

**DISTRIBUTABLE:** (2)

**TEMBA MLISWA**  
**v**  
**PARLIAMENT OF THE REPUBLIC OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE**  
**MALABA CJ, GWAUNZA DCJ, GARWE AJCC, MAKARAU AJCC, GOWORA**  
**AJCC, HLATSHWAYO AJCC AND PATEL AJCC.**  
**HARARE: SEPTEMBER 30, 2020 & MARCH 29, 2021**

Application in terms of 167 (2) of the Constitution.

*T. Biti*, for applicant

*A. Demo with K. Tundu*, for respondent

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**MAKARAU AJCC**

**Background**

The applicant is a duly elected Member of Parliament for the Norton Constituency. On 24 June 2020, during an ordinary sitting of the National Assembly over which the Speaker of Parliament was presiding, he was removed from Parliament and suspended for six consecutive sittings for allegedly behaving in a violent and grossly disorderly manner. The expulsion and suspension were ordered by the Speaker of Parliament, (“the Speaker”).

Aggrieved by the expulsion and suspension, the applicant filed this application on 20 July 2020. The application, brought specifically in terms of s 167 (2(d) of the Constitution, alleged that the respondent had failed to fulfil a constitutional obligation to ensure compliance with its Standing Orders. In particular, the applicant sought to demonstrate how the expulsion was inconsistent with the procedures and the powers granted to the Speaker by the Standing Orders and in terms of which the Speaker purportedly acted. The applicant further denied having been disorderly as alleged or at all. He also challenged the propriety and validity of the punishment that was meted out to him on the basis that he was not afforded the right to be heard before he was punished.

The application was opposed with the respondent's opposing affidavit being deposed to by the Speaker.

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In addition to opposing the matter on the merits, the respondent raised five preliminary points. Not necessarily in the same order in which the points were raised in the opposing affidavit, the respondent challenged the jurisdiction of this Court, the validity of the application itself by alleging that it was fatally defective for want of compliance with the rules of the court and the efficacy of the relief sought which it alleged was moot since the applicant had already served the punishment by the time of the filing of the application. The respondent also challenged the non-joinder of the Speaker which it alleged was fatal to the application and, finally, it requested that this Court withholds its jurisdiction as the matter was pending before the High Court where similar relief had been sought under case no HC 3367/2020.

Regarding the merits of the application, the respondent contended in the main that the applicant had indeed behaved in a disorderly manner and that the punishment meted out to him was appropriate and in accordance with the powers granted to the Speaker by the Standing Orders. The respondent specifically denied that the Speaker had exceeded his authority and powers as alleged in the application or at all.

### **The issue**

As stated above, the respondent raised the issue of the jurisdiction of this Court as one of its preliminary points. This it however did in direct response to the allegation that the applicant had not been afforded the right to be heard before he was punished. In response to this specific allegation, the respondent contended that the applicant ought to have approached the High Court on review, challenging the procedure leading to his punishment. It was thus the position of the respondent, erroneously held in my view, that since the High Court also enjoyed review jurisdiction in the matter, the jurisdiction of this Court was not triggered.

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Whilst nothing turns on this point I wish to note in passing that this Court enjoys concurrent jurisdiction with other courts in constitutional matters. The coincidence of jurisdiction with the other courts does not oust the jurisdiction of this court. The position may be contrasted with instances where this court has been granted exclusive jurisdiction. In those instances, naturally, it is the jurisdiction of the other courts that is ousted even if the matter is, technically, a constitutional matter.

Without necessarily accepting as correct the basis upon which the respondent challenged its jurisdiction in the matter, the court was on its own accord concerned with whether its jurisdiction had been triggered at all by the averments made in the application,

taken in their totality. It therefore raised the issue for preliminary argument. The specific question put to both parties for the preliminary address was whether the applicant had chosen the appropriate forum and remedy for the vindication of his alleged injury.

Therefore, the sole issue that fell for determination in this preliminary ruling was whether the conduct complained of by the applicant was conduct signifying failure by the respondent to fulfil a constitutional obligation.

### **The submissions**

In the main, counsel for the applicant submitted that by failing to follow the provisions of its own Standing Orders, the respondent had failed to uphold the rule of law and had acted without due process. To buttress his submissions in this regard, counsel relied heavily on the principles of constitutional supremacy and accountability, and on which he expended the bulk of his time and energy.

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Regarding the jurisdiction of this Court, counsel submitted that this court had jurisdiction as the respondent had a constitutional obligation which it breached “through its Speaker”. It was thus his argument that the Speaker and the respondent were inseparable and that once he was in the House, the Speaker represented the respondent. On that basis, he invited us to find as a fact that the expulsion and suspension of the applicant was conduct by the respondent, “through its Speaker”.

Counsel for the respondent in turn submitted that the application was not properly before the court as the conduct complained of was not that of the respondent. It was his argument that the Speaker is separate and distinct from the respondent. In support of this

argument, Counsel maintained the respondent's position, once again erroneously held in my view, to the effect that the Speaker ought to have been cited as a co-respondent in this application as he was the decision maker in the instance and it is his conduct that allegedly violated the provisions of the Standing Orders.

## **The Law**

That the power granted to the courts by the new Constitution to hold public officers accountable to the Constitution marks a clear departure from the state power sharing arrangement provided for under the repealed Constitution and the jurisprudence that emerged under that order, is now commonplace.

Our constitutional order has evolved from one where the conduct of those wielding public power was predominantly immune to judicial review, insulated and shielded from such by the strict application of the doctrine of separation of powers, to one where the conduct of all public affairs must measure up to the constitutional imperatives under the watchful eye of the judiciary, which in turn is also obliged to always venerate the Constitution.

Commenting on the new constitutional order, **PATEL JA** in *Judicial Service Commission v Zibani & Others* SC 68/17 had this to say:

“It is axiomatic that Zimbabwe is a constitutional in contradistinction to a parliamentary democracy. See *Biti & Anor v Minister of Justice, Legal and Parliamentary Affairs & Anor* 2002 (1) ZLR 177 (S) at 190A-B. This fundamental principle and its concomitant legal ramifications are codified in s 2 of the Constitution as follows:

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

- (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

Adding a building block onto the now settled jurisprudence on the new constitutional dispensation, **HLATSHWAYO JCC** in *Chironga and Another v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ14/20 opens his judgment by noting that:

“One of the crucial elements of the new constitutional dispensation ushered in by the 2013 Constitution is to make a decisive break from turning a blind eye to constitutional obligations. To achieve this goal, the drafters of the Zimbabwean Constitution Amendment No 20 Act 2013, (“the Constitution”), adopted the rule of law and the supremacy of the Constitution as some of the core founding values and principles of our constitutional democracy. For this reason public office bearers ignore their constitutional obligations at their own peril.”

The above remarks are ample evidence if any is needed, that the doctrines of constitutional supremacy and accountability under the new Constitution have been fully embraced by this Court and underpin the jurisprudence that is emerging therefrom. Detailed and spirited submissions by counsel for the applicant on these principles, whilst necessary to establish the base-line from which all other arguments in the matter would be considered, were thus as effective as preaching to the clergy.

Similarly, this Court has also accepted and holds as the correct position at law that the respondent has an obligation to protect the Constitution and to promote democratic governance in Zimbabwe. It accepts that the respondent has the obligation to uphold, among others, the rule of law and supremacy of the Constitution, two of the founding values and principles set out in the Constitution.

In *Gonese & Anor v Parliament of Zimbabwe & Ors* CCZ4/2020, **MALABA CJ**

noted at p 15 of the judgment, that there are provision in the Constitution that impose obligations on the respondent as directly enforceable law. In his words:

“There are provisions of the Constitution which impose obligations on Parliament. The Constitutional provisions impose the obligations on Parliament as directly enforceable law.

Section 119 of the Constitution imposes an obligation on Parliament to protect the Constitution and promote democratic governance in Zimbabwe. The obligation imposed on Parliament by s 328 (5) of the Constitution is that it must not pass a Constitutional Bill at the last reading in the national Assembly and the Senate except by affirmative votes of two-thirds of the membership of each House”.

As stated above, the submissions by counsel for the applicant on the supremacy of the Constitution and the transition from non-accountability to full accountability under the Constitution by all wielders of public power, whilst correct, do not go anywhere near addressing the issue that arises in this matter. The issue that arises **Judgment No. CCZ 2/21**  
**Court Application No. CCZ 6/20** acted at all or omitted to act and, in so doing, failed to fulfil an obligation imposed upon it by the Constitution as envisioned by s 167 (2) (d) of the Constitution.

The power granted to this Court “to determine whether Parliament or the President has failed to fulfil a constitutional obligation” is a specific and deliberate mechanism introduced into the procedures of this Court to ensure that Parliament and the President fulfil their respective constitutional obligations. It is necessarily granted in clear and unambiguous terms to constitute the vehicle only through which the supremacy of the Constitution can be fully realised and the provisions of s 2(2) of the Constitution fulfilled in respect of Parliament and the President. It sets the tone for the exercise of constitutional jurisdiction by the other courts over all other wielders of state power. The mechanism is

therefore a deliberate attenuation of the applicability of the doctrine of separation of powers among the organs of state.

For the effective and smooth functioning of the state, the comity that must exist between the judiciary and the other organs of state must, as before, act to restrain this Court from using its special jurisdiction save in strict compliance with the section.

Quite apart from the comity considerations, the ambit of the court's jurisdiction under s 167 (2) (d) is procedurally limited by the requirements of the cause of action that is created by the section. These are clear cut. They are an identified constitutional obligation and conduct or an omission by the respondent signifying a failure to fulfil the obligation. The two requirements are not consecutives but are concomitants, both of which must be alleged and proved.

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In *Doctors for Life International v Speaker of The National Assembly & Ors* 2006 (6) SA 416 (CC), **NCOBO J** (as he then was), observed that a claimant who seeks under the South African constitution to vindicate a constitutional right by impugning the conduct of a state functionary must identify the functionary and impugned conduct with reasonable precision. To plead one's case with precision is a rule of procedure that I believe also applies with equal force to all applications brought under s 167 (2) (d). I shall revert to this point below.

The special jurisdiction, not being inherent, cannot be invoked over all persons and over all constitutional matters. In particular, it being a special vehicle to hold the other two organs of state accountable, the exclusive jurisdiction of this Court cannot be invoked to



inquire into the conduct of other state agencies who are not Parliament or the President. For these other actors, common law causes of action abound and the jurisdiction of this Court over such matters is shared with the other courts in the land as stated in passing above. Put differently, the only permissible respondents under an application in terms of s 167 (2) (d) are Parliament or the President. Therefore, and limiting myself to the facts of this matter, the special jurisdiction cannot be invoked to determine whether the conduct of the Speaker, for instance, was a failure to fulfil a constitutional obligation.

On the basis of the above, I wish to comment once again in passing that it is impermissible to join another party as respondent to an application brought under s 167 (2) (d) as submitted and suggested by counsel for the respondent.

## **Analysis**

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The application as pleaded, seeks to impugn the conduct of the respondent “through its Speaker”. In my view, such style of pleading, which conflates the Speaker with the respondent, obfuscates the exact conduct that the applicant seeks to impugn. It is not precise enough for the purposes of the section. It fails to meet the requirements of the law.

The applicant specifically challenges the conduct by the Speaker as exceeding the powers granted to him by the Standing Orders and at the same time imputes such allegedly unlawful conduct to the respondent. Therein lies the first hurdle that this Court must overcome before its jurisdiction can be triggered. Whose conduct is under its scrutiny?

Being alive to the requirements of the cause of action under s 167 (2) (d) as discussed above, counsel for the applicant argued that the respondent expelled and suspended the applicant through its Speaker.

But did it?

It is appropriate at this stage that I advert briefly to the facts leading to the expulsion and suspension of the applicant, which facts are largely common cause.

On 4 June 2020, the applicant allegedly behaved in a disorderly manner during a sitting of the National Assembly that was presided over by the Deputy Speaker.

On 20 June 2020, the Speaker, now in the Chair, and in his capacity as Speaker, pronounced his ruling on the applicant's previous behaviour. He thereafter ordered the applicant to withdraw his unparliamentary language and to apologise to the House which the applicant duly did.

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Later during the same sitting, the applicant allegedly again behaved in a disorderly manner. The Speaker felt that the applicant was not remorseful. He thereafter summarily suspended the applicant for six consecutive sittings after which he ordered that the applicant be removed from the House.

As indicated above, counsel for the applicant did not seek to separate the Speaker from the respondent. In his words during oral argument, the Speaker and Parliament are inseparable; once the Speaker is in the House, he becomes Parliament.

In this regard, counsel relied on a passage from the authors Woolman and Bishop, Constitutional Law in South Africa, Vol I 2<sup>nd</sup> Ed at p 17-3 where they write:

“The NA (National Assembly) is chaired by the Speaker. The Speaker is the representative and spokes-person of the Assembly in its collective capacity. The Speaker may therefore give binding undertakings on behalf of the NA.”

On the basis of the above, counsel invited us to find that the conduct of the Speaker in the circumstances of this matter binds the respondent and amounts to a failure by the respondent to fulfil its constitutional obligation to uphold the rule of law and full compliance with its Standing orders.

Whilst there is some undeniable cogency in the submission by applicant’s counsel, we must decline his invitation.

There are instances where the juristic acts of the respondent are performed through the agency of the Speaker, especially where the respondent is transacting with third parties. Such instances include those referred to by the authors Wolman & Bishop as cited above. It stands to reason that the respondent, being a body of legislators can only act through its members, officials and duly appointed agents. The Speaker, being the head of Parliament, is naturally more often than not the voice and limbs of the respondent. Thus quite conceivably, the pronouncements and conduct of the Speaker or other functionary can at law be regarded as the actions and conduct of the respondent and will bind the respondent. An example of such an instance is readily afforded by the facts in the matter *Gonese & Anor v Parliament of Zimbabwe & Ors (supra)*. In that case, the certification by the President of the Senate that a two thirds majority had been attained on Constitution Amendment Bill No 1 when in fact it had not been so achieved, was found by this Court to amount to a failure on

the part of the respondent to fulfil a constitutional obligation concerning the process for amending the Constitution.

However, in this application, the actions of the Speaker cannot be imputed to the respondent for the reasons that follow.

Firstly, the Standing Orders under which the applicant was punished grant both the Speaker and the respondent the power to oversee the exercise of power, privileges and immunities in the House. The power given to the Speaker is independent of that given to the respondent. He is granted a discretion on what penalty to impose on a member who breaches parliamentary privileges. The level of punishment that he can decide upon is however on a lower threshold to that of the respondent. For more serious breaches of parliamentary etiquette meriting more severe penalties, the Speaker must refer the matter to the House after naming the member. This procedure is fully laid out in the respondent's Standing Orders and it is common cause between the parties.

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Also common cause between the parties is the fact that this procedure was never invoked in this matter. The matter of the applicant's breach of privileges was never referred to the respondent.

The applicant accepts that the Speaker has disciplinary powers over Members of Parliament in terms of which he can order a member to leave the House for a full day. In a moment of unintended levity, counsel for the applicant submitted that this power is used quite often against Honourable Members. Such power is not disputed. Therefore, the legitimacy of the action by the Speaker against the applicant cannot be doubted.

If it is accepted that the disciplinary power of the Speaker over Members of Parliament is legitimate, which it must, then it cannot be wished away into insignificance in his hands. The Speaker's power cannot be negated by imputing it to the respondent. It remains conduct by the Speaker and must be given its full recognition at law. It is in itself the wielding of administrative power and must be independently subject to judicial control. The argument that the Speaker's such exercise of power is at law conduct by the respondent is therefore untenable.

Secondly, it stands to reason that where disciplinary authority is granted to two functionaries, not concurrently but on escalating thresholds, the exercise of the power by one cannot be imputed to the other in the absence of clear provisions to that effect. My reading of the Standing Orders of the respondent do not show a basis upon which I can infer that the exercise of the power to punish Members of Parliament by the Speaker is to be regarded as conduct by the respondent and not by the Speaker, using his own discretion in the matter. Counsel did not direct our attention to any provision in the Standing Orders from which such an inference can be drawn.

Finally, there is no basis factually or legally for finding that the respondent had any supervisory role over the Speaker in matters of the discipline of Members of Parliament. There is thus no procedure by which the respondent could have ensured that the Speaker fully complied with the Standing Orders and limited his powers accordingly. The matter was never referred to the House for resolution.

It is therefore my finding on the facts of the matter that the conduct complained of was that of the Speaker acting independently of the respondent. Put differently, it is my finding that the conduct complained of was not the conduct of the respondent and the jurisdiction of this court is accordingly not triggered.

In the hands of the Speaker, the decision to punish a Member of Parliament under the Standing Orders hardly qualifies as a constitutional obligation that would attract the attention of this Court. Quite correctly, counsel did not so argue. It is therefore idle to discuss whether this Court would still have had jurisdiction in the matter even if the conduct was correctly attributed to the Speaker.

In view of the finding that I make above, it is unnecessary that I proceed to determine whether the exercise of disciplinary power by the respondent in terms of its Standing Orders can amount to a constitutional obligation for the purposes of s 167 (2) (d) of the Constitution. This application turns or rather falls on the fact that the respondent did not act as alleged or at all.

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### **Disposition**

The jurisdiction of this Court not having been triggered, the matter must be struck off the roll. No justification appears for the court to depart from the general position regarding the award of costs. None was pressed on us by the respondent. Accordingly, in line with the general position, no order as to costs shall be made.

In the result, I make the following order:

1. The matter is struck off the roll.

2. There shall be no order as to costs.

**MALABA CJ:** I agree

**GWAUNZA DCJ:** I agree

**GARWE JCC:** I agree

**GOWORA JCC:** I agree

**HLATSHWAYO JCC:** I agree

**PATEL JCC:** I agree

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*Mafume Law Chambers*, applicant's legal practitioners.

*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners.