ELLAH TAYENGWA
and
MOUD CHINYERERE
and
AGNES TOGAREPI
and
GRACIOUS MATSUNGA
and
DAVID GWANZURA
and
LOICE GWANGWARA
and
WOMEN'S ACADEMY FOR LEADERSHIP AND POLITICAL EXCELLENCE (WALPE)
and
THE ELECTION RESOURCE CENTRE TRUST (ERC)
versus
ZIMBABWE ELECTORAL COMMISSION
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE MINISTER OF HEALTH AND CHILD CARE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 24 May 2021 & 29 June 2022

Opposed Application – *Declaratur*

Mr T. Biti, for the applicants
Mr T.M. Kanengoni, for the 1st respondent
O. Zvedi, for the 2nd and 3rd respondents

MUSITHU J:

INTRODUCTION

The first to sixth applicants are all registered voters. They all voted in the 2018 general election. The seventh applicant is a Trust whose main objective is the advancement of women's rights by actively encouraging them to take up leadership positions, be it in politics or other public offices. It is in that connection that it has a substantial interest in the conduct of elections for public office in Zimbabwe. The eighth applicant is also a Trust, which advocates for the

participation of the citizenry in electoral processes amongst other things in line with the country's electoral laws and democratic principles for good governance.

The first respondent is an independent institution established in terms of Section 238 of the Constitution. It is responsible for the management and administration of the Zimbabwe's electoral systems. The second respondent is the President of the Republic of Zimbabwe. Amongst his functions, he is required by law to proclaim elections, including by-elections in the event of a vacancy arising in the National Assembly. The third respondent is the Minister of Health and Childcare. Amongst his diverse functions in that portfolio, he is also responsible for monitoring the provision of health services and health care in Zimbabwe. He is also the first Vice-President of the Republic of Zimbabwe.

The applicants approached this court seeking the following relief against the respondents:

"IT IS ORDERED THAT:

1. The first and second respondents omissions in not holding by elections before the 30th of September 2020, was in breach of The Electoral Act, Public Health Act and Sections 258 and 259 of the Constitution of Zimbabwe.
2. The Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (N0. 4) (SI 225A/2020) is *ultra vires* Section 158 and Section 159 of the Constitution of Zimbabwe and is hereby set aside and therefore declared a nullity.
3. The Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 4) (SI 225A/2020) is *ultra vires* Section 68 of the Public Health Act
4. The Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 4) (SI 225A/2020) is *ultra vires* Section 39 and 121A of the Electoral Act and be and is hereby set aside.
5. The first and third respondents pay the costs of suit."

The application was opposed.

BACKGROUND

In January 2020, the World Health Organisation (WHO) declared the outbreak of the coronavirus pandemic (hereinafter referred to as Covid-19 or the coronavirus pandemic), which infected millions of people across the globe. Millions of people have to date lost their lives to the coronavirus pandemic. Not surprisingly, the WHO declared Covid-19 a Public Emergency of Global concern and came up with a raft of measures to mitigate its spread and the loss of lives. It is common cause that countries all over the world reacted by coming up with restrictive measures which included travel bans, lockdowns, suspension of sporting activities and public events as well limiting economic activities through closure of businesses, save for what were termed essential services. These measures were only eased after the discovery of Covid-19

vaccines and the subsequent vaccination of millions of people globally. The vaccines helped in protecting people against infections and sicknesses, as they generated the required antibody response to infections.

Just as was the case worldwide, the Government of Zimbabwe through the third respondent also came up with a package of measures aimed at lessening the spread of the Covid-19 virus, as well as safeguarding citizens against new infections. It was discovered globally that some of the settings that made Covid-19 virus spread more easily included crowded places and close contact settings, which rendered it difficult for people to maintain the required social distancing in line with the WHO guidelines. Public gatherings were initially banned, but later on restrictions were eased to allow gatherings below certain stipulated numbers.

One of the measures that the third respondent came up with was the enactment of the Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 4), Statutory Instrument 225A of 2020 (hereinafter referred to as the Amendment Regulations or the regulations). The regulations which were gazetted on 30 September 2020, amended section 3 of the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020, published in Statutory Instrument 77 of 2020 (the principal regulations), through the insertion of subsection 3 after subsection 2.[1] Subsection 3 reads as follows:

> "(3) Pursuant to subsection (2), <u>the holding of any by-election to fill a casual vacancy in Parliament or in a local authority is, for the duration of the period of the declaration of COVID-19 as a formidable epidemic disease, suspended,</u> and if such vacancy occurred while such declaration is in force, no part of the period from the date of such vacancy to the date of the end of the declaration shall be counted for the purposes of section 158(3) of the Constitution." (Underlining for emphasis)

It was the suspension of by-elections to fill vacancies that had arisen in the Legislative Assembly and local authorities that prompted the applicants to approach this court challenging the validity of that law. The challenge is made on several bases which I shall advert to later on in the judgment.

---

[1] Section 3 of the Principal Regulations provided as follows:
"Declaration of COVID-19 as Formidable Epidemic Disease
3. (1) In terms of section 64 (1)(a) of the Act, and for the purposes of Sub-Part C of Part IV ("Infectious Diseases") of the Act, COVID-19 is declared to be a formidable epidemic disease.
(2) The declaration of COVID-19 as a formidable epidemic disease has effect till the 20th May, 2020, unless the Minister earlier, by general notice in the Gazette, extends these regulations by a further month, and may, upon expiry of that extension, in like manner further extend them for a month at a time.

It is now common cause that through Proclamation 1 of 2022[2], the second respondent fixed Saturday 26 March 2022, as the day on which by-elections were to be held to fill the electoral vacancies created by the recalls and deaths of elected Members of Parliament and the Senate. The by-elections elections were duly held on 26 March 2022 in line with that proclamation.

On 23 May 2022, I invited counsel to chambers to establish if it was still necessary for the court to render a written judgment in the matter in view of these developments. Mr *Biti* for the applicants advised that the applicants desired that the court determines the legality of the Amendment Regulations, regardless of the changed circumstances. The law remained extant notwithstanding the holding of the by-elections. The legality of the law still needed clarification for posterity. Mr *Kanengoni* for the first respondent and Mrs *Zvedi* for the second and third respondents were of the view that the matter had become moot as it had been overtaken by events.

Paragraph 1 of the applicants' draft order sought a *declaratur* that the first and second respondent's failure to hold by-elections before 30 September 2020 violated the electoral laws and the Constitution of Zimbabwe. Part of the relief fell away to the extent that by-elections had since been held. The question about whether or not the first and second respondents acted unlawfully in failing to cause the holding of by-elections when vacancies arose will be answered in the course of determining the issues raised in paragraphs 2-4 of the relief sought. Those paragraphs seek to challenge the validity of the Amendment Regulations.

The court was invited to determine whether the Amendment Regulations impinge upon: sections 158 and 159 of the Constitution, section 68 of the Public Health Act[3] and sections 39 and 121A of the Electoral Act.[4] What is before the court are essentially legal issues.

THE APPLICANTS' CASE

The first applicant deposed to the founding affidavit, while the second to eighth respondents deposed to supporting affidavits. According to the applicants, one of the founding values and principles of a constitutional democracy such as Zimbabwe was the principle of good governance as defined under s 3(2) of the Constitution. One of the fundamental principles of good governance is the requirement to hold free, fair and regular elections as and when they are due. Citizens had a right to participate in government activities directly or indirectly through

---

[2] Statutory Instrument 2 of 2022
[3] [*Chapter 15:17*]
[4] [*Chapter 2:13*]

their chosen representatives. Where electoral vacancies arise, the Constitution obliges the holding of elections in which the applicants would have a right to participate.

The applicants averred that s158(3) of the Constitution required that by-elections for vacancies in Parliament and local authorities take place within 90 days after the vacancy arose. Section 159 of the Constitution required that whenever a vacancy occurred in any elective public office established in terms of the Constitution, other than an office to which section 158 applied, the authority charged with organising elections to that body must cause an election to be held within ninety days to fill the vacancy. Section 39 of the Electoral Act is clear that where a vacancy arises among the constituency members of the National Assembly, otherwise than through a dissolution of Parliament, the Speaker is required to notify the first and second respondents of the vacancy in writing on becoming aware of it. The second respondent was then required, within 14 days thereafter, to publish a notice in the Gazette ordering the holding of a new election to fill the vacancy in the same manner with necessary changes, as provided in s 38 of the Electoral Act in regard to a general election.

The applicants further contended that in respect of by-elections to fill vacancies in local authorities, the first respondent is obliged to comply with s 121A of the Electoral Act. The first respondent is required to fix a date which is not less than 35 days nor more than 90 days after the date in which the vacancy has occurred. By-elections for local authorities are not dependant on a proclamation by the second respondent. The first respondent could not hide behind the second respondent's inaction as a reason for not conducting those by-elections.

According to the applicants, since January 2020, vacancies had arisen in the National Assembly and in local authorities necessitating the holding of by-elections. The first and second respondents were accused of dithering on the holding of by-elections up until the enactment of the Amendment Regulations, which suspended the holding of by-elections. The two had failed to comply with the Constitution and the electoral law. The applicants cited several vacancies that had arisen in the National Assembly and local authorities before the enactment of the Amendment Regulations. For that reason, the applicants contended that the first and second respondents' failure to comply with the law up until 30 September 2020 when the third respondent enacted the Amendment Regulations, violated the Constitution and the Electoral Act.

The applicants averred that the Amendment Regulations were *ultra vires* s 68 of the Public Health Act. They further contended that section 68 was clear on the type of regulations that the third respondent could make in the event of the occurrence or threatened outbreak of

any formidable epidemic disease, condition or event of public health concern. The applicants argued that the suspension of by-elections was not a power that the third respondent was accorded by the Legislature under s 68 of the Public Health Act.

The applicants also argued that the Amendment Regulations were *ultra vires* sections 158 and 159 of the Constitution. The two sections speak to the timing of elections and the filling of electoral vacancies. The third respondent was accused of having suspended the operation of the Constitution through the Amendment Regulations.

Lastly, the applicants averred that the Amendment Regulations infringed sections 39 and 121A of the Electoral Act. The third respondent had no power to override an Act of Parliament.

The applicants further contended that even assuming the regulations were lawfully made, still they were grossly irrational and unreasonable. There had been a relaxation of the lockdown conditions through amendments made to Statutory Instrument 83 of 2020[5] (S.I. 83 of 2020). Formal businesses had since been reopened. Schools had also reopened. Airports had been reopened for flights in and out of the country. On 9 September 2020, the first respondent had through a press release, announced that by-elections would be held by 5 December 2020. The nomination court was expected to sit on 5 October 2020. The by-elections were still not held.

According to the applicants, the WHO guidelines permitted the holding of elections. National elections were expected in the United States of America, Tanzania, Ghana, Guinea, Seychelles, Ivory Coast, Burkina Faso and the Central African Republic. South Africa was expected to hold local authority elections even though it was one of the countries most affected by the COVID-19 pandemic on the African continent. In the Southern African region, elections were expected in Zambia, Malawi and Namibia. The third respondent's decision was therefore not motivated by COVID-19 considerations. It was political and meant to subvert democratic processes.

The second to eighth respondents by and large associated themselves with the first applicant's founding affidavit on both factual and legal contentions set out therein.

[5] Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020, Statutory Instrument 83 of 2020. The instrument became law on 28 March 2020.

THE FIRST RESPONDENT'S CASE

In its opposing affidavit and by way of background, the first respondent averred that the applicants' application had to be considered in the context of the initiatives taken by the second and third respondents to deal with the coronavirus epidemic since March 2020, when it was declared a national disaster. At that time, countries that shared borders with Zimbabwe had recorded their first coronavirus cases and health authorities anticipated an upsurge in the number of infections as a result of cross border movements. The rate of infections could only be controlled through the implementation of several preventive methods which included the banning of public gatherings and closing down of businesses.

According to the first respondent, as at April 2020, about half of the world's population was under some national lockdown. Zimbabwe went into full lockdown on 30 March 2020. The lockdown restrictions impacted on rights of movement, association and assembly. Rights to liberty were curtailed as a result of the compulsory quarantine measures. The right to protection of the law was affected by the suspension of court business. The right to freedom of worship and political rights were not spared either as a result of the banning of religious and political gatherings. These rights, with the exception of religious freedom, were the rights that were fundamental to the conduct of a free, fair and credible election.

The first respondent further averred that while the applicants were correct in pointing out the requirements of the law as it pertained to the timing of elections, they forgot that the period between the occurrence of a vacancy and the conduct of elections was beset with legal processes that had to be surmounted before the conduct of an election that satisfied the Constitutional benchmark. These intervening processes and activities were affected by the lockdown restrictions.

The following examples were given. Voter education was one of the first respondent's key mandates as prescribed in s 239(h) of the Constitution. Section 40D (1) of the Electoral Act requires the first respondent to commence voter education not later than one week after the publication of a proclamation or notice fixing the dates of the election in terms of s 38 or s 39 of that Act. Voter education by its nature would require people to gather in numbers, which was not possible owing to the ban on public gatherings.

Voter registration is prescribed under s 239(c) of the Constitution. The voters roll for any given election is closed two days after a proclamation was published. The mandate to register voters wishing to participate in the proclaimed election for those two days is one of the obligations reposed in the first respondent. Claims relating to registration of voters is provided

for in ss 17A and 24(1) of the Electoral Act. The law does not provide for digital registration of voters. The curtailment of movement as a result of the lockdown meant that a lot of potential voters were going to miss out on their registration. That would affect the freeness and fairness of an election conducted under such conditions.

Hearing and determination of objections by aggrieved voters in terms of ss27 and 28 of the Electoral Act was one of the processes that would be affected by the lockdown restrictions. Objections by aggrieved voters were determined by Magistrates at the first instance. These could be escalated to Judges in chambers for further determination. The suspension of court business as one of the lockdown measures meant that voters with grievances were denied access to the courts. That would affect the freeness and fairness of an election held under such conditions.

The nomination of candidates is done in open court in terms of Part XII of the Electoral Act. There was no legislative framework to allow for the remote lodging of nomination papers. Lockdown restrictions meant that the process would not be carried out owing to the suspension of court business. Equally affected was the process of challenging the rejection of nomination papers lodged by candidates. Section 46(19) makes provision for an appeal to the Electoral Court within four days of the receipt of the decision to reject nomination papers. If such an appeal is not lodged, then the right to appeal is lost. The closure of the courts impinges upon the rights of aggrieved persons to seek redress.

A free, fair and credible election is also measured by the ability of candidates to freely interact with voters at political meetings and rallies. Section 67(2)(b) and (c) of the Constitution recognises the right of Zimbabweans to campaign freely and peacefully for a political party or cause, as well as to participate freely in peaceful political activities. The restrictions on gatherings and free movement wrought about by the Covid-19 induced lockdown affected the right to campaign as well as the right to participate in political activities.

The law requires voting to be done in person at polling stations where voters are registered to vote. The only exception is in respect of those permitted by law to cast postal votes under s 72 of the Electoral Act. The law has no provision for online voting under any other circumstances. The lockdown restriction on movement makes it impossible for people to cast votes at polling stations. The closure of the courts also made it impossible for unsuccessful or aggrieved candidates to make challenges to election returns.

The first respondent also averred that apart from the legal considerations that it had to contend with, there was the human impulse towards self-preservation that warranted

consideration. As the coronavirus continued to ravage communities, people also became more informed about its dangers to their wellbeing. The tendency was for people to avoid exposing themselves to circumstances that increased the risk of contracting the virus. They would definitely shy away from responding to political campaigns, voter education meetings, attending at the nomination courts and polling stations to cast their votes. The conditions were certainly not conductive to achieve a democratic electoral process.

Also worth of consideration was the key role played by the first respondent's employees in the whole electoral process. The nature of their duties involved high levels of interaction with members of the public. There was not enough personal protective equipment and effective protocols to guarantee the safety of the public and the first respondent's employees.

The first respondent noted that the applicants did not challenge the national lockdown implemented from 30 March 2020. They did not demonstrate that such lockdown was unnecessary in the interests of preserving public health and safety. They did not even seek to have the legal instruments that ushered in the lockdown set aside as being unduly restrictive. Instead, the applicants only challenged the Amendment Regulations, which suggested that they wanted the first respondent to ignore a declared national disaster and proceed with the holding of by-elections, a scenario that would only help increase the spread of the virus. Sections 86 and 87 of the Constitution, which placed limitations on the enjoyment of fundamental human rights and freedoms came to mind.

The first respondent further averred that the Constitution did not proscribe vacancies in elective offices beyond ninety days. Reference was made to s 158 (3) of the Constitution which contemplated the existence of a vacancy beyond ninety days from the date of occurrence of that vacancy. According to the first respondent, what the Constitution enjoined was the unjustified failure to hold elections and the crippling of those institutions in which vacancies existed. It was not the case in the Zimbabwean context.

The first respondent further contended that Zimbabwe was not the only country that had suspended the holding of elections owing to the covid-19 pandemic. Several countries within Africa and beyond had been forced to defer the holding of elections under similar circumstances. The court was urged to dismiss the application.

THE SECOND AND THIRD RESPONDENTS' CASE

The second and third respondents' opposing affidavit was deposed to by the third respondent in his capacity as the Minister of Health and Child Care as well as the Vice President of the Republic of Zimbabwe. Agnes Illah Mahomva filed a supporting affidavit in her capacity

as the Chief Coordinator for the National Response to the COVID-19 Pandemic in the Office of the President and Cabinet.

The third respondent admitted the statement attributed to the first respondent's chairperson suspending all electoral activities following the second respondent's declaration of the coronavirus as a national disaster. That statement was confirmed by the first respondent's Chief Elections Officer, who on 9 May 2020 also advised of the suspension of by-elections in light of the coronavirus pandemic. The third respondent averred that the first respondent could not proceed with by-elections since it was not prescribed as an essential service in terms of the lockdown legislation.

The third respondent further averred that the second respondent could not proclaim by-elections in circumstances where the first respondent was not prescribed as an essential service. Further, the Covid-19 lockdown legislation placed a minimum limit of two people and a maximum limit of one hundred persons on various types of gatherings. That limitation on gatherings was a constraint on the exercise of political rights. There was also the attendant risk of people getting contaminated by the virus during gatherings.

The third respondent denied that the Amendment Regulations were *ultra vires* sections 68 of the Public Health Act and sections 158 and 159 of the Constitution. Third respondent also denied that the Amendment Regulations were grossly unreasonable and irrational. That law had been enacted pursuant to the taking of expert advice. Be that as it may, what was evident on the ground was that citizens had dropped their guard. There was a laxity in the manner in which masks were worn, there was non-observance of social distancing anymore, and there was also a laxity in sanitisation. Such laxity therefore provided a fertile ground for the spread of the pandemic. Infections were likely to spiral out of control and for that reason, any additional restrictive measures meant to reduce the risk of infections were welcome.

The third respondent denied that it was possible to hold by-elections under strict covid-19 guidelines such as the wearing of masks, gloves and sanitizing. People had generally relaxed in observing the covid-19 guidelines, and the world over even developed countries were re-introducing stringent measures to curb the sudden spike in the rate of infections. While conceding that the WHO guidelines permitted the holding of elections, the third respondent averred that they nevertheless required that this be done under conditions that minimised the risk of infections. The fact that other countries were going to hold elections during the period of the pandemic did not mean that every country had to follow suit. The third respondent gave examples of South Africa and the United States which were preparing to hold elections despite

recording an increase in Covid-19 infections. New Zealand had reportedly zero infections when it held its elections in October 2020. It was up to each country to assess whether conditions were conducive for the holding of elections considering the attendant risks of infections induced by public gatherings.

While the number of infections and deaths was relatively low in Zimbabwe when compared to other countries, that on its own was not a justification for holding by-elections if there was a possibility of a spike in infections. There was no point in risking the loss of lives just for the sake of holding by-elections. The Constitution recognises the right to life, and it is the Government's legal and moral duty to preserve lives.

The third respondent denied that his decisions were meant to emasculate the Constitution so as to subvert democracy. He averred that the application as amplified by the second to eighth applicants' supporting affidavits was meritless and urged the court to dismiss it with costs.

THE ANSWERING AFFIDAVIT

The applicants averred that the third respondent's description of himself as the Minister of Health and Childcare, as well as being one of the two Vice Presidents, raised a constitutional question that had to be dealt with by the court. Section 103 of the Constitution was clear that the President, Vice President and former Presidents, must not directly or indirectly hold any other public office or be employed by anyone else while they were in office or receiving a pension from the State. That meant that the Vice President could not hold another public office such as that of Minister of Health. Section 99 of the Constitution allowed the Vice President to *"perform any other functions, including the administration of any Ministry, department or Act of Parliament, that the President may as-sign to them."* The first applicant still averred that the section did not permit a Vice President to assume the title and functions of a Minister of Health. Accordingly, there was no Minister of Health to the extent that the third respondent purported to hold that office.

I must hasten to remark that this point was not pursued in heads of argument and neither was it pursued in oral submissions by counsel. I therefore considered it to have been abandoned so as not to warrant further attention hereafter.

The applicants persisted with their contentions that the first and second respondents had failed to comply with their obligations under the Constitution and the Electoral Act. They also maintained their argument that the third respondent had no power to suspend an election under s68 of the Public Health Act. The respondents had no right to open the economy whilst shutting

the doors of democracy. The by-elections could still be held under the auspices of the WHO guidelines on managing the coronavirus during election time.

SUBMISSIONS AND THE ANALYSIS

The court will now proceed to determine whether the Amendment Regulations impinge upon: sections 158 and 159 of the Constitution, section 68 of the Public Health Act[6], sections 39 and 121A of the Electoral Act and whether the first and second respondents acted unlawfully in failing to cause the holding of by-elections before 30 September 2020. I will start by determining whether the Amendment Regulations infringe the very Act in terms of which they were made.

Whether the amendment Regulations are ultra vires s 68 of the Public Health Act

In their heads of argument, the applicants submitted that although s68 of the Public Health Act permitted the third respondent to make regulations, such regulations could not override an Act of Parliament. That would make the regulations *ultra vires* the very law that created them. Reference was made to the case of *Pharmaceutical Manufacturers Associations of South Africa: Ex Parte President of the Republic of South Africa*[7] in which the court explained the *ultra vires* principle. It was further submitted that the suspension of by-elections was not part of the powers that the third respondent could exercise under s 68 of the Public Health Act.

In her response, Mrs *Zvedi* submitted that s 68 of the Public Health Act was a law of general application which permitted the promulgation of the Amendment Regulations. It is worthy reciting s 68 herein to place the parties' arguments into perspective. It reads as follows:

> "**68 Regulations regarding formidable epidemic diseases and conditions or events of public health concern**
> (1) Subject to the provisions of this Act, in the case of the occurrence or threatened outbreak of any formidable epidemic disease, condition or event of public health concern, the Minister may make regulations as to all or any of the following matters, namely—
> (*a*) <u>the imposition and enforcement of quarantine and the regulation and restriction of public traffic and of the movements of persons</u>;
> (*b*) the closing of schools or the regulation and restriction of school attendance;
> (*c*) <u>the closing of churches and Sunday schools and restriction of gatherings or meetings for the purpose of public worship</u>;
> (*d*) the regulation or restriction or, where deemed necessary, the closing of any place or places of public entertainment recreation or amusement, or where intoxicating liquor is sold by retail,

[6] [*Chapter 15:17*]

[7] 1994 (4) SA 788 TPD at 797C. The court explained the *ultra vires* doctrine as follows:

> "It is well established that delegated powers must be exercised within the limits of the authority that corrected. If not, the purported exercise of the power is unlawful and a court is quite entitled to set it aside as it would set aside the unlawful act of any other functionary who has acted outside the powers conferred upon him by the Legislature"

and the regulation or restriction, or, where deemed necessary, the prohibition, of the convening, holding or attending of entertainments, assemblies, meetings or other public gatherings;
(*e*) ………….;
(*n*) ……………………..;
and such other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of this Part." *(Underlining for emphasis)*[8]

Most of the matters referred to under s 68 (1)(a-n) were catered for in S.I. 83 of 2020 and the Principal Regulations. The issue that arises is whether s 68 confers upon the third respondent, the power to make regulations in the mould of the Amendment Regulations whose effect was to suspend the holding of by-elections. A reading of items (a)-(n) of s 68(1) shows that the suspension of by-elections is not one of the matters for which the third respondent can make regulations.

What remains is to consider whether the catch all provision *"and such other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of this Part"*, can be construed as conferring upon the third respondent powers to pass legislation in the form of the Amendment Regulations. The principles governing interpretation of legislation are a well beaten path. In the South African case of *Natal Joint Municipal Pension Fund* v *Endumeni Municipality*[9] the court held as follows:

"Interpretation is the process of attributing meaning to the words in a document be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production."

It is ostensibly clear that the catch all provision must be read and interpreted in the context of the matters stated in s68(1)(a)-(n). Such legislation must be *"necessary for*

[8] Sub-paragraphs (g) and (h) of s68(1) also provide as follows:
"(*g*) the keeping under medical observation or surveillance, or the removal, detention and isolation of persons who may have recently been exposed to the infection of, and who may be in the incubation stage of; such disease the detention and isolation of such persons until released by due authority, the use of guards and force for that purpose, and, in case of absolute necessity, the use of firearms or other weapons, and the arrest with or without warrant of any person who has escaped from such detention or isolation;
(*h*) the establishment of isolation hospitals and the removal and isolation of persons who are or are suspected to be suffering from any such disease, the accommodation, classification, care and control of such persons and their detention until discharged by due authority as recovered and free from infection, and the establishment, management and control of convalescent homes or similar institutions for the accommodation of persons who have recovered from any such disease."
[9] 2012 (4) SA 593 (SCA)

preventing the occurrence of such disease or limiting or preventing the spread thereof". The question which needs to be answered is whether the Amendment Regulations are necessary for preventing the occurrence of the coronavirus as well as limiting or preventing its spread? One needs to consider the context in which the provision appears. Subsections 1(a) and (d) show that the third respondent can make regulations whose effect restricts the movement of persons as well as the prohibition of meetings or public gatherings. A by-election by its nature is synonymous with the movement of persons, public meetings and public gatherings.

It follows that the suspension of by-elections through the Amendment Regulations was clearly one of the matters for which the third respondent could make regulations, if the catch all provision is read in the context of the matters set out in the s68(1)(a)–(n). The court resultantly finds that the Amendment Regulations are in consonant with s68 of the Public Health Act. They are *intra-vires* that law.

Whether the Amendment Regulations are *ultra vires* sections 39 and 121A of the Electoral Act.

It was submitted on behalf of the applicants that s 39 of the Electoral Act required the Speaker of the National Assembly, to notify the first and second respondents where a vacancy arose among the constituency members of the National Assembly. Thereafter, the second respondent was required, within 14 days thereafter, to publish a notice in the Gazette ordering a new election to fill the vacancy in the same manner with necessary changes, as is provided in s 38 in regard to a general election. Section 121A obliges the first respondent to fix a date which is not less than 35 days nor more than 90 days after the date in which the vacancy occurs. All those processes were rendered nugatory by the Amendment Regulations. The applicants also argued that by-elections for local authorities were not dependant on a proclamation by the second respondent.

Mr *Kanengoni* submitted that the non-designation of the first respondent as an essential service, and the suspension of political rights as a result of the lockdown legislation meant that elections could not be held under those circumstances. It is relevant to recite the two provisions that were allegedly infringed upon by the Amendment Regulations.

Section 39 of the Electoral Act reads in part as follows:

> **"39 Vacancies and by-elections**
> (1) In the event of a vacancy occurring among the constituency members of the National Assembly, otherwise than through a dissolution of Parliament, the Speaker shall notify the President and the Commission of the vacancy, in writing, as soon as possible after he or she becomes aware of it.
> (2) The President shall, within a period of fourteen days after—

(*a*) he or she has been notified in terms of this section of a vacancy among the constituency members of the National Assembly; or
(*b*) a declaration is made by the Chief Elections Officer in terms of section *fifty*; or
(*c*) …………………;
publish a notice in the *Gazette* ordering a new election to fill the vacancy in the same manner, with any changes that may be necessary, as is provided in section *thirty-eight* in regard to a general election, and the provisions of this Act shall apply accordingly.":

Section 121A of the Electoral Act provides in part as follows:

"121A Notice of election and nomination day to fill casual or special vacancies in councils
(1) A by-election to fill—
(*a*) a casual or special vacancy in a council; or
(*b*) a vacancy arising from—
(i) any area added to a council area being constituted as an additional ward; or
(ii) the number of councillors of a council area or ward being increased;
shall be held on a date fixed by the Commission, which date shall be not less than thirty-five days nor more than ninety days after the date on which the vacancy occurred:……."

Section 39 deals with processes that must be undertaken from the time a declaration of a vacancy is made right up to the point the second respondent is required to publish a notice in the *Gazette* ordering a new election to fill the vacancy that has been so declared. Section 121A deals with processes that are attendant on filling vacancies arising in local authorities. In determining the legality of the Amendment Regulations, one must start with s 67 of the Constitution itself. Political rights are well established in s67 of the Constitution. The relevant part provides as follows:

"67 Political rights
(1) Every Zimbabwean citizen has the right—
(*a*) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and
(*b*) to make political choices freely.
(2) Subject to this Constitution, every Zimbabwean citizen has the right—
(*a*) to form, to join and to participate in the activities of a political party or organisation of their choice;
(*b*) to campaign freely and peacefully for a political party or cause;
(*c*) to participate in peaceful political activity; and
(*d*) to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or what-ever cause."[10]

[10] S67 (3) also states:
"(3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right—
(*a*) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and
(*b*) to stand for election for public office and, if elected, to hold such office."

Section 86(2) of the Constitution is also relevant in the discussion of political rights in the context of the electoral process. That section states as follows:

> "**86 Limitation of rights and freedoms**
> (1) ……………….
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
> (*a*) the nature of the right or freedom concerned;
> (*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> (*c*) the nature and extent of the limitation;
> (*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
> (*e*) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
> (*f*) whether there are any less restrictive means of achieving the purpose of the limitation."

There are certain fundamental human rights and freedoms that are completely inviolable, and these are provided for in s 86(3) of the Constitution.[11]

Section 3 of the Electoral Act deals with the general principles of democratic elections, which are also related to in the Constitution. It states in the material part as follows:

> "**General principles of democratic elections**
> Subject to the Constitution and this Act, every election shall be conducted in way that is consistent with the following principles:
> (*a*) the authority to govern derives from the will of the people demonstrated through elections that are conducted efficiently, freely, fairly, transparently and properly on the basis of universal and equal suffrage exercised through a secret ballot; and
> (*b*) every citizen has the right:
> (i) to participate in government directly or through freely chosen representatives, and is entitled, without distinction on the ground of race, ethnicity, gender, language, political or religious belief, education, physical appearance or disability or economic or social condition, to stand for office and cast a vote freely;
> (ii) to join or participate in the activities of and to recruit members of a political party of his or her choice;
> (iii) to participate in peaceful political activity intended to influence the composition and policies of Government;

---

[11] Section 86 (3) of the Constitution reads as follows:

> "(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
> (*a*) the right to life, except to the extent specified in section 48;
> (*b*) the right to human dignity;
> (*c*) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
> (*d*) the right not to be placed in slavery or servitude;
> (*e*) the right to a fair trial;
> (*f*) the right to obtain an order of *habeas corpus* as provided in section 50(7)(*a*)."

> (iv) to participate, through civic organisations, in peaceful activities to influence and challenge the policies of Government"

In addition to the above, s 3 (c)(iii) of the Electoral Act, allows political parties to campaign freely within the confines of the law. A credible election must be one that is held in conformity with sections 3(2) and 67 of the Constitution as read with s3 of the Electoral Act. The above provisions are relevant in contextualising counsels' submissions herein.

It is clear from a reading of sections 67 and 86(2) of the Constitution that political rights are subject to limitation in terms of a law of general application. A law of general application is one that must be applied equally, must not be arbitrary or aimed at a specific class of citizens. In their heads of argument, the second and third respondents argued that s68 of the Public Health Act, in terms of which the Amendment Regulations were made, was a law of general application and so were the Amendment Regulations. The Amendment Regulations were promulgated in the interests of public health and safety. In *Majome* v *Zimbabwe Broadcasting Corporation & 2 Others*[12], MALABA DCJ (as he was then), said the following about a law of general application:

> "The threshold test of a law of general application excludes instances in which the party whose conduct has been found to limit a fundamental right cannot rely upon an existing rule of law as a justification for the limitation. There cannot be justification of conduct for which no legal authorization exists. <u>The question of the validity of conduct which falls within the ambit of a law of general application cannot be determined by reference to the Constitution. It must be determined by reference to the provisions of the law of general application unless the constitutionality of that law is itself being attacked</u>." (Underlining for emphasis).

It is common cause that the applicants impugn the conduct of the third respondent in promulgating the Amendment Regulations which they contend to be *ultra vires* sections 39 and 121A of the Electoral Act. The Constitution permits the limitation of political rights if such limitation is made pursuant to a law of general application. Section 68 of the Public Health Act is one such law. The Amendment Regulations were made in terms of that law. As this court has already decided, the Amendment Regulations are *intra vires* s 68 of the Public Health Act.

Admittedly, the suspension of by-elections to fill the vacancies in Parliament or in local authorities pursuant to the Amendment Regulations made deep inroads into the applicants' political rights as set out in s 67 of the Constitution. But such inroads were pursuant to a law of general application which is permissible under s 86(2) of the Constitution. A reading of the general principles governing democratic elections as set out in s(3) of the Electoral Act, shows

---

[12] CCZ 14/16 at page 7 of the cyclostyled judgment

that they are in *pari materia* with the principles of good governance set out in sections 3(2) and 67 of the Constitution. The court determines that the Amendment Regulations are not *ultra vires* ss 39 and 121A of the Electoral Act since the regulations were made in terms of a law of general application which, in terms of the Constitution, can be utilised to limit certain fundamental human rights and freedoms.

The legality of the Amendment Regulations, and the conduct of the respondents

Mr *Biti* submitted that s2 of the Constitution reaffirmed the supremacy of the Constitution as the supreme law of the land, and any law, practice, custom or conduct inconsistent with it was invalid to the extent of the inconsistency. He further submitted that the respondents' failure to respect the provisions of sections 158 and 159 of the Constitution constituted an unconstitutional act which violated s 2 of the said law. In their heads of argument, the applicants submitted that Zimbabwe was a constitutional State in which the exercise of public power was anchored on the principle of legality. It was the constitutional task of the court to control the exercise of that public power so that it conformed to the principle of legality.

The principle of legality was espoused in the South African case of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa*[13]. Legality demanded a respect of the Constitution and the Electoral Act. The failure to comply with sections 158 and 159 struck at the heart of the principle of legality. The net effect of sections 158 and 159 was that by-elections had to be held within ninety (90) days from the time a vacancy arose. Section 324 of the Constitution required constitutional obligations to be performed diligently and without delay.

In response, Mr *Kanengoni* urged the court to adopt a purposive interpretation to s158 (3) of the Constitution. Holding an election under the Covid-19 conditions would have meant that many voters were going to be disenfranchised. The issue was not just about the timing of the election. It was also about the participation of the electorate. In any event, the law gave the first respondent some latitude in as far as election dates were concerned. Election dates could be changed.

In its heads of argument, the first respondent submitted that s159 of the Constitution did not apply to the elective offices covered by s 158. The applicants' case against the respondents was that the failure to hold by-elections constituted a constitutional breach. Such

[13] 2000 (2) SA 674 (CC)

violation, if established, would relate to s 158 (3) of the Constitution with no reference to s159. It was s 158 (3) which required attention in determining if the alleged violations were well grounded. Section 158(3) needed to be interpreted within the broader context of the entire Constitution. The context within which any election was to be conducted naturally arose from the entirety of the provisions of the Constitution that dealt with the conduct and timing of elections. Reference was made to the case of *Nhari v Mugabe & 2 Ors*[14]. The first respondent made reference to the provisions of the Constitution, which provided the context in which s 158(3) operated.[15]

It was submitted that the Constitution set parameters for its own interpretation, by making the interpretation of individual provisions reliant upon the underlying principles of the Constitution. It moved away from the targeted, literal interpretation of individual provisions without context. As regards elections and electoral processes, the underlying principle governing the conduct and participation in an electoral process was that the result must be free and fair both in process and outcome. Political rights afforded to citizens were not immutable. The holding of an election in circumstances where the people for whom the election mattered most were unable to effectively exercise their right to vote because of lawful limitations imposed on that right in response to an emergency, would be illusionary. It would produce an absurdity in that for the sake of adhering to the literal meaning of s 158 (3), an election was held in circumstances where the electorate was constrained from fully and effectively participating.

The first respondent further contended that in normal circumstances, a literal interpretation of s 158 would prevail. The reality on the ground was that Covid-19 had wreaked havoc, and the circumstances under which the country found itself could hardly be construed as normal. The times were unprecedented, and it was in that context that s 158(3) had to be interpreted. According it a literal interpretation would mean that the first respondent was expected to hold elections in an environment that exposed voters to the risk of contracting Covid-19. The question that the first respondent paused was whether the Legislature could be presumed to have intended an absurdity, ambiguity or repugnancy to arise from the grammatical and ordinary meaning of the words it used in an enactment, such that human lives

---

[14] SC 161/20
[15] See the following sections of the Constitution: s 3(2)(b); s 8(2); s 9(2); s 46(1)(b); s 46(1)(d); s 67; s 87; s 113(7); s 113(8); s 155(2)(b); s 155(2)(e); s 239(a)(ii); s 239(d); s 239(h); s 277(1)(b); s 331.

could be exposed to danger simply in order to adhere to electoral timelines? It had to be understood that the period in which an election was to be held was not superior to the other provisions by which a free and fair election was to be achieved.

The timing of elections was one in a family of provisions that cumulatively guaranteed the conduct of a free and fair election. The electoral process ought not to be a process of going through a procedural checklist, but on the whole, it must be a process intended to realise the broader ideals of affording the electorate a chance to choose representatives of their choice. The Legislature could not have intended that s 158 (3) be construed in such a manner that did not accommodate instances of public emergencies or national disasters. The ideals of a free, fair and representative election, as espoused by the Constitution would scarcely be achievable under the lockdown measures imposed to arrest the spread of the Covid-19 virus. These measures had a profound effect on the rights to gather and associate, in the political environment, all of which were crucial to the conduct of a free, fair and representative election.

Mrs *Zvedi* submitted that the supremacy of the Constitution had to be considered in a context. The applicants were taking a selective approach in their interpretation of the Constitution. The Constitution needed a holistic interpretation. Section 86(2) provided for a limitation of fundamental human rights and freedoms, subject to a law of general application. Section 68 of the Public Health Act was a law of general application, which justified the promulgation of the Amendment Regulations. The Amendment Regulations were therefore in harmony with the Constitution that made provision for the limitation of fundamental human rights and freedoms. The application was clearly without merit.

In his brief reply, Mr *Biti* argued that the respondents had clearly misread sections 85 and 86 of the Constitution. While it was admitted that not all fundamental rights were absolute, any limitations imposed on the enjoyment of those rights had to be justified. At any rate, what was before the court was not an application based on s85 (1) of the Constitution. The court was not invited to interrogate whether there was an infringement of the Bill of Rights. Sections 85 and 86 were therefore irrelevant to the determination of the application. The period within which an election had to be held was prescribed in s158 (3).

Sections 158 and 159 relate to the timing of elections. However for purposes of the dispute before the court, it is section 158(3) which is relevant. The section states as follows:

> "TIMING OF ELECTIONS
> **158 Timing of elections**
> (1) ………………………..
> (2) ……………………….

> (3) Polling in by-elections to Parliament and local authorities must take place within ninety days after the vacancies occurred unless the vacancies occur within nine months before a general election is due to be held, in which event the vacancies may remain unfilled until the general election." (Underlining for emphasis).

Section 159 does not apply to elective offices that are covered by s 158. It states that whenever a vacancy occurs in any elective public office established in terms of this Constitution, other than an office to which s 158 applies, the authority charged with organising elections to that body must cause an election to be held within ninety days to fill the vacancy. The analysis will therefore be confined to a consideration of whether or not the Amendment Regulations are *ultra vires* s 158 (3) of the Constitution.

[*Chapter 7*] of the Constitution deals with elections. Part 1 deals with electoral systems and processes, while Part 2 is concerned with the timing of elections. Part 3 applies to the delimitation of electoral boundaries. Of relevance to this matter are Parts 1 and 2 of [*Chapter 7*]. They constitute part of the electoral regime that is significantly affected by the Amendment Regulations. Part 2 is also critical in determining whether the respondents acted lawfully in failing to conduct by-elections before the Amendment Regulations became law on 30 September 2020.

Section 155 of the Constitution deals with the principles of the electoral system. The major highlight under that section is the need to hold regular elections which must be peaceful, free and fair. The State is required to take appropriate measures to ensure that: all eligible citizens are registered as voters; every eligible citizen gets an opportunity to cast their vote; political parties and candidates contesting an election have reasonable access to all material and information necessary for them to participate effectively, and that there are mechanisms for the timely resolution of electoral disputes. Section 157 requires an Act of Parliament to provide for the conduct of the elections.

The principles of the electoral system blend well with the principles of good governance which bind the State and institutions of government as set out in s 3(2)(b) of the Constitution. The same are also espoused in s67 of the Constitution. As already noted, political rights form part of the fundamental rights and freedoms guaranteed under [*Chapter 4*] of the Constitution. Mr *Biti* argued that the respondents ought to have simply followed s158 (3) to the letter. It prescribes the period within which by-elections must be held. Mr *Kanengoni* urged the court to adopt a broad and generous approach in interpreting the Constitution as a literal interpretation would yield an absurdity. For how on earth would the Legislature have contemplated the holding of an election in the midst of a deadly and ruinous pandemic such as

the Covid-19 virus? Mrs *Zvedi* urged the court to be cognisant of the fact that the Amendment Regulations were passed pursuant to a law of general application. The right to vote, and the holding of an election that was free, fair and credible, were all part of the fundamental rights and freedoms that were subject to limitation in terms of a law of general application. The Amendment Regulations had to be considered in that context.

In *Nhari v Mugabe & 2 Ors*[16], the Court said:

> "…..The very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions and that all relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective Constitution……The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to the semantic and grammatical analysis. The interpreter must endeavour to infer the design or purpose which lies behind the legislation. Words should only be given their ordinary grammatical meaning if such meaning is compatible with their complete context…" (Underlining for emphasis).

Similar sentiments had been expressed by the Constitutional Court in *Shumba & Ors* v *Minister of Justice Legal & Parliamentary Affairs & Ors*[17], where GWAUNZA JCC writing for the bench held:

> "It is trite that the Constitution is a legal instrument which falls to be interpreted, generally, according to the same principles that govern the interpretation of any other legislation. In this respect it is important to note, as stated in the case of *Rushesha and Others v Dera and Others* CCZ 24/17, that the Constitution evinces one singular document, one singular law which is consistent within itself. This principle is aptly explained as follows in *Tsvangirayi v Mugabe and Others* CCZ 24/17:
>
> > "The preferred rule of interpretation is that all relevant provisions having a bearing on the subject for interpretation must be considered together as the whole in order to give effect to the objective of the Constitution, taking into account the nature and scope of the rights, interests and duties forming the subject matter of the provisions." (Underlining for emphasis).[18]

It makes a lot of legal sense that when a particular provision of the Constitution falls for consideration, then it must be interpreted in the broader context of the other provisions of the Constitution that have a bearing on the same subject matter. Admittedly, the Constitution comes in the form of a statute. It is however *sui generis*. Its interpretation must, at the end of

---

[16] SC 161/20
[17] CCZ 4/18 at p13 of the cyclostyled judgment.
[18] See also cases cited in the second and third respondents heads of argument. In *Government of the Republic of Namibia & Ano* v *Cultura 2000 & Ano* (SA2/92) [1993] NA SC 1, where MAHOMED C.J. held at p 20-21:

> "A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui-generis*. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation in the values bonding its people and in disciplining its Government".

the day, endeavour to fulfil its overall objectives. After all it is the ultimate benchmark by which the legality of all other laws must be measured.

Was the first and second respondents' conduct unlawful?

The holding of elections finds expression in several parts of the Constitution. More significantly, political rights, which encapsulate the idea of free, fair and regular elections, fall under fundamental human rights and freedoms. They also include the right to form, join and to participate in the activities of a political party of choice; the right to campaign freely and peacefully for a political party or cause; the right to participate in peaceful political activity; and the right to participate whether individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of Government or any political or whatever cause.[19]

It is common cause that by the time the Amendment Regulations were promulgated, serious inroads had already been made into some of these political rights through the Principal Regulations and S.I. 83 of 2020. Those regulations introduced a national lockdown, restricted the movement of people, and prohibited public gatherings amongst a raft of measures meant to contain the spread of the Covid-19 virus. Court business was also suspended, save for urgent matters. The Principal Regulations became law on 23 March 2020, while S.I. 83 of 2020 was gazetted on 28 March 2020. An election process must be held under conditions that guarantee: the free movement of people to allow for campaigning and attending meetings, as well as public gatherings. It meant that the timing of the election in terms of s 158 (3) of the Constitution had to be made with these realities on the ground. The question which arises is whether voters, candidates and political parties were going to be able to freely exercise their electoral rights under those conditions? The answer in my view is in the negative.

The next question that arises is whether it was prudent for the first and second respondents to proceed in terms of s 158(3) for the sake of complying with a Constitutional obligation well aware that conditions were not ripe for the holding of an election that satisfied the minimum Constitutional standards. An election held under such conditions would have just been for the sake of fulfilling a Constitutional obligation, but denying the voters, candidates and political parties an opportunity to fully enjoy their electoral rights. Government had also placed legislation in place meant to supress the spread of the coronavirus. That legislation went

---

[19] Section 67 (2) of the Constitution.

to the extent of delimiting those services and businesses that were essential for purposes of restricting the movement of people.

The first respondent is the key player in the preparation for, conducting and supervision of an election. It was not designated as an essential service in the national lockdown legislation. It meant that it was constrained from fulfilling its constitutional mandate as a result of that legislation. The legality of that legislation was not questioned. It is not an issue before the court. As already stated, the lockdown legislation made serious inroads into electoral rights meaning that no credible, free and fair by-election could be held during the time that the legislation was in force. This court cannot ignore the conditions on the ground, which must be considered in the context of the coronavirus and the lockdown in determining whether the second and third respondents acted unlawfully in not calling for by-elections before the Amendment Regulations became law. An election held under the conditions enumerated above would clearly have been a charade.

The legality of the Amendment Regulations

The legality of the Amendment Regulations must be considered with s 86 of the Constitution in mind. Mr *Biti* argued that s 86 was irrelevant because the application did not concern itself with the Bill of Rights. That submission cannot be entirely correct if one accepts that the exercise of political rights is a key factor in the holding of a successful election.

Put differently, an election cannot be successfully held without due regard to political rights which form part of the fundamental human rights and freedoms. Those rights are subject to limitation in terms of a law of general application. The same Legislature which set timelines for the holding of by-elections is the same Legislature that came up with limitations to the enjoyment of some fundamental human rights and freedoms. In my respectful view, the Legislature could not have intended that in one breath elections must be held in line with s 158(3), regardless of the circumstances on the ground, while on the other hand it restricted the rights of citizens to fully enjoy their political rights through the various lockdown measures whose lawfulness was not challenged. The Legislature must have been alive to the reality that at some point it was going to be necessary to curtail the enjoyment of certain fundamental human rights and freedoms, and that some Constitutional obligations would have to be suspended.

It is in the context of the above that this court must determine whether the Amendment Regulations are reconcilable with s 158(3) of the Constitution. A law of general application can limit the enjoyment of fundamental human rights and freedoms to the extent that the

limitation is fair, reasonable, necessary and justifiable in a democratic society. One of the factors considered in determining the reasonableness of the limitation is the purpose of the limitation and whether it was necessary in the interests' of public safety, public health or the general public interest.[20] In *Democratic Assembly for Restoration and Empowerment & 3 Ors* v *Saunyama & 3 Ors*[21], MAKARAU JCC writing for the Constitutional Court bench held as follows:

> "The correct approach of presuming constitutionality is to avoid interpreting the Constitution in a restricted manner in order to accommodate the challenged legislation. Instead, after properly interpreting the Constitution, the court then examines the challenged legislation to establish whether it fits into the framework of the Constitution.
> This approach gives the Constitution its rightful place, one of primacy over the challenged legislation. The Constitution is properly interpreted first to get its true meaning. Only thereafter is the challenged legislation held against the properly constructed provision of the Constitution to test its validity. In other words, one does not stretch the Constitution to cover the challenged legislation but instead, one assesses the challenged law, and tries to fit it like a jigsaw puzzle piece into the big picture which is the Constitution. If it does not fit, it must be thrown away. (See Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983(2) ZLR 376 (S). (Underlining for emphasis).

Having considered the constitutional framework and the context in which s 158(3) operates, this court is satisfied that the Amendment Regulations are *intra vires* s 158(3) of the Constitution. The Amendment Regulations were made in terms of s 68 of the Public Health Act, a law of general application. The suspension of by-elections was temporary. It was only intended to be *"for the duration of the period of the declaration of COVID-19 a formidable epidemic disease"*. That intervention was, in this court's view necessary in the interests of public safety and public health.

The Amendment Regulations sit well with the limitations provided for under s86 of the Constitution. Political rights do not fall under the category of those fundamental human rights and freedoms that are completely sacrosanct, and in respect of which no law may provide for their limitation.[22] The court determines that from a contextual reading of s 158 (3) of the Constitution and the rest of the provisions pertaining to the holding of elections, as well as the limitations of fundamental human rights and freedoms, the Legislature was aware that there would arise abnormal situations such as the Covid-19 epidemic that would necessitate the suspension of fundamental human rights and freedoms, through a law of general application.

---

[20] See section 86(2)(b) of the Constitution which outlines the relevant factors.
[21] CCZ/19 at page 11 of the cyclostyled judgment.
[22] See s 86(3) of the Constitution.

One can visualise several examples where the State would be obliged to declare a state of emergency at a time by-elections were due to be held under s 158(3) of the Constitution. Tropical cyclones comes to mind. They are known to have a devastating effect on property and mankind. The Legislature cannot be presumed to have intended that elections must nevertheless proceed notwithstanding the existence of weather conditions that inhibited human movement for purposes of casting votes. The same goes for the coronavirus. The respondents would have been culpably careless to allow a by-election in the midst of a deadly virus that was known to spread easily in close contact settings where social distancing was not achievable. The fact that other countries held their elections during the time that the virus was still at its peak, and at a time when lives were still being lost in large numbers, does not necessarily mean that this country should have followed suit. Each country had its own peculiar circumstances, which informed the decision to hold or not to hold elections during the pandemic. Considerations differed from country to country.

CONCLUSION

For the foregoing reasons, the court determines that the amendment Regulations are not *ultra vires* s 158(3) of the Constitution. The Amendment Regulations did not have the effect of suspending the Constitution. They are complementary. The court also finds no bases on which it can determine that the Amendment Regulations violated s68 of the Public Health Act and sections 39 and 121A of the Electoral Act. The court further determines that the first and second respondent's failure to hold by-elections by 30 September 2020 was not unlawful.

COSTS

The application was not frivolous and neither was it vexatious. It raised very important legal issues which are of public interest and important for the development of jurisprudence in the area of electoral rights. In the same breadth, I must commend counsel for their insightful and well researched submissions. It is only befitting in the circumstances that each party be ordered to bear its own costs of suit.

DISPOSITION

Resultantly it is ordered that:

1. The application is hereby dismissed
2. Each party shall bear its own costs of suit.

Tendai Biti Law, legal practitioners for the applicant
Nyika Kanengoni & Partners, legal practitioners for the 1st respondent
Civil Division of the Attorney General's Office, legal practitioners for 2nd and 3rd respondents