were duly called upon to vote and were able to cast their votes in the polling booths provided. Taking into account the usual volatility associated with the conduct of Parliamentary business generally, I am inclined to take the robust view that the election proceedings as a whole were sufficiently regulated to enable the election to take place to a satisfactory conclusion." (emphasis added)

In any event, as the appellants elected to proceed by way of motion proceedings in the court *a quo*, any disputes of fact between the parties had to be resolved in favour of the respondents. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). In this regard, it is pertinent to note that the allegation that the election was chaotic was denied by the respondents.

Accordingly, I would dismiss the appeal with costs.

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Atherstone & Cook, second respondent's legal practitioner