IN THE SUPREME COURT OF ZIMBABWE

HOLDEN AT HARARE

CASE NO. SC 387-23

In the matter between:

SAVIOUR KASUKUWERE APPELLANT

LOVEDALE MANGWANA 1ST RESPONDENT

ZIMBABWE ELECTORAL COMMISSION 2ND RESPONDENT

MINISTER OF JUSTICE, LEGAL

AND PARLIAMENTARY AFFAIRS 3RD RESPONDENT

Heads of argument

For and on behalf of the Appellant in respect of an appeal enrolled for hearing on the 27th of July 2023 at 2:30 PM

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1. Never in the history of litigation in this country has a private citizen, with the remotest of interest in the subject matter, ferociously fought to remove a candidate from exercising his right to participate in, and if elected then to hold public office. For the same reason, one will not find any precedent in which this unfounded tactic has found favour in the courts, not just in Zimbabwe but in any civilized democracy. Having been challenged in the Supreme Court, the applicant filed an urgent application for directions in regard to urgent set down of the matter. It was granted thus the urgent hearing of the instant appeal.

2. The instant appeal is against the judgment of the High Court which appears at **page 117 of the record of proceedings**. The appeal is predicated on 13 grounds of appeal as the judgment of the court a quo is patently erroneous and must be vacated by this court.

GROUNDS OF APPEAL IN RESPECT OF DISMISSED PRELIMINARY POINTS

3. The court a quo acted in a matter it clearly did not have jurisdiction to deal with and entertained a litigant who had no standing at law. Not only had that it made a bizarre finding that the gazette did not turn the decision of the nomination court into law. It further found that the matter was urgent and dismissed the point that the application was a disguised review.

4. On the merits, it reversed onus and made the Appellant prove the 1st Respondent's case contrary to the **Plascon Evan rule**. It further misconstrued section 23 (3) of the Electoral Act and in the process embarked on a wrong inquiry of "absence" instead of "cessation". It further made a finding which does not appreciate that the Appellant is a Presidential Candidate and not a Member of Parliament. All these errors vitiates the judgment of the court a quo and counsel prays that the appeal be allowed and the judgment of the court a quo be set aside with costs.

5. The first ground of appeal relates to the lack of jurisdiction of the court a quo. It is submitted that the court ought to have declined jurisdiction instead of entertaining the matter.

6. Inevitably this must be the starting point. It is submitted for the Appellant that the court a quo not have the power and competency to relate to the said application. Put otherwise, did not have requisite jurisdiction to deal with the application that has been brought up by the 1st Respondent.

7. The founding affidavit accepts that the nomination court set on the **21st of June 2023** and the Appellant successfully lodged his papers and the same were accepted. It is law and no responsible debate can be raised as regards to the status of the outcome of the Nomination Court. It is an order of court which is extant and that binds all and sundry.

8. It is submitted that the nomination process admitted by the 1st Respondent was lawfully conducted and in terms of **section 38(1) (a) of the Act**[1]. The process was therefore sanctioned by statute and in sync with the diktats of the law. When such nomination is done, it results in an order which carries the same status with an order of court and may be subjected to review.

9. LORD DENNING in **Macfoy v United Africa Co Ltd [1961] 3 All ER 1169** eloquently said:

> *"I allow for the limitation placed on those words by LORD DIPLOCK in the Privy Council case of Isaacs v Robertson [1984] 3 All ER 140 at 143c, to the effect that an order of a court of unlimited jurisdiction must stand until it is set aside. I accept further the words of ROMER LJ in Hadkinson v Hadkinson [1952] 2 All ER 567 at 569 that : "...it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction (my emphasis) to obey it unless and until that order is discharged."*

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[1] It provides that: "1) In a proclamation in terms of section 58(1) of the Constitution fixing a day or days for the holding of an
election to the office of President, a general election and elections for councillors, the President shall—
(a) for the purposes of the election of a person to the office of President, fix—
(i) a place or places at which, and a day or days, not less than fourteen and not more than twenty- one days after the day of publication of the proclamation, on which a nomination court shall sit
for the purpose of receiving nominations of candidates for election to the office of President; and
(ii) a day or days, not less than forty-two and not more than sixty-three days after the nomination day or last nomination day, as the case may be, fixed in terms of subparagraph (i), on which a poll shall be taken if a poll becomes necessary in terms of section 110(2); and
[Subparagraph substituted by Act 3 of 2012]
(iii) a day or days, not less than twenty-eight and not more than forty-two days after the polling day or last polling day, as the case may be, fixed in terms of subparagraph (ii), on which a runoff Presidential election shall be taken if such an election becomes necessary in terms of section 110(3)(f)(iii)"

10. Its position was governed by the rule:

> *"that judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are certain A exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside." - per FANNIN J in* ***Mkhize v Swemmer & Ors 1967 (1) SA 186 (D) at 197C-D. See MANNING v MANNING 1986 (2) ZLR 1 (SC)***

11. Recently in **Magauzi & Anor v Jekera SC 54/22** the court said:

> *"When a court grants an order all subsequent acts affecting the dispute between the parties rely on the court's order and not the reason or facts the court based its judgment on. Execution of judgment debts is based on court orders and not the reason for which the court order was granted. Therefore a party or the parties cannot disregard a court order as they are bound by it. In the case of* ***Chiwenga v Chiwenga SC 2/14****, it was stated that: The law is clear that an extant order of this Court must be obeyed or given effect to unless it has been varied or set aside by this Court and not even by consent can parties vary or depart therefrom. See also CFU v Mhuriro & Ors 2000 (2) ZLR 405 (S)"*

12. It is submitted that **section 161 of the Act** becomes relevant for the purposes of bolstering this elementary point. It states that:

> "(1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record. **(2) The Electoral Court shall have exclusive jurisdiction—** (a) to hear appeals, applications and petitions in terms of this Act; and **(b) to review any decision of the Commission or any other person made or purporting to have been made under this Act**; and shall have power to give such judgments, orders and directions in those matters

as might be given by the High Court: Provided that the Electoral Court shall have no jurisdiction to try any criminal case. (3) Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court."

13. The point is thus made that **per section 161** of the Act, a decision made by the officers of the 2nd Respondent in exercise of their powers bestowed to them by virtue of **section 38 of the Act**, such discissions are judicial in character and reviewable.

14. **Section 161 of the Act** is apparent and elaborate and provides that any dispute that "**The Electoral Court shall have exclusive jurisdiction—** (a) **to hear appeals, applications and petitions in terms of this Act**" The catch phrase in terms of section 161 is "applications and petitions in terms of this Act".

15. It is submitted with respect that the dispute that was before the court a quo emanated from the process that was done in terms of the Electoral Act. As such, it is only the Electoral Court that could deal with the dispute and not the High Court. It is on this footing that the Appellant takes the point that the 1st Respondent was in the wrong forum and had disregarded the command of statute. The Electoral Court is thus endowed with the exclusive jurisdiction to deal with the matters arising from the Act. By failing to decline jurisdiction, the court a quo erred and its judgment must thus be set aside.

16. While dealing with the above provision, UCHENA J (as he then was) stated as follows in **Mliswa v Chairperson, ZEC & Others (EC 03/15) [2015] ZWHHC 586** :

> *"The Electoral Court now has "power to give such judgments, orders and directions in those matters as might be given by the High Court". The granting to the Electoral Court of exclusive jurisdiction, and power to give such judgments, orders and directions in those matters as might be given by the High Court, is a clear enhancement of the Electoral Court's jurisdiction after the Makone case (supra). The fact that the Legislature which is deemed*

to know the law made these deliberate changes, means it intended to alter case law by giving this court jurisdiction the Makone case (supra) said it did not have. Exclusive jurisdiction means this court does not share concurrent jurisdiction with any other court, on matters it has jurisdiction on. The granting of power to give judgments and orders the High Court might give enables this court to exercise jurisdiction over cases in which it used to decline jurisdiction and such cases would be heard by the High Court. It has simply been given exclusive jurisdiction with unlimited power to hear and determine cases under the Electoral Act just as the High Court had jurisdiction to hear such cases during the era when the Electoral Court did not have exclusive jurisdiction."

17. On this basis alone, this matter is within the exclusive purview of the Electoral Court. Even if the complaint arises from a constitutional basis, the Applicant ought to have raised those constitutional issues as the basis for an application for review made to the Electoral Court in terms of the Electoral Act. The basis of the complaint is that the decision of the Nomination Court is irrational, is irregular. The remedy for that is provided for under the Electoral Act. On this score, the court a quo should not have entertained the matter.

18. Sections **23 and 28 as read with Section 33 (4)** of the Electoral Act are instructive on the course that the 1dt Respondent ought to have taken since he challenges Appellant retention on the voters' roll. There is no justification whatsoever for the Applicant's departure from the bespoke remedy for the complaint made. The objection procedure is specifically there for this kind of issue and outside that process, the 1st Respondent cannot cause the Appellant's removal from the voters' roll.

19. In his papers, 1st Respondent did not plausibly explain why he abandoned the objection route he had adopted as he pleads in his papers. There is no indication of whether 1st Respondent abandoned that process. Without exhausting available remedies, the fact that this process was left hanging in preference to the application seeking a final order makes it incompetent.

20. Courts generally withhold their jurisdiction in cases where a litigant has ignored available internal remedies. That is the point made by NDOU J in **Sithole v Senior Assistant Commissioner and Others**[2] where the learned judge reasoned:

> *"If I am wrong in the above finding, still the application had to be dismissed for failure to exhaust internal remedies. Even if it is true that the applicant failed to get audience with the 1st and 2nd respondents, applicant is at liberty to approach the Police Service Commission for relief- section 16 of the Police Trials and Boards of Inquiry Regulations 1965. Thus applicant's failure without good and sufficient cause to exhaust domestic remedies available to him is fatal to his application – Tutani v Minister of Labour and Others 1987 (2) ZLR 88 (H) and Communications Allied Svc(s) Workers Union of Zimbabwe v Tel-One (Pvt) Ltd 2005 (2) ZLR 280 (H) at 287."*

21. The above pronouncement cannot be faulted at all. Domestic remedies in respect of this matter are those provided for in the Electoral Act as stated above. The 1st Respondent had the right to challenge the conduct of the nomination Court; the right to seek review of administrative conduct is available to any person affected thereby; s 4 of the Administrative Justice Act.[3] The conduct of nomination court is administrative action.

22. The only instance where a departure may be allowed is where 1st Respondent had shown good and sufficient cause to avert the remedies.[4] In this case, he dismally failed to discharge the burden. Crucially, section 23 (3) of the Electoral Act is not a deeming provision. It only provides for the basis upon which a person's name may be struck off the voters' roll. In any event, it cannot be a deeming provision because it is depended on a factual position that can only be established by the processes provided for under s 28 and

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[2] HB 17-10
[3] [Chapter 10:28]
[4] See **Moyo v Gwindingwi NO & Another** 2011 (2) ZLR 368 (H) 371E.

33 of the Act. All s 23 does is to enable an interested party to engage the processes under ss 28 and 33.

23. The Electoral Court is a division of the High Court. The only difference between it and the Commercial Division is that electoral matters are to be filed in that division to the exclusion of any other. As such, it can issue a declarator. The **Kambarami v 1893 Mthwakazi Restoration Movement Trust and Ors**[5] was therefore decided per incuriam, the Court did not consider what it means that the Electoral Court is a division of the High Court, did not consider the import of s 161 of the Electoral Court. That judgment was made per incuriam, it did not consider the import of the provisions stated above. A judgment that is found to have been decided per incuriam does not have to be followed as a precedent of the court.

24. It is submitted that the dispute that the 1st Respondent had brought to the court emanated from the Electoral Act. It is for this reason that the 1st Respondent heavily relied in its application on section 23 of the Act regarding residence as misplaced as the argument is as shall be canvassed under the merits of the matter. If the 1st Respondent's cause was not in the Electoral Act then it must not have referred to it at all. Once reference is made to certain provisions of the Electoral Act being violated then, the Electoral Court has jurisdiction as such will be emanating from the Act. Cadeat questio.

25. The 1st Respondent stated that the Electoral Court has no power to grant declaratory orders hence his application to the High Court. Counsel needs to debunk this argument at length. At first and as shall be shown under a different preliminary point, the present application is not for a declaratory order. The judgment therefore per GUVAVA JA in **Kambarami** cited at paragraph 7 of the Applicant's heads of argument is misapplied. Yes, the Electoral Court will not grant declaratory orders. Fair enough. The issue then is what the nature of the application at hand is. It is submitted that the application is a review application which simply seeks the setting aside of the discussion of the Nomination Court. The point is belabored that there is a way of challenging that discission which is not to do what the 1st Respondent did.

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[5] SC 66/21

26. The principle of **generalia specialibus non derogant** would apply. It is to the effect that general provisions do not override special provisions. In **Barker v Edger [1898] AC 748 at 754** LORD HOBHOUSE said:

> *"The general maxim is generalia specialibus non derogant. When the legislature has given attention to a separate subject and made provisions for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject – matter and its own terms." See also* ***BUBYE MINERALS (PVT) LIMITED v (1) MINISTER OF MINES AND MINING DEVELOPMENT SC 3-11, Bon Espoir (Pvt) Ltd. v Chabata and Others (77/03).***

27. There is a specific provision that lays out the procedure to be followed when one is not happy about the nomination process. The 1st Respondent could not remake its case as it did in heads of argument. Its case is that the nomination process was not properly done, and the Appellant should not have been accepted. That is a dispute within the Act and there are specific provisions that must be resorted to than for the Applicant to rush to the Constitutional remedies. It is improper. The attempt to remake the case in heads of argument is clear. 1st Respondent must be reminded that heads of argument are not pleadings - **Cargill Zimbabwe v Culvenhum Trading (Pvt) Ltd HH 42 of 2006.**

28. The existence of section 171 (a) and (c) of the Constitution led the court astray thereby committing a misdirection-**record page 21.** Section 171 of the Constitution does not take away the jurisdiction of the Electoral Court which is a creature of statute, the Electoral Act. Section 171 of the Constitution does not denote that any dispute, the High Court can hear. The Electoral Act is clear that the Electoral Court shall have exclusive jurisdiction on matters emanating from the Electoral Act. The court missaplied the Guwa judgment and incorrectly dimissed the preliminary point. On this score alone the appeal may be afforded.

The High Court can go around taking matters from specialized courts on the basis of section 171 of the Constitution. Such is neither law nor jurisprudence.

29. It is submitted that the court a quo erred in so adopting what it called a liberal approach and granted standing to the 1st Respondent. The court a quo dealt with the issue of standing at page 125 and 126 of the record. It adopted what it called a liberal approach to locusi. The court deals at page 126 of the record with what it calls the interests of the 1st Respondent. It says that his interests is to participate in a lawful election. The court found that an unlawful election process will infringe on the 1st Respondent's right to vote. It is submitted that this was a gross misdirection.

30. The 1st Respondent had no right whatsoever to have had brought the application to the court aquo as he has no substantial interest in the matter. In his founding affidavit he states that he is a registered voter but does not provide such proof despite the point being taken in opposition. Even the court in its judgment does not deal with this aspect. The Appellant took issue with his status of registration and yet in his answering affidavit he did not rebut the same. For the founding affidavit does not provide for this, he did not prove his substantial interest. It is common cause that an application will stand or fall on its own founding papers-Muchini v Adams SC47/13. The court's failure to pronounce itself on the registration status of the Applicant vitiates its judgment.

31. It is submitted that 1st Respondent is not a nominated presidential candidate and as such he has no interest in who was nominated and gazzetted in terms of the law. As a busy body his role is to vote if he is registered for the candidate that he so wishes. The presence of the Appellant on the nomination list must not make him lose sleep. He may not vote for him and decamping him at the same time as he exudes such energy of minding that which is not his.

32. It is submitted that the 1st Respondent's right to vote as per section 67 of the Constitution is not taken away by the presence of the 1st Respondent in the list. At law he is not disenfranchised of his right to universal suffrage, if he is registered and wishes to exercise

the same. This therefore entails that the Applicant has no interest at all in the affairs and listing of the Appellant as the process was done in terms of the law.

33. For the 1st Respondent to have standing to challenge the decision of the 2nd Respondent, he must have a sufficient personal interest in the matter concerned. At law only a person who has a direct, personal interest in the remedy being sought has locus standi to seek that remedy in court. The personal interest that a person may have that will provide the basis for legal standing can be that the action will affect interests such as personal liberty- **Patz v Greene & Co 1907 TS 427; Adler v Salisbury City Council 1947 (2) SA 220 (SR); Stevenson v Minister of Local Government and National Housing & Ors 2001 (1) ZLR 321 (H) – the High Court judgment) and Stevenson v Minister of Local Government and National Housing & Ors 2002 (1) ZLR 498 (S)** For a critical commentary on the High Court decision in the **Stevenson case see Feltoe "Legal standing in Public Law" 2002 Issue No 7 Zimbabwe Human Rights Bulletin 187.**

34. In **Makarudze & Anor v Bungu & Ors 2015 (1) ZLR 15 (H)** the court pointed out that locus standi in judicio refers to ones right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such an interest is a legal in the subject-matter of the action which could be prejudicially affected by the judgment of the court and the Mawarire judgment does not change this and neither is section 85 of the Constitution.

35. The 1st Respondent is playing politics, and such does not bestow him of proper standing in court. In **Dzingirai v Hwende & Ors HH 468-19**, this court (per ZHOU J) appositely put the position as follows:

> *"The **personal ego, political idiosyncrasies** and financial wishes may be interests but they do not give the affected person the legal standing to seek recourse through the court procedures irrespective of how strongly the affected person feels about them". See **ECOCASH Zimbabwe (Pvt) Ltd. vs RBZ HH 333-20** per CHINAMORA J.*

36. That question was put to rest in **Zimbabwe Teachers Association v Minister of Education and Culture 1990 (2) ZLR 48 (HC)** which decided that:

> *"It is well settled that, in order to justify participation in a suit such as the present, a party such as the … **applicant has to show that it has a direct and substantial interest in** the subject matter and outcome of the application".*

37. For the Applicant to have standing, he must demonstrate how he is personally affected by the nomination of the 1st Respondent. The law demands that he must be an aggrieved litigant. In this respect, in CORBETT J in **United Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor 1972 (4) SA 409 (C)** quoted with approval the view expressed in **Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O)** as regards to what constitutes "direct and substantial interest"

38. In **Ex p Sidebotham (1880) 14 ChD 458 (CA)** (an English case), the dispute concerned the Bankruptcy Act 1869. A court refused to act upon a report by the Comptroller that a trustee had been guilty of negligence which resulted in loss to the estate. It was held that neither the bankrupt nor any creditor was entitled to appeal against such refusal. During his judgment, James LJ said the following at 465:

> *"It is said that any person aggrieved by an order of the court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something."*

39. "The words "aggrieved person" has been defined by the Privy Council in **Attorney-General of the Gambia v N'Jie, (1961) 2 All E.R. 504 (P.C.) at p. 511**, thus:

> *"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of*

course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

40. In **Concorde Leasing Corporation (Rhodesia) Ltd V Pringle-Wood, N.O. And Another 1975 (4) SA 231 (R**) BEADLE ACJ stated thus:

"It seems to me, if the definition of "aggrieved person" is correct, then the applicant in this case falls squarely within it, because there is no doubt that the decision made by the first respondent prejudiced the interests of the applicant. Whether or not the applicant is an "aggrieved person", however, seems to me to beg the whole question. The real issue is whether the first respondent acted reasonably in refusing to sell the property to the applicant's nominee, and in selling it instead to the second respondent. If he acted reasonably in so doing, then obviously the applicant has no right to an order setting the sale aside and it must fail in its application. Whether in these circumstances it still regards itself as an "agrieved person" is therefore only a matter of academic interest. If, however, the first respondent did not act reasonably in selling the property to the second respondent, the applicant would have what is sometimes referred to as a "legal grievance", and would therefore be an "aggrieved person", even within the narrowest interpretation therefore be an "aggrieved person", even within the narrowest interpretation of those words." See, for example, such cases as ***De Hart, N.O. F v. Klopper and Botha, NN.O and Others, 1969 (2) SA 91 (T) at p. 99.***

41. Lord Esher MR pointed that out in **Re Reed, Bowen & Co, Ex p E Official Receiver (1887) 19 QBD at p 178**.

"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but

they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the appellant a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that, if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge or is otherwise a point in which the public interest is concerned, the Attorney-General is a 'person aggrieved' by the decision and can properly petition Her Majesty for special leave to appeal." See also ***Van Niekerk V Van Niek*****erk & Ors 1999 (1) ZLR 421 (SC)** per SANDURA JA.

42. The person who sues must have a direct interest in the subject-matter of the suit. It was observed in **Dalrymple v Colonial Treasurer 1910 TS 372 at 380** that:

> *"…In a wide sense every individual has an interest in every suit that is pending, for he/she may be placed tomorrow in the same position of either plaintiff or defendant in which the same principle may be involved. Courts of law, however are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest but also an interest not too remote. Whether the interest is remote or not depends upon the circumstances of the case and no definite rule can be laid down."*

43. In the case of **Timba v Chief Elections Officer 2015 (2) ZLR 777 (S)** at page 785 where the court quoted the following passage:

> *"I am fortified in this view by the following passage contained in Herbstein and van Winsen Civil Practice of the High Courts of South Africa 5 ed at p 217:*

"A direct and substantial interest has been held to be 'an interest in the right which is the subject matter of the litigation and not merely a financial interest . . .' It is a 'legal interest in the subject matter of the litigation, excluding an indirect commercial interest only.' The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists".

44. At page 785 the Court said:

"I find too that the same candidates constituted what Herbstein and van Winsen termed "necessary" parties, defined thus at p 215 of the same book: "A third party who has, or may have, a substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined B in the proceedings, unless the court is satisfied that such person waived the right to be joined . . . In fact, when such person is a necessary party in this sense, the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises."

45. In **Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2013 (3) BCLR 251 (CC)** at para 41 where the following is said:

"To establish own interest standing under the Constitution a litigant need not show the same written "sufficient, personal and direct interest' that the common law requires but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests."

46. In **Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) & another (SA) v Muslim Judicial Council (Cape) and others 1983 (4) 855 (C) at 863H-864A**

'It is clear that in our law a person who sues must have an interest in the subject-matter of the suit and that such interest must be a direct one (see Dalyrymple & Others v H Colonial Treasurer 1910 TS 372). In P E Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T) at 804B, ELOFF J states that:

"It is well settled that, in order to justify its participation in a suit such as the present, a party... has to show that it has a direct and substantial interest in the subject-matter and outcome of the application"

47. An application under **s 85 of the Constitution** is one for constitutional review; **Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited and Anor**. Section 85 of the Constitution entitled a person to approach a court. In terms of that section, the Court then exercises constitutional review. The Electoral Court is a court for purposes of s 85 of the Constitution, is entitled to entertain review applications. As such, the Electoral Court has the jurisdiction to entertain constitutional reviews in electoral matters.

48. In **Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA)** at paragraph stated :

"In my view, a fundamental reason for maintaining the adversarial system in which the parties identify the dispute, is to ensure that judicial officers remain independent and impartial and are seen to be so. This is a cornerstone of any fair and just legal system. When a judge intervenes in a case and has recourse to issues falling outside the pleadings which are unnecessary for the decision of the case and departs from the rule of party presentation, there is a risk that such intervention could create an apprehension of bias. The court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality."

49. **Fischer & another v Ramahlele & others 2014 (4) SA 614 (SCA) para 13:**

"Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone"

50. The 1st Respondent made the 'point' that **Part IV of the Electoral (Applications, Appeals and Petitions) Rules** is restricted to candidates only. That part deals with appeals. For reviews, one must have regard to **r 33 of the Electoral (Applications, Appeals and Petitions) Rules.** That leads one to the High Court Rules and applications for review are governed there.

51. There is an attempt by the 1st Respondent to mislead the seat of equity. At first it is submitted that there is no constitutional issue in this case. This is a litigant who is unhappy with the nomination process of the Appellant who is said not to reside in Zimbabwe. There is nothing more.

52. The reliance on **Mupungu, Mawarire** is misplaced. Those cases were dealing with a totally different scenario. In the **Mawarire** case a litigant wanted elections to be proclaimed and **Mupungu** is farfetched. It cannot be law that by being a mere citizen of Zimbabwe you can challenge anything. The law places an onus on every Applicant to show that it has the requisite substantial interest. There is no debate that the 1st Respondents holds no substantial interest in the nomination of the Appellant. Let him not vote for him. One shudders how counsel argues that there is a constitutional issue. The issue is trifling and illusory.

53. It is trite that he who alleges must prove. Equally, an application stands or falls on the founding affidavit,[6] as such, the evidence must be apparent from or attached to the founding affidavit. In motion proceedings, it is trite that an affidavit constitutes both the pleadings and the evidence necessary to sustain an action; **Jackson v Rothmans of Pall Mall**

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[6] **Austerlands (Pvt) Limited v Trade & Investment Bank Limited & Ors[6]**, **Muchiri v Adams**,[6] **Muzeza v Muzeza & Ors[6]**, **Hiltunen v Hiltunen[6]** and **Mangwiza v Ziumbe.[6]**

(Zimbabwe) (Pvt) Ltd; [7] Triomf Kunsmis (Edms) Bpk v AE & CI Bpk[8] and Saunders Valve Co Ltd v Insamcor (Pty) Ltd.[9] This principle was further explained in WP Fresh Distributers (Pty) Ltd v Klaaste NO and Others[10]; see also Transnet Ltd v Rubenstein.[11]

54. No evidence was attached that as a matter of fact, the 1st Respondent has been resident elsewhere for the past 18 months. The 1st Respondent himself did not serve him by substituted service or edictal citation, the application a quo. The 1st Respondent identified the Appellant's residence and served him there. The 1st Respondent could not take two inconsistent positions, cannot blow hot and cold, cannot approbate and reprobate- S v Marutsi 1990 (2) ZLR 370; Trinity Engineering v Karimazondo and Others HH 672/15.

55. Resultantly, there was nothing to motivate the court to set aside the extant decision of the Nomination Court and subsequently the Appellant presidential candidature. Nothing puts a dent on his fulfilment of the nomination requirements and in the absence of an order declaring that Appellant is not a registered voter, no case could be sustained. No cause was established on the papers entitling to the relief he sought. The founding affidavit did not traverse the requirements for the order sought to be granted.

56. In that instance, a factual situation, entitling the 1st Respondent to relief has was not set out – Peebles v Dairiboard Zimbabwe (Pvt) Ltd[12], Patel v Controller of Customs and Excise[13], and Dube v Banana.[14] The 1st Respondent can vote for any candidate of his choice. Nothing stops him from doing that. The 2nd Respondent crystallized the factual

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[7] 1993 (2) ZLR 156 (SC)

[8] 1984 (2) SA 261 (W) 269G-H.

[9] 1985 (1) SA 146 (T) 149C.

[10] [2013] ZAWCHC 95 para [4].

[11] 2006 (1) SA 591 (SCA) para [2].

[12] 1999 (1) ZLR 41 (HC),

[13] 1982 (2) ZLR 82 (H),

[14] 1998 (2) ZLR 92 (H).

position by accepting the nomination of the Appellant and also by enacting GN 1128 of 2023.

57. In **Gonese and Anor v Parliament of Zimbabwe and Anor**[15] the Constitutional Court reasoned:

> *It has been said that the presumption is in favour of every legislative act, and that the whole burden of proof lies on the party who denies its constitutionality-**Brown v Maryland 25 U.S. 419, 436 (1827); Lawrence v State Tax Commission of Mississippi 286 U.S. 276, 283 (1932).***

58. Those two acts, being done by an administrative authority pursuant to an Act of Parliament create a presumption of regularity. In **Gonese and Anor v Parliament of Zimbabwe and Anor**[16] the Constitutional Court reasoned:

> …The above section makes it clear that the Speaker's certificate speaks to the presumption of the fact that there was an affirmative vote on the day in question and that the vote reached the requisite minimum threshold of two-thirds majority of the membership of the House. The certificate is an integral part of the legislative process. It is taken as evidence of the facts it contains. It creates a constitutional presumption of regularity. In order to rebut the presumption, the applicants needed to show that the certificate was not born out of a process that is consistent with the law.

59. The papers before the Court a quo did not rebut that presumption. The authority which at law is required to make the determination whether the Appellant was fit to be retained on the voters' roll was satisfied and that the same was above board.

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[15] **CCZ 4/20.**

[16] **CCZ 4/20.**

60. **Section 106 of the Electoral Act** provides thus:

> *"As soon as practicable after the day fixed for the sitting of a nomination court in terms of section 38(1)(a), the Chief Elections Officer shall cause to be published in the Gazette and in all newspapers of mass circulation in Zimbabwe the names of all candidates who have been validly nominated for election to the office of President."*

61. It is submitted that the application in the court a quo was overtaken by events. After the Nomination Court sat a list of Presidential Candidates was published in the extraordinary Government Gazette under **General Notice 1 128 of 2023.**

62. The gazette partly reads.

> *'It is hereby notified in terms of section 106 of the Electoral Act [Chapter 2:13], that at the close of sitting of the Nomination Court which sat on Wednesday, 21st June 2023, the candidates listed in the Schedule were duly nominated for election to the office of President'.*

63. Amongst those candidates that were successfully nominated is the Appellant. published in the *Government Gazette*. By the process of gazette it followed that the same became law. The word law is defined in section 2 of the Interpretation Act Chapter 1.01 to mean:

> *"any enactment and the common law of Zimbabwe"*

64. This requirement is also laid down in **s 20 of the Interpretation Act [*Chapter 1:01*].)** It provides as follows at subsection 1:

> *"Every statutory instrument shall be published in or with or as a supplement to the* Gazette *and shall come into operation on the date of its publication*

unless some other date is fixed by or under the statutory instrument for the coming into operation thereof."

65. Section 15 A of the Interpretation Act Chapter 1:01 provides as follows:

> *"Where an enactment requires or permits anything to be done (a) by notice in the Gazette, the thing may be done by statutory instrument published as a supplement to the Gazette, (b) by statutory instrument, the instrument may be published as a notice in the Gazette rather than as a supplement to the Gazette."*

66. The effect of a gazette is that it turned the list of candidates into law-See also **R v Gluck1923 AD 149 at 151, Hayes v Baldachin & Ors (2) 1980 ZLR 422 at 427(S); 1981 (1) SA 749 (ZS) at 754.**

67. At page 134 and 135 of the record, the court a quo dismissed the issue of the gazette. It made a finding that the gazette could be undone and nothing was turned into law. It is submitted that the court erred on this aspect. The 1st Respondent was not challenging the gazette in the court a quo. The court further could not ignore the gazette as it did. Counsel thus prays that the appeal be granted on this ground again.

68. It is submitted that the 2nd Respondent did carry out its functions per the demands of the Constitution as a constitutional board. The law of the land demands that there be no interference with the carrying out of their functions. It is worse and deeper in casu as the 2nd Respondent has already carried out its functions.

69. Thus in **Judicial Service Commission v Romeo Taombera Zibani and Ors** SC 68-2017 PATEL JA (as he then was) lucidly stated that:

"It cannot be doubted that the courts are bound not only to respect the provisions of the Constitution but also to enforce them insofar as they dictate substantive and procedural requirements to be fulfilled by constitutional bodies. In the absence of any constitutional fiat to do so, it is clearly not within the ambit of the power or authority of a judge of the High Court to override or purport to suspend or limit the operation of an unambiguous provision of the Constitution under the pretext of pending executive action."

70. Undeniably, the nomination function and process done by the 2nd Respondent is a constitutional function. Further In **JSC (supra)** it was sagaciously stated that:

"In the instant case, the appellant duly invited nominations to fill the vacancy in the office of Chief Justice. The nominees were then invited to attend public interviews. In short, it is common cause that the appellant fully complied with its obligations under the Constitution. It is therefore difficult to perceive what wrong the appellant can be said to have committed or how the first respondent's rights have been violated so as to justify the issuance of an interdict against the appellant from conducting the interviews as scheduled in terms of a valid and binding constitutional provision. A court of law simply has no power to interdict a constitutional body from performing its constitutional obligations."

71. In **Magaya v Zimbabwe Gender Commission [2021] ZWSC 105** it was lucidly stated that:

"In the final analysis, the applicant has failed to take into account the formidable hurdle presented by the rule that an interdict cannot in principle be granted against conduct that is prima facie lawful and carried out in terms of an extant statutory instrument that is presumed to be valid until it is duly set aside by a competent court that is properly seized with the question of its validity. In any case, as a matter of procedural correctness, the validity of the impugned General Notice could not properly have been an issue

before the court a quo until the return day had arrived. By the same token, it cannot be properly ventilated before and determined by this Court on appeal against the judgment a quo. For these essentially technical reasons, I would agree with Gowora JA that the present appeal should not be allowed. "

72. It is submitted that the so-called declaration of invalidity could not be granted in the face of law. There is a law which this court is duty bound to obey. While the issue of the General Notice is one that does not appear in the papers, it is submitted that the court ought to take judicial notice of it and in any event, there is a presumption that the court knows the law and must be all knowing.

73. Thus section **24 of the Civil Evidence Act** is most apt and applicable as it provides as follows:

"(1) A court shall take judicial notice of the following— (a) the law of Zimbabwe; and (b) decisions of the High Court or the Supreme Court, if reported or recorded in citable form; and (c) any enactment published in or as a supplement to the Gazette; and (d) any other matter whatsoever which, in terms of rules of court or any other enactment, the court is required to accept as correct or of which it is required to take judicial notice."

74. It is therefore the law of the land that the Appellant is a candidate for Presidential election set on the 23rd of August 2023. If the 1st Respondent does not agree with that law he must obey it and challenge it later. That is an available avenue and course of action to him as a busy body.

75. In **Associated Newspapers of Zimbabwe (Pvt) Ltd. v Minister of State for Information and Publicity in the President's Office and Others SC 7-03**, it was opined and aptly so that:

"This Court is a court of law, and as such, cannot connive at or condone the applicants open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers"

76. It is not permissible for a court to interdict the lawful exercise of powers conferred by statute. **See Gool v Minister of Justice & Anor 1955 (2) SA 682 (CPD) at 688F-G.** This approach applies a fortiori where a court is called upon to interdict the lawful and bona fide performance of a constitutional duty.". See **National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors 2012 (6) SA 223 (CC) at para 66.**

77. The 1st Respondent asked the court to treat as pro non scripto the law of the land and in the same vein asked the court to interfere with the activities of another arm of the government. Such is impermissible. In **Doctors for Life International v Speaker of the National Assembly & Ors 2006 (6) SA 416 (CC)** at para 37:

"Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution." This principle was also clearly articulated in International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012

(4) SA 618 (CC) at para 95: "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

78. The words of MOGOENG CJ (as he then was) in **Economic Freedom Fighters v Speaker of the National Assembly & Others [2016] ZACC 11 at para 1**, are very pertinent. It was poetically said:

"To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, ***accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck."***

79. As was lucidly enunciated in **State v Mabena & Anor [2006] SCA 132 (RSA)** at para 2:

"The Constitution proclaims the existence of a State that is founded on the rule of law. Under such a regime legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with the law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the State. Far from conferring authority to disregard the law the Constitution is

the imperative for justice to be done in accordance with the law. As in the case of other State authority, the exercise of judicial authority otherwise than according to law is simply invalid."

80. It is submitted that the court has imperative constitutional duty to uphold the law of the land. Once there is law that lists the Appellant as a candidate the application is blown off. One wonders how the court a quo granted the application. Thus **section 45 of the Constitution of Zimbabwe 2013** states that all agents of the government **include the judiciary** must uphold the law.

81. Put differently, the court a quo permitted departure from statute. It is law written in a stone with a pen of iron that a court will not allow a departure from statute- **Courtesey Connection (Pvt) Limited and Another v Mupamhadzi [2006] ZWHHC 63.**

82. It is submitted that crookedly, the 1st Respondent was asking the court to reverse that which the legislature has said. That is neither law nor jurisprudence. Thus, **York Estates Ltd v Wareham 1950 (1) SA 125 at p 128** were LEWIS ACJ, said: -

"The Court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. See *Matthews v Rabinowitz* 1948 (2) SALR 876 W.L.D. In fact the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties. *CAPE DIARY and GENERAL LIVESTOCK ENGINEERS v SIM (*Supra) This rule is absolute and admits of no exception. It is expressed in the *maxim ex turpi causa non oritur actio*. See *Dube v Khumalo* 1986(2) ZLR 103 (SC) at p 109. It is based on the principle, expressed variously, that the Court cannot aid a party to defeat the clear intention of an ordinance or statute; that Courts of justice cannot recognize and give validity to that which the legislature has declared shall be illegal and void; and that the courts will not permit to be done indirectly

and obliquely what has expressly and directly been forbidden by the legislature".

83. The **York Estates** judgment has been accepted to be the law of the land in this forum. See **Chioza v Siziba SC 16/11**.

84. It is submitted that the application a quo was not that of a declarator but in fact a review. It was a disguised application for review. In deciding whether it is an application for a *declaratur* or review application disguised as a *declaratur*, the court will look at the substance of the application and the evidence led and not only at what applicant call his application.[17] A thorough perusal of the founding affidavit and the relief sought shows that this is a disguised review. It is apparent that this is impermissible.

85. Based on the substance of the application, it must be underscored that the Electoral Court was competent enough to address the 1st Respondent's alleged grievances. Section 161 of the Electoral Act gives the court exclusive power to deal with all issues pertaining to election processes. The court can hear appeals, applications and petitions within the confines of the Act. It can also review decisions of the commission and shall grant such orders, judgments and directions as may be granted by the High Court in such matters. It is a creature of statute, and its powers are confined to the four corners of the Act.

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[17] See **Mukanganise and Ors v Mwale and Ors** HB 131/21 at pages 7 and 8, where the Court said-

Applicants calls their application a declaratur. In considering whether this is a declaratur proper or a review disguised as a declaratur this court looks at the substance of the application rather than what a litigant chooses to call his or her application, or its form. See Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications 1997 (1) ZLR 342 at 344-345. In Geddes v Tawonezvi 2002 (1) ZLR 479 (S) the Supreme Court said in deciding whether an application is for a declaratur or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. Setting aside of a decision or proceeding is a relief normally sought in an application for review. In casu, the fact that in para 1 of the order sought applicants ask this court to declare the registration of the estate null and void, is not proof that this is an application for a declaratory order.

86. What the Appellant sought was, a review of the decision by an administrative body in declaring 1st Respondent as a duly nominated presidential candidate, can be dealt with in the Electoral Court and in terms of the Electoral Act based on the same grounds set out in the founding affidavit. As stated above, s 85 of the Constitution is all about a review.

87. It is erroneous that the court a quo made a finding that the decision of the nomination court was not judicial in character. Assuming that the decision of the nomination court is not judicial in character, it is not correct to say the same cannot be reviewed at law. The finding thus by the court a quo is impeachable yet again on this basis.

88. There was therefore no justification for burdening the court a quo's roll with an application that could be best described as an attempt to hoodwink the court into presiding over a review masked as a declaratur.

89. This Court has lambasted this approach of bringing review matters under the guise of declaratory orders.[18] It is simply impermissible and renders the application fatally defective with the result being that it ought to be struck off the roll. In seeking to rebut the point on disguised review, the 1st Respondent's counsel wrongly relied on **Gwaradzimba**. It is submitted that case is not authority for the procedure adopted by the 1st Respondent. It is a case which is self-defeating as it completely applies against the 1st Respondent.

90. The point was unassailable hence the only response proffered by the 1st Respondent was that the point has no merit without demonstrating the same. The 1st Respondent dodged the point and got the wrong gun from the armory. Counsel ought not to mislead court by citing inapplicable decisions. Gladly **the Gwaradzimba judgment** resolves the matter alas against the 1st Respondent. The court ought to have upheld this point.

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[18] See **Kwete v Africa Community Publishing and Development Trust & Others** HH 226/98; see also **Mutare City Council v Madzime** 1992 (2) ZLR 140 (S) 143D.

91. The 1st Respondent alleged violation of stated constitutional rights and he purports to have a right to approach this court for vindication in terms of section 85 of the Constitution. The doctrine of subsidiarity in constitutional matters precludes the court a quo from determining the matter as constitutional in terms of section 85 of the Constitution.

92. It is incompetent for one to seek a relief that can be granted under some other law or legislation without invoking a constitutional provision. In terms of the doctrine, a litigant that alleges infringement of his or her constitutional right(s) must seek recourse in legislation enacted to protect that right unless he or she intends to attack the constitutional validity of that legislation.

93. The whole complaint is that the Appellant should not have been retained on the voters' roll and for that reason he is not qualified to contest for the presidency. The Electoral Act has provisions which deal with the process by which a person may lose their status as a registered voter. The process is provided for under **s 28 and 33** thereof.

94. The same entails a factual enquiry and a procedure where a person is invited to show cause why their name should not be deleted from the voters' roll if there is prima facie belief that they have violated **s 23 of the Electoral Act.** Without a factual enquiry, one cannot determine whether or not one has violated s 23.

95. The remedies provided for under **s 23, 28 and 33** as well as those under s 161 of the Electoral Act are meant to enforce the right under s 63 of the Constitution. The requirements under s 91 of the Constitution are enforced through the Electoral Act. In this regard in **Moyo v Sgt Chacha & Others (cited in Applicant 's heads)** , the Constitutional Court remarked as follows:

> *"The principle of subsidiarity … states that a litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless he or she wants to attack the constitutional validity or efficacy of the legislation itself.*

Norms of greater specificity should be relied upon before resorting to norms of greater abstraction"

96. In **Mazibuko and Ors v City of Johannesburg and Ors (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)** the principle is set out as follows:

> *"Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge* the legislation as being inconsistent with the Constitution."

97. The provisions under the Electoral Act are elaborate and they are the only ones capable of enable the necessary factual findings to be made on whether the Appellant has violated the Electoral Act. This is precisely why the 1st Respondent ought to have pursued these. In the premises, the application was not supposed to succeed.

98. The court dismissed the point on subsidiarity at page 128 of the record on the basis that the Appellant had not identified provisions that could have been utilized by the 1st Respondent. The court listed the provisions being section 28, 23 and 33. These provide remedies for the 1st Respondent especially section 28 which calls on for a factual enquiry. It is incorrect for the court a quo to have found that there were no subsidiary provisions that could be resorted to. The appeal ought to succeed on this aspect.

99. As **I Currie and J de Waal in The Bill of Rights Handbook, 6ed, p 128 point** out, constitutional matters cannot be brought directly to the court as a matter of course. If this were to be allowed, the court could get bogged down in cases in which there may be disputes of fact on which evidence might be necessary or may be called upon to decide constitutional issues which are not decisive of the litigation and which might prove to be of purely academic interest. It is also not ordinarily in the interests of justice for any court,

including this Court, to sit as a court of first instance without there being the possibility of appealing against the decision taken.

100. The Electoral Act clearly provides for remedies of dealing with violations of section 23 of the Act. The same ought to be pursued before the prior to any purportedly resort to constitutional remedies. It is as simple as that.

101. There was absolutely no need to assert political rights per section 67 of the Constitution. This is not a matter of political rights. The 1st Respondent was supposed to identify his causa and run with it. This ground of appeal has merit counsel prays that it be allowed.

GROUNDS OF APPEAL THAT RELATE TO THE MERITS OF THE MATTER

102. It is an Achilles' heel for one to understand that which was being sought by the 1st Respondent. After painstakingly going through the application one can only imagine that the Appellant probably seeks that the Appellant be removed from the voter's roll, that he be removed from the list of contesting candidates and that he cannot stand for elections. The difficulty is one struggles to identify the basis upon which it is said to be placed. At some point it purports to be a constitutional application and on another it finds its basis on the Electoral Act. There was a clear attempt to change the causa in the heads of argument. That has been picked and counsel will focus on the founding affidavit as heads of argument are not pleadings.

103. The 1st Respondent says he is a registered voter and wants to participate in the forthcoming elections. In his affidavit which is drafted like heads of argument he does not provide any evidence that he is a registered voter. In opposition a point was taken that he is not and in his answering affidavit he further does not provide the relevant proof. It is submitted that at law he who alleges must prove. He ought to positively proved that he is a registered

voter in the Constituency of the 1st Respondent. It is submitted that he has failed to discharge such onus and that is the end. He fails the simple adage he who alleges must prove.

104. There is another further factual averment that is made by the Applicant. He positively states that the Appellant is not resident in Zimbabwe. He says that at paragraph 17 of his founding affidavit page 12 of the record. He states as follows:

> *"I have indicated that I am aware that first respondent has been away from the republic for a period in excess of 18 months. I add that this is a continuous period of absence. In other words, he has been out of the republic for each day of the past 18 months"*

105. He further says it is in the public knowledge and dares the Appellant to deny it. It is not law to reverse the onus to the Appellant as he has not come to court seeking any relief. It is the 1st Respondent who has come to court stating a positive fact. He does not attach any evidence that shows that the Appellant was absent from the country. He makes an allegation that he again he fails to prove- **Dr. Lunga v ZETDC HH 267-16.**

106. The allegation that the Appellant is absent in Zimbabwe is shocking when one considers the address that is provided for by the 1st Respondent himself. He stated in his application that the Appellant's address is number 4 Debys Road Helensavale, Harare. That is the end of the ill begotten application. He cannot state the address of a person and on the next line says he does not reside there. It is just but very difficult to fathom. It is submitted that the founding affidavit itself and the application admits the residency status of the Appellant. The effect of an admission is common cause in our law- **Adler v Elliot 1988(2) ZLR 283(S) & DD Transport v Abbot 1988 (2) ZLR 92.**

107. The 1st Respondent had anchored its mast on the provisions of section 23 of the Electoral Act. **Section 23 (3) of the Electoral Act** provides that:

> *" A voter who is registered on the voters roll for a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1) shall not be entitled to have his or her name retained on such roll if for a continuous period of eighteen months, he or she has **ceased** to reside in that constituency"*

108. It is submitted that the court a quo misconstrued section 23 (3) of the Electoral Act. The said provision relates cessation as opposed to absence. The founding affidavit was based on absence. The court dealt with absence as opposed to cessation. The time-honored and golden rule of statutory interpretation is that you give the words of a statute their primary meaning. See **National Railways of Zimbabwe Contributory Pension Fund v Edy S-141-88; Madoda v Tanganda Tea Company Ltd 1999 (1) ZLR 374 (S); S v Masivira 1990 (1) ZLR 373 (HC); Maxwell on The Interpretation of Statutes 12 ed at p 28; Nyemba and Watunga v R 1961 R & N 688 (SR) at 691C-D; Mike Campbell (Pvt) Ltd v Minister of Lands and Anor 2008 (1) ZLR 17 (S) at 33-35; and Mawarire v Mugabe NO and Ors CCZ-01-2013.**

109. The court a quo with respect embarked on a wild goose chase and conducted a wrong enquiry. It has already been stated that it is not an issue of absence but that of cessation that matters. The court dealt at length about the issue of passport. The passport can only prove absence and not cessation. It is thus submitted that the court erred in conducting a wrong enquiry.

110. It is apposite for counsel to deal with the issue of residence and how one ceases to be resident.

111. The Act as per section 2 does not define the meaning of cessation residence. Even if one assumes for a moment that the 1st Respondent is currently not in Zimbabwe not for a period of 18 months as alleged without proof, the Appellant perfectly qualifies to be said to reside in Zimbabwe.

112. In **Ex Parte Minister of Native Affairs 1941 AD 53** Centlivres JA, in dealing with the proper meaning of the word "residence" in a certain statute, held as follows:

> "There have been a number of decisions under these statutes and certain general principles have been laid down in construing the word 'resides'. Firstly it has been decided that the question to be considered is not one of domicile but of residence and that a defendant may have his domicile at one place and his residence for the time being at another place. See Langerman v. Alport (1911, C.P.D. at p. 379) and Chapman v. D'Alton (1914, E.D.L at p. 276). These decisions seem to me to be sound. For instance a citizen of the United States, while still domiciled there, may for the purposes of his business reside in South Africa, although he intends to return to the United States as soon as he retires from business. Secondly it is clear on the authorities that a person can have more than one residence and should in that case be sued before the magistrate of the place where he is residing at the time when the summons is served. See Norman v. Davis (9 N.L.R. at p. 220), Ngadi v. Temba (22 S.C. at p. 576), Becker v. Forster (1913, C.P.D. at p. 968) and Maritz v. Erasmus (1914, C.P.D. at p. 122). The case of Ngadi v. Temba (supra) is instructive. That was a case in which the plaintiff claimed from the defendant his (plaintiff's) wife or eight head of cattle,

being the number of cattle handed over by plaintiff to defendant as payment for the wife. It appeared that the defendant was a constable at Sterkstroom where he lived with one wife. He had another wife who lived at his kraal in the district of Idutywa, where he paid hut tax for the wife. He used to visit Idutywa. It was held that the defendant resided at Sterkstroom and not at Idutywa. Thirdly it is inherent in the decision of Solomon v. Wolff (15. S.C. 152) that a person cannot be said to reside at a place which he is temporarily visiting. In such a case it seems to me that such a person resides at his home which he has temporarily left, or as Wessels, J., put it in Cowie v. Pretoria Municipality (1911, T.P.D. at p. 632) 'in ordinary language a person is said to live in a place, even though he may be temporarily absent on certain occasions and for certain short periods.' 2. Apart from the above general principles which have been enunciated by the Courts, the Courts have studiously refrained from attempting the impossible task of giving a precise or exhaustive definition of the word 'resides'. For as Searle, J., correctly said in Hogsett v. Buys (1913, C.P.D. at p. 205):- 'lt has never been laid down what degree of permanence is required in residence; but at all events it ought to be shown that the person sought to be brought within the jurisdiction had some interest in the place where he was served, in the sense that there was some good reason for regarding it as his place of ordinary habitation at the date of service.' To put the matter in another way, the question whether a person resides at a particular place at any given time depends upon all the circumstances of the case read in the light of the general principles referred to above." (At 58-60.) [15] In Tick v Broude and another 1973 (1) SA 462 (T) at 469F-G it was said that residence is a concept which conveys "some sense of stability or something of a settled nature".

113. **Black's Law Dictionary (8th ed. 2004) at page 4083** is helpful as it defines residence as :

"The place where one actually lives, as distinguished from a domicile . • Residence usu. just means bodily presence as an inhabitant in a given place; domicile usu. requires bodily presence plus an intention to make the place one's home. **A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously**."

114. **In BRAIMAH** v **BRAIMAH 1996 (1) ZLR 571 (HC)** , it was stated that:

> *"The learned judge went on to refer to* ***Stransky v Stransky [1954] 2 ALL ER 536 (PDA) and Lewis v Lewis [1956] 1 ALL ER 375 (PDA****) where the courts had held that the wife's temporary residence in one country had not prevented her from being regarded as having been ordinarily resident in another. In the Stransky case, the wife had spent 15 months in Germany but kept a flat and most of her possession in London. In the Lewis case, the wife had spent 6 months in Australia but left a flat and her furniture in London"*

115. **In Kennedy v Kennedy 1978 RLR 58 (G); 1978 (2) SA 698 (R)** Gubbay J (as he then was) concluded that a person may be residing in one country but be ordinarily resident in another. At p 61-62 (700A-H) the learned judge said:

> *"The meaning of the words ordinarily resident' and resident' has been the subject of much judicial consideration. There are stray dicta to the effect that the word ordinarily' lends no added meaning to the word resident' - See Hopkins v Hopkins [1950] 2 All ER 1035 at pp 1038H-1039A. But the better view is that the two expressions do have different meanings. It is to be observed that s 12 (1) [now s 3(1)] of the Matrimonial Causes Act use the word resided' in para (b) and the words ordinarily resident' in para (c). I have no doubt that the use of the two terms is not accidental, and that the legislature intended each to bear a different signification. The section was amended in 1970 by the addition of para (c). The legislature must be*

presumed to have known at that time that the courts had differentiated in meaning between the terms resident' and ordinarily resident'. The rule is well expressed by Lord Coleridge CJ in Barlow & Anor v Teale (1885) 15 QBD 403 at p 405 thus:

> *Where ... Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts showing that the legislative did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them.'*

116. In **Chidoda v Mhangaki 1996 (2) ZLR 111 (SC) at page 114 it** was stated that:

"I doubt very much whether it were possible for a person to be ordinarily resident in two places at the same time, for as Somervell LJ observed in Macrae v Macrae (2) [1949] 2 All ER 34 at 36:

> *"Ordinary residence ... can be changed in a day. A man is ordinarily resident in one place up to a particular day. He then cuts the connection he has with that place - in this case (Macrae v Macrae (2)) he left his wife; in another case he may have disposed of his house - and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."*

117. **In Biro v Minister of the Interior 1957 (1) SA 234 (T)** at page 240-1 it was stated that:

'An illustration will show what is meant. A man from a foreign country may come to the Union for business or some other purpose

which necessitates a long period of residence here. He is admitted to the Union for permanent residence, although he may not then form the intention to reside here permanently. He may maintain a home in the foreign country and may leave his wife and children there; he continues to be 'ordinarily resident' in that country, although he is 'resident' here. If he actually lives here for 5 years he fulfils part of the requirements for naturalisation. But before he can qualify, he must become ordinarily resident in the Union and he must be ordinarily resident here during the year immediately preceding the application. I think that what is required is that an applicant for naturalisation must have made the Union his ordinary place of residence and in addition he must actually have lived here for five years during the seven years preceding the date of the application. What the Legislature intended was that an applicant must have made the Union his ordinary home, and in addition he must have lived in the Union for a substantial period.

118. **In Buck v Parker, 1908 T.S. 1100, SOLOMON, J., said (at p. 1104):**

'Now the word 'residence' is one which is capable of bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act.'

119. In this case the dispute turns on the meaning of the phrase "*ordinarily resident*". **In Zwvssig v Zwvssia 1997(2) SA 467 at 470F the Court citing Dicev: The Conflict of Laws say**s:

"It is possible to be resident in a country despite a temporary absence and at least in some context to have two or more residences."

120. The Court also approved of the earlier dictum in **Robinson v Commissioner of Taxes 1917 TPD 542 at 547-548 and 470F**;

"There are ..... certain considerations which may afford a guide to its interpretation. In the first place it is not synonymous with domicile, nor is it necessarily permanent, nor is it exclusive, but on the other hand a mere passer by or a casual visitor is not resident, although in a sense he may be said to reside during the period of his visit. Perhaps the best general description of what is imported by residence is that it means a man's home or one of his homes for the time being; for exactly what period and what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule .... Again the maintenance of an establishment coupled with intermittent or occasional dwellings is sufficient to constitute residence .... It appears therefore that if a man sets up an establishment in a country and lives there at intervals he is resident in that country, however many similar residences he may have elsewhere."

121. **Schreiner. JA in Cohen v CIR 1946 AD 174 at 185H stated that:**

"His ordinary residence would be the country to which he would naturally as a matter of course return from his wanderings; as contrasted with other lands that might be called his usual principal residence and it would be described more aptly than other countries as his real home."

122. **Forsyth Private International Law (4th Edition) at 193 writes thus of the concept of residence;**

> *"It has been argued that residence does not include an animus residendi although in certain cases the contrary view is taken. [The author cites authority at footnote 279.] The acquisition of residence is certainly not dependent on the legal capacity of the de cujus; there is nothing to prevent a minor or an insane person for example from residing in an area. It is probably quite correct to say that residence does not embrace an animus in the sense of a specific intention to remain in an area. From physical presence of a certain duration and from the nature of a person's activities in the area an interest or attachment may be inferred; and this is the crucial factor - the reason for being in a particular place. If the facts of the case show that the de cujus was at some time present in a particular area for a person requiring some fair degree of attachment this will suffice to establish residence."*

123. A presence which is merely fleeting or transient would not satisfy the requirement for residence; some greater degree of permanence is necessary. The Appellant is a Zimbabwean resident and has not ceased to be such in terms of the law, section 23(3) of the Electoral Act. Further to that an interpretation and net effect of the judgment of the court a quo will mean that all those in diaspora has ceased to be residents and thereby disenfranchised to vote. That is incorrect and justifies that the judgment of the court a quo be vacated.

124. It is further submitted that the court could not construe **section 23 of the Electoral Act in exclusion of section 28** of the same. Section 28 of the Act provides that:

> *"(1) A voter may object to the retention of any name on the voters roll of the constituency in which the objecting voter is registered, and to the removal of his or her name from the voters roll in terms of section 33(4).*

(2) An objection in terms of subsection (1) shall be—

(a) in writing, setting forth the grounds of the objection; and

(b) lodged in duplicate with the voter registration officer; and

(c) accompanied by the prescribed fee.

(3) If an objection in terms of subsection (1) is lodged and—

(a) the voter registration officer upholds the objection, he or she shall give written notice accordingly to—

(i) the voter who has objected; and

(ii) the person to whom the objection relates, where the effect of upholding the objection is to strike his or her name off the voters roll or to place it on another voters roll;"

125. It is submitted that there is a patent world of difference between section 23 of the Electoral Act and section 28. Section 23 of the Act is not a deeming provision and as such it does not render automatically the Appellant out of the voter's roll. Put simple violation of section 23 does not result in the automatic kicking out of a voter from the voter's roll. Section 28 is the relevant provision that is used to remove a voter from the voters' roll after the same has been duly served with a notice and given an opportunity to make representations. If the 1st Respondent genuinely believes that the Appellant must be removed as a voter, he ought to have utilized the provisions of section 28. As of now it is too little too late, as a General Notice has already been gazzetted and such carries the status of law. Authorities have already been provided.

126. Section 91 of the Constitution which deals with the qualification for a presidential candidate is irrelevant. It only applies when a candidate's name is not in the voters' roll. In

casu, the Appellant is in the voters roll and the Nomination Court sat and accepted the papers. A gazette followed and that turned such nominations into law. The Applicant as a busy body may challenge such law if he saw wish. The gazette changes all and sundry.

127. Much noise is made about section 67 of the Constitution which deals with political rights. There is an allegation that the same have been violated. 1st Respondent must be serious. His right to vote if he is registered remains there. It has not been taken away. How dare he says there is violation of his right to vote is bizarre. He alleges that he wants to partake in a lawful election that is exactly what has happened. The election date is there per a proclamation. The list of candidates to contest for a presidential post are there per a General Notice. Now therefore, the election is all set. All processes were being done per the constitution and the Acts made thereto. 1st Respondent may vote for any candidate .No right has been violated here.

128. Counsel will turn to the ground which deals with reverse onus and this resolves the matter. The court a quo accepted at page 130 of the record that he who alleges must prove. It accepts that the Applicant had the onus of proof.

129. It however changed when it says at page 130 of the record that:

> *"onus is however not a static phenomenon. It shifts between the parties depending on what one alleges against the other and the later 's response to the same. "*

130. The court proceeded to state that the averments made by the 1st Respondent at paragraph 17 of his founding affidavit was in the negative. With respect, the court a quo erred and its judgment cannot stand as part of our electoral jurisprudence.

131. The court improperly shifted onus to the Appellant without any justification to do so. The first point to make is that the 1st Respondent's averment at paragraph 17 of his founding affidavit is a positive one. It is difficult to imagine how the court found that it was an averment on the negative. In any event that is an unknown principle of law in our jurisdiction. An Applicant cannot plead in the negative when it prays for relief. It must make a positive assertion and prove it. The court violated the Plascon Evans Rule.

132. It is law that in certain instances, the law will shift onus to a Respondent in motion proceedings. Such will only happen if the Respondent is relying on a special defense like fraud, set off , waiver and estoppel among others. It is is in this instance that then the law shifts the onus to the litigant alleging it.See **Zhangare v Chioza and Another (136 of 2023) [2023] ZWHHC 136, THE PRESBYTERIAN CHURCH OF SOUTHERN AFRICA v SHIELD OF ZIMBABWE INSURANCE LTD 1991 (2) ZLR 261 (HC).**

133. Generally, evidence for either party must, in both criminal and civil cases, be given orally by the witness in the presence of the parties. Evidence essentially consists of oral statements made under oath or affirmation. The purpose of this practice is that parties should have an opportunity to confront the witnesses who testify against them, and should be able to challenge the evidence by questioning the witnesses where they and the court can also observe the demeanour of the witness for purposes of assessing his or her credibility.

134. The terms "burden of proof" and "onus of proof" refer to the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that the claim or the defence, as the case may be should succeed. In **Pillay v Krishna and Another**[19] it was described as follows:

[19] 1946 AD 946

"*The only correct use of the word "onus" is that which I believe to be its true and original sense (cf D31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be…..".*[20]

135. The burden of proof in an action will not necessarily fall on the one party alone, but each of the parties must bear a burden of proof in relation to different issues. In ***Pillay v Krishna*** the general approach was explained as follows:

"if one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it:- Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regard *quoad* that defence, as being the Claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it…… But there is a third rule, which Voet states…. As follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute". The onus is on the person who alleges something and not on his opponent who merely denies it"[21]

136. Where there are a number of distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof. These issues have nothing to do with each other, save of course that the second will not arise until the first has been discharged.[22]

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[20] At 952-3
[21] (Supra) at 951-2.
[22] Pillay v Krishna supra at 953.

137. In *South Cape Corporation (Pty) Ltd V Engineering Management Services (Pty) Ltd*[23] Corbett JA (as he then was), explained the distinction between the burden of proof properly so called and the evidential burden as follows:

"As was pointed out by Davis AJA in *Pillay v Krishna and Another 1946 AD at 952-3*, the word onus has often been used to denote, inter alia two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In *Brand v Minister of Justice and Another 1959 (4) SA 712 (A) at 715* Ogilvie-Thompson JA called it "the overall onus". In this sense, the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other".

138. By applying reverse onus in a case where the Respondent had not raised a special defense the court a quo erred and its judgment must be vacated.

139. For the reason that the appeal has merit and is elaborate may it be afforded with costs against the 1st Respondent. The judgment of the court a quo is patently wrong. It focused on wrong enquiries and shifted onus in circumstances not permitted by the law. The issue is that of cessation and not absence from Zimbabwe.

140. In any event, the Appellant is contesting for a presidential post. The issues of constituency are irrelevant.

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[23] 1977 (3) SA 534 (A) at 548.

In the above premises may the appeal be afforded with costs against the 1st Respondent.

DATED AT HARARE THIS 26TH DAY OF JULY 2023

Prepared by Adv Method Ndlovu and Adv R. T. Mutero

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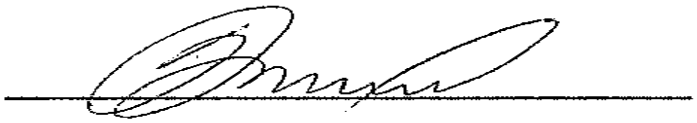
Instructed by



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