1. PRINCE DUBEKO SIBANDA
and
BRIGHT VANYA MOYO
and
VELISWE NKOMO
and
JASMINE TOFFA
and
STABILE MLILO
and
PASHOR RAPHAEL SIBANDA
and
NICOLA JANE WATSON
and
ERECK GONO
and
EVIDENCE SUNUNGURAI ZANA
and
MORGAN NCUBE
And
OBERT MANDUNA
and
JANETH DUBE
and
DESMOND MAKAZA
and
FEBION MUNYARADZI KUFAHAKUTIZWI
versus
SENGEZO TSHABANGU
and
SPEAKER OF NATIONAL ASSEMEBLY N.O.
and
ZIMBABWE ELECTORAL COMMISSON

2. GIDEON SHOKO
and
TENDAI SIBANDA
and
ANASTASIA MOYO
and
JOEL GABUZA GABUZZA
and
DAVID ANTHONY CHIMHINI
and
SIPHIWE NCUBE
and
FELIX MAGAGELA SIBANDA
and

HELEN ZIVIRA
and
MATIVENGA GODFREY MADZIKANDA
versus
SENGEZO TSHABANGU
and
PRESIDENT OF THE SENATE N.O.

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE; 2 and 3 November 2023

A S Ndhlovu with J Ndhlovu, for 1st -14th applicants in first application
A Muchadehama, for 1st -9th applicants in second case
L Uriri with K I Phulu, for the 1st respondent
S Hoko with A Demo, for the 2nd respondents
T M Kanengoni, for the 3rd respondent

Opposed application

MUTEVEDZI J: Just like it is difficult if not impossible for a man to impugn the paternity of his brother without directly involving the parents it is naïve for a member of a political party to approach a court seeking to prove that another is a non-member of the same party without the involvement of the political party itself. The applicants in the two applications before me all share the mortification of failing to appreciate the elementary notion that they are individuals who are distinct from their political party. They cannot conflate the rights acquired through their individual membership in the party with the responsibilities which are reposed in the political party itself. I will later in the judgment, demonstrate the fallacy of believing otherwise.

The two applications were filed separately. The first one was filed on 12 October 2023 under case number HCH 6684/23. The second application was filed on 16 October 2023. They are both urgent court applications for a declaratur and consequential relief in terms of s 14 of the High Court Act [*Chapter 7:06*]. At a case management meeting held on 17 October 2023 all the parties to both applications consented to the consolidation of the two applications for them to be argued as one. That agreement stemmed from the realization and acceptance that

the cause of action was the same and that the relief sought is essentially similar in both applications.

The parties

The applicants in both applications said they are members of a political party called the Citizens Coalition for Change (CCC) led by a man called Advocate Nelson Chamisa. The party so they said, was formed around January 2022. They further alleged that they all participated in Zimbabwe's harmonized elections held in August 2023. The applicants in the first application participated in the National Assembly elections whilst those in the second application were contestants for senatorial seats. They were all successful and became members of the National Assembly and of the Senate respectively. The legal confirmation of their successes came when their names were published in the Government Gazette of 30 August 2023 before they were subsequently sworn in as members of the two Houses of Parliament on 7 September 2023.

The first respondent in both applications is Sengezo Tshabangu, who from the tone of the applicants' founding and supporting affidavits is a much maligned man. They described him as a male adult of Fiva village under Headman Hlabangana in Chief Matshane's jurisdiction. They said he is a fraudster and an impostor cited for his role as the author of the correspondence directed to the Speaker of the National Assembly and the President of the Senate.

The second respondent in the first application is the Speaker of the National Assembly whilst the President of the Senate is cited as the second respondent in the second application. For convenience, I will collectively refer to those two respondents as the presiding officers. They were both cited in their official capacities as the constitutional functionaries who received and acted upon the disputed communication addressed to them by first respondent. The Zimbabwe Electoral Commission is cited as the third respondent in the first application. The applicants described it, and correctly so, as an independent constitutional commission established in terms of the Constitution of Zimbabwe but no sooner had that been said that than they turned around and for no apparent reason besmirched it by alleging that its practical independence is subjective. Luckily for it, the Electoral Commission was not cited in the second application.

The basis of the applications appeared in the applicants' founding affidavits which unfortunately teemed with resentment and rage. In my paraphrase, it was that in a nasty turn

of fortunes on 3 October 2023, hardly a month after their momentous swearing in, the first respondent authored letters to the presiding officers. In that communication he alleged that the applicants had *'seized'* to be members of the CCC political party. Although the first respondent appeared to have followed up his letter with an erratum which indicated that by *seized* he meant *ceased*, the applicants latched on to that error to allege that the first respondent's letter was meaningless because to seize means to take hold of something suddenly and violently. As a result of the confusion which they perceived from the use or misuse of the two English words, the applicants alleged that the letters must have been authored by an illiterate or semi-illiterate person yet both the presiding officers appeared to have scandalously acted on those letters. Displeased by that display of 'injustice' the applicants resorted to the use of expletives. They alleged that the presiding officers had failed to properly apply their minds and acted **unashamedly, irrationally, capriciously, whimsically** and in a biased manner to give effect to the letters. They further asseverated that the presiding officers conspired with and were actually undertaking a hatchet job for another political outfit in Zimbabwe called ZANU PF to manufacture "goons and spooks" like the first respondent. They added that in the presiding officers ZANU PF had secured pliant tools which turned blind eyes to the need to uphold the principles of a constitutional democracy. In pursuance of those ulterior objectives, so the argument continued, the presiding officers, on 10 October 2023 announced during separate sessions of the two Houses of Parliament that the applicants had been recalled by their CCC party and were consequently expelled from Parliament.

I pause here to comment on the employment of the above nauseating profanities in an affidavit. An applicant who displays such ridiculously puerile disrespect to respondents whom he/she has dragged to court does himself a complete disservice by clouding his/her argument in revulsive insults. In the case of *Yvonne Musarurwa and Others* v *Minister of Justice and Others* HH 751/22 I had occasion to caution litigants against the use of overly intemperate and unrestrained language in affidavits when I said:

> "Whilst it is not impermissible for a litigant to forcefully put across facts which assist in advancing his/her/its cause in an application, it is not ideal to make outlandish averments which sound like threats to a party against whom one is contesting. The language used must remain temperate and respectful. The objective of averments in affidavits is not to gauge which party throws more insults than the other but to simply help the court in the determination of the issues before it."

An affidavit which is full of infantile insults may easily lose its essence and detract the party deposing to it from properly putting across his/her/its case. In addition, my view is that

it is inappropriate for a litigant to denigrate a person or institution which he/she has deliberately neglected to cite in court papers with the full knowledge that whatever aspersions he/she casts on that person/institution, he/she/it will not have the opportunity to answer back. The applicants' attack on the political party called ZANU PF appears completely off side. In reality it smacks of cowardice and uncalled for grandstanding. Allegations can only be made against a party who is before the court. In legal parlance, an allegation refers to a claim of fact not yet proven to be true. It is not synonymous with an insult. The principles of natural justice require a party against whom a decision adverse to his/her/its interests to be heard before such decision is made. I cannot in this instance, make a finding that ZANU PF connived with the presiding officers without hearing its side of the story. Commendably at the hearing Ms. *Ndhlovu* who appeared with Mr. *Muchadehama* for the applicants unreservedly apologized to both the court and the respondents for the use of that over the top language.

The ethical issues aside, the applicants further contended that in a move aimed at pre-empting the effects of the letters written to the presiding officers, the CCC party on 4 October 2023, addressed a letter written by its leader Advocate Nelson Chamisa to the presiding officers advising that the first respondent's letter of recall was a fraudulent document and did not represent the position of the CCC party and that all the applicants had not been expelled from the party. On 6 October 2023 the presiding officers wrote to the third respondent, the Electoral Commission notifying it of the existence of the vacancies which had arisen in both houses of Parliament. The subsequent expulsion from Parliament was announced on 10 October 2023. That letter followed others which had been written on 2 February 2022 and 11 September 2023 directed to the third respondent's Chief Elections Officer and to the presiding officers respectively.

The applicants' argument was therefore that the first respondent's letter of recall was a fraudulent document in one or more of the following ways:

a. He is not a member of the CCC party
b. He is not an interim Secretary General of the CCC
c. There is no Secretary General or interim Secretary General of CCC
d. The applicants have not ceased to be members of the CCC

In respect of the presiding officers, the applicants contended that:

(i) They had no reasonable basis to believe as they did that the first respondent was a functionary of the CCC party who had authority to act in the manner he did

(ii) At all material times, and after the formation of the CCC, all communications between the CCC and the presiding officers were made through the office of their leader called Advocate Nelson Chamisa
(iii) The presiding officers had never previously received communication from the CCC through the first respondent
(iv) The first respondent was never introduced through correspondence to the presiding officers by the leader of CCC or any other legitimate officer bearer
(v) The presiding officers by virtue of their offices cannot just accept and act on correspondence drawn up and send to them from any person from the streets without verifying the authenticity of such letters because they are not automatons who can just act on anything which comes to their attention

All the applicants indicated that they were not seeking any relief against the third respondent which they had cited for information purposes only. That climb down was despite them having made remarks aimed at unnecessarily damaging the third respondent's reputation.

As already indicated the relief which the applicants in both applications sought was the same. In the first application it was couched as follows:

1. The instant application succeeds with costs on an attorney client scale
2. It be and is hereby declared that 1st respondent had no right or authority to write letters to the 2nd respondent recalling the applicants from the National Assembly
3. It be and is hereby declared that the recall of the applicants from the National Assembly by the respondents was illegal, null and void and of no force and effect
4. Applicants be and are hereby deemed to be still Members of Parliament duly elected as such on a CCC political party ticket
5. Respondents and all those acting claiming or acting through them or on their behalf be and are hereby interdicted from interfering with the applicants' duties as Members of Parliament
6. The 1st respondent be and is hereby interdicted from effecting any further recalls.
7. The 2nd respondent be and is hereby interdicted and restrained from acting on any correspondence purporting to be on behalf of the Citizens Coalition for Change other than the party's designated official for that purpose being its leader Advocate Nelson Chamisa.

The draft order attached to the second application was as follows:

1. The instant application succeeds with costs on a higher scale of legal practitioner and client scale
2. It be and is hereby declared that 1st respondent had no right or authority to write letters to the 2nd respondents recalling the applicants from Parliament
3. It be and is hereby declared that there was no valid letter from 1st respondent to 2nd respondent advising 2nd respondent that applicants had ceased to be members of the Citizens Coalition for Change political party
4. It be and is hereby declared that the purported recall of applicants from parliament by the respondents was illegal, null and void and of no force and effect
5. Applicants be and are hereby deemed to be still members of Parliament duly elected on CCC political party ticket
6. Respondents and all those acting or claiming through them or on their behalf be and are hereby interdicted from interfering with the applicants' duties as Members of Parliament

As can be discerned, there is very little if any difference between the draft orders in both applications. At the hearing the applicants conceded that the reliefs they were seeking against the presiding officers and the third respondent were untenable. Ms. *Ndlovu* indicated that she was withdrawing every aspect of the draft order which had a bearing on the presiding officers or the third respondent. She emphasised that the applicants were seeking orders against the first respondent only. That in essence meant that para(s) 5 and 7 of the draft order in the first application became redundant. It equally meant that paragraph 4 of the draft order in the second application would be amended by the deletion of respondents and its substitution thereof with first respondent. Paragraph 6 would completely fall off. At the end of it and when the two draft orders were consolidated what the applicants sought was an order to the effect that:

1. The instant application succeeds with costs on a higher scale of legal practitioner and client scale
2. It be and is hereby declared that the 1st respondent had no right or authority to write letters to the 2nd respondents recalling the applicants from Parliament and that the recall of the applicants from Parliament was illegal, null and void and of no force and effect
3. Applicants be and are hereby deemed to be still members of Parliament duly elected on CCC political party ticket
4. 1st respondent and all those acting or claiming through him or on his behalf be and are hereby interdicted from interfering with the applicants' duties as Members of Parliament

Given the above concessions, a lot of the arguments which were made by the applicants fell off. In equal measure many of the submissions made by the respondents in opposition became immaterial for the purposes of the issues which the court has to determine.

The opposition

All the respondents filed notices of opposition to the applications. The first respondent and the presiding officers each deposed to an opposing affidavit contesting the relief which the applicants sought.

In his opposition the first respondent started by raising preliminary objections. Below, I deal with the objections seriatim.

That the court lacks Jurisdiction

If the concessions made by Ms. *Ndlovu* for the applicants above had been adhered to the argument that this court lacks jurisdiction would have easily fallen by the way side. Unfortunately, Mr. *Muchadehama* in support of the submissions by his co-counsel appeared to impress that the presiding officers had acted outside the provisions of s 129(1) (k). He took everyone back to the argument whether the applicants were challenging the conduct of Parliament. For purposes of completeness I deal with that issue once and for all.

In his opposing affidavit, the first respondent omitted to raise the objection that this court lacks jurisdiction to determine the application before it. It only belatedly raised it in the heads of argument. Jurisdiction refers to the ability or authority given to a court by the law to preside over, determine and render judgment on a matter. It undoubtedly is a question of law. In the case of *P* v *D* [redacted] HH 3/2019 CHITAKUNYE J (now JA) quoted with approval the dicta in the case *Stander* v *Marais* 2015 (3) SA 424(WCC) which cited Black's Law Dictionary, sixth edition, wherein jurisdiction is defined as follows:

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

Because it is a point of law, a party is permitted to raise it at any time in the proceedings. It can be raised even for first time at the hearing of an appeal. See the case of *Muchakata* v *Nertheburn Mine* 1996 (1) ZLR 153 (S) at 157A. In the case of *Zimasco Private Limited* v *Maynard Farai Marikano* SC6/14 the Supreme Court held that the rationale for allowing issues of law to be raised at any time is to enable a court to have all the information, even at a very late stage, so that it is enabled to make a proper decision. It added that the question of jurisdiction is a grave one because if a court has no jurisdiction that would signal the end of the matter. If it proceeds to hear and determine the case any such determination by the court would be null and void. For that reason, it is always ideal for a court, where its jurisdiction is challenged, to dispose of that question ahead of all others. As such despite the point not having been raised in the opposing affidavit, I allowed argument on it. Equally because of the prevarication of Mr. *Muchadehama* the court was obliged to determine the question to guard against falling into the trap of presiding over a case in which it did not have jurisdiction. Parties may not give jurisdiction to a court whether by consent, express or implied. They equally cannot take away the court's powers by argument or disagreement.

Interestingly, the same question arose in the case of *Majaya and Others* v *Mwonzora and Others* HH 526/20 but my brother KWENDA J chose to leave it open because he decided the case before him on separate grounds which did not require him to discuss whether or not the High Court had jurisdiction over the dispute. The first respondent argued that if the substance of the application before the court is considered, it is that Parliament has failed to act in terms of s 129(1) (k) of the Constitution. He further stated that for instance, the thread which

runs across several paragraphs of the applicants' founding affidavit upon which the entire cause is predicated is that:

> "… 2nd respondent failed to comply with the provisions of s 129(1) (k) of the Constitution of Zimbabwe."

Mr. *Uriri* added that once there is an allegation that the presiding officers have acted or failed to act in terms of s 129(1) (k), such actions or such failure to act is the conduct of Parliament. In other words the allegation that the presiding officers failed to comply with the provisions of s 129(1) (k) is an allegation that Parliament has failed to fulfil a constitutional obligation. In their papers, so counsel went on, the applicants are clear that Parliament breached the principle of legality in relation to s 129(1) (k). He said it does not matter what form the application takes. What does is its substance. Once it is agreed that it is the conduct of Parliament which the applicants seek to impugn, the High Court has no power to inquire into that conduct because its jurisdiction to hear and determine constitutional matters is derived from s 171(c) of the Constitution. It provides that the High Court may determine constitutional matters except those that only the Constitutional Court may decide. In turn s 167(1) (d) states that only the Constitutional Court has the jurisdiction to determine whether Parliament or the President has failed to fulfill a constitutional obligation. In other words the first respondent argues that where a litigant seeks to impeach the conduct of the presiding officers under s 129(1) (k) only the Constitutional Court can hear and determine such impeachment.

At the hearing Mr. *Uriri* spotlighted the issue further. He said there was no distinction between the presiding officers and Parliament. The act of one could be imputed on the other. He referred the court to the case of *Mutasa and Anor* v *The Speaker of the National Assembly and Others* CCZ18/19 particularly at p 12 of the cyclostyled decision for the proposition he was making. I read it. Although the Constitutional Court was in that case discussing s 129(1) (k) of the Constitution, there is nothing in relation to whether the responsibilities of Parliament and those of its presiding officers can be conflated. The case which I found to be apposite is *Settlement Chikwinya and Others v Mudenda N.O. and Others* HH 48/22. In that case CHITAPI J thoroughly discussed what constitutes Parliament and what entails the conduct of Parliament. At p. 14 of the cyclostyled judgment his LORDSHIP concluded that:-

> "It is also an elementary fact that the Senate and National Assembly conduct business in accordance with Standing Orders passed by the two houses. In casu there was no allegation made or evidence provided to show that either of the two houses placed the issue of the recall of the applicants on the agenda paper for discussion. None of them made any resolutions relative thereto."

In the court's view the objection regarding its jurisdiction turns on the resolution of the issue whether the Speaker of the National Assembly and the President of the Senate are part of Parliament such that their administrative actions can be taken as actions of Parliament.

Section 118 of the Constitution provides that:

> **118 Parliament**
>
> Parliament consists of the Senate and the National Assembly

Section 120 then stipulates the composition of the Senate. It is made up of eighty (80) senators elected in various ways that are prescribed thereunder. It is important to note though that the office of President of the Senate is provided for separately. The President of the Senate is not part of the Senate. If there was any debate about that then section 122 extinguishes it. It provides that:

> **122 President of Senate**
>
> (1) At its first sitting after a general election and before proceeding to any other business, the Senate must elect a presiding officer to be known as the President of the Senate.
>
> (2)…
>
> (3)…
>
> (4)…
>
> (5)…
>
> (6) **A Senator who is elected as President of the Senate ceases to be a Senator**, and the vacant seat must be filled in accordance with the Electoral Law. (Bolding is mine for emphasis)

In contrast, the Deputy President of the Senate is specifically required to be part of the Senate. He/she must be a senator and is actually required to step down from the post if he/she ceases to be a senator. Unlike the President, the Deputy President has voting rights in the House. He/she participates in the members' debates. My view therefore is that the President of Senate is not part of the Senate. Similar provisions and requirements circumscribe the office and conduct of the Speaker of the National Assembly. He/she is not a member of that House. He has no voting rights. Like the President of the Senate, his duty is to direct the members' proceedings and to generally oversee the conduct of business in the House. Parliament therefore is a body which exists separately from its presiding officers. In fact the National Assembly or the Senate on its own does not and cannot make up Parliament. Once again see

the case of *Settlement Chikwinya and Others* (*supra*). It is the two Houses acting collectively that are regarded as Parliament. It follows then that it is only those cases where one seeks to challenge the collective decisions or conduct of the two Houses acting together as Parliament in terms of the Standing Orders which are the preserve of the Constitutional Court. The conduct of a presiding officer can be challenged in any court with the requisite jurisdiction. In this case, the conduct complained of, if it was any conduct at all, is that of the presiding officers acting separately from the Houses of Parliament which they chair. As will be demonstrated later, all that the presiding officers did was to announce what had already taken place by operation of law. My finding is that a litigant is not precluded from challenging that solely on the basis that the High Court has no jurisdiction. The allegation that by seeking to impugn the conduct of the presiding officers of Parliament, the applicants in this case, are in effect impeaching the conduct of Parliament is not and cannot be correct. As already shown there is a distinction between the offices of the presiding officers and Parliament. It is for that reason that the objection *in limine* is dismissed.

Non-joinder of CCC

The first respondent alleged that in terms of s 129(k) of the Constitution of Zimbabwe, it is a political party which sponsored a candidate that is entitled to recall the candidate and not an individual. Without joining the CCC party to the application, so went the argument, the applicants cannot succeed. They ought to have co-opted the CCC either as a co-applicant or as a respondent. That route was particularly necessary in these circumstances where the applicants allege that the first respondent is an impostor.

In answer to the above objection, the applicants alleged that the *point in limine* was misplaced for several reasons. To begin with they said the joinder was unnecessary because no relief is being sought from CCC. Secondly they argued that it was not the CCC which recalled the applicants from Parliament but the first respondent who acted on a frolic of his own aided by the presiding officers. Thirdly they averred that they were all directly affected by the respondents' conduct and were therefore entitled to seek relief in their own names. In any case, so they added, Rule 32(11) of the High Court Rules, 2021(the Rules) precluded a court from dismissing any cause or matter for the reason of non-joinder or misjoinder of any party and that the court is enjoined to determine in the cause or matter, any issues or questions of dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

In the court's view the preliminary objection can be resolved without much ado primarily on the basis of R 32(11) of the Rules. It states that:

> "(1) No cause or mater shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

As was held by the Supreme Court in the case of *Wakatama and Others* v *Madamombe* SC 58/10 the above provision is unambiguous. It is clear that the objection of non-joinder cannot be used to defeat a cause of action. Authors Herbstein and Van Winsen in their work, *The Civil Procedure of the High Courts of South Africa,* 5th Edition at p 239 state that:

> "The right of a defendant to demand the joinder of another party and the duty of a court to order such joinder …have repeatedly been held to be limited to cases of joint owners; joint contractors and partners..."

In this case the first respondent simply alleges that the applicants will not be able to prove their allegations without making CCC a party to the proceedings. Their failure to prove their case does not bring the applications into the realm of the cases where joinder is considered necessary. As such, the non-joinder of the CCC as a party to these proceedings cannot in the circumstances disgorge the applicants of *locus standi* to file the application. The preliminary objection is without substance and is therefore also dismissed.

Disguised application for review

I could not comprehend the first respondent's argument in respect of this objection. The allegation as I tried to understand it was that the application is not one for a declaratur. Rather so he argued, it is an application for this court to review the decisions made by the presiding officers. The line of argument is seriously dubitable. I find so because as this court stated in the case of *Mangwana* v *Kasukuwere* HH 418/23 which the applicants' counsel referred me to in the heads of argument, the contention that the application is a disguised review is difficult to comprehend where it does not raise any grounds of review and where it is filed in terms of provisions which have nothing to do with review. The court added that the fact that the applicants could have brought a review application should take nothing away from the application for a declaratur which will be before the court. There is no basis to allege that the declaratur being sought by the applicants is a camouflaged application for review. Like the earlier ones, the objection is equally unsustainable. It is dismissed.

Material disputes of fact

The first respondent further alleged that the applications are replete with material disputes of fact particularly that the applicants alleged that they are members of the CCC party whilst he is not yet they did not attach that party's constitution or any other documents which prove that they are indeed members and he is a non-member. In the same vein they have neither attached any documentation that refutes his claim that he is the interim secretary general of the CCC party nor did they provide the party's membership register. In the absence of those, the issues raised become material disputes of fact incapable of resolution on the papers. The letters which they seek to rely on written by Nelson Chamisa are all hearsay evidence which is inadmissible. What makes everything worse is that the CCC party is not a part to these proceedings.

My understanding of the question of material disputes of fact is not that there mustn't be any disputes of fact. Invariably, every application presents some dispute of fact. What is critical is that the dispute must be significant and central to the resolution of the matter. That centrality is not decipherable on the basis of the heat the argument of fact generates. It is for that reason that what may be regarded as a material dispute of fact in one matter may not be so in another. Put conversely a dispute of fact is not what this court described in the case of *Supa Plant Investments* v *Chidavaenzi* 2009(2) ZLR 132(H) at 136 F-G which was cited with approval by the Supreme Court in *Dube v Murehwa and Another* SC 68/21 where it said that:

> "…it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by …in *Masukusa v National Foods Ltd and Another* 1983(1) ZLR 232 (H) and in all other cases which have followed."

Rather the court said a material dispute of fact arises:

> "When material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In order to avoid insipid methods of dealing with motion proceedings the courts devised what has come to be called the robust common sense approach. It is basically a method where the court adopts an enduring way of looking at and resolving the application regardless of the presence of a clear conflict of fact. The method requires the court to ask itself if it is possible to determine the matters before it on the papers without the need to call further evidence and without causing prejudice to the other party. The Constitutional Court in the case of *Muzanenhamo* v *Officer Commanding Police and Others* CCZ 3/13 advocated for that

approach and outlined the processes which must be followed. It said to begin with, a court must determine whether or not a dispute of fact indeed exists. Where it does, the second stage would be to examine if the parties' divergent positions can be harmonized on the papers. I would add that the dispute must be relevant to the resolution of the matter.

In this case, some disputes of fact admittedly exist. The applicants and the first respondent are at odds in relation to their membership of the CCC party and the position held by the first respondent in that entity if any. The applicants allege that the first respondent is not a member of the CCC party. He says he is. The applicants further allege that the first respondent is not the interim secretary general of their party but he argues that he is. On the face of it that may appear difficult to resolve but the simple question which the court must ask itself is whether the applicants are qualified to disown the first respondent as a member of their CCC political party and to deny that he does not hold the post which he claims to occupy. Adopting a robust common sense approach, the court can without difficult and without occasioning prejudice on any of the parties resolve that dispute on the papers. I will endeavor to illustrate that later in the judgment. I make the finding therefore, that despite the appearance of the mentioned conflicts of fact, the disputes are not incapable of resolution on the papers. I am in the circumstances constrained to dismiss as I hereby do, this particular preliminary objection.

The presiding officers' preliminary objections.

They both alleged that the applicants have **no cause of action against them** and that the **relief they seek against them is incompetent.** This they say is so because the applicants' seats in Parliament became vacant by operation of law. The role of presiding officers of Parliament has been pronounced by the courts times without number. What cannot be disputed, so they argue, is that their functions are not judicial. They do not extend to expulsion of members from Parliament but rather are confined to facilitating notification to the Houses of any recalls which may be made by political parties which sponsored candidates at elections which brought such candidates into Parliament.

Needless to say, the applicants conceded their erroneous views on this aspect and withdrew all the reliefs which they had suggested against the presiding officers. In other words the applicants admitted that they had no cause against the presiding officers. They equally confessed the incompetence of the relief they were seeking against the two.

The merits

The first respondent's opposition

The first respondent commenced his opposition by attacking the letters allegedly written by the leader of the CCC party Advocate Nelson Chamisa. He said the first letter annexure **PD1** is an inconsequential document because it simply related to the appointment of office bearers whose responsibility was to sign nomination papers for the party's candidates in different parts of the country for the 2022 by-elections. They are not the elections which ushered the applicants into parliament. To counter even that apparently irrelevant letter the first respondent produced his own letter which showed that like the rest of the officers therein he was also designated as an officer who could counter sign for the nomination of CCC candidates. He remained adamant though that those letters did not designate anyone to occupy the offices created by the party's constitution. The first respondent further refuted the authenticity of annexure **PD 3** which is a letter allegedly addressed to the third respondent's Chief Elections Officer by Nelson Chamisa. His argument was that in their papers the applicants did not say where they got the letter from. In any case, he said all that was in the letter constituted hearsay which is not admissible in affidavits. He denied the truthfulness of the averments made by the applicants. The first respondent equally controverted the letter dated 11 September 2023**(PD5)** addressed to the presiding officers on the same basis that the applicants had not disclosed how and where they had gotten the letter from and that the contents of the letter constituted hearsay. He added that the CCC party was not a party to the proceedings; that the danger attendant on the court depending on the hearsay evidence is that on the face of it, annexure PD 5 did not even show that it was delivered to the presiding officers. He argued that it was preposterous that the leader of CCC would give such directives and instructions in clear violation of the dictates of the party constitution.

Further, the first respondent denied that his letter was fraudulent. He said none of the applicants had the power or right to challenge his authority as only the party could do that. The applicants are not the party. Neither CCC nor its leader was a party to the proceedings. He raised his concern about the liberal insults chosen by the applicants against him and the other respondents. He further denied that the presiding officers had acted illegally because he as CCC's interim secretary general had written to them to act in terms of the law. He further stated that in that capacity he is empowered to deal with the administrative issues of the CCC party which included the recall of parliamentarians who had ceased to be members of the party. In his view the court could not in determining the application before it decide the question of

whether or not the applicants had stopped being members of CCC at the time of their recall from Parliament because the law, so the argument proceeded, provided them with separate remedies if they wished to challenge the cessation of their membership.

Counsel referred the court to various authorities which he said have interpreted s 129(1) (k) to mean that the question whether or not a Member has ceased to belong to the political party concerned is an issue between that member and his/her political party. He insisted that it meant therefore that the issue of whether the applicants remained members of their political party could not arise at the instance of s 129(1) (k) because only the political party has standing to invoke that provision or to resist what it may regard as an inappropriate invocation of the section. Put in another way, the first respondent said it is only the CCC which could allege that it has not recalled the applicants from Parliament.

The first respondent rounded off his argument by imploring the court to note the applicants' use of brazenly insulting language in the application. He prayed that as a result the applicants ought to be visited with a punitive order of costs. That however was before the apology tendered by Ms. *Ndlovu* on behalf of the applicants.

Given the concessions already made, it is only necessary to restate the position which was adopted by the presiding officers in the briefest of terms. There is nothing being sought against them. Suffice to say their emphasis was that they did not, as erroneously portrayed by the applicants, expel anyone from Parliament. The applicants were recalled by their political party and their membership of Parliament terminated by operation of law. They also pointed out that the law is clear that institutions whose existence is birthed by the Constitution cannot be interdicted from performing their lawful functions. Seeking to do so would make the intended interdict incompetent relief. In any case, so they added, the interdict being sought against them is so general and wide that it would only serve to interfere with Parliamentary processes. Parliament is empowered to regulate its own processes and anyone aggrieved by its decision must seek review of such. Even if it were possible to interdict the presiding officers from *acting on any correspondence purporting to be on behalf of CCC,* the applicants lack the *locus standi* to seek such relief because only CCC itself could do so. In this case, CCC is neither a party to the litigation nor did the applicants allege that they were given authority to act for and on behalf of that party.

The presiding officers equally denied any links to the entity called ZANU PF as alleged by the applicants. They added that they had only received the letter dated 11 September 2023

authored by Nelson Chamisa on 6 October 2023 and that in any event it was not within their powers to interfere with the internal disputes of a political party.

The third respondent noted that basically no relief was being sought against it. The paragraphs which it had earlier complained of in its opposing affidavit fell off after the applicants indicated they were withdrawing all of them. As such the third respondent said it was prepared to abide by whatever decision the court would make.

Common cause issues

1. The applicants were voted into Parliament on the ticket of a political entity called the Citizens Coalition for Change which uses the moniker CCC and is fronted by Nelson Chamisa
2. The first respondent on 3 and 4 October 2023 notified the Speaker of Parliament and the President of the Senate respectively, that each of the applicants had ceased to be members of the CCC party which had sponsored their election into Parliament. He notified the presiding officers to proceed in terms of the relevant constitutional provisions relating to members who have ceased to belong to the political party under which they were elected into Parliament.
3. Nelson Chamisa also wrote a letter to the presiding officers wherein he notified them that he was the CCC party's designated person for its communication with Parliament. That letter was apparently not delivered to the intended addressees at the time it was written.
4. The presiding officers did not expel any of the applicants from Parliament. In fact as stated in *Madzimure and Others* (supra) they have no such power and in the circumstances of this case did not purport to be doing so. As admitted by the applicants the presiding officers did nothing wrong in this process.
5. The applicants' tenure as members of Parliament terminated by operation of law

The issue

All other contentious issues having fallen by the way side, the only question which remained for the court's resolution is whether the communication written by the first respondent notifying the presiding officers about the cessation of the applicants' membership in the CCC party on whose ticket they had been voted into Parliament and for them to act in terms of the law conformed to the requirements of s 129 (1) (k).

The law

I have not lost cite that this is purportedly an application for a declaratory order and consequential relief in terms of s 14 of the High court Act. The law governing the grant of a declaratur is trite. For instance it was summed up in the case of *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) at 343-344, where GUBBAY CJ made the finding that:

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd &Ors* v *Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415 *in fine*; *Milani & Anor* v *South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G–H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. *See Anglo-Transvaal Collieries Ltd* v *S A Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635G–H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See *Ex p Nell* 1963 (1) SA 754 (A) at 759H–760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent."

In the case of a recall from Parliament, an applicant's right to a declaratur stems directly from the provisions of s 129(1) (k). In this case the applicants wish to assert their right to remain in Parliament. Put conversely they seek to protect their right not to be recalled from Parliament. The question which arises is whether they possess that right. S 129(1) (k) of the Constitution is couched in the following terms.

> "**129 Tenure of seat of Member of Parliament**
>
> (1) The seat of a Member of Parliament becomes vacant -
> (a) – (j) … (not relevant);
>
> (k) if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it."

Section 129 of the Constitution provides the essential elements which must be fulfilled before the seat of a Member of Parliament can become vacant. One of those circumstances is prescribed in s 129(1) (k). Tenure as used in the section refers to the Member's incumbency. It is the Member's right to occupy the seat after winning an election. In *Madzimure and others v*

Speaker of Parliament and Others (supra) the Constitutional Court held that the essence of s 129(1) (k) of the Constitution may be summarised as being that –

> (a) The Member of Parliament should have been a member of a political party when he or she was elected to Parliament;
>
> (b) The Member of Parliament should have ceased to belong to the political party, either by voluntary withdrawal of membership or by being expelled from the political party concerned; and
>
> (c) The political party concerned should have given a written notice to the Speaker or the President of the Senate of the cessation of membership of it by the Member of Parliament. In the written notice the political party concerned must declare that the Member of Parliament has ceased to belong to it.

There is no doubt, from an analysis of the above elements that s 129(1) (k) is intrinsically connected to the symbiotic relationship between the Member of Parliament and the political party which sponsored his election into Parliament. The section is put into motion by the cessation of the Member to belong to the concerned political party. That fact is the prerequisite. Everything else which succeeds it is simply procedural and informative. So, what must be determined is whether a Member ceased to belong to the political party to which he belonged at the time of his election. In *Madzimure and Others* MALABA DCJ (now CJ) at p.5 of the cyclostyled judgment put it in the following crisp manner:

> "The status of having ceased to be a member of the political party concerned is a matter of fact, the legality of which is determined by reference to the provisions of the constitution of the political party concerned. It may be a fact resulting from a process of expulsion or voluntary resignation. When it occurs, it remains a matter affecting the internal affairs of the political party concerned."

A closer reading of s 129(1) (k) would show that nowhere in it is the Member of Parliament accorded any active role. The power of recall from Parliament created by s 129(1) (k) of the Constitution is reposed in the political party to which the Member of Parliament belonged at the time of the election. It is that concerned party which recalls a Member. By parity of reasoning the Member cannot contest his/her recall against any other person without joining the concerned political party. An applicant who alleges that his/her recall from Parliament was unlawful must, as KWENDAJ put in in *Majaya and Others v Mwonzora and Others* (supra):-

> "Seek protection from the party which they say they represent in Parliament. Their right is parasitical and cannot stand without relying on the host."

Put in another way, the parasite and host relationship described above is not removed by the allegation that there is an intruder or an insurgent who has come between the concerned political party and the Member and has arrogated himself the political party's entitlement. The political party cannot abdicate the responsibility to approach the courts, broach the subject and seek redress in terms of s 129(1) (k) to reclaim its right. Where the concerned political party does not agree with the recall, it is as of necessity, required to contest the lawfulness or otherwise of a recall in court. A recalled Member of Parliament cannot come to court alone, drag in a third party and choose to ignore his/her political party. The same sentiments were pronounced in the case of *Didymus Mutasa and Another v The Speaker of the National Assembly and Others* (supra) where the Court expressed the view that any allegation of unfairness or illegality relating to expulsion from a political party is supposed to be raised with the concerned political party. It added that s 129(1)(k) envisages that every political party as an organization has in its administrative structures individuals tasked with the duty to communicate the fact of a Member of Parliament having ceased to be its member in the appropriate form to the presiding officers of Parliament. As such a Member who is unhappy and apprehensive with the termination of his/her membership of the political party's recourse lies in pursuing that party. Nobody but the Member is conversant with the internal mechanics and dynamics of expulsion of members from his/her political party. It is him/her who is equally aware of the rights and obligations of members within his/her party. When the party writes to the presiding officers of Parliament, it exercises unbridled power to cause termination of membership to Parliament of those Members elected on its ticket. Even where the members whose tenure has terminated are of the view that it is not their party which recalled them, they neglect to cite the concerned political party at their own peril. The party must come to court to speak about the illegality of the recalls because the courts are not soothsayers. They equally do not eavesdrop on what happens in the day to day activities of political parties.

Application of the law to the facts

In this case, the facts as already stated are that the first respondent wrote to the presiding officers on 3 October 2023. His letters were identical except that the one was addressed to the Speaker and the other to the President of the Senate and that the names attached depended on which house each of the applicants was in. The letters were written on a letter head which

prima facie resembles the one described by the applicants as the CCC party's logo in all material respects. Read with the necessary changes, the letters stated:-

> "Kindly be advised that the following members of the Senate (read National Assembly in the other letter) were elected under Citizens Coalition for Change political party and have seized to be members of Citizens Coalition for Change political party."

The names of all the applicants were then listed. Thereunder the letters continued and stated:-

> "Kindly proceed in terms of the relevant provisions of the Constitution of Zimbabwe relating to members who have seized to be members of a political party which they were elected under.
>
> Yours faithfully
>
> **SENGEZO TSHABANGU**
>
> **INTERIM SECRETARY GENERAL"**

On 4 October 2023, the first respondent followed his letters with an erratum as explained in earlier paragraphs correcting the word *seized* to read *ceased.* In the pleadings the applicants went to town about the issue but at the hearing counsel appeared to have seen reason and mellowed. She did not pursue it. The applicants in the second application had not even raised it the pleadings. The mistake is inconsequential particularly where it was corrected almost immediately after the delivery of the letters. The use of an incorrect word for a correct one which sounds similar is common and is called malapropism. The English language is a second language to many in this jurisdiction. The applicants' founding affidavit itself has errors strewn all over. For instance in paragraph 2 the first applicant in the second application states that:

> "I have been authorised by my co-applicants to depose to this affidavit on their **behaviour** which I hereby do." (Bolding is mine)

There is no question that the deponent intended to say on their **behalf** instead of their **behaviour** because in the paragraphs ahead we didn't get to know anything about the applicants' behaviour. The courts are not there to mark litigants' appropriate use of English. If the meaning is conveyed it suffices. Joanna Whitehead a freelance journalist and editor actually said judging a person on the basis of their spelling and grammar reveals more about you than it does about them. A proficient grasp of matters typographical says as much about a person's intelligence as the colour of their hair. Absolutely naught. [1]

[1] https://www.independent.co.uk/voices/spelling-grammar-judge-literacy-privilege-elitism-a9213516.html accessed on 23 October 2023

That aside, in addition, the receipt of the letter by the Speaker of the National Assembly was acknowledged by the imposition of his official date stamp on the face of the letter. It was received on 3 October 2023. Receipt of the notification to the President of the Senate was on 4 October 2023. An officer called *J.Mapokotera* appended a signature above the official date stamp of the President of the Senate.

As already explained, it follows that the termination of the tenure of the applicants who were Members of the National Assembly occurred on 3 October 2023 whilst that of those applicants who were Members of the Senate happened on 4 October 2023. All the other events such as the announcements which were made on later dates to the majority of Members of Parliament could not and did not affect the termination of the Members' tenures on the indicated dates. What is critical is that the letters as quoted above fully complied with the requirements of s 129(1) (k). They both indicated that the applicants were elected into Parliament as members of the CCC party. They further stated that the applicants had ceased to belong to the CCC political party. The letters were directed to the Speaker of the National Assembly and the President of the Senate as required by law. *Prima facie,* they were from the CCC party. The presiding officers needed nothing more to prove that and to satisfy themselves that the letters had originated from that party. As the law prescribes the presiding officers had no business interrogating the internal politics of the political party concerned. See *Madzimure and Others* (supra) for that proposition.

The applicants however contend otherwise. They allege that their leader Nelson Chamisa had on 11 September 2023, written to the Speaker of the National Assembly advising him that:

> "Any correspondence regarding any CCC Member of Parliament listed in the said General Notice 1380D of 2023 and General Notice 1380E of 2023 is to be directed to this office.
>
> Any communication or notification regarding any CCC Member of Parliament listed…shall come from this office
>
> For the avoidance of doubt no other person is authorised to correspond or communicate with Parliament concerning CCC members in Parliament.
>
> I trust that you find this in order
>
> Yours sincerely
>
> Adv. Nelson Chamisa
>
> Leader and Presidential Candidate
>
> Citizens Coalition for Change (CCC)
>
> Cc: President of the Senate of Zimbabwe"

As already said and as is apparent on the face of it, the letter purports to have been written on 11 September 2023. The first respondent said he disputed the authenticity of the letter but in my view he need not have expended energy on that. There is a deeper problem with the letter. Supposing that it was written on 11 September 2023 like it purports what is clear is that its author drafted it and kept it to himself. It was never delivered to the addressee until 5 October 2023. The practice at Parliament is commendable. Their officers seem to acknowledge receipt of every correspondence which is delivered to the institution by date stamping it. The applicants filed stamped copies of the letters. It illustrates that they were in possession of their return copies. There is no doubt therefore that Nelson Chamisa's 11 September 2023 letter was only received at Parliament almost a month later on 5 October 2023. If it is not a contrived document then it only serves to demonstrate his tardiness. More importantly the letter was only addressed to the Speaker of the National Assembly. It was copied to the President of the Senate. The acronym 'cc' in letter writing means carbon copy. When you 'cc' a document to a recipient you are literally saying it is for their information only. The recipient is not expected to do anything about it. It can at times actually be regarded as rude.[2] As such, the President of the Senate had nothing to do with that correspondence. It was for his information only. He was in reality, never officially informed of Nelson Chamisa's wish to centralize communication regarding his party's Members in Parliament. But even more damning is the date when the letter was received. The tenures of the members had been terminated by operation of law on 3 and 4 October 2023 as indicated earlier. Nelson Chamisa's second communication dated 4 October 2023 which apparently is a protest letter acknowledging that the recalls had already been made was received at Parliament on 6 October 2023. The argument by the applicants that the presiding officers disregarded the letters from Nelson Chamisa therefore has no basis. His correspondences were not preemptive as applicants allege. They were ex post facto. The same scenario happened in the case of *Diymus Mutasa and Another* (supra) where the applicants contended that their expulsion from the party had been unlawful and there was a letter written to the Speaker of Parliament disputing the authenticity of the letter of recall. The Court in that case concluded that the applicants could only contest their expulsion with their party with reference to the constitution of the party.

[2] https://www.mail.com/blog/posts/cc-and-bcc/5/ accessed on 3 November 2023

Although there could be many definitions of a political party the Constitutional Court provided an all-encompassing one in *Madzimure and Others* when it said:

> "A political party is a product of a voluntary association of people who share a common ideology on how the affairs of the State should be administered and believe that if some members are elected to Parliament, and the political party gets control of the levers Governmental power, they will use them for the benefit of all citizens. It is constituted in terms of its own constitution and as such is a legal entity independent of its members."

It is admitted that a constitution is a not a prerequisite for the formation of a political party. It is however highly advisable if situations like the one before the court are to be avoided. A serious political party is one which envisages running the affairs of the State. That on its own means having millions of citizens in its membership and other structures. It ideally would have administrative structures through which it is run. A political party which does not have constitutive documents to make reference to opens itself up to the vagaries of inclement political weather. There possibly could be nothing to stop any member of such an institution from successfully claiming any position in it.

Viewed against the above background the applicants made a mortal error. They claim to be members of the party. They are therefore simply children therein. None of them has an administrative position from which to contest the claims made by the first respondent. None of them can speak for and on behalf of the party. Their parent is the party itself. It is the one which knows who is a member and who is not. It ought to have been in court to speak about these issues. It was required to support the applicants' claims that it is not the party which initiated the termination of their tenures in Parliament. I am not sure why the party leader is averse to appearing in court because in *Majaya and Others* (supra) this court expressed similar sentiments about him when it said:

> "What is surprising is that neither the applicants nor the MDC Alliance as a political party led by Nelson Chamisa has approached the court for a declaratory order confirming that the MDC Alliance is the political party in Parliament and not the MDC Tsvangirai. The right to recall the applicants and other MDC members of Parliament is ancillary to the grant or refusal of the declaratory order."

The above remarks did not make him any wiser. The first respondent alleged that the party leader and the party did not join this litigation because the party is not with the applicants and instigated their recall. Whatever the reason is, the court is solely concerned with the effect of that non-participation on the application before it. Counsel for the applicants however appreciated that need. It was for that reason that she sought to cling on to the Nelson Chamisa letters already referred to with all their incurable maladies pointed out above. The letters appear

to have been all reactive to what had already taken place. The applicants claimed that previously all communication regarding the CCC party had been through Nelson Chamisa. They once more neglected to provide even a single letter directed to Chamisa from Parliament as proof of that averment. The conflicts playing out in Parliament and brought to court may be a sign of disharmony within the CCC political party but they do not erase the consequences of the correspondences written by the first respondent on behalf of the party. In the founding affidavit, the applicants posed any interesting issue in an effort to brush aside the first respondent's actions when the question was asked:

> "What stops anyone from picking a piece of tissue and writing a letter of recall to the speaker?"

That question is telling and unless the applicants view themselves as being more virtuous than the first respondent the same question could be asked of the Nelson Chamisa letters. Anyone else could certainly write to the speaker alleging that Nelson Chamisa is the only one permitted to make recalls in the CCC political party. The only thing which can be authentic are proper constitutive documents of the concerned political party with clear office bearers whose powers are clearly stated therein. In the absence of such it can easily be a free for all scenario. And when it degenerates to that level, the remedy is not to see ghosts in other people and other institutions but to self-introspect and seek to stop the putrefaction. The danger posed by and the incredulity of the Nelson Chamisa letters stems from the fact that it could have taken no effort at all, if the party did not want to participate in these proceedings, to depose even to a supporting affidavit or to have given written authority to one of the applicants to litigate on behalf of the party and attach the party's constitution if there is any to illustrate that the first respondent had no authority to write the letter of recall. Because of the uselessness of the letters I did not think it worthwhile to even examine the question that they could be inadmissible hearsay evidence. But for purposes of completeness, I have to. The law governing the admissibility of hearsay evidence in applications was summed up in the cases of *Hiltunen v Hiltunen HH 2008(2) ZLR 296(H); Johnstone v Wildlife Utilization Services (Pvt) Ltd* 1966 RLR 596 and *Bubye Minerals (Pvt) Ltd v Rani International Ltd* SC 60/06. The general principles which run through the cases are that hearsay evidence remains generally inadmissible in court applications unless it is evidence of a statement made orally or in writing by a person where the statement would have been admissible from the mouth of that person. The conditions precedent to the admissibility of that evidence are that:

a. An acceptable explanation must be given as to why direct evidence is unavailable
b. The deponent to the affidavit must disclose his/her source of the information
c. He/she must also disclose his/her grounds for belief in the truthfulness of the statement or information

In this case, none of the applicants attempted to satisfy even one of the requirements save to say they relied on the letters in dispute. There was no explanation why the direct evidence of Nelson Chamisa could not be obtained. The deponent to the founding affidavit did not disclose where he had gotten the letters from even after the first respondent had indicated in the founding affidavit that he was challenging their authenticity. The court remained at large as to whether the letters were handed to him by the author; or he picked them; or stumbled upon them on social media platforms. Worse still there was no disclosure of the deponent's grounds why he believed that what the letters stated was true. In the absence of those prerequisites the letters as introduced in the applicants' affidavits do not even qualify as statements of information and belief. Eligibility into that bracket is dependent on the deponent categorically stating that "he/she is informed and verily believes" certain facts on which the relief sought is based. All these must be disclosed with a degree of particularity sufficient to enable the opposing party to make his/her own investigations including where it is vital, the verification of the statement from the source itself. Because of the deficiencies pointed out the first respondent was not afforded that opportunity.

Disposition

On the background of all the above issues, what stands out is that the first respondent's letters to the presiding officers of Parliament satisfied all the requirements under s 129(1) (k) of the Constitution. In addition he attached annexures 'ST2', a document addressed to the third respondent which showed that he was designated by the CCC as its officer. There is nothing to rebut that other than the belated and discredited letters of Nelson Chamisa. He went out of his way to prove what he ordinarily was not required to prove. The applicants failed to produce their party constitution or any document which showed that the first respondent could possibly not have held the position he claimed he held. It was simply their word that he wasn't. That is not enough. Contrary to counsel's allegation that the first respondent conceded that he was not a member of the CCC party, his opposing affidavit has claims in innumerable paragraphs saying he is a *bona fide* member and official of that party with authority to write

correspondences of recalls like he did. The onus to prove entitlement to the declaratory orders sought was on the applicants. They did not even begin to discharge it. They have not established their case on a balance of probabilities as required by law and are therefore not entitled to the declaratur which they seek. The other relief was consequential upon the grant of the declaratur. It should also fail.

Costs

There was serious argument on the question of costs. The general rule is that costs follow the cause. Put in another way it is that the party who succeeds is usually reimbursed his/her/its costs. The basis of the principle is that that the successful party must not be burdened with legal expenses which he/she/it incurred as a result of being forced into groundlessly initiating or defending a legal suit. A court can only depart from that general rule when good cause is shown.

In the instant case, the respondents sought costs on a higher scale largely because of the inappropriate language deliberately employed by the applicants in their pleadings. That usually can be a good ground for the court to depart from the general rule. See the case of *Crief Investments (Pvt) Ltd and Others v Grand Home Centre (Pvt) Ltd and Others* HH 12/18 for grounds which attract costs on higher scales.

In addition, the applicants admitted that they had no cause of action against the second and third respondents. Unfortunately, it was well after those respondents had been needlessly dragged into legal expenses. I doubt that the concessions would assuage their financial bruises. The court cannot however ignore the apology tendered by Ms. *Ndlovu* on behalf of all the applicants and which appeared to have been well received by the respondents. It mitigates whatever turpitude had been occasioned. Although it was largely driven by the applicants' personal interests this is a case which borders on the realm of public interest litigation. As a result I do not see any reason why I should depart from the norm that costs should follow the cause and order payment of costs on the ordinary scale.

In the circumstances it is ordered:

1. **That the application be and is hereby dismissed in its entirety**
2. **That the applicants shall pay each of the respondents' costs jointly and severally the one paying the others to be absolved.**

Mtetwa and Nyambirai, applicants 1-14 in first case' legal practitioners
Mbidzo, Muchadehama and Makoni, applicants 1-9 in second case's legal practitioners
Messrs Ncube Attorneys, first respondent's legal practitioners
Chihambakwe Mutizwa & Partners, second respondents in both cases' legal practitioners
Nyika Kanengoni and Partners, third respondent in first case's legal practitioners