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FOREWORD

This Compendium is testament to the international and regional character of Judicial Education and Training (JET). The sharing of experiences, practices and jurisprudences remains a fundamental pillar of JET across African jurisdictions, particularly with the advent of judicial globalisation. This Compendium chronicles a significant epistemological milestone in fostering national collaboration and jurisprudence sharing among judges.

The papers included in this compilation were presented during the COMESA Competition Commission Workshop for Judges, the Bar Bench Colloquium and Judges' Symposia.

Conferences and symposia play a crucial role in promoting dialogue and cooperation among the judicial and legal fraternities in deepening insights and knowledge on regional legal frameworks, and on addressing the challenges and opportunities in the justice delivery system. The papers contained herein cover a wide spectrum of legal subjects and discourses, ranging from court orders, human rights, commercial

law, and cross-border dispute resolution. These papers were prepared by authors with the requisite expertise, experience, and mastery of content, as such, they reflect the collective endeavour by stakeholders in advancing jurisprudence and promoting justice within Zimbabwe and beyond.

This Compendium undergirds the role of judges as guardians of the law and advocates for fairness, impartiality, and the protection of fundamental rights. Through their collective wisdom and commitment to justice, judges contribute to the strengthening of legal systems and the advancement of jurisprudence.

MR. W. T CHIKWANA

SECRETARY, JUDICIAL SERVICE COMMISSION

COURT ORDERS[1]

Honourable Mr. Justice L. Malaba

The Chief Justice, Republic of Zimbabwe

Abstract

A court order is an official pronouncement by a court, upon the determination of a dispute, whose effect is to declare the rights and obligations of the parties to the dispute. Court orders must be reduced to writing in clear and concise terms that do not admit to any ambiguity or equivocation. A court order becomes binding once the judicial officer who issues it affixes his or her signature on the document. In essence, court orders are a direction or command by a court of law, as such, they must be sufficiently clear and specific as to allow a party to determine, with reasonable certainty, what it is they are required to do or not do. An order that lacks clarity and preciseness is incapable of enforcement. If the order issued does not have the critical elements of an order, the court would have failed to exercise to apply the law and to answer to the prayers sought by the parties.

1. INTRODUCTION

A discussion on court orders is not complete without an exposition of the constitutional background. Section 162 of the Constitution of Zimbabwe, 2013 bestows judicial authority upon the courts. This section must be read with the supremacy clause of the Constitution contained in

[1] A paper presented at the End of First Term Judges Symposium held at Great Zimbabwe Hotel, Masvingo in April 2022.

section 2 which provides that judicial authority derives from the people of Zimbabwe. The Constitution further enjoins organs of State to assist and protect the courts to ensure, among other things, their dignity and effectiveness. To ensure that courts' authority is effective, section 164(3) of the Constitution makes orders of court binding on the State and all persons and governmental institutions and agencies.

A court order is an official pronouncement by a court which has the effect of determining matters of rights and obligations in dispute between parties. It is generally reduced to writing and becomes binding once the judicial officer who issues it affixes his or her signature on the document. John Bouvier[2] defines "orders" as rules made by a court or other competent jurisdiction.[3] According to this author, the formula is generally in these words: *"It is ordered, etc ..."[4].*

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[2] John Bouvier, *Bouvier's Law Dictionary,* Vol II, Sweet and Maxwell Limited, London at page 555.
[3] John Bouvier, *Bouvier's Law Dictionary,* Vol II, Sweet and Maxwell Limited, London at page 555.
[4] John Bouvier, *Bouvier's Law Dictionary,* Vol II, Sweet and Maxwell Limited, London at page 555.

In *R* v *Recorder of Oxford, ex p Brasenose College,*[5] in considering the meaning of the word "order" BRIDGE J said:

> *"The word 'order' in relation to legal proceedings in itself is ambiguous; clearly it may mean, perhaps, a linguistic purist would say that its most accurate connotation was to indicate, an order requiring an affirmative course of action to be taken in pursuance of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decisions of courts."*[6]

PHILLIPS JA in *McPherson* v *The General Legal Council*[7] held as follows at para 30:

> *"In legal parlance 'order' is used in a number of ways and based on the context will take on a different meaning. Further, these words are often used interchangeably. 'Order' is also used to mean, based on the context, directions or directives given in legal proceedings, as well as the judgment handed down when a matter is finally disposed of."*[8]

It is evident from the above that court orders are a direction or command by a court of law, and directions or commands termed "rules" are included in "orders". In most cases, an order which is granted by a court is based on a "draft order" which is drawn by the party who approaches the court for relief. A draft order embodies

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[5] [1969] 3 All ER 428.
[6] *R v Recorder of Oxford, ex p Brasenose College* [1969] 3 All ER 428.
[7] [2016] JMCA App 19.
[8] *McPherson* v *The General Legal Council* [2016] JMCA App 19.

the exact nature and type of relief which a party seeks. A draft order remains a proposition and only becomes a court order if granted by the court. A court may endorse the draft order with or without variations.

2. THE NATURE OF COURT ORDERS

It is important to note that no court order can be made except upon application to the court for a particular specific relief. The term "order" implies that there must be a distinct application by one of the parties for definitive relief. These sentiments were echoed in *Dickenson* v *Fisher's Executors*,[9] where INNES ACJ (as he then was) had this to say:

> *"The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order."*[10]

It also flows from the above that court orders vary in content depending on the type of proceedings, the stage of proceedings, and the procedural and evidentiary rules governing those proceedings. The

[9] 1914 AD 424.
[10] *Dickenson v Fisher's Executors* 1914 AD 424.

simplest of orders is one embodying instruction as to how to proceed in a legal suit, for example, a court order directing the defendant to file certain documents by a specific date. Another species of orders reflects the several divisions of the law, for example, a protection order, a custody order, a maintenance order in family law, an order for eviction under the broad spectrum of property law, or an order for committal in criminal law.

The more significant division relates to the stage of the proceedings, thus the distinction between interim and final orders of court. An interim order is an order which is made in the course of the proceedings and a final order is an order which concludes the action. In some cases, it determines the validity of subsequent proceedings which may flow from either a grant or refusal of the order. For example, an aggrieved party cannot appeal against an order of court which does not have a final and definitive effect without leave of the court. See *Blue Rangers Estate (Pvt) Ltd* v *Muduviri and Anor*[11] and section 43 of the High Court Act.[12]

A court order may also be an order for the payment of a sum of money - *ad pecuniam solvendum* or an order *ad*

[11] 2009 (1) ZLR 368 (S).
[12] Section 43 of the High Court Act [*Chapter 7:06*].

factum praestandum - that is, an order to do, or abstain from doing, a particular act, or to deliver a thing.

2.1. *The Purpose of a Court Order*

The primary purpose of a court order is to authoritatively determine the rights, duties, and obligations of parties per the court's mandate in respect of the issues placed before it. The Supreme Court in *Nzara and Ors* v *Kashumba N.O. and Ors*[13] at page 13 of the cyclostyled judgment held that: -

> *"The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence, and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court.*
>
> *This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues. It is only when the issues or the facts are not clear that the court can seek their clarification to enable it to correctly apply the law to those facts in determining the issues placed before it by the parties."*[14]

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[13] SC 18/18.

[14] *Nzara and Ors* v *Kashumba N.O. and Ors* SC 18/18.

On this point it is appropriate to refer to what was said by BHAGWATI J (as he then was) in *M. M. Pathak* v *Union*[15] in relation to the practice of the Supreme Court of India: -

> *"It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case".*[16]

Therefore, it is clear from the above that the function of a court order is to determine issues between contesting parties, and not to go beyond the scope of the parties' dispute. Where an order is made in favour of one party, the other party bears a correlative obligation to comply with the court. In *Hadkinson* v *Hadkinson*[17] the court made the following remarks: -

> *"It is a plain and unqualified obligation of every person against, or in respect of, whom the order is made by the court of competent jurisdiction to obey it, unless and until that order is discharged. Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of court is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such a person will be entertained unless he has purged himself of his contempt."*[18]

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15 (1978) 3 SCR 334.
16 *M. M Pathak* v *Union* (1978) 3 SCR 334.
17 [1952] 2 All ER 567 (CA).
18 *Hadkinson* v *Hadkinson* [1952] 2 All ER 567 (CA).

A court order in essence addresses and disposes of live and concrete issues of dispute between the parties. In most cases, it is the basis upon which a successful party to a suit enforces its rights, e.g., a creditor can get an order declaring a debtor's immovable property especially executable in order to satisfy the judgment debt.

Disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice in that the dignity, repute and authority of the court, whose judicial authority is derived from the people and constitutionally protected, is called into question. In *Matjhabeng Local Municipality* v *Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others* v *Compensation Solutions (Pty) Ltd*[19] NKABINDE ADCJ stated the following at para 54:

> *"In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of CAMERON JA (as he then was) for the majority in Fakie:*
>
> > *'[W]hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the*

[19] [2017] ZACC 35.

broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.'"[20]

2.2. The Requirements of a Court Order

An order of a court must be sufficiently clear and specific as to allow a party to determine, with reasonable certainty, what it is required to do. In *Eke* v *Parsons*,[21] the South African Constitutional Court highlighted the essential features of a court order as follows:

> *"A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance ... If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard it."*[22]

In line with the sentiments expressed above, a court order must satisfy the following: –

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[20] *Matjhabeng Local Municipality* v *Eskom Holdings Limited and Others; Shadrack Shivumba, Homu Mkhonto and Others* v *Compensation Solutions (Pty) Ltd* [2017] ZACC 35.

[21] [2015] ZACC 3.

[22] *Eke* v *Parsons* [2015] ZACC 3.

2.2.1. Clarity

A court order's wording must be unambiguous and must easily convey the decision of the court. It must not be subject to subsequent clarifications. A party must know with certainty what is required of him or her. In *Lujabe* v *Maruatona*[23] the court held at para 17 that:

> *"The issue that arises in a case where the settlement agreement has been made an order of Court and in the context of contempt proceedings is whether such an order is executable or enforceable. The basic principle is that for an order to be executable or enforceable, its wording must be clear and unambiguous. An order that lacks clarity in its wording or is vague is incapable of enforcement. The other basic principle is that the order should, as soon as it is made, be readily enforceable. In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order."*[24]

2.2.2. Precision

A court order must be marked by exactness and accuracy. It must be a stand-alone determination which addresses the salient issues of a case. The precision requirement also necessitates that the order should set out the logical process behind the court's ruling. Hence,

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[23] (35730/2012) [2013] ZAGPJHC 66 (15 April 2013).

[24] *Lujabe* v *Maruatona* (35730/2012) [2013] ZAGPJHC 66 (15 April 2013).

the order must inform the litigating parties of the competing facts and arguments used as a basis for the decision for purpose of review or appeal. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of the facts and argument have been accepted, and if not, why.

The Supreme Court of North Carolina in *Coble* v *Coble*[25] held as follows in this regard:

> *"Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto."*[26]

2.2.3. Enforceability

A court will not make an order that cannot be enforced. In *Administrator, Cape* v *Ntshwaqela*[27] the court noted that: -

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[25] 268 S.E. 2d 185 (1980) 300 N.C. 708.
[26] *Coble* v *Coble* 268 S.E. 2d 185 (1980) 300 N.C. 708.
[27] 1990 (1) SA 705 (A).

> *"It is trite that a Court will not engage in the futile exercise of making an order which cannot be carried out. So, an order for specific performance of a contract will be refused where performance is impossible; and an order ad factum praestandum will similarly be refused in such circumstances (e.g., an order for maintenance where the defendant is destitute)."*[28]

An order must be capable of being imposed for purposes of compliance. It must be capable of being made effective or, put differently, it must be executable. In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order. This requirement is closely related to the aforementioned features of a court order. An order that lacks clarity and preciseness is incapable of enforcement. If the order issued does not have the critical elements of an order aforementioned, the court would have failed to exercise its discretion correctly.

2.3. Why Do These Requirements Exist?

The requirements that a court order must be clear, specific, and capable of being enforced ensure effective case disposition and good administration of justice. A court ought to be mindful of these requirements

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[28] *Administrator, Cape* v *Ntshwaqela* 1990 (1) SA 705 (A).

when considering whether to grant an order, particularly where the order sought is based on the parties' settlement agreement. It must ensure that the order it issues has all the requisite features. If the order issued does not have the key elements of an order, the court will have failed to exercise its discretion properly.[29]

3. Conclusion

In summation, a court order is an official proclamation by a judge which has the effect of determining the legal issues of a dispute between parties. Court orders vary in content and provisions depending on the type of proceedings and relief sought. As stated above, no order can be made except upon application to the court for relief. There are certain requirements that a court order must satisfy, and as discussed above, these include clarity and enforceability. These requirements hinge on the doctrine of effectiveness. Literally, an order must be capable of being imposed for purposes of compliance. A court must not engage in the futile exercise of making an order which cannot be enforced.

[29] *Lujabe v Maruatona* [2013] ZAGPJHC 66.

PROVISIONAL COURT ORDERS COUCHED AS FINAL ORDERS[30]

Honourable Mr. Justice L. Malaba

The Chief Justice, Republic of Zimbabwe

Abstract

Provisional orders, also known as interim orders or temporary orders, are court orders that are issued on an interlocutory basis, pendente lite, to address urgent or immediate matters. These orders are designed to provide temporary relief or protection until a final decision can be made. Provisional orders are temporary in nature and are not intended to visit any permanent effect. They are decreed to address immediate issues or prevent irreparable harm pending a final resolution. Provisional orders avail various forms of relief, depending on the type of case. They may be used to maintain the status quo, protect the rights of parties, prevent further harm, or damage, or ensure fairness during the legal process or proceedings.

1. INTRODUCTION

This presentation addresses the irregularity of granting provisional orders whose substance and effect is in fact final. The paper is premised on the following case law: -

- *Blue Rangers Estates (Pvt) Ltd* v *Muduvuri & Anor* 2009 (1) ZLR 368 (S);

[30] A paper presented at the End of First Term Judges Symposium held at Great Zimbabwe Hotel, Masvingo in April 2022.

- *Airfield Investments (Pvt) Ltd* v *The Minister of Lands, Agriculture & Rural Resettlement & 4 Ors* 2004 (1) ZLR 511 (S);
- *Jamal Ahmed & 3 Ors* v *Russel Goreraza & 2 Ors* HH 402/17;
- *Constantino Guvheya Dominic Chiwenga v Marry Mubaiwa* SC 86/20; and
- *Mohammed Ismail [in his capacity as the guardian of Yusuf Ismail (a minor)] v St John's College and Others* CCZ 19/19.

In Zimbabwe, applications for provisional orders are regulated by rule 60 of the High Court Rules. In terms of rule 60 (13) of the Rules, where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional order shall be in Form 27 of the Rules. Any other provisional order not specified under rule 60 (13) shall be in Form 26 and be accompanied by terms of final order on Form 26A as required by rule 60(11) of the Rules.

It is the intention of this paper to go back to the foundations of the remedy of provisional orders and in the process, define what a proper provisional order is in an effort to equip Judges with knowledge on the true

nature of what a provisional order is. The object of this paper is to also emphasise the need to always be aware that a provisional order is temporary by its nature and that granting a final order in the form of a provisional order does not serve that purpose. As reference will be made to decisions of other jurisdictions, the terms "provisional order", "interim relief", "interlocutory order" and "interlocutory injunction" will be used interchangeably.

2. WHAT IS A PROVISIONAL ORDER?

According to the author C.B. Prest in his textbook titled "*The Law and Practice of Interdicts*",[31] a provisional order is a remedy by way of an interdict which is intended to prohibit all *prima facie* illegitimate activities. By its very nature, it is both temporary and provisional, providing relief which serves to guard the applicant against irreparable harm which may befall him, her should a full trial of the alleged grievance be carried out. As the name suggests, it is provisional in nature, as the parties anticipate certain relief to be made final on a certain future date upon which the applicant has to fully

[31] C.B. Prest (2014) "*The Law and Practice of Interdicts"* 9 ed Juta & Co (Pty) Ltd.

disclose his, her or its entitlement to a final order that the interim relief sought was ancillary to.

3. WHAT IS THE PURPOSE OF A PROVISIONAL ORDER *VIS-À-VIS* THE RULE *NISI*?

The purpose of a provisional order has been set out in an array of case law. The court in the South African case of *Development Bank of Southern Africa (Ltd)* v *Van Rensburg No & Ors*[32] stated that its purpose is to preserve the *status quo* pending the return day. See also C.B. Prest in his textbook titled "*The Law and Practice of Interdicts.*"[33] The purpose remains the same under English law, as was confirmed in the case of *Attorney General* v *Punch Limited & Anor.*[34] The court articulated the purpose of a provisional order referred to in that jurisdiction as an "interlocutory injunction" as follows at para 99: -

> *"The purpose for which the court grants an interlocutory injunction can be stated quite simply. In American Cyanamid Co v Ethicon Ltd [1975] AC 396, 405D LORD DIPLOCK described it as a remedy which is both temporary and discretionary. Its purpose is to regulate, and where possible to preserve, the rights of the parties*

[32] [2002] 3 All SA 669 (SCA).
[33] C.B. Prest (2014) "*The Law and Practice of Interdicts*" 9 ed Juta & Co (Pty) Ltd
[34] [2002] UKHL 50.

> *pending the final determination of the matter which is in issue by the court."*[35]

The purpose of an interlocutory injunction in Australia is also defined as follows in the case of *Re Brian Charles Gluestein; Ex Parte Anthony*[36]

> *"Relevantly, the purpose of an interlocutory injunction is to preserve the position until the rights of the parties can be determined at the hearing of the suit. A plaintiff seeking an interlocutory injunction must be able to show a sufficiently arguable claim to a right to the final relief in aid of which the interlocutory relief is sought. (Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199 [9] - [11] (GLEESON CJ).) If the application for an injunction cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears. (ABC v Lenah Game Meats Pty Ltd supra (GLEESON CJ).)*
>
> *To put the same point another way, an interlocutory injunction aims to prevent the injustice to the plaintiff of the refusal of an injunction in support of relief to which the plaintiff may ultimately be held to be entitled. (Twinside Pty Ltd v Venetian Nominees Pty Ltd [2008] WASC 110; Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533, 535; Appleton Papers Inc v Tomasetti Paper Pty Ltd (1983) 3 NSWLR 208, 216.) As LORD DIPLOCK explained in American Cyanamid Co v Ethicon Ltd [1975] UKHL 1 'the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial'. As was said in Minister for Immigration v VFAD [2002] FCAFC 390; (2002) 125 FCR 269 [124] the stream*

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[35] *Attorney General v Punch Limited & Anor* [2002] UKHL 50.
[36] [2014] WASC 381.

(interlocutory relief) cannot rise higher than its source (rights claimed at the final hearing)."[37]

Incidental to the purpose of a provisional order as defined above is the term rule *nisi*. In explaining what the rule *nisi* is, the court in the *Development Bank of Southern Africa (Ltd)* case *supra*[38] went on to hold as follows at para 14:-

> *"... Thus it was said by CORBETT CJ in Shoba v Officer Commanding, Temporary Police Camp, Wagendrift and Another; Maphanga v Officer Commanding, South African Police and Murder and Robbery Unit, Pietermaritzburg and Others [1995] ZASCA 49; 1995 (4) SA 1 (A) at 18J-19B:*
>
> > *'The term "rule nisi" is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the relief applied for should not be granted (see Van Zyl's Judicial Practice 3 ed 450 et seq; Tollman v Tollman 1963 (4) SA 44 (C) at 46H). Walker's Oxford Companion to Law, states that a decree, rule, or order is made nisi when it is not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As Van Zyl points out, our common law knew the temporary interdict and a curious mixture of our practice with the practice of England took place and the practice arose of asking the Court for a rule nisi, returnable on a certain day, but in the meantime to operate as a temporary interdict.'"*

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[37] *Re Brian Charles Gluestein; Ex Parte Anthony* [2014] WASC 381.

[38] [2002] 3 All SA 669 (SCA); See also *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654.

From the above case law, it is clear and must be emphasised that an order for interim relief must be confirmed or discharged on a certain future date should the parties be so willing. Even the terms of the mandatory Form 26 of the Rules contemplate that it is only on a certain return date that a final order can be made. Resultantly therefore, an order for interim relief can never be final in effect because, should it be final, the confirmation or discharge of the provisional order will no longer be possible.

Once informed on what the purpose of a provisional order is, one has to be guided by the principles surrounding an application for interim relief.

4. GENERAL GUIDING PRINCIPLES IN AN APPLICATION FOR INTERIM RELIEF

The following four principles have been applied in Zimbabwe and are widely accepted as applicable in South Africa, England, and Australia. The principles, which are in effect requirements to be met by an applicant when seeking interim relief, are as follows -

i. *that the right which is the subject matter of the main action and which he, she or it seeks to protect by means*

of interim relief is clear or, if not clear, is prima facie established though open to some doubt;

ii. *that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he, she or it ultimately succeeds in establishing his, her or its right;*

iii. *that the balance of convenience favours the granting of interim relief; and*

iv. *that the applicant has no other satisfactory remedy.*

The above principles, as set out in the South African cases of *Rudolph and Anor* v *Commissioner for Inland Revenue and Ors*[39] and *L F Boshoff Investments (Pty) Ltd* v *Cape Town Municipality,*[40] and were also relied upon by the Supreme Court in the case of *Airfield Investments (Pvt) Ltd supra*.[41] For the same position in Australia, see the following cases –

- *Twinside Pty Ltd* v *Venetian Nominees Pty Ltd* [2008] WASC 110;
- *Re Brian Charles Gluestein; Ex Parte Anthony* [2014] WASC 381;
- *Castlemaine Tooheys Ltd* v *The State of South Australia* [1986] HCA 58; (1986) 161 CLR 148;
- *Heugh* v *Central Petroleum Ltd* [2012] WASC 155 [17] [22];
- *ABC* v *Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199 [9] – [11]*; and

[39] 1994 (3) SA 771.
[40] 1969 (2) SA 256 (C).
[41] 2004 (1) ZLR 511 (S).

o *Beecham Group Ltd* v *Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618.

Zoning in on the principle that a *prima facie* case must be shown, the court in the *Beecham Group Ltd* case[42] held that the phrase "*prima facie* case" does not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify, in the circumstances, the preservation of the *status quo* pending the trial. How strong the probability needs to be depended upon the nature of the rights the plaintiff asserts, and the practical consequences likely to flow from the orders the plaintiff seeks.

The point was further made in the Australian cases of *Films Rover International Ltd* v *Cannon Film Sales Ltd*[43] and *Madaffari* v *Labenai Nominees Pty Ltd*,[44] where it was held that the grant of an injunction involves balancing the injustice which might be suffered by the defendant if the injunction is granted and the plaintiff later fails at trial, against the injustice which might be suffered by the plaintiff if the injunction is not granted and the plaintiff later succeeds at trial.

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[42] [1968] HCA 1; (1968) 118 CLR 618.
[43] [1987] 1 WLR 670.
[44] [2002] WASC 67.

It must also be highlighted that in considering the balance the court must, as a matter of principle, consider the nature and consequences of the particular injunction sought. See *Glenwood Management Group Pty Ltd* v *Mayo*;[45] *Todd* v *Novotny*.[46] Fully equipped and knowledgeable on the true essence of a proper provisional order which is valid at law, the next stage is to look at the form of provisional orders.

5. WHAT IS THE FORM OF A PROPER PROVISIONAL ORDER?

It is imperative to take due cognisance of the language of the provisional order itself. Like any other order of court, a provisional order must speak for itself. It must be clear and exact as to what it is that it prohibits or permits pending its finalisation or confirmation or discharge on the return date. Lord Nicholls of Birkenhead in *Attorney General v Punch Limited and Anor*[47] emphasised the point by stating as follows at paras 35-36: -

> *"An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly based*

[45] [1991] 2 VR 49.
[46] [2001] WASC 171.
[47] [2002] UKHL 50.

> *principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. … An interlocutory order ought not to be drawn in terms where it is apparent that such a dispute may arise over its scope."*[48]

Having explained that the language in a provisional order must be clear as to what exactly it is that it prohibits pending the return date, I will in turn deal with the most important aspect of a provisional order; What substance ought to be in a provisional order. The late retired CHIDYAUSIKU CJ stated in the case of *The Registrar General of Elections* v *Combined Harare Residents Association and Anor*[49] as follows:

> *"Where the relief sought as interim relief is essentially the same as the relief sought on the return day, the court's correct approach should be to proceed by way of an urgent court application seeking final relief".*

In *Kuvarega* v *Registrar General and Anor, supra,* CHATIKOBO J aired the following sentiments with regards to the form of a provisional order:

> *"The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. … If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a prima facie case. This, to my mind, is*

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[48] *Attorney General v Punch Limited and Anor* [2002] UKHL 50.
[49] 2002 (1) ZLR 83 (SC).

> *undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. ... Care must be taken in framing the interim relief sought as well as the final relief so as to obviate such incongruities."*[50]

An order for interim relief must be temporary in effect. It must be temporary in nature such that a return date must become a necessity. Furthermore, the terms of an interim relief order must speak to its title. The term "provisional order" must not only be given lip service, for it is supposed to communicate its true nature to be a proper and valid provisional order at law.

6. WHAT A COURT FACED WITH AN APPLICATION FOR INTERIM RELIEF MUST CONSIDER BEFORE GRANTING OR DISMISSING THE APPLICATION?

The role of the court in an application for interim relief is of extreme importance. It is not to be undermined. In the case of *Attorney General* v *Punch Limited and Anor, supra,* the court stated that the purpose of interim relief should not be confused with the court's reasons for deciding that it would be appropriate to grant an

[50] *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H).

interlocutory injunction. It was stated at para 99 as follows: -

> *"The court must of course have a good reason for granting an order of this kind. It must be satisfied in the first place that a sufficient ground has been stated to show that there is a real dispute between the parties. As LORD DIPLOCK put it in American Cynamid Co v Ethicon Ltd supra at p 407, the court must be satisfied that there is a serious question to be tried. It must then consider whether the balance of convenience lies in favour of granting or refusing an interlocutory injunction. But it is in no position to reach a final decision at the interlocutory stage on the matters which are in dispute between the parties. It is no part of the court's function at that stage to resolve conflicts of evidence or questions of law that require detailed argument. All it can do is preserve the status quo in the meantime until these matters can be determined at the trial."*

In the celebrated English case of *American Cyanamid Co*,[51] it was held that the court's duty, when faced with an application for a provisional order, must be follows: -

> *"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."*

[51] *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1.

Indeed, a person drafting an order for interim relief has the duty to make the terms of that order reflect the true nature of the interim relief sought. The duty does not mean, however, that all the applications for an interim relief placed before a judge under the title “interim relief” or “provisional order” are exactly so. It has been noted that most of the interim orders placed before the High Court are in fact final in nature, which has seen most of them being appealed against.

It essentially means that a Judge, when approached with an application for interim relief, must not allow himself or herself to be misled by the mere title of the provisional order. The Judge has the onerous and unassailable duty to go a step further and ensure that indeed the substance of the terms of the interim relief placed before him or her have an interlocutory effect on the rights of the parties. It is the Judge’s duty to make sure that the applicant is not granted what he, she or it is not entitled to in a final order couched as a provisional order. It is the duty of the court to protect a defendant from an applicant who disguises a relief for a final order in the form of a provisional order. The Judge must be satisfied that should he or she grant the interim relief sought as it is placed before him or her, there remains an issue to deliberate upon on the return date. The point

made in essence is that an application for interim relief is not for the asking.

The court in the case of *Attorney General* v *Punch Limited and Anor, supra,* further went on to state as follows at para 43: -

> *"When proceedings come before a court the plaintiff typically asserts that he has a legal right which has been or is about to be infringed by the defendant. The claim having come before the court, it is then for the court, not the parties to the proceedings or third parties, to determine the way justice is best administered in the proceedings. It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the court's determination on what interim protection is needed and is appropriate. … The reason why the court grants interim protection is to protect the plaintiff's asserted right. But the manner in which this protection is afforded depends upon the terms of the interlocutory injunction. The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done."*

As highlighted earlier, interim relief is granted by a court in the exercise of its discretion. However, that discretion must not be abused by way of a court granting a final order couched in the form of a provisional order simply because it has come in the name of a provisional order. The discretion has to be exercised only after a court has fully applied its mind to and scrutinised the substance of

the interim relief sought and its subsequent effect on the rights of the parties in the event that it is granted.

The following three questions may be asked before making the order: -

1. *Would there be anything to confirm or discharge on the return date if the interim relief sought as placed before the court is granted?*
2. *Will the defendant be condemned to that provisional order because there remains nothing to determine on the return date due to the finality in the order granted?*
3. *If the interim relief sought is granted, will the aggrieved defendant almost obviously succeed in either setting aside that interim order on appeal or in an application to rescind the order on the basis that it was erroneously sought and granted?*

Where the provisional order is granted *ex parte* the same principles apply. The court in *Phillips and Ors* v *National Director of Public Prosecutions*[52] at para 29 stated as follows: -

> *"It is trite that an ex parte applicant must disclose all material facts which might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it."*[53]

Having fully explained what a provisional order is, and the principles linked to it, its purpose and substance or

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[52] [2003] 4 All SA 16 (SCA).

[53] *Phillips and Ors v National Director of Public Prosecutions* [2003] 4 All SA 16 (SCA).

form and the role of the court in granting or dismissing an application for interim relief, the paper examines the relevant case law.

7. CASE LAW FOR PROVISIONAL ORDERS

7.1. *Blue Rangers Estates (Pvt) Ltd V Muduvuri & Anor*[54]

7.1.1. Factual Background

This is a judgment where the decision was made to dismiss an urgent chamber application before a single judge of the Supreme Court for the striking off from the roll of an appeal by the first respondent. The application was made with the applicant being of the view that the first respondent had not applied for leave to appeal against an interlocutory order.

The facts leading to the application were as follows: -

A spoliation order in the form of a provisional order was made in the High Court in favour of the applicant which was for the restoration of peaceful and undisturbed possession of an estate in Chegutu. The same order directed the first respondent and all those claiming possession of the estate through him to vacate the

[54] 2009 (1) ZLR 368 (S).

estate. In the event of their failure to vacate the premises the order authorised the Deputy Sheriff to remove them.

Being a "provisional order", the terms of the final order sought on the return day were that the quiet and undisturbed possession of the estate by the applicants would be confirmed. The final order would also declare the continuation of the applicant's right to remain on the property until a time when the applicant was lawfully evicted by a competent order of court having final effect. It was also a term of the final order that the conduct of the second respondent would be declared to be an unlawful spoliation of the applicant's property.

The first respondent, having been aggrieved by the purported provisional order, filed a valid notice of appeal for its setting aside in the Supreme Court being of the view that although provisional in form the High Court order was final and definitive. The applicant then made a chamber application for the striking off of the appeal from the roll because in its view, the provisional order made was interlocutory and, in terms of section 43 (2)(d) of the High Court Act,[55] no appeal lay to the Supreme Court against an interlocutory order without leave of the court. The applicant asserted that no proper appeal lay

[55] Section 43(2)(d) of the High Court Act [*Chapter 7:06*].

before the Supreme Court without leave to appeal being sought by the first respondent.

Relevant to this paper, the application was opposed on the merits, the first respondent being of the firm view that the order that it was appealing against was final and definitive despite the fact that it was in interlocutory form. In essence, the first respondent argued that because of the nature of the order appealed against, no leave of the court was required for the appeal to be valid.

In arguing against the first respondent on the merits of the application, the applicant relied on two decisions of the High Court in *Chikafu* v *Dodhill (Pvt) Ltd and Ors*[56] and *Nyikadzino* v *Asher and Ors*,[57] where the High Court at some stage had issued spoliation orders in the form of a provisional order just as in this case.

The applicant in the *Chikafu* case,[58] believing that the provisional order was interlocutory, approached the High Court for leave to appeal. Leave to appeal was denied by the Judge who, although accepting that a spoliation order had been made, found that the

[56] HH-41-09.
[57] HH-36-09.
[58] *Chikafu* v *Dodhill (Pvt) Ltd and Ors* HH-41-09.

applicant in that case had no prospects of success on appeal.

In the *Nyikadzino* case[59] the respondent had instructed the Deputy Sheriff to execute the eviction order, although an appeal had been noted against the provisional order. The applicant's legal practitioners had advised that no appeal was pending before the Supreme Court as no leave to appeal against the "interlocutory order" had been sought and granted. The learned Judge found that since the spoliation order had been made in the form of an interlocutory order, no valid appeal could have been made without leave of the court.

In determining the merits of the main application before the Supreme Court, the legal issue for determination was whether the order made by the High Court was interlocutory and, if so, whether it was appealable without leave of the court. The Supreme Court found that, although interlocutory in form, the order that was the subject of the appeal was a spoliation order which is final in effect. Therefore, an appeal against it without

[59] *Nyikadzino* v *Asher and Ors* HH-36-09.

leave of the court was valid and proper at law. The application was dismissed for lack of merit.

7.1.2. Principles regarding provisional orders as established by the decision in Blue Rangers Estates (Pvt) Ltd v Muduvuri and Anor[60]: -

a. *The test of considering whether an order is final and definitive or interlocutory is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge.*

b. *In order to determine whether or not an order is provisional, one has to look at the nature of the order and its effect. Does the aggrieved party anticipate a decision in his, her or its favour on the return day or is his, her or its only relief by way of an appeal because the provisional order is final and definitive in nature?*

c. *A provisional order is not for the granting simply because it has been titled as such. A court has to go a step further and establish if at all an order titled a provisional order is indeed provisional in substance.*

d. *No leave is required to appeal against a final order couched in the form of a provisional order.*

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[60] *Blue Rangers Estates (Pvt) Ltd v Muduvuri and Anor* 2009 (1) ZLR 368 (S).

e. *An order although provisional in form is final and definitive because it has the effect of a final determination of the issues between the parties in respect to which relief is sought from the court.*

f. *Where the purported provisional order is such that there is no issue for determination on the return day, the order is in actual fact a final order.*

g. *The fact that a final order is in the form of an interim relief is irrelevant to the consideration of the question whether it is final or interlocutory. The issue of an order in the form in which it was applied for does not make the order itself a provisional order.*

h. *For an order to have the effect of an interim relief, it must be granted in aid of, and as ancillary to, the main relief which may be available to the applicant on the final determination of his, her or its rights in the proceedings.*

i. *A spoliation order is a final order, whether or not it is made in the form of a provisional order.*

j. *A final order cannot be made as a provisional order in the hope that its sustainability at law will be established on the return day. The object of seeking a provisional order pending the return day is of paramount importance.*

7.2. *Airfield Investments (Pvt) Ltd* v *The Minister of Lands, Agriculture & Rural Resettlement and 4 Ors*[61]

[61] 2004 (1) ZLR 511 (S).

7.2.1. Factual Background

The Supreme Court was faced with an appeal against the refusal by the High Court to grant an order for interim relief. In summary, the appellant provisionally sought an order that -

1. *The first respondent would be interdicted from further proceeding with the acquisition in terms of the Land Acquisition Act [Chapter 20:10] ("the Act") of the property formerly owned by the appellant pending the resolution of the question of whether the acquisition of the appellant's former land was constitutional.*
2. *The operation of the acquisition order would also be suspended.*
3. *The appellant would continue its farming activities during the currency of the interim order without disturbance.*
4. *The third respondent would render any and all lawful assistance to the appellant in ensuring its continued occupation, use and enjoyment of the aforementioned property.*

The facts leading to that application are as follows -

After following due process as required by the Act, the first respondent compulsorily acquired agricultural land which was once owned by the appellant for resettlement purposes in terms of the Act. The order of the acquisition of the appellant's property was duly served on its managing director on 9 April 2002. Instead of following legal avenues to legalise its continued stay on the now compulsorily acquired land, the appellant

made a deliberate decision to defy the law and continue to occupy the land, proceeding with its farming operations. The land in issue was subsequently offered to the fifth respondent in August 2003.

The appellant refused to give the fifth respondent vacant possession of the land. The appellant made an application in the High Court for an order declaring to be unconstitutional the legal provisions under which its formerly owned land was acquired. Another application was then made by the appellant as summarised earlier, the dismissal of which became the subject of the appeal.

In dismissing the application, the High Court found that the first respondent was authorised at law to acquire the land for resettlement purposes. Therefore, he could not be interdicted from performing a legal duty. It also found that the appellant had acted in open defiance of a valid law that had not, at the time of acting as such, been declared unconstitutional. The learned Judge also correctly declined to grant the interim relief, finding that doing so would give the appellant protection to continue its farming activities on land that no longer belonged to it, which would in effect constitute an illegality. It is the decision to deny the relief sought by the

appellant in the High Court that became the subject of the appeal.

In dismissing the appeal, the Supreme Court found that an applicant for interim relief has to show a *prima facie* right, and that the appellant did not have a *prima facie* right to speak of since its ownership of the land had since been validly taken away at law. It also found that since the first respondent had properly acquired the land, he could not have been interdicted from acting well within the dictates of the law. The Supreme Court, like the High Court, also found that the appellant could not have been allowed to continuously be on the acquired land when it was no longer the owner of it.

7.2.2. *Principles regarding provisional orders as established by the decision in Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture & Rural Resettlement & 4 Ors*[62]: -

a. *An interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief.*

[62] *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture & Rural Resettlement & 4 Ors* 2004 (1) ZLR 511 (S).

b. *In an application for interim relief, the applicant has to prove a prima facie right not a clear right, if proof of that clear right at that stage entitled the applicant to a final order.*

c. *The prima facie right to be established at the time that the interim relief is applied for cannot be on the probability that existing legislation which the applicant has contravened may be altered on some undetermined future date or on the possibility that such existing legislation would be held unconstitutional.*

d. *An interim interdict is not a remedy for past invasions of rights and will not be granted to a litigant whose rights in a thing have already been taken from him, her, or it by operation of law at the time he, she or it makes an application for interim relief. In other words, the prima facie right must be in existence at the time that the application for interim relief is made.*

e. *A court faced with an application for interim relief must consider whether the applicant is likely to succeed in getting a confirmation of the provisional order on the return day. Where a final order is likely to be made as a provisional order, then there would be no return day. It should follow that interim relief which is likely to have final effect ought not to be granted.*

f. *An interim interdict is not a remedy for prohibiting lawful conduct.*

g. *An interim interdict as a remedy for the prohibition of unlawful conduct cannot be granted for the protection of the illegal activities of the applicant who wishes to continue to commit an offence at law.*

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7.3. *Jamal Ahmed & 3 Ors v Russel Goreraza & 2 Ors*[63]

The applicants in the case sought the confirmation or discharge of the following order which they had been granted as interim relief in the absence of the respondents:

7.3.1. Court Order

"IT IS ORDERED THAT:

1. *The respondents and all those claiming through them forthwith vacate the premises known as NOS. 409 HARARE DRIVE, POMONA, HARARE; NO. 18 CAMBRIDGE ROAD, AVONDALE, HARARE and NO. 75 KING GEORGE ROAD, AVONDALE, HARARE.*
2. *In the event that the respondents and their agents do not vacate the said premises within 24 hours of the service of this order at each one of the premises, that the Sheriff be and is hereby authorised to evict the respondents, their agents at each one of the premises and all those claiming title through the respondents and to restore and hand over the properties and their keys to the applicants' agents and nominees.*

[63] HH 402/17.

3. *The respondents restore onto the premises all property removed and taken to the workers' alternative homes.*
4. *Costs to be costs in the cause."*

It is averred that the respondents, having been involved in a misunderstanding with the first applicant, took control and occupation of the first applicant's immovable properties, evicting the first applicant's agents therefrom without following due process and without the first applicant's consent. Having failed in the negotiations with the respondents in order to retake possession of the properties, the applicants then made an application for and were granted the "provisional order".

In the confirmation or discharge proceedings, the applicants' argument was that the order was a final order for all intents and purposes although it was titled a provisional order. They further asserted that any person aggrieved by the order had to proceed by way of an appeal, as it could not be subject to any confirmation or discharge proceedings in the High Court which had become *functus officio.* The respondents on the other hand insisted that the order was merely provisional, and the High Court had jurisdiction to confirm or discharge it.

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The Judge in the High Court agreed with the applicants that the order was undeniably a spoliation order couched in the language of a final order. It found that the order had finally resolved the dispute between the parties therefore no return date could have been spoken of. However, looking at the import of the "provisional order", the Judge found that it could not be subject to confirmation or discharge because the rights of the parties before it had been finally adjudicated upon. The Judge declined to confirm or discharge the order and went on to rescind the order *mero motu* in terms of rule 449(1)(a) of the Rules, being of the view that the order had been erroneously sought and erroneously granted in default of the respondents.

7.3.2. Principles regarding provisional orders as established by the decision in Jamal Ahmed & 3 Ors v Russel Goreraza & 2 Ors

a. *Once an order is deemed final, the court granting it becomes functus officio and the remedy of any party aggrieved by such order lies in an appeal to the Supreme Court or the appropriate intermediate appeal court.*
b. *Once a court on the return date of a "provisional order" with final effect realises that the provisional order with final effect*

was granted by another Judge, that court if properly informed is compelled to mero motu rescind the erroneously granted provisional order. The aggrieved party in that situation, in addition to the right to appeal, may also apply for rescission of judgment in terms of rule 449(1) of the High Court Rules.

c. *If an order is deemed to be interlocutory or provisional, it remains subject to confirmation or discharge by the same court.*

d. *Where an order is in the form of a provisional order, that in itself does not mean that the order per se is necessarily a provisional order. If the order has the effect of finally determining "the issue or cause of action between the parties" it is a final order, regardless of the misleading form in which it is cast and may not be subject to confirmation or discharge.*

7.4. *Mohammed Ismail [in his capacity as the guardian of Yusuf Ismail (a minor)] v St Johns' College & Ors*[64]

7.4.1. Factual Background

The applicant, who is the father of a minor child ("the minor"), enrolled his son at St. John's College ("the college") for secondary education. At the time of enrolment, the applicant signed a contract with the college which provided that the applicant would be

[64] CCZ 19/19.

bound by the college's Code of Conduct as amended from time to time. The said Code of Conduct made it an offence for a student not to be clean shaven.

In line with his religious beliefs, the minor decided to keep his beard in contravention of the college's Code of Conduct. This prompted the college to refuse the minor access to its facilities until he was clean shaven. The applicant filed an urgent chamber application in the High Court seeking, *inter alia*, an order that the respondents be interdicted from barring the minor from attending school notwithstanding that he had not shaved his beard. It was argued that the college, by refusing the minor access to its facilities, was violating his freedom of religion, and unfairly discriminating against him. Such conduct was said to be in direct violation of ss 60(1) and 56(3) of the Constitution.[65]

The High Court found that the college's Code of Conduct was applied to all learners alike and was not discriminatory. As regards the alleged infringement of s 60(1) of the Constitution, [66] the High Court held that the requirement for the minor to be clean shaven while he was a student at the college was known to the applicant

[65] Section 56(3) as read with section 60(1) of the Constitution of Zimbabwe, 2013.
[66] Constitution of Zimbabwe, 2013.

at the time, he signed the enrolment contract. The High Court held that, by signing the agreement, the applicant compromised the minor's right to freedom of religion in order for the minor to gain entry into the college. The High Court also noted that freedom of religion is not an absolute right and was subject to limitation. The application was consequently dismissed.

Dissatisfied with the decision of the High Court, the applicant noted an appeal to the Supreme Court. The Supreme Court found that, *inter alia*, there was no *prima facie* right that had been established in the High Court and, absent that, the applicant was not entitled to the interim interdict he had sought. The appeal was dismissed.

The applicant was dissatisfied with that decision and sought leave to appeal against it in the Constitutional Court. The contention was that the Supreme Court decided a matter connected with a decision on a constitutional issue when it found that the applicant had not proved in the High Court that an unshaven beard was a fundamental tenet of the Islamic religion. It was also alleged that the Supreme Court erred in not finding that the requirement that the minor must shave his beard

before continuing with his studies was a *prima facie* infringement of his right to freedom of religion.

The Constitutional Court found that the relief sought in the High Court showed that the applicant prayed for an interim order that was fundamentally similar in substance to the final order sought. It was held that the effect of such an order would be the pre-emption of the determination of the substantive issues on the return date. That would negate the very purpose of an interim interdict. The Court also found that the applicant had pursued the wrong remedy, in that he had sought an interim interdict to enforce a right and not to preserve the status *quo* and that he ought to have applied for a substantive hearing of the matter on an urgent basis instead. The application for leave to appeal was dismissed.

7.4.2. Principles regarding provisional orders as established by the decision in Mohammed Ismail [in his capacity as the guardian of Yusuf Ismail (a minor)] v St John's College and Ors

a. *In an application for interim relief, an applicant need only prove a prima facie right and not a clear right.*

b. *An applicant in an application for interim relief cannot seek, on an interim basis, the same constitutional relief that he or she or it seeks on the return day because the effect of such an order would be the pre-emption of the determination of the substantive issues on the return date. That would negate the very purpose of interim relief.*

c. *The purpose of an interim relief is the preservation of the status quo to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right.*

d. *Where interim relief is granted in respect of constitutional rights, no leave to appeal can be granted in respect of that order because an appeal by definition relates to a request being made to a higher tribunal or court for the correction of the final decision of a lower one.*

e. *Constitutional matters ought not to be authoritatively decided on an interim basis, for this would negate the purpose of the return day. The proper procedure is to apply for a substantive hearing of the matter on an urgent basis.*

7.5. *Constantino Guvheya Dominic Chiwenga v Marry Mubaiwa*[67]

7.5.1. Factual Background

[67] SC 86/20.

The appellant and the respondent were customarily married, and the marriage was blessed with three minor children. During the course of the marriage, the parties acquired various immovable and movable properties. The appellant initiated divorce proceedings under customary law and thereafter filed summons in the High Court claiming custody of the three minor children in terms of section 4 of the Guardianship of Minors Act[68] and division of the matrimonial property acquired during the subsistence of the marriage.

The respondent was subsequently arrested on several charges including the attempted murder of the appellant and she was detained. During the period of the respondent's detention, the appellant assumed *de facto* custody of the minor children and possession of the matrimonial property. Thereafter, the respondent filed an urgent chamber application in the High Court for a "provisional spoliation order" essentially directing that the appellant grant her access to the matrimonial home and personal property and custody of the minor children pending the return date. In the final relief, the respondent sought essentially what she had sought in the interim relief.

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[68] Section 4 of Guardianship of Minors Act [*Chapter 5:08*].

The High Court made a final order directing that the appellant restore custody of the minor children to the applicant, and that he be interdicted from interfering with the respondent`s use and enjoyment of the matrimonial property and other movables. That order was granted despite the fact that the respondent had prayed for a provisional order on a *prima facie* basis.

The appellant appealed against that decision on the basis that, *inter alia*, the High Court erred when it granted an interdict when the respondent had sought a "provisional" spoliation order.

The Supreme Court found that a spoliation order, being final in effect, cannot be granted as an interim order on the evidence of a *prima facie* right and that the respondent's quest for a "provisional" spoliation order was misplaced and bad at law. It further found that the purpose of a provisional order is to preserve the status *quo* pending the return day and that it was different from a final order which seeks to finally settle the issues and has no return date. The court also noted that the interim relief which the respondent sought in the High Court was crafted in such a way that if granted she would get the primary relief sought and thus it was nothing other than a final order disguised as a provisional order. As such, it

was held that the High Court had misdirected itself by going on a frolic of its own and granting a final interdict when the respondent had asked for a provisional order after pleading a *prima facie* right.

7.5.2. Principles regarding provisional orders as established by the decision in Constantino Guvheya Dominic Chiwenga v Marry Mubaiwa

a. *A spoliation order being final in effect cannot be granted as an interim order on the evidence of a prima facie right.*
b. *The purpose of a provisional order is to preserve the status quo pending the return day. In other words, its purpose is to regulate, and where possible to preserve, the rights of the parties pending the final determination of the matter which is in issue.*
c. *The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute and has no return date. Once a final order is given the court issuing the order becomes functus officio and it cannot revisit the same issues at a later date.*
d. *The standard of proof for a provisional order is different from that of a final order. In a provisional order, one need only establish a prima facie right because it is merely a temporary order pending the final determination of the dispute on the return date. On the other hand, a final order is obtained on*

the higher test of a clear right because it is final and definitive as it has no return date.

e. *The test for considering whether an order is final and definitive or interlocutory is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge.*

f. *Where the purported provisional order is such that there is no issue for determination on the return day, the order is in actual fact a final order.*

8. CONCLUSION

It is important to highlight the characteristics of the remedy of an interlocutory or interim interdict or provisional order or interlocutory injunction, which were neatly summarised by C.B. Prest in his textbook "*The Law and Practice of Interdicts*" *supra*[69] at pages 4 to 5 as follows:

i. *It is an order of court, i.e. it is a remedy (like damages); it is neither a procedure nor a cause of action;*

ii. *It is an interim order of court pending the final determination of the principal dispute between the parties;*

iii. *It is directed at the maintenance of the status quo pending final determination of the matter;*

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[69] C.B. Prest in his textbook titled "*The Law and Practice of Interdicts* 9 ed Juta & Co (Pty) Ltd 2014.

iv. *It is a remedy of an extraordinary nature which is not available to a litigant who is possessed of another or alternative remedy;*

v. *It does not involve a final determination of rights and does not affect their final determination. See Apleni v Minister of Law & Order and Ors 1989 (1) SA 195 (A) at 201B;*

vi. *It is not a remedy for the past invasion of rights. See Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company 1988 (1) SA 805 (T); Philip Morris Inc and Anor v Marlboro Shirt Co SA Ltd and Anor 1991 (2) SA 720 (A); Payen Components SA Ltd v Bovic CC and Ors 1995 (4) SA 441 (A).*

vii. *It is a discretionary remedy dependent upon the weighing up of the balance of convenience between the parties where the right relied upon is prima facie established though open to some doubt; and*

viii. *It is granted in almost any kind of circumstance where there is a well-grounded apprehension of irreparable harm.*

The summary of the principles relating to the remedy speaks for itself as to the true nature of a provisional order. It cannot be over-emphasised that when making a provisional order, that order must anticipate confirmation or discharge of issues on a return date that could not be put to finality on the date of the granting of the interim relief. Further to that, a final order in the form

of a provisional order will never be a provisional order. It is the duty of a court to satisfy itself that a provisional order is indeed provisional or interim in effect or nature and thereafter exercise its discretion to either grant or dismiss the application.

THE INTERFACE BETWEEN REGIONAL AND NATIONAL LAWS[70]

The Honourable Mr. Justice L. Malaba

Chief Justice, Republic of Zimbabwe

Abstract

This paper examines the interface between regional and national laws, focusing on the context of the Common Market for Eastern and Southern Africa (COMESA) competition and consumer protection laws. COMESA, as a regional economic community, has harmonised its competition and consumer protection regulations to promote fair trade practices and safeguard consumer rights across member states. It explores the challenges and opportunities associated with the interaction between regional and national laws within the COMESA region. It investigates the harmonisation efforts undertaken by COMESA and the legal mechanisms employed to ensure consistency and coherence across member states. It also examines the role of national competition and consumer protection authorities in implementing and enforcing regional regulations while considering their autonomy and the potential for conflicts or overlaps with national laws.

1. INTRODUCTION

The inherent premise of the topic at hand is that there exist distinct legal regimes at national and regional level.

[70] Presentation by the Honourable Mr. Justice L. Malaba, Chief Justice of Zimbabwe on the occasion of the COMESA Judges Workshop for the Judiciary of Zimbabwe at Victoria Falls, Zimbabwe.

From this, the tentative view fashioned is that regional laws and national laws enjoy interaction, with the former commanding supremacy over the latter. The supremacy of one legal regime over another is closely tied to the question of the resolution of conflicts arising during the simultaneous operation of different legal regimes. This is because the question of supremacy only logically arises in circumstances of conflicts between legal regimes. Conflicts between different legal systems are bound to occur whenever different legal regimes have to coexist. Therefore, the topic offers an opportune moment to ponder whether the COMESA Member States have fully embraced this position and whether it is binding in their economic interaction as a regional bloc.

This paper will generally consider the hierarchical interaction of regional laws with national laws. In particular, it will consider the interaction of select aspects of COMESA competition and consumer protection laws with the corresponding laws of Member States. The starting point in this regard is to note that there are several dynamics underlying the hierarchy and interaction of regional laws with national laws. One such dynamic is the principle of reciprocity of international obligations. Other dynamics include the specific treaties imposing legal obligations in a particular region and

customary international law.[71] These dynamics form the matrix upon which the supremacy of regional law can be asserted. They also explain why one regime of law is superior to another regime of law and graphically spell out the consequences of the disregard for the supremacy of a regime of law.

This paper has been divided into two parts in light of the above. The first part will deal with the theoretical framework underlying the subject of the supremacy of regional laws over national laws. The second part will consider some practical aspects of the application of regional laws over national laws.

2. THEORETICAL FRAMEWORK

2.1. The Principle of Reciprocity

The first dynamic is the principle of reciprocity. The principle of reciprocity extensively runs through almost all international relations. While a general definition of reciprocity is evasive, an American academic by the name of Robert Keohane identified two aspects virtually

[71] See Keohane, Robert O. "Reciprocity in International Relations." International Organization Vol. 40, No. 1 (Winter, 1986): pp. 1-27 at pp 5 – 6. Available at: http://www.jstor.org/stable/2706740. Accessed on 16 April 2022.

constituting the essential dimensions of reciprocity. These are contingency and equivalence. The former aspect envisages that "Reciprocity implies 'actions that are contingent on rewarding reactions from others and that cease when these expected reactions are not forthcoming.'"[72] Regarding the latter aspect, Keohane states that: -

> *"Reciprocity refers to exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good, and bad for bad. These exchanges are often, but not necessarily, mutually beneficial; they may be based on self-interest as well as on shared concepts of rights and obligations; and the value of what is exchanged may or may not be comparable."*[73]

In addition, it must also be recorded that reciprocity does not mean strict equivalence of obligations and rights. Keohane lucidly makes this point: -

> *"The social exchange literature is careful not to define reciprocity as the strict equivalence of benefits. Among equals, rough equivalence is the usual expectation: the man who gives a dinner party does not bargain with his guests about what they will do for him in return, but 'he*

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[72] See Keohane, Robert O. "Reciprocity in International Relations." International Organization Vol. 40, No. 1 (Winter, 1986): pp. 1-27 at pp 5 – 6. Available at: http://www.jstor.org/stable/2706740. Accessed on 16 April 2022.

[73] See Keohane, Robert O. "Reciprocity in International Relations." International Organization Vol. 40, No. 1 (Winter, 1986): pp. 1-27 at pp 5 – 6. Available at: http://www.jstor.org/stable/2706740. Accessed on 16 April 2022.

> *expects them not simply to ask him for a quick lunch if he has given a formal dinner for them.'"*[74]

Having said this, there are two broad conceptions of reciprocity, namely, specific reciprocity and diffuse reciprocity. Specific reciprocity refers to: -

> *"Situations in which specified partners exchange items of equivalent value in a strictly delimited sequence. If any obligations exist, they are clearly specified in terms of rights and duties of particular actors."*[75]

On the other hand, diffuse reciprocity is regarded as involving conformity "to generally accepted standards of behaviour".[76] F Paris and G Nita equate diffuse reciprocity to what they term "stochastic reciprocity".[77] To them, this kind of reciprocity arises: -

> *"... where an agent cooperates not in expectation of a specific reciprocal reward, but rather for some general reciprocal return in the future."*

In law, the principle of reciprocity is described as a meta-rule of customary international law. To support this proposition, F. Paris, and G. Nita state that: -

> *"Not surprisingly, reciprocity and fairness tend to be meta-rules in customary international law. For instance,*

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[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] See Paris F., and Nita G. (2003), "The role of reciprocity in International Law", Cornell International Law Journal: Vol. 36, Iss. 1, Art 4 at p. 108. Accessed on 15 April 2022 Available at: http://scholarship.law.cornell.edu/cilj/vol36/iss1/4?utm_source=scholarship.law.cornell.edu%2Fcilj%2Fvol36%2Fiss1%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages.

> *evidence can be found in ancient customs of retaliations. Even though practices of literal retaliation are no longer endorsed as desirable international customs, the principle of reciprocity remains critical in international law, due to the dominant role played by customary law among the sources of international law."*[78]

The nature and character of the principle of reciprocity as a rule of customary international law endows regional laws with value and supremacy. Although a particular treaty may not specifically state that the obligations, they impose are reciprocal in nature and thus superior to the national laws or practices of a State, the wording of a treaty usually reveals this fact. This is true even for the COMESA Treaty. The wording it uses partly reveals the reciprocal nature of the obligations it imposes. For good measure, its preamble reflects that the contracting States considered that there was an "overriding need" to establish a Common Market for Eastern and Southern Africa. It records that the contracting States were determined to consolidate "their economic co-operation through the implementation of common policies and programmes aimed at achieving

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[78] See Paris F., and Nita G. (2003), "The role of reciprocity in International Law", Cornell International Law Journal: Vol. 36, Iss. 1, Art 4 at p. 108. Accessed on 15 April 2022 Available at: http://scholarship.law.cornell.edu/cilj/vol36/iss1/4?utm_source=scholarship.law.cornell.edu%2Fcilj%2Fvol36%2Fiss1%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages.

sustainable growth and development". This shows that the States considered the causes for which they were entering into the Treaty superior to their municipal laws and practices.

Further, the incorporation of the 'Most Favoured Nation Treatment' concept also suggests that reciprocity is a foundational consideration of the COMESA Treaty. The concept is provided for in Article 56: -

> *"Article 56*
>
> *Most Favoured Nation Treatment*
>
> *1. The Member States shall accord to one another the most favoured nation treatment.*
>
> *2. Nothing in this Treaty shall prevent a Member State from maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of this Treaty and that any advantage, concession, privilege, and favour granted to a third country under such agreements are extended to the Member States on a reciprocal basis.*
>
> *3. Nothing in this Treaty shall prevent two or more Member States from entering into new preferential agreements among themselves which aim at achieving the objectives of the Common Market, provided that any preferential treatment accorded under such agreements is extended to the other Member States on a reciprocal and non-discriminatory basis.*
>
> *4. Copies of agreements concluded pursuant to paragraph 2 of this Article shall be transmitted to the Secretary-General by the Member States parties to them."*

Robert Keohane considered the concept of the Most Favoured Nation Treatment as a reflection of the principle of reciprocity. He observed that:

> *"In the field of trade, ... demands for aggressive reciprocity, or what used to be known as conditional most-favoured-nation ("MFN") treatment, reflect the concept of specific reciprocity, while unconditional MFN treatment embodies diffuse reciprocity".*

The Most Favoured Nation Treatment is intended to guarantee equality in regional interaction. It prevents some Member States from unilaterally enjoying the benefits created by the COMESA Treaty. There must be a reciprocal exchange of benefits and such reciprocation is basically borne out of the respect for regional laws. Therefore, it follows that the insistence of the COMESA Treaty on the Most Favoured Nation Treatment is a recognition of the essential supremacy of the regional law embodied in it, which is itself anchored on reciprocity.

Overall, the provisions of the COMESA Treaty show that it embraces reciprocity as its bedrock. As a regional law, it affirms that the principle of reciprocity is useful in upholding regional obligations. Taken to its logical end, the principle of reciprocity requires a significant measure of supremacy to be accorded to regional norms embodied in treaties. Without such supremacy, the

application of regional law may be interrupted by non-compliant national laws. In turn, this may undermine the capability and willingness of States that are subject to regional treaties to reciprocate the obligations that such treaties establish. The absence of national laws that reflect the reciprocal nature of regional obligations undermines the supremacy of regional laws. Thus, by compelling Member States to honour their obligations, the principle of reciprocity anchors the supremacy of regional law.

2.2. Principles of Ratification of Treaties and Regional Agreements

The second significant dynamic in understanding the relationship between regional laws and national laws is the act of ratification of a treaty [that constitutes regional law]. For the purpose of this discussion, it will suffice to regard ratification as "the final establishment of consent by the parties to a treaty to be bound by it, usually including the exchange or deposit of instruments of ratification."[79] In Article 1 of the Vienna Convention on the Law of Treaties, 1969, ("the Vienna Convention") ratification is considered to be "the international act ...

[79] See B. A. Gardner (ed), Black's Law Dictionary 8th Ed, (St. Paul, MN: Thompson/West, 2004) at p. 3957.

whereby a State establishes on the international plane its consent to be bound by a treaty."

There is considerable consensus on the manner in which ratification occurs. More often than not, ratification will be regarded as having been complete when the treaty-making power of a State has ratified a treaty and, in turn, deposited the treaty with the depositary.[80] Ratification of a treaty is a juridical act. It is through it that other States or actors on the international plane are able to assert that a treaty binds another State.

In order to elaborate on the supremacy of regional laws over national laws, the legal effects of ratification require elucidation. A substantial portion of the legal effects of ratification is set out in the Vienna Convention. Needless to say, the Vienna Convention is considered to be a codification and development of the customary international law that governed treaties.[81] Articles 26 and 27 of that Treaty are pertinent in this regard. They are hereby quoted verbatim for the effect required: -

"Article 26

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[80] See, G. Boas, Public International Law Contemporary Principles and Perspectives, (Cheltenham: Edward Elgar Publishing Limited, 2012) at p. 56.

[81] See Aust, Anthony. "Vienna convention on the law of treaties (1969)." Max Planck Encyclopaedia of Public International Law (2006).

> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*
>
> *Article 27*
>
> *Internal law and observance of treaties*
>
> *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."*

This refers to "the rule that agreements and stipulations, especially those contained in treaties, must be observed" in good faith.[82] The principle as codified in Article 26 of the Vienna Convention is a meta-rule. It tells parties how they are to regard the obligations to a treaty that they are bound by. The rule inherently demands parties to international treaties to perform their obligations in good faith.[83] In the case of *Australia v France*, which is famously known as the Nuclear Tests case, the International Court of Justice held that: -

> *"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."*[84]

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[82] B. A. Gardner (ed), Black's Law Dictionary 8th Ed, at p. 3508.

[83] See Hennie Strydom and Laurence Juma, "The fundamental principles of the international legal order", in Hennie Strydom (ed) International Law, (Cape Town: Oxford University Press Southern Africa, 2016) at pp. 135 – 136.

[84] See *Australia v France* [1974] I.C.J. Rep 253 at para. 46.

The good faith requirement inherent in the *pacta sunt servanda* principle accords with its normative character in international customary law as a jus cogens norm. A jus cogens norm is characterised by rigid application accepting no derogation. The jus cogens character of the *pacta sunt servanda* principle imbues treaties that are entered into at a regional level with immense legal authority over the national laws and practices of a State. Perforce, the principle renders national laws and practices subservient to the dictates of a treaty and invites a contracting State to model its national laws in accordance with the dictates of regional law. G Boas states that: -

> *"The binding force of treaties is sourced in the principle of pacta sunt servanda (agreements must be kept). A customary norm that is by its very nature non-derogable, pacta sunt servanda is a jus cogens norm."*[85]

The other important consequence of the ratification of a treaty that buttresses the supremacy of regional law is the proscription against the reliance on national law as justification for a state's failure to perform a treaty. As already observed, this imperative is codified in Article 27 of the Vienna Convention. That article is accepted as a

[85] See G. Boas, Public International Law Contemporary Principles and Perspectives, (Cheltenham: Edward Elgar Publishing Limited, 2012) at p. 58.

codification of longstanding rules of customary international law.[86] De Hoogh aptly notes that: -

> *"The rules given expression in article 27 VCLT ... are broadly accepted as reflections of longstanding, existing rules of customary international law (cf. M. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties) and may be deemed to be part of the international constitutional identity or meta-law on international norm-creation of international law at large. Indeed, any other construction than the inability to invoke the internal law, including the constitution, of a State would not be viable, since this would allow a State an (easy) escape of its own (unilateral) design from the observance of international law."*[87]

The two rules contained in Articles 26 and 27 of the Vienna Convention spell out the superior force of law attached to treaty law, including at a regional level. The learned author Hennie Strydom, while commenting on the utility of delayed ratification of treaties in view of the binding obligations that they create, stated that: -

> *"Two other rules of treaty law may further explain the need for delayed ratification. Of fundamental importance is the pacta sunt servanda rule, which places a good faith obligation on parties to a treaty to comply with the treaty's terms and conditions once the treaty has entered into force between them. The*

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[86] See De Hoogh, André. "The relationship between national law and international law in the report of the Georgia Fact-Finding Mission." EJIL: Talk 4 (2010). Available at: https://www.ejiltalk.org/the-relationship-between-national-law-and-international-law-in-the-report-of-the-georgia-fact-finding-mission/ Accessed on 15 April 2022.

[87] Ibid.

> *second rule prohibits a State from invoking the provisions of its domestic law as justification for its failure to perform in terms of a treaty binding upon it. Hence, a State mindful of the implications of these rules can be expected to act responsibly when considering its ability to perform in terms of a treaty that will eventually bear the State's consent and to avoid a situation where the consent to be bound is given for politically expedient or symbolic reasons. By acting with indifference to the realisability of a treaty's objectives, States will undermine the rule of law and the trust that is needed to make interstate relations work."*[88]

In light of the above, there is little room left to consider national laws as possibly having supremacy over regional laws. The act of ratification is an expression of consent by a State to subject its national laws to regional laws. That consent is consciously expressed with full appreciation of the *pacta sunt servanda* rule and the rule against the reliance on national law as a defence for non-compliance with the provisions of a treaty. Pertinently, Article 6(g) of the COMESA Treaty states that the Member States agreed to adhere to the principle of "the recognition and observance of the rule of law". In the context of COMESA competition and consumer protection laws, these principles make for a valid

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[88] See Hennie Strydom, "International Law Making as an Attribute of State Sovereignty", in Hennie Strydom (ed) International Law, (Cape Town: Oxford University Press Southern Africa, 2016) at p. 98.

conclusion that the act of ratification of a treaty endows regional laws with supremacy over national laws.

2.3. The Doctrines of Monism and Dualism

Any worthwhile discussion on treaty law mandates an analysis of the fraternal concepts of monism and dualism. This is appropriate due to the potential conflict that exists between international and regional law principles in one corner and constitutional law at the opposite end. An analysis of the models highlights the complex juridical relationship that exists between international law and municipal law. It sheds light on the general concept of law and the legal system, as monism and dualism were originally conceived as two polar explanations of the relationship between international law and domestic law.

To begin with, the chief proponent of monism, Kelsen promoted the view that there was one legal order that comprised both international and domestic legal systems within the same legal hierarchy. According to this jurist, a legal structure under which international and municipal law were distinct and separate was flawed because that would produce a world in which behaviour that would be permissible in one legal order would be

impermissible in another.[89] Whilst Kelsen accepted that either international law or domestic law could be at the top of the hierarchy of legal norms, it is the generally accepted monist stance that international law is universal in its reach both vertically and horizontally and occupies a position of prominence in terms of the validity of laws and primacy. It has been labelled by some scholars as the progressive internationalisation of national law inspired by aspects of natural law jurisprudence.[90] The recognition of natural law is inspired by the fact that the model in some quarters is pervaded by naturalists who believe that primary law is drawn from the natural order.

Therefore, the monist approach entails a direct application of international law as part of the fabric of municipal law of the State without the requirement of domesticating the enabling treaty or convention. Treaties and accords at an international or regional level have an automatic effect in domestic affairs once they have been ratified by the relevant State. There is no additional requirement for its incorporation at a

[89] See Hans Kelsen, The Pure Theory of Law 328–47 (Max Knight trans., 2nd ed., 1967) (translating Hans Kelsen, Reine Rechtslehre (2d ed. 1960)).

[90] See James W. Harris, Legal Philosophies 2nd Edition (London: Butterworths, 1997).

domestic level. Also, in any conflict between international law and domestic law, the former is held to trump the latter due to it enjoying primary status under the monist theory.

Conversely, dualism presupposes the existence of two distinct and separate legal orders. International law does not enjoy unfettered access and application at a domestic level as it is traditionally regarded as applying at an international level to a community of independent States. On the other hand, municipal law is taken to be applicable within a State and independently regulates the relations of its citizens *inter partes* and within the State. The question of supremacy is regarded to be contingent upon the relevant plane under which international and domestic law is discussed. This conceptualisation identifies mainly with positivists, as it requires municipal law to provide a legislative instrument that brings international law into effect in a national legal system. This is in line with John Austin's view of sovereignty as a pre-legal political fact. This hypothesis basically stipulates that for a State to be bound by international law, there has to be an expression of its will that authorises the application of the aforesaid international norm.

The dualist model at some level is informed by the intra dynamics of the arms of State. Treaties and conventions signed by the Executive are subject to the scrutiny of the Legislature before they are accorded national effect. This is consistent with the constitutional principle of separation of powers between the arms of State. The limitation of this concept stems from the increasingly untenable position that generally recognises States as the sole actors internationally to the exclusion of private persons and residents.

As a matter of fact, both theories are hampered by their inadequacies in explaining how international law is applied locally in practice. A recurring criticism is that there is no legal system in existence that can be strictly construed as monist and dualist in nature. There are some international treaties and conventions that are not self-executing and may rely on the enactment of municipal laws for their enforcement. In addition, the application of customary international law norms blurs the distinction that is sought to be imposed. Jeremy Telman notes the following when discussing the application of customary international law in the context of the two models:

> *"Most domestic systems are complex hybrids rather than instantiations of one of the available theoretical options.*

> *The United Kingdom is often described as having a dualist system, because Parliament must approve domestic implementing legislation before treaties and rules of customary international law can be introduced in the domestic legal order. This model has been adopted in many of Britain's former colonies, such as Canada, Australia, India, and Israel as well. But the fact that there is a mechanism for domestic implementation of treaty norms does not necessarily suggest a dualist system, so long as there is an assumption that international norms will be incorporated into and recognized as binding within the domestic legal order"*[91]

Regardless of the growing jurisprudence that refutes the ideals embodied by the two classical concepts, monism and dualism retain their worth as analytical tools that have utility in the modern-day discussion of treaty law. They venerate the relationship that exists between international and domestic law. This exposition is critical in light of the objectives of the COMESA Treaty, that is, to ensure the effective enforcement of competition and consumer protection law. This standard can only be met through an analysis of the germane provisions of the COMESA Treaty. It is only through this course that an effective assessment of the supremacy of regional law over domestic laws of member States can be established.

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[91] See Telman, D. A. "*A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as US Law*." Basic Concepts of Public International Law: Monism and Dualism (Marko Novakovic ed.) (2013): 13-6.

The crucial question that is inherent in this assessment is whether or not the COMESA Treaty retains a position of primacy over the municipal law in member States. The question is blurred to an extent by an acceptance that the Member States have varied domestic legal structures with some States preferring common law systems i.e., English Common Law or Roman-Dutch Law and others employing civil law legal structures.

To this end, it is necessary to identify the attendant obligations that are relevant under the COMESA Treaty and the relations that it creates amongst the member States.

3. APPLICATION OF COMESA LAWS

3.1. The Interplay Between COMESA Competition and Consumer Protection Laws and National Laws

The COMESA competition and consumer protection laws can be used to discuss the symbiotic relationship between regional laws and national laws. They also lucidly illustrate the hierarchy existing between bodies of law. The first point to note is that COMESA competition and consumer protection laws are subsumed under the rubric of what is generally known as regional laws. Regional international law exists as both treaty law and

customary international law. Professor Mathias Forteau provides a definition of the two senses in which regional international law can be construed: -

> *"Regional international law can be defined narrowly or broadly. In the first sense, it designates any set of rules with which a region endows itself because of the distinctive values shared by its members. In the second sense, it encompasses any rule having a regional scope of application."*[92]

In most instances, regional international law is a product of intergovernmental relations aimed at regulating the shared interests and concerns of States belonging to a particular geographical region. The observance or otherwise of regional norms will be a matter of huge concern primarily to the nations within the particular geographical location. This fact may tempt one to believe that the limited geographical application of a regional law correspondingly diminishes its forcefulness in comparison to the forcefulness of laws that enjoy international observance.

Having said this, it is imperative to discuss the COMESA competition and consumer protection laws in the context of the supremacy of regional laws and with an aim of interrogating the idea that regional law is superior

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[92] See Forteau, Mathias. "*Regional International Law*." Max Planck Encyclopaedia of Public International Law (2006).

to national laws. Competition within the Common Market is regulated by Article 55 of the COMESA Treaty. Article 55(3) mandates the Council to "make regulations to regulate competition within the Member States". The COMESA Competition Regulations ("the Regulations") are regarded as the primary source of law providing for the promotion of competition and enhancement of consumer welfare in the Common Market. Article 2(1) of the Regulations provides for their purpose: -

> *"The purpose of these Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors."*

The Regulations impose several obligations on the Member States. In order to contextually exemplify the supremacy of the Regulations over national laws, as a matter of necessity there is need to identify some of the specific rules of law that enact obligations on the Member States in general terms.

The obligations imposed by COMESA competition and consumer protection laws are regional laws that demand to be observed and be given primacy over national laws. In the identification of these regional laws, one must appreciate that the conduct to which the

COMESA Competition Regulations apply is generally set out in Article 3 of the Regulations: -

> *"Article 3*
>
> *Scope of Application*
>
> *1. These Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities as set forth under Article 4.*
>
> *2. These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.*
>
> *3. These Regulations shall have primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4 of these Regulations. This Article does not apply to conduct expressly exempted by national legislation."*

Article 4 of the Regulations exempts arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment, activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members, and activities of professional associations designed to develop or enforce professional standards necessary for the protection of the public interest from their application.

Clearly, the ambit of application of the Regulations is fairly wide. Their thrust is against all economic activities which have an appreciable effect on trade between the Member States and which undermine competition within the Common Market regardless of the legal status of the perpetrator of those activities. They regulate anti-competitive business practices and conduct carried out by players within the Common Market.[93] They regulate mergers and acquisitions where both the acquiring firm and the target firm or either the acquiring firm or the target firm operate in two or more Member States.[94] The Regulations also cover any conduct which has the effect of undermining consumer protection and welfare within the Common Market.[95]

The considerably wide ambit of application of the Regulations necessitates their hierarchical supremacy over national laws. However, not all national laws are superseded by COMESA competition and consumer protection laws. Only those national laws that regulate economic activities that have an effect within the COMESA Market will engage the COMESA regional law on competition and consumer protection. The

[93] See Part 3 of the COMESA Competition Regulations.
[94] See Part 4 of the COMESA Competition Regulations.
[95] See Part 5 of the COMESA Competition Regulations.

supremacy of COMESA competition and consumer protection laws would, therefore, be restricted to those national laws anchoring economic activities that have effects beyond the borders of a Member State.

It is also necessary to consider the legal consequences arising from the existence of parallel regional trade agreements. Examples of such agreements include the Tripartite Free Trade Agreement ("TFTA") and the African Continental Free Trade Agreement ("AfCFTA"). These agreements are intended to concretise the integration of regional economic communities. I note that the COMESA Treaty was and is particularly alive to the need to establish an integrated market that spans the interests and development goals of the Regional Economic Communities to which Member States belong.[96]One reason for this is to have coherence and uniformity in regional law.

In view of the existence of other regional economic communities and trade agreements, it suffices to quote

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[96] See Muzorori, Tasara. "Can any best Practices be Identified in Developing Countries use of Regional Integration to boost Trade and Supply Side Capacity Such as CFTA, TFTA, RECS?" In COMESA Trade Policy and Sustainable Development Meeting, Ginebra, UNCTAD, pp. 6-8. 2015. Available at: https://unctad.org/system/files/non-official-document/ditc_tncd_2015_d19_Muzorori.pdf Accessed on 16 April 2022.

one scholar who noted that "The success of treaties has led to the increased concern over regulatory overlap, treaty conflicts, and the inadvertent hierarchisation of substantive areas of international law."[97] Additionally, the problems created by treaty conflicts may have the effect of interfering with the supremacy of a regional law that had become settled. However, Article 56 of the COMESA Treaty resolves the question of conflicts between trade agreements. It requires any advantage, concession, privilege, and favour granted to a third country to be extended to the Member States on a reciprocal basis. Undoubtedly, such a design safeguards the supremacy of COMESA regional laws.

Therefore, there is an interplay between COMESA competition and consumer protection laws with national laws. The manner in which the Competition Regulations are couched shows that they are intended to have an overarching application over the national laws of the States. Their design is a confirmation that they were made against an understanding that regional law is superior to national law.

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[97] See Borgen, C. J., "*Resolving treaty conflicts*." Geo. Wash. Int'l L. Rev., 37, (2005) 573 at p. 647.

4. THE ENFORCEMENT OF COMESA OBLIGATIONS

The modes of enforcement of obligations arising from COMESA competition law and consumer protection law also illustrate the hierarchical interaction of regional laws and national laws. In the first place, the emergence of obligations is a direct result of the ratification of a treaty, which I have already alluded to as having theoretical importance to this paper. This suggests that enforcement of a treaty is a consequence of the need to safeguard the performance of treaty obligations.

The COMESA Competition Commission is a key institution in the enforcement of competition and consumer protection laws. The COMESA Competition Rules are instructive in this regard. Rule 5 thereof provides for the following enforcement mechanism: -

> *"Rule 5*
>
> *The Enforcement Institutions*
>
> *1. For the purposes of the implementation of Regulations, the Regulations established two authorities, the COMESA Competition Commission ("the Commission") and the Board of Commissioners ("the Board").*
>
> *2. Decisions rendered by the enforcement institutions above shall, pursuant to Article 5 of the Regulations, be binding on undertakings, governments of Member States and State courts." (Emphasis added).*

To enforce the COMESA competition and consumer protection laws, the Commission is empowered to monitor, investigate,[98] detect, make determinations, or take action to prevent, inhibit or penalise undertakings whose business activities appreciably restrain competition in respect of trade between the Member States.[99]

Similarly, the Board's function is to issue determinations on any anti-competitive conduct that is prohibited in terms of the Regulations, to hear appeals from, or review any decision of the Commission referred to it,[100] and to hear appeals from initial determinations made by the committee responsible for determination.[101] Notably, the Chairperson of the Board may appoint a Committee of Commissioners to make an initial determination on any matter that falls within its mandate.[102] All these functions occur in endeavours aimed at enforcing the legal obligations on the Member States, private or public persons.

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[98] See rule 18 of the COMESA Competition Rules.
[99] See Art. 7(1) of the COMESA Competition Regulations.
[100] See rule 47 of the COMESA Competition Rules.
[101] See Art. 15 of the COMESA Competition Regulations.
[102] See Art. 13(4) of the COMESA Competition Regulations and rule 24 of the COMESA Competition Rules.

Pertinent observations may be made in respect of the enforcement of COMESA competition and consumer protection laws. Chief among them is that the provisions of rule 5(2) of the COMESA Competition Rules settle the position appertaining to the decisions of the enforcement institutions as binding on undertakings, governments of the Member States and State courts. The rules demand that the Member States and private or public persons within the COMESA Market should submit to the enforcement institutions as well as to be bound by the decisions of these institutions. This set-up points to a hierarchy in which COMESA regional law is superior to national laws.

The COMESA Court of Justice is also entrusted with the power to enforce COMESA competition and consumer protection laws. Article 19(1) of the COMESA Treaty specifically prescribes its mandate as ensuring "the adherence to law in the interpretation and application of [the] Treaty". In terms of Article 29(2) of the COMESA Treaty, "Decisions of the Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts". By placing decisions of the Court of Justice on the interpretation of the provisions of the COMESA Treaty above the decisions of national

courts, the COMESA Treaty establishes a hierarchy of laws.

Again, it can also be observed that the precedential value of decisions of the Court of Justice over decisions of national courts is anchored on the supremacy of COMESA regional law. This too is an indication that regional laws are dominant over national laws. Overall, it can be said that the enforcement mechanisms put in place for the enforcement of regional obligations recognise that disputes may undermine the supremacy of regional law. Therefore, the enforcement mechanisms further confirm and buttress the supremacy of regional laws over national laws.

5. APPLICATION OF COMESA REGIONAL LAWS

Moving on, the authoritative case of *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius*[103] epitomises the practical relevance of the above-discussed principles and norms by the COMESA Court. In the matter, the local Mauritian company (hereinafter "Polytol") petitioned the COMESA Court of First Instance in 2012 wherein it sought various reliefs against the State of Mauritius. Chief amongst its concerns

[103] *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* Reference Number 1 of 2012.

was that Mauritius had failed to implement the treaty provisions of COMESA as part of its municipal law. In addition, it strenuously objected to the imposition of an exclusive customs duty on *inter alia* Kapci paint products that were imported from Egypt. The levy of duty was the consequence of dialogue with Egypt wherein Mauritius indicated its intent to protect its locally manufactured products.

Polytol's objection was centred on the fact that the conduct of the Mauritian Government violated the import of the COMESA agreement and, in particular, the imposition of customs duty on the imported products ran contrary to the objective set out in Article 46 of the multilateral agreement. Thus, Polytol sought compensation for the principal amount it had tendered as customs duty to the Mauritius Revenue Authority from the year 2001 to 2010. Article 46 of the accord entreated Member States to eliminate by the year 2000 customs duties and equivalent charges on the importation of goods that are eligible for Common Market tariff treatment.

The background of the case as well as the preliminary issues that arose for determination in the matter profoundly resonate with the theme of this paper. The

applicant had initially sought relief before the national courts up to the Supreme Court in 2008 where its application for leave to apply for judicial review of the State's decision to levy customs duty on Kapci paint products was rejected. The reasons for the rejection were twofold. To begin with, the Supreme Court held that the application was filed out of time as the duty had been imposed in 2001. More pertinently, it was held that the provisions of the COMESA Treaty could only be regarded as binding to the extent that they had been incorporated into Mauritian municipal law. The *dicta* of the Supreme Court on the question of incorporation reads as follows: -

> *"This Court can only consider the validity of the regulations against the backdrop of the Customs Tariff Act and our Constitution. In the absence of any such legislation to that effect, non-fulfilment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts."*[104]

In essence, the Supreme Court upheld the supremacy of municipal law over community law based on the different planes that international and national law are generally regarded to exist in under the monist conception of law. In the absence of legislation that

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[104] *Polytol Paints and Adhesive Manufacturers Co Ltd v The Minister of Finance* 2009 SCJ 106.

incorporated the relevant provisions of the COMESA Treaty, the State of Mauritius was to be above reproach in its introduction of customs duty post the year 2000, regardless of its apparent conflict with the multilateral accord.

Before a determination of the reference by the COMESA Court, the State of Mauritius filed an application seeking to set aside the main matter. It relied on the following grounds -

> *(a) the Applicant had no locus standi to file the Reference in matters relating to the implementation of Treaty obligations;*
>
> *(b) that the Applicant had not established a valid basis upon which it was invoking the jurisdiction of the COMESA Court of Justice; and*
>
> *(c) that the Applicant was not an aggrieved party as there was no regulation in violation of the Treaty at the date of the Reference.*

In rendering its verdict, the COMESA Court established the implementation of key principles in relation to the enforcement of the Treaty's provisions. It held that, following Article 26 of the COMESA agreement, private citizens that were resident in Member States were clothed with the requisite *locus standi* to petition its jurisdiction on the grounds that an act, directive, decision, or regulation by the aforesaid State violated

the express terms of its commitment under the Treaty. It confirmed the evolution in the realm of international law relating to the recognition of private persons as valid actors at this level.

However, the *locus standi* of private citizens is contingent upon the exhaustion of local remedies. Thus, the recognition of the private persons under the COMESA Treaty still pays homage to the immutable principle of national sovereignty. States are still given first preference to address the inadequacies that arise in instances of perceived COMESA Treaty violations. The objection to the absence of a violation at the time of the reference was discarded based on the fact that the claim was founded on a period predating the removal of customs duty against Kapci products.

On the merits, the defence harped on by the respondent regarding the extension of the period for establishing a Customs Union for the member States as per Article 45 was negated on the basis that it did not extend the implementation period for all parts of the COMESA Treaty. The judgment of the Court provided further clarity on the limitations inhibiting the *locus standi* of private persons in regional litigation. The responsibility for bringing a matter relating to the non-fulfilment of

obligations under the COMESA Treaty was held to be reserved for the Member States and the Secretary-General. Private citizens were held to be limited by the import of Articles 24, 25 and 26.

The Court's position regarding Polytol's allegations of breach of the COMESA Treaty provisions by Mauritius ran contrary to the pronouncement made in the national courts. It was held that there was an inescapable violation of the accord regardless of the bilateral arrangement with Egypt. The Court ruled that States could not selectively apply the provisions of the COMESA Treaty. In addition, the rights of private persons as actors under the COMESA Treaty were reaffirmed as the Court advanced the point that residents in the Member States were empowered in terms of Article 26 to petition the jurisdiction of the Court in apposite circumstances. The COMESA Treaty was upheld as the concern of both the Member States and their residents. The limitation of the concept of national sovereignty under the COMESA Treaty was rightly observed as emanating from this status quo.

The landmark ruling's impact remains monumental, as highlighted by various scholars that have microscopically dissected its far-reaching consequences

on the perpetual discourse surrounding the relationship between municipal and international law. As highlighted earlier, the challenges that potentially undermine regional integration were watered down by the community approach adopted by the COMESA Court of Justice. Professor Erasmus aptly underscored the novel approach that was posited by the Court as follows:

> *"Effective community law allows for and requires a different approach. In instances such as the present one private firms and natural persons should be able to bring applications to protect certain rights in appropriate instances. For this to happen the court or tribunal in question must be granted the necessary jurisdiction; as is the case with regard to the COMESA Court of Justice. The relevant provisions in the COMESA Treaty and the Rules of the Court of Justice allow for a comprehensive set of jurisdictional powers and are to be mentioned. They provide an example of the legal basis required for the development of appropriate community jurisprudence."*[105]

A common refrain surrounding regional integration in our context relates to the paucity and weakness of enforcement mechanisms. The Polytol judgment represents a watershed moment where this malaise can be cured by empowering residents of Member States to

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[105] See Erasmus G, "*The Polytol judgment of the COMESA Court of Justice: Implications for rules-based regional integration*,". Stellenbosch: tralac, 2015 at p 6. Available at: https://www.tralac.org/publications/article/7604-the-polytol-judgment-of-the-comesa-court-of-justice-implications-for-rules-based-regional-integration.html. Accessed on 29 March 2022.

petition regional courts and enforce their rights. This provides an outlet to develop and entrench the supremacy of regional law over municipal law. This growing community law approach enables Member States to circumvent the inherent challenges that arise from differences in the national legal systems as it enables a uniform application of the provisions of the COMESA Treaty. Once a State violates explicit obligations under the agreement, residents ought to be clothed with the requisite locus standi to vindicate their interests.

Furthermore, in order to buttress the capacitation of residents with regional *locus standi*, there ought to be mechanisms in place to ensure that precedents set in the regional courts have binding authority over the member States. This is pertinent, as it sets a common standard that is applicable to all member States and reinforces the objectives of the COMESA Treaty. On this aspect, Professor Erasmus, in his exposition of the implications of the Polytol judgment on private persons, advanced the following: -

> *"Its immediate beneficial effects will be limited to the parties concerned; nationals in other COMESA or SADC States cannot invoke this precedent as directly binding within their states of nationality. This is not an ideal arrangement; it will bring about a fragmented outcome*

and should be rectified. Community law should be uniformly applied, and regional legal instruments should contain the necessary requirements. Compliance should be monitored; preferably by regional institutions. This is a task for the relevant COMESA institutions."[106]

Equal application of the law is the basic tenet of municipal law and as regional or community law represents a novel approach that is distinct from conventional international law, it ought to draw upon such qualities that refine its effectiveness. Any discussion regarding regional supremacy would be rendered futile by the selective application of its principles. As emphasised in the above excerpt, community law ought to be uniformly applied and, by extension, this necessitates ensuring that its import is binding on all Member States.

However, as highlighted by the examples emanating from the Zimbabwean jurisdiction, in order for regional integration to be effective States ought to be committed to upholding their obligations under the accord. It is for this reason that section 34 of the Constitution of Zimbabwe, 2013 provides that the State must ensure that all international conventions, treaties, and agreements

[106] See Erasmus G. The Polytol judgment of the COMESA Court of Justice, op cit. at p 11.

to which Zimbabwe is a party are incorporated into domestic law. This endeavour is clarified by section 327(2) which provides that: -

> *"2. An international treaty which has been concluded or executed by the President or under the President's authority -*
>
> *a. does not bind Zimbabwe until it has been approved by Parliament; and*
>
> *b. does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament."*

From the above provisions, it is evident that merely being signatories to the COMESA Treaty in most instances does not bind the States in their domestic affairs. States have to follow through on their commitment by the incorporation of the regional accord into their domestic affairs. This enables the supremacy of regional law to come to the fore as, in the absence of such incorporation, the application and effectiveness of regional principles remain dependent on the whim of the government of the day.

In addition, municipal courts have a key role in aiding the promotion of the effective enforcement of the ideals captured in regional agreements. The Zimbabwean courts have underlined their commitment to effective enforcement of competition and consumer protection

laws in several judicial pronouncements. One such prime example was an appeal to the Supreme Court in the case of *Innscor Africa Limited and Anor v Competition and Tariff Commission*.[107]The brief facts of the case are that: -

> *"In 2015 the first appellant acquired a controlling interest in the second appellant. The first appellant traded in the food industry while the second appellant plied its trade in motor spares and accessories. The first appellant's acquisition of a controlling interest in the second appellant yielded a merger with a value above a threshold of US$1.2 million. In terms of the Competition (Notifiable Merger Thresholds) Regulations, 2002, the [conglomerate] merger had a value above the prescribed threshold. Thus, it had to be notified to the respondent.*
>
> *There was a divergence of views between the appellants and the respondent regarding the question of whether the conglomerate was a notifiable merger. The respondent took the firm view that the conglomerate was a merger in terms of section 2 of the Competition Act [Chapter 14:28] and it sought a declaration in the High Court that the conglomerate that was formed by the appellants was notifiable and an order compelling the appellant to pay fees in terms of section 34A of the Act as read with the Regulations. After hearing the parties, the High Court held that the conglomerate formed by the appellants was a merger in terms of section 2 of the Act. Consequently, it was notifiable to the respondent as the relevant authority.*
>
> *The appellants noted an appeal against that finding to the Supreme Court. The issue for determination before the Supreme Court was whether or not the High Court was correct in its interpretation of the definition of "merger" in section 2 of the Act to include a conglomerate. In reaching its conclusion, the Supreme*

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107 *Innscor Africa Limited & Anor v Competition and Tariff Commission* 2018 (2) ZLR 236 (S); S-52-18.

Court held that conglomerates were a form of a merger between two or more firms that engage in unrelated business activities with different customer bases. It interrogated the provisions of section 2 of the Competition Act [108]which reads thus:

> *"'merger' means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of —*
>
> *(a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;*
>
> *(b) the amalgamation or combination with a competitor, supplier, customer or other person; or*
>
> *(c) any means other than as specified in paragraph (a) or (b)." [Emphasis supplied in the Court's judgment]*

The Supreme Court held that by using the words "or other person" the Legislature's intention was to broaden the definition of a merger to include a situation where one or more persons acquired or established a controlling interest in an undertaking not falling within the categories of a competitor, supplier, or customer. According to the Court, the determinative factor in the consideration of the question whether a merger has arisen from a business relationship was the existence of a controlling interest by

[108] Section 2 of the Competition Act [*Chapter 14:28*].

one or more persons in the whole or part of a business. The Supreme Court observed that: -

> *"The definition is inclusive. In other words, the definition was deliberately widened to include all types of mergers. Without the words 'or other person', the definition of 'merger' would have been exhaustive as it would apply only to businesses or undertakings falling within each of the categories specifically stated. The word 'other' describes a person who would not belong to any of the categories of persons specifically mentioned."*

The Supreme Court held that the words "or other person" could not be regarded as denoting mergers falling within the category of the named businesses i.e., the businesses of a competitor, supplier, or customer. Put differently, the eiusdem generis rule had no application in interpreting section 2 of the Act.

In dismissing the appeal against the outlawing of a conglomerate merger by the Competition and Tariff Commission, it was held that:

> *"It is clear from this title [of the Competition Act] that, among other things, the Act aims to promote and maintain competition in the economy by regulating anti-competitive mergers. Merger regulation is at the core of competition law and in the spirit of regulating anti-competitive mergers, the Legislature enacted the current wide definition which covers all mergers which must be notified to the respondent. In terms of the Act, when a merger is notified, the respondent decides if the merger undermines competition. Conglomerate mergers, although not entered into with competitors, suppliers, or customers, just like horizontal and vertical*

mergers, affect competition. All mergers have the capacity to undermine competition."[109]

In the result, the Supreme Court upheld the decision of the High Court which had declared that the conglomerate merger between the appellants was notifiable in terms of section 34A of the Act as read with the Competition (Notification of Mergers) Regulations, 2002.

In another case, *Competition and Tariff Commission v Iwayafrica Zimbabwe (Pvt) Ltd*,[110] the Supreme Court dealt with the High Court's determination to grant the respondent absolution from the instance at the close of the appellant's case as the plaintiff in that court. Central to the dispute was whether the respondent had merged with another internet service provider known as Africa Online. Both companies provide the same services, with the only distinction being their target markets. The additional point under consideration was whether such an alleged merger was subject to the appellant's notification as stipulated in the Competition Act.

The court *a quo* had ruled that there was no evidence before it upon which a reasonable court might give

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[109] Section 2 of the Competition Act [*Chapter 14:28*].

[110] *Competition and Tariff Commission v Iwayafrica Zimbabwe* (Pvt) Ltd S–58–19.

judgment against the respondent. In overturning the verdict, the Supreme Court opined that where the cause of action is based on the provisions of a statute, the essential elements of the cause of action are to be found expressly within the four corners of the statute.

The point of departure was the failure by the court *a quo* to make reference to the provisions of the statute providing for the cause of action, namely, the Competition Act. The Court held that the appellant had established a *prima facie* case for the respondent to rebut. The appeal succeeded and the matter was remitted to the court *a quo* for the continuation of the trial.

The *ratio decidendi* of the Supreme Court's decision, which illustrates the role of national courts in enforcing competition law, is set out below:

> *"[22] For instance, the court a quo found that the respondent and Africa Online did not fish from the same pond. This was an unnecessary finding to make. In the suit a quo, it was not necessary for the appellant to aver and prove that the respondent and Africa Online were not in competition for the same market. This is because a merger in terms of the Competition Act can be established between any persons who may not be in any recognised relationship. It was therefore not necessary that the appellant lead evidence to show that the respondent and Africa Online shared the same market as this is not a requirement of the law.*

> *[23] Secondly, the court a quo granted absolution from the instance on the added basis that there was no evidence placed before it that a monopoly had been created and competition stifled. The law does not require that a monopoly be created as a result of the merger and that there be a stifling of competition. There was therefore no need for the appellant to lead evidence tending to show the creation of a monopoly and the stifling of competition following the alleged merger. Absence of such evidence was therefore an improper basis to ground the order that the court made.*
>
> *[24] Lastly, whilst the court a quo correctly identified the need for the appellant to lead evidence on the establishment of an interest in Africa Online that would enable it to control the assets or activities of Africa Online, it set the threshold of proof at a level higher than is stipulated in the law. The court required the appellant to lead evidence showing that as a result of the alleged merger, the respondent now had the upper hand and could dictate terms to Africa Online and also enable it to manipulate the market. This is not a requirement of the law."*

The role of the Zimbabwean courts in enforcing competition law nationally and regionally are also exemplified by the approach of the Supreme Court in *Ariston Holding Limited v Competition and Tariff Commission of Zimbabwe.*[111] In that case, the appellant's controlling shareholder was a company called *Emvest Holdings (Pvt) Ltd. Emvest Holdings (Pvt) Ltd* sold its shares to Origin Global Holdings (Pvt) Ltd, which, in turn, was a subsidiary of Afrifresh Holdings Limited. The sale

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[111] *Ariston Holding Limited v Competition and Tariff Commission of Zimbabwe* S–83–20.

transaction was a merger that was subject to notification to the respondent because its value exceeded the prescribed threshold. The appellant did not, however, notify the respondent of the merger. Resultantly, the respondent penalised the appellant for the non-notification of the merger. The appellant opposed the penalty on the basis that it could not be regarded as a party to the merger in terms of the Competition Act [*Chapter 14:28*].

On appeal, the Supreme Court had to determine whether or not the appellant, being the entity in which a controlling interest was acquired, was a party to the merger in terms of section 2 of the Act. The Court held that a party to a merger is either a party which acquires or establishes a controlling interest in a business of another or a party in whose business a controlling interest is acquired/established. It further held that the appellant was a party in whom a controlling interest was acquired. Accordingly, the Court concluded that the appellant, having been a party to the merger, had an obligation to notify the respondent of the merger.

Significantly, the courts in Zimbabwe have also adjudicated disputes involving unlawful competition practices or restrictive practices. One such case is

Harare Sports Club & Anor v United Bottlers Ltd.[112] The applicants had entered into an arrangement in terms of which the second applicant, in return for a consideration, had the first applicant's permission to market its 500 ml "PET" packs of soft drink to the exclusion of any competitor's right to market a similarly packaged soft drink at the first applicant's cricket ground during a series of matches to be played there. The respondent objected, regarding the arrangement as a "restrictive practice" as defined in section 2 of the Competition Act.

The High Court, in interpreting the concepts of an "unfair trade practice" and "restrictive practice" as used in the Competition Act, held that "unfair business practice" and "restrictive practice" are two distinct concepts. An unfair business practice is absolutely prohibited, and its commission constitutes an offence. A restrictive practice may only be prevented or regulated by the Competition Commission where it holds the practice to be contrary to the public interest. The Commission may authorise, either wholly or on conditions, a restrictive practice. In other words, "unfair business practice" as used in competition law does not include all restrictive practices; it means

[112] *Harare Sports Club & Anor v United Bottlers Ltd* 2000 (1) ZLR 264 (H).

only those restrictive practices specified in the schedule to the Act, and any other conduct similarly so specified.

The High Court also reached conclusions that reiterated the role of the courts in enforcing competition law despite the establishment of the Competition and Tariff Commission. The High Court held that: -

> *"The rationale of the Act is to create a commission to investigate and to approve, conditionally or otherwise, or to prohibit restrictive practices, mergers and monopolies. In doing so, the commission is enjoined to consider a number of wide-ranging and varied factors. It may act with a very broad power, including the function of negotiating compromises and of altering its own orders. Its orders are appealable to the Administrative Court.*
>
> *There is, however, no provision ousting the jurisdiction of this court. There is no clear intendment to that effect. On the contrary, the clear need for this court to act, whether urgently or not, for instance, to grant prohibitive or mandatory interdictory relief, is readily to be envisaged. In the absence of the clearest express provision, or of the most pressing necessary indication, the court will uphold a presumption against the ouster of its jurisdiction. I am therefore satisfied that this court has jurisdiction to declare on restrictive practices and grant relief as appropriate."*[113]

Finally, it must be observed that competition law is underpinned by constitutional, human rights, and public interest considerations. This point was made in the case

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[113] *Harare Sports Club & Anor v United Bottlers Ltd* 2000 (1) ZLR 264 (H).

of *Retrofit (Pvt) Ltd v PTC & Anor*.[114] The applicant was a company that intended to establish a mobile cellular telephone service in Zimbabwe. It unsuccessfully applied to the respondent for a licence to establish the service. The respondent contended that it enjoyed a monopoly over telecommunication services in terms of section 26(1) of the Postal and Telecommunications Services Act [*Chapter 12:02*]. As a result, the applicant approached the Supreme Court in terms of section 24(1) of the former Constitution of Zimbabwe, 1980. It contended that the first respondent's exclusive monopoly violated section 20(1) of that Constitution as it interfered with its freedom of expression and, more particularly, its right to receive and impart ideas without interference. On the other hand, the first respondent defended its monopoly on the basis that it was necessary to attain several objectives including the provision of less expensive telecommunications by avoiding unnecessary overlap and duplication.

The Supreme Court had to determine whether or not the granting of the monopoly to the PTC hindered the right to receive and impart ideas and information. Although this was a constitutional question, the Court made

[114] *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S).

observations that are pertinent in understanding the rationale of competition law. It held, in determining the question, that the Court had to have regard to the effect of the monopoly and not its purpose. The Court observed that a monopoly that had the effect of abridging a fundamental right was undesirable. It held: -

> *"A fortiori any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right."*

In the United States there has been much litigation over the undesirability of monopolies and their impact upon First Amendment rights. In *Associated Press v US*[115] the court, held that the anti-monopoly legislation embodied in the Sherman Antitrust Act of 1890, was entirely consonant with the First Amendment's guarantee of freedom of expression. He pointed out at 20: -

> *'The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means*

[115] 326 US 1 (1945).

> *freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.'"*[116]

Further, the Court stated that: -

> *"Conversely, the values and advantages of open market competition were praised in US v American Telephone & Telegraph Co & Ors supra in equally eloquent language by GREENE J at 149-150:*
>
> > *'Competition has not been endorsed by the Congress and the courts as a purely academic matter. The need to safeguard free competition is a direct result of the fundamental premise of our economic system that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.'"*

The above case extract highlights that there are fundamental human rights considerations in the enforcement of competition law, which all Judges must be alive to.

In light of the foregoing, it is evident that competition law and its subsequent interpretation by the Judiciary serves a specific aim. Both regional and municipal law are key enablers of economic integration. They facilitate the creation of an economic climate conducive to economic growth. Thus, judicial fora such as the Administrative Court and the High Court when they

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[116] *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S).

determine and regulate competition disputes that normally arise from the Competition Act become agents of economic integration.

Scenarios where fair competition between producers, manufacturers and developers is not encouraged hardly coincide with an increase in economic activity both horizontally and vertically. Certainly, some parties might benefit from the exploitation of their favourable position in the market as monopoly holders but in the long run economic progress is stunted by the absence of fair competition.

Moreover, innovation, which is essential and has been central to human evolution throughout the ages, is safeguarded by competition law. Access to economic markets is imperative to enable participants who bring an influx of new methods and pioneer inventions that reimagine and improve the quality of products available to end users. A pertinent example is the peculiar case of Nokia's dominance at the turn of the millennium. Due to the observance of healthy competition, developers such as Apple and Samsung were able to come on board and push the needle for innovation further to the present date.

However, the most prominent role that competition law serves is the maintenance of market regulation. In the absence of market regulations, State control would be ousted, resulting in conglomerates dictating and exerting control over business enterprises in a manner that drives the interests of their monopoly. Thus, competition law ensures that there is parity in markets and that should monopolies arise they are regulated in a manner that caters for sustainable growth. All in all, the golden thread running through the necessity of regulating competition is the role of the courts in enforcing such competition law.

As such, municipal courts ought to be vigilant and recognise instances that call for the enforcement of competition and consumer protection laws. This form of judicial activism complements the obligations that are contained in treaty law. It is also relevant in the context of the COMESA Treaty, as municipal law ought to be construed in a manner that is consistent with the ideals of the regional agreement.

The question of the interface between regional law and municipal law is not limited to COMESA. Other regional blocs in Africa and beyond have been seized with the matter, which strikes at the heart of the commitment of

individual States to be held to a common standard. A prominent example is the European Union. Its endeavour is to provide a political and economic union of its Member States. The effect of its economic agenda, much like COMESA, is to establish a common market that enables the unrestricted movement of goods and services through its Member States. To give effect to its objectives, the regional bloc has through the Treaty on the Functioning of the European Union (hereinafter, "the TFEU") and the Treaty of the European Union ("the TEU"), sought to limit the influence of domestic laws over its agenda.

Unlike the COMESA Treaty, the provisions of the aforementioned treaties are binding once signed and become part of the legal order of the Member States without the need to undertake any national measures to incorporate their import into domestic law. This position was established in the seminal case of Van Gend & Loos,[117] wherein the European Court of Justice (hereinafter "the ECJ") underscored the following: -

> *"The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields,*

[117] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (case 26/62) [1963] ECR 1.

> *and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".*

The supremacy of the regional instruments under the European Union is emphatic, as highlighted by the above extract. The judgment has faced criticism in some quarters as evidence of judicial activism on the part of the regional court. Christie Eaton commenting on the judgment submitted that the concept of direct effect and supremacy was not conferred in a treaty but developed by the ECJ.[118]

This perspective has also been countered by some scholars as misplaced. Weiler advanced the proposition that the concept of community law was developed by the States upon signing the TFEU and TEU agreements.[119] He emphasised that the peculiar nature of the regional

[118] Christie Eaton, "*Direct Effect*" (Online), Insight (29th June 2015).
[119] See Joseph Weiler, ECJ's 50 Years' Celebration of Van Gend, 12 May 2013. Available at: http://player.companywebcast.com/televicdevelopment/20130513_1/en/player.

accords entrenched the supremacy of regional law over municipal law. To this end, he posited that the ECJ merely took upon itself the role of reminding the Member States of their binding obligations under the auspices of the European Union.[120]

Regardless of the divergent opinions on the subject matter, it is clear that, if regional integration is to be fully achieved, the regional courts have a substantial role in ensuring that the supremacy of Treaty law is undiluted. This is further highlighted by the case of *Costa v ENEL*,[121] which built upon the foundation of Van Gend supra. Commenting on whether the Italian courts were bound to apply regional law in their decisions, it was held that: -

> *"By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*
>
> *The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it*

[120] See Joseph Weiler, ECJ's 50 Years' Celebration of Van Gend, 12 May 2013. Available at: http://player.companywebcast.com/televicdevelopment/20130513_1/en/player.

[121] *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (6/64) [1964] E.C.R. 585.

> *impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7."*

Other regional unions have adopted a contrary position to the liberal approach espoused under the European Union. A case in point is the Southern African Development Community (hereinafter "SADC") Tribunal (hereinafter "the Tribunal"). Article 33 of the 2014 Protocol on the Tribunal limits its material jurisdiction to interstate disputes relating to the interpretation of the Treaty of SADC. This approach has been criticised and its debilitating effects on the supremacy of regional law are captured as follows by Erasmus: -

> *"The true benefits of regional integration cannot be secured through the approach seen in e.g., SADC; where litigation about SADC legal instruments will now be the exclusive right of Governments. African Governments do not litigate against each other in trade matters; there are no examples of inter-state disputes about violations of regional obligations. The REC agreements typically contain general provisions on compliance but the response when Member States violate tariff or other obligations, is to deal with them through political discussions and in meetings of regional bodies consisting of representatives of the very same States. Such decisions are, in addition, taken on the basis of consensus. This practice, and the failure to pursue respect for legal obligations through judicial review,*

prevent the development of community law. ... Respect for legal obligations is undermined."[122]

Thus, in order to establish a *sui generis* legal order that effectively provides for regional economic integration, private persons and residents in member States ought to be enabled to petition the jurisdiction of regional courts. Without access to the jurisdiction of the legal forums, gaps tend to appear as States may be interested in clinging onto their sovereignty and as such might not litigate with the fervour and verve of its residents who are the primary beneficiaries of the Common Market. This direct benefit endows residents with a sizeable interest in the development, as it caters for their economic interests.

6. AN ANALYSIS OF POSSIBLE PROBLEMS IN THE INTERFACE BETWEEN REGIONAL LAWS AND MUNICIPAL LAWS

Several barriers may be perceived as standing in the way of the smooth interface between regional laws and national laws. It is important to consider some of the

[122] Erasmus G. The Polytol judgment of the COMESA Court of Justice, op cit. at p 10.

perceived barriers as they tend to undermine the supremacy of regional laws over national laws.

The first barrier is the possibility of a conflict of obligations in a Member State that is a party to another bilateral or multilateral treaty. It often happens that a Member State may be a party to a treaty that imposes an obligation on it to adopt legislation whose object will be at cross-purposes with a regional law. One instance in which this is possible is where a Member State is a party to more than one free trade area agreement. This creates conflicts. According to Borgen: -

> *"A conflict in the strict sense occurs when a party to two treaties cannot simultaneously honour its obligations under both. A divergence between treaties, however, need not always be a conflict. ... Using this narrow definition of what constitutes a conflict between treaties, however, is too restrictive. States are not only concerned with when it is impossible for a State to abide by two treaties, but also when one treaty frustrates the goals of another. Thus, treaty conflicts can be conceived more broadly as when a State is party to two or more treaty regimes and either the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty."*[123]

Treaty conflicts may manifest in the national legislation intended to give effect to a treaty or in a State's practices. In turn, where there is a conflict between regional law and national law, the supremacy of

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[123] Borgen, C. J., "*Resolving treaty conflicts.*" Geo. Wash. Int'l L. Rev., 37, (2005) 573 at p. 575.

regional law is jeopardised. This poses a barrier to the application of regional law. There is, therefore, an obligation on States to always ensure that they adopt legislation that does not interfere with their observance of regional laws. In addition, States must be mindful not to engage in any practice that results in a conflict of obligations.

Second, barriers may also arise in the binding nature or otherwise of a decision of the COMESA Competition Commission, the Board of Commissioners of the COMESA and that of the Court of Justice. In national legal systems, decisions of courts and some quasi-judicial institutions may carry both interpretative and precedent value. This characteristic is credited to the common doctrine of stare decisis. However, on the regional plane, States do not pay befitting homage to the precedent value of decisions of the enforcement institutions and judicial bodies of the regional bloc, as was noted by Erasmus supra. This is usually the case where a State is a third party to a decision of a regional Court.

Commenting on the binding nature or otherwise of decisions of the African Court on Human and Peoples' Rights, Jonas Obonye stated that: -

> *"Similarly, because rulings of interpretive organs or judicial mechanisms of treaties are part of the treaty system, they are res inter alios acta vis-à-vis third parties, that is, non-record parties. In terms of article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol), read with Rule 72 of the Court's Rules of Procedure, decisions of the African Court on Human and Peoples' Rights (African Court) are only binding inter partes. This means that the possibility of the erga omnes effect of these decisions is ruled out."*[124]

The COMESA Treaty states that decisions of the Court of Justice take precedence over decisions of national courts. While such decisions may bind national courts, the COMESA Treaty does not state that they have a direct binding effect on the conduct of third parties to the decision. This setup does not sufficiently motivate States to conduct themselves in accordance with past decisions of the Court of Justice. The third-party Member States may be tempted to believe that their circumstances are different to those contemplated in a decision of the Court of Justice. This undermines the supremacy of the regional law in light of the interpretative and precedent value of a decision that

[124] Jonas, Obonye. "Res interpretata principle: Giving domestic effect to the judgments of the African Court on Human and Peoples' Rights." African Human Rights Law Journal, 20(2), 736-755 (2020). Available at: https://dx.doi.org/10.17159/1996-2096/2020/v20n2a17. Accessed on 12 April 2022.

entrenches the binding nature and supremacy of the regional law.

7. CONCLUSION

In summation, theoretical foundations such as reciprocity, monism, dualism, *pacta sunt servanda*, and others were not only meant to demonstrate the complexity of this discussion but also to expose the rationale behind them. Further, the intention of the drafters of COMESA Treaty laws was to make them binding on national institutions to which they are applicable. It is partly through this approach that the commitment to the achievement of principles that underpin fair competition and consumer protection in the sub-region can be achieved. The supremacy of the COMESA body of laws over national law frameworks affirms the commitment of Member States to the achievement of shared interests for socio-economic development of the people in these regions. Therefore, national courts should not fight this but rather complement regional law and decisions made under them by ensuring that they are given full effect at the municipal level so that the objectives of regional economic integration are fully achieved.

RECUSAL: THE GUIDING PRINCIPLES REVISITED[125]

The Honourable Mr. Justice B. Patel

Judge of the Constitutional Court of Zimbabwe

Abstract

Recusal, in substance, gives practical effect to the principle of natural justice that prevents one from being an arbiter in his or her own cause. It provides for the law against bias. Judicial recusal exists in two forms, namely, upon application by a party appearing before a Judge or of the Judge's own volition. Recusal occurs when a judge determines that they have a conflict of interest, bias, or other circumstances that may compromise their impartiality or fairness in the case. In essence, the impugned Judge is charged with the obligation to assess the validity of the perceived threat to a fair hearing.

1. INTRODUCTION

Generally, in most constitutional democracies, the Judiciary wields the third arm of the tripartite State. It is endowed with a monopoly over the exercise of judicial authority beyond the domains of the Executive and the Legislature. This separation of powers is a deliberate mechanism aimed at ensuring the rule of law which, in

[125] Presentation by the Honourable Mr. Justice B. Patel Judge of the Constitutional Court on the Occasion of the Bar Bench Colloquium 2022 at Carribea Bay Resort, Kariba.

turn, secures the interests of justice in the interpretation and application of the law as between juristic and natural persons alike.

Therefore, the independence and impartiality of the Judiciary become imperative in order to give effect to this aim. In our jurisdiction, section 164 of the Constitution entrenches the independence of the Judiciary from external influence. Section 164 of the Constitution provides that: -

> *(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour, or prejudice.*
>
> *(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—*
>
> *(a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;*
>
> *(b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness and to ensure that they comply with the principles set out in section 165.*
>
> *(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies and must be obeyed by them.*
>
> *(4) Nothing in this section is to be construed as preventing an Act of Parliament from vesting functions other than adjudicating functions in a member of the judiciary, provided that the exercise of those functions does not compromise the independence of the judicial officer concerned in the performance of his or her*

judicial functions and does not compromise the independence of the judiciary in general.

The institutional independence of the Judiciary is then imparted to all judicial officers upon taking their judicial oath. Thus, in executing their constitutional mandate as repositories of justice, Judges must endeavour to ensure not only that justice is served but also that it must appear to have been done. The adherence to this standard gives credence to the Judiciary's inherent status as an impartial adjudicator in litigation. It is from this constitutional ideal that the common law doctrine of recusal attains significance in our judicial system.

2. DEFINITION OF THE DOCTRINE OF RECUSAL

The law of recusal is a manifestation of the principle of natural justice that prevents one from being an arbiter in his or her own cause. It has been regarded in some quarters succinctly as the law against bias. Reference to *Black's Law Dictionary* further illuminates this concept. Recusal is defined as the process "*by which a judge is disqualified on the objection of either party (or*

disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice."[126]

In *Aubrey Cummings v State*[127] recusal was defined as: -

> *Recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest. It is a rule of natural justice. No man should be judge over his own cause, or nemo judex in sua causa.*[128]

From the foregoing, it is apparent that judicial recusal is contemplated in two forms, namely, upon application by a party appearing before a Judge or of the Judge's own volition. In both scenarios, the impugned Judge is charged with the obligation to assess the validity of the perceived threat to a fair hearing.

The case of *S* v *Paradza*[129] is illustrative of a setting in which a Judge ought *mero motu* to recuse himself from the determination of a matter placed before him. Commenting on the propriety of trying a fellow Judge with whom he had a personal relationship, BHUNU J (as he then was) advanced the following:

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[126] Black and Nolan *Black's Law Dictionary*, 6th ed (1990) 1277.
[127] HMA 17- 18.
[128] *Council of Review, South African Defence Force & Ors v Monning & Ors* 1992 [3] SA 482; *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* 1999 [4] SA 147.
[129] 2004 (2) ZLR (H) 319.

> *"I was with Mr. Justice Paradza in the liberation struggle. We worked together as magistrates and thereafter he appeared before me as a legal practitioner. We are now fellow judges and colleagues. I strongly feel that this is a case which should perhaps be best handled by a retired judge or someone from outside our jurisdiction. I am of the view that, whatever my decision is going to be in this case, justice would not be seen to be done and yet justice must not only be done but it must be seen to be done. I therefore feel compelled to recuse myself.*
>
> *…….. In recusing myself, I feel constrained to point out that neither the State nor the defence has prompted my recusal. The decision is purely mine coming from the depth of my heart and conscience."*

In *Aubrey Cummings v State*[130] the court held that were the judicial officer has personal interest of conflict of interest in the matter. The Judge should recuse himself or herself. In *Aubrey Cummings supra* the court referred to the following cases *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd;*[131] *S v Mutizwa*[132] *and Mahlangu v Dowa & Ors.*[133]

> *"Thus, a judicial officer who has cultivated an interest in a matter before him or her, be it financial, personal or whatever else, is required by the rules of natural justice that he or she should recuse himself or herself"*[134]

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130 HMA 17- 18.
131 2001 [1] ZLR 226 [H].
132 2006 [1] ZLR 78 [H].
133 2011 [1] ZLR 47 [H].
134 HMA 17- 18.

The primary consideration in the listed grounds of recusal such as bias, self-interest and prejudice, when viewed through judicial lenses, is to protect the public perception of the Judiciary as an impartial and independent arbiter of justice. This consideration in turn safeguards the legitimacy of the proceedings as a whole and the interests of the parties appearing before a Judge whose impartiality may be impaired because of his prior interaction with the subject matter or any of the persons appearing before him.

The importance of recusal was highlighted by the South African Supreme Court in the case of *S* v *Le Grange,*[135] wherein the following was posited on the doctrine: -

> *"It must not be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this □ social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the*

[135] 2009 (2) SA 434 (SCA).

> *sense of judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'. In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result'. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."*

It is also evident that recusal ought not to be construed as a spur of the moment decision but as the culmination of a process wherein due consideration is given to all the germane factors in a matter before the Judge. In other words, the grounds for seeking recusal should be based upon credible legal factors that preclude a judicious determination of the matter. It is important to realise that judicial officers have a duty to sit and decide cases before them and in which they are not disqualified. They should not too readily accede to suggestions of bias or other interest in the matter. The High Court of Australia put it this way in *Re JRL: Ex parte CJL*[136]

> *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearances of bias, encourage parties to believe that by seeking the*

[136] 1986) 161 CLR 342 [HCA].

disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

3. THE LAW GOVERNING RECUSAL PROCEEDINGS

The previously referenced section 164 of the Constitution provides the following:

"*164 Independence of judiciary*

(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour, or prejudice.

(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—

(a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;

(b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness and to ensure that they comply with the principles set out in section 165.

(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies and must be obeyed by them.

(4) Nothing in this section is to be construed as preventing an Act of Parliament from vesting functions other than adjudicating functions in a member of the judiciary, provided that the exercise of those functions does not compromise the independence of the judicial officer concerned in the performance of his or her judicial functions and does not compromise the independence of the judiciary in general."

Section 164(1) imposes an obligation upon the Judiciary to apply the law impartially without any exception. This duty only yields to the dictates of the Constitution and the rule of law. The provision highlights the independence and impartiality of the Judiciary as imperative for the rule of law to prevail in a fully functional State. The concept of judicial independence lies at the heart of the doctrine of recusal. A Judge whose impartiality cannot be guaranteed in a manner that gives effect to the provision ought not to exercise his judicial authority in the matter at hand.

The doctrine of recusal is consequently anchored in the right to a fair trial guaranteed to litigants under section 69 of the Constitution. The independence and impartiality of the Judiciary are conditions precedent to the fulfilment of the right to a fair hearing for litigants. Thus, though the doctrine of recusal has its origins in common law, it is given expression in the Declaration of Rights under Chapter 4 of the Constitution. Invariably, when the impartiality of a Judge is called into question, the scope for a potential violation of the right to a fair hearing increase depending upon the course of action taken by the judicial officer concerned.

The interlink between recusal and the right to a fair hearing under section 69 was extensively canvassed in the authoritative case of *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors*,[137] wherein MAKARAU JCC posited the following:

> *"As correctly submitted by counsel for the respondents, the law of recusal also finds expression in our supreme law, where it is part and parcel of the bundle of rights that make up the right to a fair hearing as guaranteed in s 69 of the Constitution. The law provides in s 69(2) of the Constitution that in the determination of their civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court.*
>
> *It is self-evident that at the heart of the principle of recusal is the need to protect the right to a fair hearing, which in turn lies at the heart of the rule of law. Put differently, an application for recusal is invariably an allegation that the litigant's right to a fair hearing, as constitutionally guaranteed, is under threat of violation.*
>
> *The law of recusal therefore seeks to re-assert the independence and impartiality of the court that is demanded by s 69 of the Constitution. It further seeks to enhance the notion of even handedness, the universal standard that is required from all those who dispense justice."*

This position was further elucidated in the case of *Mangenje v TBIC Investments [Pvt] Ltd / TBIC Investments [Pvt] Ltd & Anor v Mangenje*[138]

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[137] CCZ 07/21.
[138] 2014 [2] ZLR 401 [H].

> *"…it is the right of every litigant to seek the recusal of a judicial officer who may be conflicted, or whose impartiality is not guaranteed. However, a judicial officer should not unduly take a recusal application as a personal affront. Section 69[2] of the Constitution says that in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law".*

The above exposition highlights that, in our jurisdiction, the doctrine of recusal is embedded in various provisions of the highest law of the land. It is undergirded by the obligation imposed on the Judiciary to serve its justice function as an independent and impartial arbiter in terms of section 164. Section 69, with particular reference to subsection (2), serves to guarantee the reality of an impartial and independent court as an integral mechanism in the enjoyment of the fundamental right to a fair hearing for litigants.

Thus, when a Judge is confronted by a scenario in which the doctrine of recusal becomes relevant, the constitutional implications highlighted above ought to be factored into his or her ultimate decision. Generally, the perception of the Judiciary as an independent and impartial arbiter ought to be given the greatest protection when the question of recusal arises. Nevertheless, this ought not to be construed as an

inference that recusal is merely there for the taking and that, once an allegation of bias is raised, however spurious it may be, the impugned Judge should vacate his constitutional mandate.

In the recent case of *Mawere & Ors v Mupasiri & Ors*[139] the court listed the following guidelines for Judges and other judicial officers when the question of recusal arose: -

> *"The law against bias seeks to balance two equal positions at law. These are the duty of every judge to sit and determine all matters allocated to him or her unless, in the interests of justice, recusal is necessary.*
>
> *Expressing himself on the two competing positions, in South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 Cameron AJ had this to say:*
>
> > *'On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is 'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance.'*

[139] CCZ 2/22.

Flowing from the above, it is evident that Judges ought not to concede their role as independent adjudicators in matters placed before them at the merest hint of discontent from litigants. There ought to be a balance between the competing values of the Judiciary's pre-eminent status as an independent and impartial constitutional organ endowed with judicial authority and the right to a fair hearing for litigants. To concede to a spurious recusal application undermines the independence of the Judiciary in a manner that has grave consequences on its obligation to the public as contained in section 164 of the Constitution.[140]

The constitutional safeguard regarding the doctrine of recusal, as underscored by sections 69 and 164 of the Constitution, has been afforded greater prominence and specificity in the Judicial Service (Code of Ethics) Regulations, 2012. In terms of section 14, judicial officers are compelled to recuse themselves in instances where their impartiality can be reasonably impugned. The section is worded in the following terms: -

> *"14. Recusal*
>
> *(1) A judicial officer shall disqualify or recuse himself or herself in any proceedings in which the judicial officer's*

[140] Section 164 of the Constitution of Zimbabwe, 2013.

impartiality may reasonably be questioned, including but not limited to instances where—

(a) the judicial officer has personal knowledge of disputed evidentiary facts concerning the proceedings; or

(b) subject to subsection (2), the matter in controversy—

(i) is one in which the judicial officer had served as a legal practitioner; or

(ii) involves a legal practitioner with whom the judicial officer had previously practised law, and such involvement began during the time when the judicial officer and legal practitioner were practising together; or

(c) subject to subsection (2), the judicial officer or any of his or her family members or associates has, to his or her knowledge, a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceedings; or

(d) subject to subsection (3), the judicial officer has a personal bias or prejudice concerning a party.

(2) A judicial officer who would otherwise be disqualified in terms of subsection (1)(b) or (c) may, instead of withdrawing from the proceedings, disclose to the parties, the grounds upon which such potential disqualification may arise. If, based on such disclosure, all the parties independently of the judicial officer's participation agree that the judicial officer's basis for potential disqualification is immaterial or insubstantial, the judicial officer is no longer disqualified and may participate, or continue to participate, in the proceedings.

(3) The inability on the part of a judicial officer to overcome any personal bias or prejudice concerning a party is inconsistent with the exercise of judicial office, and a recusal on that ground is a violation of this Code, unless the circumstances giving rise to the bias or

prejudice are of such a nature that any fair-minded person would not perceive that the bias or prejudice is unreasonable, in which event the judicial officer must inform his or her head of court or division of those circumstances before recusing himself or herself.

(4) The head of court or division to whom any grounds of recusal referred to in subsection (3) are disclosed may, at the request of the judicial officer concerned and if the head of court or division so deems it fit, direct that no disclosure of such grounds of recusal shall be made to the parties in the case."[141]

The above-cited provision of the Regulations offers greater elaboration of and insight into the instances in which the impartiality of the Judiciary may be reasonably impugned. By extension, it also illuminates the relevant consideration of occasions where the right to a fair hearing is impacted upon the identity of the judicial officer presiding over the matter.

The position against recusal is supported by the context of the earlier cited case of *Mawere & Ors v Mupasiri & Ors*.[142] In dismissing the application for her recusal, the court advanced the following: -

"The law against bias prohibits a judicial officer who has already expressed himself or herself on the merits of the matter at hand, in or out of court, from sitting in determination of such merits. It prohibits a judicial officer who will not bring an open mind to bear on the matter

[141] Section 14 of the Judicial Service (Code of Ethics) Regulations, 2012.

[142] CCZ 2/22.

> *to be determined to sit in adjudication of such a matter. Mere exposure, without comment, to the merits of the matter is not an adequate and valid basis for seeking recusal.*
>
> *Per contra, the prohibition does not extend to judicial officers who make findings on preliminary issues only. This is so because, borrowing the language of NGCOBO CJ in President of the RSA and Others v South African Rugby Football Union and Others (supra), a judicial officer who limits himself or herself to disposing of a matter on procedural issues remains of a mind open to persuasion by the evidence and the submissions of counsel on the merits.*
>
> *The above position at law applies where the court that disposed of the matter previously on preliminary issues is called upon to determine the matter on the merits. Such a court is not disabled from proceeding to pronounce itself on the merits of the matter at a future date."*

The primary *ratio* stemming from the above extract is that where a Judge's impartiality is clouded by his personal knowledge of the facts of the matter, he ought to recuse himself. In addition, the case provides authority for the point that a Judge who disposes of a matter on procedural or preliminary grounds, may not be precluded at a future date from adjudicating the merits of the matter. This distinction is important for the effective conduct of judicial authority by Judges who have previously interacted with the subject matter of cases placed before them.

There is also an emphasis on transparency in court proceedings in the 2012 Regulations. This is provided by the import of section 14(2) of the Judicial Code[143] that judicial officers are compelled to disclose reasonable grounds for recusal such as personal proximity or financial interest in the cause to the parties appearing before them. If the parties are reasonably satisfied that such grounds do not deter the Judge from undertaking his justice function in an impartial manner, the Judge need not recuse himself from the proceedings. Again, previous activities in which Judges have been involved will not form the basis of a reasonable apprehension of bias, unless the subject matter of the litigation arises from such association or activity.

4. FUNDAMENTAL PRINCIPLES IN THE TEST FOR RECUSAL

The test for recusal was most aptly summarised by LORD DENNING in the case of *Metropolitan Properties Ltd* v *Lannon*.[144] Commenting on the law against bias, LORD DENNING sagely noted the following, at 310 A-D: -

> *"... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice*

[143] Section 14 (2) of the Judicial Service (Code of Ethics) Regulations, 2012.

[144] [1968] 3 All ER 304.

himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit, and if he does sit, his decision cannot stand; ... Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough ... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

The test was further distilled in the case of *Brawerman v Van Wieringen & Associates & Ors*,[145] wherein the following requirements were noted: -

(1) There must be a suspicion that the judicial officer might, not would, be biased.

(2) The suspicion must be that of a reasonable person in the position of the accused or litigant.

(3) The suspicion must be based on reasonable grounds.

(4) The suspicion is one which the reasonable person referred to would, not [just] might, have.

[145] ZAWCHC/2019/128.

In summary, these are the guidelines when determining whether there is a reasonable apprehension of bias: -

> *(a) The test is objective, the question being whether a reasonable, objective, and informed person would, on the basis of the facts, reasonably apprehend that the judge will not apply an impartial mind that is open to persuasion to the matter.*
>
> *(b) It must be assumed that judges are able to apply their minds independently and disabuse their minds of irrelevant personal beliefs or predispositions.*
>
> *(c) Judges have a duty to sit in all matters absent an obligation to recuse themselves.*
>
> *(d) It is a fundamental principle that there should be no hesitation on the part of a judge to recuse himself or herself if there are reasonable grounds for apprehending partiality on his or her part.*
>
> *(e) An applicant for recusal bears the onus of rebutting the presumption of judicial impartiality and this presumption is not easily dislodged.*
>
> *(f) As to what is meant by impartiality, it is not an absolute neutrality, but rather an open-minded readiness to persuasion and the absence of an unfitting adherence to either of the parties or the judge's own predilections, preconceptions, and personal views.*
>
> *(g) There is a two-fold emphasis on reasonableness, in that the apprehension must be that of a reasonable person, and it must be based on reasonable grounds. This underscores the weight of the burden resting on the person alleging the appearance of bias.*
>
> *(h) Attention must be given to two contending factors, namely, the discouragement of ill-founded and misdirected challenges to the composition of a bench, and the importance of public confidence in impartial adjudication."*

Given the common law origins of the doctrine of recusal, several principles have been developed over time to assist Judges when considering applications for recusal. The doctrine of recusal has proved ubiquitous with its application in various jurisdictions outside the Roman-Dutch law domain. As such, the applicable principles have gained almost universal acclaim in their application by Courts globally. This is observable from the following exposition of the various fundamental principles that come to the fore in the face of an application for recusal.

4.1. Presumption of judicial impartiality

When the question of recusal arises before a Judge, the foremost principle that militates against its immediate acceptance is the presumption of judicial impartiality. This is primarily highlighted by the fact that where an application for recusal is made, the same impugned Judge has to deliberate on its merit before deciding whether or not to vacate his or her judicial mandate.

From a Zimbabwean perspective, this principle finds application in the seminal authority of *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs & Ors*

(*supra*),[146] wherein the third, fourth and fifth respondents sought the recusal of the entire Constitutional Court bench because they had been cited by the third respondent as parties to the proceedings in the court *a quo*. In refuting the validity of the recusal application, the Court opined as follows: -

> *"To seek the recusal of the entire court on an untenable legal position is synonymous with seeking the recusal on no grounds at all. It makes the application frivolous. We further observe in this regard that, when questioned as to which persons should properly constitute the bench to hear the merits of this matter, in the event that all the incumbent judges of the Constitutional Court and Supreme Court were to recuse themselves, and which authority could be called upon to legitimately appoint such persons to that bench, both counsel for the respondents were studiously unable to enlighten the Court with any meaningful answers to those very pertinent questions.*
>
> *In Bernert v Absa Bank 2011 (3) SA 92 (CC), NGCOBO CJ repeated the position earlier on taken by that court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC), that the judicial function, together with the oath of office that judges subscribe to, creates a presumption of impartiality in favour of the Constitutional Court.*
>
> *By the same reasoning as emerges from the South African cases, there is a presumption of impartiality in favour of this Court, for we too carry out similar judicial functions and subscribe to a similar oath. It is our finding that in casu, the presumption that this Court is impartial was not displaced."*

[146] CCZ 07/21.

The impartiality of Judges and other judicial officers in our court hierarchy is presumed to be guaranteed by the various principles articulated in section 165 of the Constitution[147] which serve to regulate the exercise of judicial authority. The section provides the following:

> *"165 Principles guiding judiciary*
>
> *(1) In exercising judicial authority, members of the judiciary must be guided by the following principles—*
>
> *(a) justice must be done to all, irrespective of status;*
>
> *(b) justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness;*
>
> *(c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.*
>
> *(2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.*
>
> *(3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.*
>
> *(4) Members of the judiciary must not—*
>
> *(a) engage in any political activities;*
>
> *(b) hold office in or be members of any political organisation;*
>
> *(c) solicit funds for or contribute towards any political organisation; or*

[147] Section 165 of the Constitution of Zimbabwe, 2013.

(d) attend political meetings.

(5) Members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.

(6) Members of the judiciary must give their judicial duties precedence over all other activities and must not engage in any activities which interfere with or compromise their judicial duties."

The above principles articulate the relevant considerations that underpin the exercise of judicial authority by Judges. The existence of these constitutional principles serves to reinforce the presumption of impartiality together with the oath of office administered to Judges upon their assumption of duty. Section 185 of the Constitution prescribes the judicial oath of office as follows:

"185 Oath of office

(1) Before the Chief Justice or Deputy Chief Justice assumes office, he or she must take, before the President or a person authorised by the President, the judicial oath in the form set out in the Third Schedule.

(2) Before a judge, other than the Chief Justice or Deputy Chief Justice, assumes office, he or she must take, before the Chief Justice or the next most senior judge available, the judicial oath in the form set out in the Third Schedule.

(3) The Acts of Parliament under which magistrates and other members of the judiciary, other than judges, are

> *appointed must prescribe the oath to be taken by those members of the judiciary."* [148]

In terms of the Third Schedule to the Constitution, Judges take an oath to uphold and protect the Constitution and to administer justice to all persons alike, without fear, favour, or prejudice, in accordance with the Constitution and the law.

Cumulatively, these guarantees operate as a formidable hurdle against the ouster of any Judge from validly presiding over a matter in which his or her Court is clothed with the requisite jurisdiction. Thus, the applicant for recusal bears the onus of dislodging or rebutting the existing presumption of impartiality that weighs in favour of the Judge. This can only be displaced through the submission of cogent reasons that illustrate a reasonable apprehension of bias.

This was confirmed in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[149]

> *"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should*

[148] Section 185 of the Constitution of Zimbabwe, 2013.
[149] 1999 (4) SA 147 (CC).

> *not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront."*

It is pertinent to comment that where the presumption of judicial impartiality is assailed through an application for recusal, comity ought to be maintained in the intervening exchanges. This is because the ultimate objective of the law against bias is to preserve the interests of justice by maintaining the perception of the Judiciary as an impartial arbiter and ultimately safeguarding litigants' right to a fair hearing. The often-difficult nature of the proceedings was alluded to in the case of *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors* (*supra*),[150] wherein the following was noted:

> *"It then presents itself to us that, conceptually, an application for recusal is largely an exchange between the court and the litigant who is apprehensive that his or her right to a fair hearing is under threat. There is hardly room or comfort for that matter, and self-evidently so, for the adversary litigant to fight in the corner of the court and show by way of submissions or evidence that the*

[150] CCZ 07/21.

court is not biased towards it or does not have some interest in the matter.[151]

In summation, it is evident that the presumption of judicial impartiality forms the first hurdle that an application for recusal ought to clear. The reasoning is that the very nature of the judicial function involves the determination of often contentious matters. Therefore, litigants and legal practitioners alike ought to be disabused of the notion that they have an inherent right to object to certain Judges presiding over their matters simply on the fear of a potentially adverse order or decision. An application for recusal ought to be taken only where there is a reasonable apprehension of bias in the matter on the part of the Judge involved.

4.2. Duty to Sit

This principle exists in close proximity to the presumption of judicial impartiality. The office of Judgeship is a creation of the Constitution. Therefore, once a matter is placed before a presiding Judge, he ought to fulfil and

[151] *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Company (Pvt) Ltd* 2001 (1) ZLR 226.

dispense his constitutional mandate. Its origins attest that: -

> *"Indeed, the 'duty to sit' doctrine required judges to decide borderline recusal questions in favour of participating in the case. Under the 'duty to sit' doctrine, judicial decisions articulated [a] strong 'duty to sit' that was generally construed in such a way as to oblige the assigned judge to hear a case unless and until an unambiguous demonstration of extrajudicial bias was made."*[152]

Professor Stempel refined the parameters of this principle of recusal in the following passage (*ibidem*): -

> *"In cases where the challenged judge faces a serious and close disqualification decision, the judge should decide in favour of sitting and against recusal in order to minimise intrusions on fellow judges and enhance judicial efficiency, as well as to discourage the bringing of disqualification motions by litigants as a variant of forum or judge shopping."*[153]

The application of the doctrine in the Supreme Court of the United States of America was limited by the amendments to their federal statute. The "duty to sit" rule was displaced by a "presumption of disqualification" so that, after those amendments went into effect,

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[152] Debra Lyn Basset, "*Recusal and the Supreme Court*", Hastings Law Journal, (Vol 56, issue 4), 2005.

[153] Debra Lyn Basset, "*Recusal and the Supreme Court*", Hastings Law Journal, (Vol 56, issue 4), 2005.

whenever a judge harbours any doubts about whether his disqualification is warranted, he ought to resolve those doubts in favour of recusal.[154]

However, the principle has been retained in other African constitutional democracies. One of the most prominent examples of its recent use was in the Supreme Court of Kenya. This was highlighted in the case of *Gladys Boss Shollei v Judicial Service Commission & Anor*,[155] wherein the first respondent sought the recusal of several Judges on the basis that they also doubled as Commissioners of the respondent. The concurring opinion of Justice Ibrahim in the dismissal of the recusal application articulated the following: -

> *"[25] Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognises that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.*
>
> *[26] In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of*

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[154] *Nichols v Alley* 71 F.3d 347, 352 (10th Cir. 1995).
[155] [2018] eKLR.

Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court, and Judicial Ethics; May 4, 2012; observed:

> *"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason"*

[27] In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

> *"Recusal and reassignment is not a matter to be lightly undertaken by a district judge, while, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."*

[28] It is useful to refer to the case from the New Zealand Court of Appeal Muir -v- Commissioner of Inland Revenue [2007] NZLR 495 in which the Court stated as follows:-

> *"...the requirement of independence and impartiality of a judge is counter balanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 "it is equally important the judicial officers discharge their*

> *duty to sit and do not by acceding too readily to suggestion of appearance of bias encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*
>
> *[29] From my readings, it is not lost to my mind that there is a criticism of this doctrine for being subject of abuse by judges, so as to sit in matters when it is blatantly clear that they are biased and ought not to have sat. However, where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism. I will invoke that doctrine in this matter and hold that all Judges of the Supreme Court of Kenya, members of the Judicial Service Commission or former members, have a duty to sit in this matter so as to affirm Constitutionalism."*

From the foregoing, it is evident that the application of the principle is restricted. This is because of its potential to impair the administration of justice when Judges exercise their discretion to determine matters simply on the basis that apprehension of bias has not been proven in absolute terms. However, when properly regulated, the principle can be used as an aid for Judges to determine matters where the presumption of judicial impartiality has not been rebutted or displaced.

4.3. Rule of Necessity

The rule of necessity is unarguably the most contentious principle that underpins the law against bias. The reason for this is that it only arises when a concession is made

that there are reasonable grounds for an apprehension of bias. Rather than vacating proceedings, the impugned Judge is compelled to preside over the matter as a labour of duty. The rule of necessity is a judicial doctrine that permits a judge or administrative decision-maker to decide a case even if he or she would ordinarily be disqualified due to bias or prejudice.

Accordingly, the rule of necessity serves as a well-established common law exception to the recusal principle. As Wade and Forsyth explain:

> *"In most of the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible since no one else is empowered to act. Natural justice then has to give way to necessity: for otherwise there is no means of deciding and the machinery of justice or administration will break down."*[156]

The doctrine of necessity applies in the following contexts:

> *"First, if the person who makes the decision is biased, but cannot effectively be replaced, e.g. if a quorum cannot be formed without him. Secondly, where the administrative structure makes it inevitable that there is an appearance of bias."*[157]

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[156] Wade & Forsyth, Administrative Law (9th ed), p 459.
[157] Woolf et al, *De Smith's Judicial Review* (6th ed), p. 526.

The rule of necessity has been consistently applied in the United States in both state and federal courts. In *State ex re Mitchell* v *Sage Stores Co.*,[158] the Supreme Court of Kansas observed:

> *"[I]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated."*

The earlier cited Kenyan case of *Gladys Boss Shollei* v *Judicial Service Commission & Anor* (*supra*)[159] also addressed the rule of necessity, where the Supreme Court's *quorum* was affected by an application for recusal. It was opined as follows: -

> *"[22] In the Jasbir Singh Rai and Another v. Tarlochan Singh and 4 Others, [2003] eKLR case, the Court alluded to the doctrine of necessity in the concurring opinion and the numerical challenge of the Supreme Court, more so as there was a vacancy. That doctrine is even more pronounced in this matter, and it is amplified by the Constitution itself.*
>
> *[23] First, the preamble to the Constitution is unequivocal that it is the People of Kenya who give unto themselves the Constitution. They give unto themselves the Constitution in its entirety. In this Constitution at Article 163, the People of Kenya have established the Supreme Court, consisting of seven Justices (the Chief Justice, the*

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[158] *State ex re Mitchell v Sage Stores Co.,* 157 Kan. 622, 143 P.2d 652 (1943).

[159] [2018] eKLR.

> *Deputy Chief Justice, and five other Judges). In this same Constitution, the People of Kenya have also established the Judicial Service Commission (hereinafter referred to as 'JSC'), with its membership composition clearly stipulated under Article 171 (2). A scrutiny of this membership clearly shows that at any given time, two (2) members of the Supreme Court shall be JSC Commissioners.*
>
> *[24] Another truth, which is a reality now, is that among the Supreme Court Judges, we shall/may have former JSC Commissioners. It cannot therefore be stated in general terms that any Supreme Court Judge who sits/sat in the JSC will, as a matter of cause, not adjudicate in a matter where the JSC is a party. Such a pronouncement will be a total mockery of the Sovereign will of the People of Kenya who established the two institutions in the Constitution and willed that they carry out their various functions simultaneously."*

In our jurisdiction, the doctrine was briefly adverted to in the case of *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* (*supra*).[160] Therein a question arose regarding the *quorum* of the Constitutional Court bench should the third, fourth and fifth respondents' recusal application for all the cited Judges of the Constitutional and Supreme Court bench have been granted. The doctrine of necessity was addressed in the following passage: -

> *"Had the application for recusal been validly taken, we may have proceeded to determine whether the common law doctrine of necessity, an exception to the nemo judex in sua causa principle, was of any*

[160] CCZ 07/21.

application. It is not necessary that we encumber this judgment with a discussion of the principle and its applicability in this jurisdiction. Suffice it to say that, where it is applicable, it operates to obviate a situation of administrative or judicial paralysis where no person other than the biased decision maker can make a decision in the matter."

Therefore, it is manifest that when an application for recusal has been duly taken, the Judge in question also has to be alive to the applicability of this exception. If the administration of justice is effectively impaired by the potential ouster of the presiding Judge, he or she ought to dispense his justice function. However, in such an exceptional instance, the Judge ought to ensure that the disposition of the matter is fastidiously guided by the earlier mentioned principles that undergird the exercise of judicial authority.

Notwithstanding the apparent permissibility of the rule, it ought to be utilised by Judges in a judicious manner. The Supreme Court of Canada has also made it clear that the doctrine of necessity should not be applied mechanically.[161] In particular, it should not be used if the result would be to promote a substantive injustice, and its application should be strictly limited to the extent that

[161] *R v Campbell* [1998] 1 S.C.R. 3.

the need to prevent a failure of justice requires.[162] The rule ought not to be overextended in a manner that frustrates the object of the law against bias.

5. CONCLUSION

In summation, the doctrine of recusal retains a place of importance in the dispensation of justice by the Judiciary. It serves a relevant purpose which is to ensure that justice is not only done but appears to be served in a manner that is consistent with the dictates of natural justice. Predominantly, it precludes a Judge from adjudicating a matter where an apprehension of bias is objectively and reasonably discernible. Its significance has been recognised through its constitutional guarantee in sections 69 and 164 of the Constitution. The doctrine is also regulated by certain fundamental principles such as the presumption of judicial impartiality, the duty to sit and the rule of necessity.

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[162] Professor Philip Bryden, "*Legal Principles Governing the Disqualification of Judges*", The Canadian Bar Review, Vol. 2, 2003.

THE RIGHT OF AUDIENCE IN SUPERIOR COURT[163]

The Honourable Mrs. Justice A. Guvava

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Abstract

This paper explores the right of audience in the Superior Courts for legal practitioners and examines the delicate balance between advocacy skills and access to justice. The paper delves into the historical development of the right to audience, the legal frameworks that govern it, and the implications for legal representation and the administration of justice. It further investigates how restrictions or limitations on the right of audience may impact individuals' ability to obtain legal representation and have their cases heard in the Superior Courts.

1. INTRODUCTION

The right of audience may be defined as the legal right to appear before a court of law and to be heard. In terms of section 69 (4) of the Constitution of Zimbabwe[164] this right is extended to litigants being represented by their legal practitioners of choice. In his Judicial Year Opening Speech on 11 January 2016, the late

[163] Presentation by the Honourable Mrs. Justice A. Guvava, Judge of the Supreme Court on the Occasion of the Bar Bench Colloquium 2022 at Carribea Bay Resort, Kariba.

[164] Section 69(4) of the Constitution of Zimbabwe, 2013.

CHIDYAUSIKU CJ, speaking on the standard of legal representation in the courts, stated as follows:

> *"...the Constitutional and Supreme Courts have found as a general rule that advocates from the sidebar are better prepared and are of much assistance to the court".*

The position, as stated above does, not seem to have changed over the years. The purpose of this paper, therefore, is to ignite debate on whether or not there is a need to change the existing position where all legal practitioners have the right to appear in Superior Courts and the way forward.

2. CONSTITUTIONAL AND LEGISLATIVE RIGHT OF AUDIENCE

The right of audience is crystalised and entrenched in the Constitution under section 69 (4) wherein it provides: -

> *"Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."*

It is thus a constitutional right which every litigant, who becomes a party to proceedings after instituting a matter before any court of law seeking redress or to defend his or her or its rights, enjoys. In exercising this right, the litigant can then seek a legal practitioner to

represent him or her or it before the court or can choose to appear in person.

The right of audience before a court which is enjoyed by legal practitioners flows from the bundle of the litigants' constitutional rights to a fair hearing established in terms of section 69 of the Constitution. It is the litigant who instructs legal counsel of his, her or its choice. After giving such instructions for representation the legal counsel acts on behalf of the litigant.

The Constitution goes on to provide for the Superior Courts of Zimbabwe as being; the Constitutional Court, Supreme Court, High Court, Labour Court, and Administrative Court. The Acts of Parliament regulating the function of these courts specifically provide for the right of audience before each of these courts. Of note are section 13 of the Constitutional Court Act,[165] section 30 of the Supreme Court Act[166] and section 51 of the High Court Act. A common thread runs through these provisions. They provide for the right of audience of litigants and extends the right to litigants being represented by any legal practitioner registered in terms

[165] Section 13 of the Constitutional Court Act [*Chapter 7:22*].
[166] Section 30 of the Supreme Court Act [*Chapter 7:13].*

of the Legal Practitioners Act [*Chapter 27:07*] (hereinafter referred to as the 'Legal Practitioners Act').

The importance of the question regarding the right of audience in Superior Courts is highlighted by the prominence of those very courts. A pertinent example is the Constitutional Court which occupies an eminent position in our judicial hierarchy. It is recognised as the apex court in constitutional litigation. Its authority is derived from the very same Constitution over which it is granted custodial rights. The Constitution grants that Court exclusive jurisdiction in certain constitutional issues such as the presidential petitions. This highlights the significance of the Court as the Constitution is effectively a manifestation of the will of the people. Therefore, its decisions are regarded as the protection of the will of the people. Its pronouncements in such matters are considered definitive and binding, not only on the litigants but on all persons.

Likewise, the Supreme Court is also accorded prominence as the apex court in all other litigation. Thus, in matters that preclude the determination of a constitutional issue, it is the final court of appeal. Clearly therefore, legal practitioners who appear in those courts must have the ability to assist the court as litigants have

no other recourse once their matters are determined by that court.

Turning to the High Court, it is trite that the court enjoys inherent jurisdiction except in instances where its competency is ousted by statute. Accordingly, the competency of legal practitioners who appear before such an esteemed judicial forum is relevant in the advancement of the interests of justice.

The common law position regarding the right of audience was addressed in *Tritonia Ltd v Equity and Law Life Assurance Society*,[167] wherein Viscount Simon LC referred to the rule "limiting a right of audience on behalf of others to members of the English or Scottish or Northern Irish Bars" and in *Abse v Smith* [1986] 2 WLR 322, Lord Donaldson MR stated the following[168]:-

> *"Limitation of the categories of persons whom courts are prepared to hear as advocates for parties to proceedings before them is, so far as I know, a feature of all developed systems for the administration of justice."*

The common law position has been considered by various jurisdictions and has undergone modifications to

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[167] [1943] AC 584.

[168] Dickson J, "*Students in Court: Competent and Ethical Advocates*" (1998) Vol 16(2) Journal of Professional Legal Education.

suit their particular circumstances. Our jurisdiction is no exception to this fact. Section 8 (2)(a) of the Legal Practitioners Act provides for the right of audience to all registered legal practitioners who hold valid practising certificates. From the foregoing, it is evident that all legal practitioners in Zimbabwe holding valid practising certificates, despite their experience or seniority are empowered to appear before any court of law.

Therefore, under the Zimbabwean legal system, the Law Society of Zimbabwe plays a significant role in determining the scope of the right to audience in superior courts. It retains the discretion to grant practising certificates which are relied upon by the Judiciary to regulate the grant of the right of audience for legal practitioners that petition the courts. The authority of the Law Society of Zimbabwe on this score is amplified by the fact that all registered legal practitioners fall under its aegis by virtue of section 53 of the Legal Practitioners Act.

In theory, the current iteration of our legal system does not distinguish between advocates and attorneys. The term legal practitioner though not expressly defined in the Legal Practitioners Act applies to both categories of lawyers in Zimbabwe. We have adopted a fused bar in

respect of the legal profession since 1981. The policy objectives for the adoption of this system appear to have been satisfied. However, certain challenges have been observed and experienced with particular regard to the right of audience in superior courts. These inherent shortcomings have been mostly experienced due to the abolishment of the statutory division between attorneys and advocates.

The legal requirements for commencing practice under both classes are generally similar as articulated by the Legal Practitioners Act and the Legal Practitioners Regulations, 1999. Section 4 of the latter provides, in part, as follows: -

> *"4. Practical legal training after registration*
>
> *(1) Subject to this section, a legal practitioner shall not commence to practise as a principal, whether on his own account or in partnership or association with any other person, unless he has been employed as a legal assistant for not less than thirty-six months after registration with a legal practitioner who has himself—*
>
> *(a) been in practice in Zimbabwe for at least forty-eight months; and*
>
> *(b) been approved by the Minister after consultation with the Council for Legal Education and the Council of the Society...."*

This limitation is binding in respect of all newly registered legal practitioners regardless of their affinity for

advocacy under the *de facto* bar or as an attorney. This issue was canvassed in the case of *Sibanda and Anor v Ochieng and Ors*[169] wherein the right of audience for all legal practitioners in the Superior Courts was addressed.

Over the years litigants who appear in person have also been recognised in Superior Courts. There is a new wave of litigants who no longer see the need to seek legal counsel and prefer to litigate on their own. The concerns relating to the right of audience for such litigants will not be dealt with in this paper as they require a whole presentation of their own.

3. HISTORICAL BACKGROUND OF THE RIGHT OF AUDIENCE

The following extract provides a concise narration of the changes to the right of audience to superior courts for legal practitioners in Zimbabwe: -

> *"In 1981, the legal profession in Zimbabwe was fused. Prior to fusion there were two categories of legal practitioners, namely, attorneys and advocates. The latter could only operate upon receipt of briefs by attorneys. The former, while they freely appeared in magistrates' courts, had no right of audience in the superior courts. The advocates were governed by the Bar Association and the Attorneys by the Law Society. Every practising legal practitioner had to be a member, or practise under the auspices of, one of these bodies.*
>
> *The effect of the Legal Practitioners Act 1981 was that all practising lawyers were called legal practitioners. They*

[169] 2013 (2) ZLR 326 (S).

> *were all endowed with the right of audience in the superior courts. Former attorneys began to appear in the High and Supreme Courts no longer fettered by the need to brief advocates. The former advocates chose to continue with their previous mode of practice. They remained at Advocates Chambers and communicated to the former attorneys their intention to continue as before. As a result, what is now known as a de facto bar emerged and is still in existence today." Per ZIYAMBI JA in Sibanda and Anor v Ochieng and Ors 2013 (2) ZLR 326 (S) p. 1-2.*

The above remarks show in a nutshell the development and transformation of the legal profession in Zimbabwe from colonial times to the existing status *quo* following independence. Before the attainment of independence, there existed two distinct bodies of legal practitioners respectively referred to as the Advocates and Attorneys. These two titles were distinct and carried different rights with regard to the right of audience before a court of law. However, rather than exist in antagonism, they were complementary and worked in tandem. The titles unlike in present times were not merely nominal.

The two governing legislative Acts which regulated these two different legal counsels were the Advocates Act [*Chapter 2:16*],[170] and the Attorneys Notaries and

[170] Section 18 of the Attorneys, Notaries and Conveyancers Act [*Chapter 2:18*].

Conveyancers Act [*Chapter 2:18*].[171] No one could be an advocate and an attorney at the same time, and it was only advocates who were allowed to appear in the Superior Courts in the normal course. Due to the racial inequalities existing at the time, the majority of advocates were the white minority which meant that very few lawyers of colour were endowed with the right of audience in superior courts. The net result of the system saw only white advocates having a right of appearance before the superior courts whereas black lawyers would be relegated to the inferior courts as they did not have the requisite qualification to become advocates.

Thus, very few black lawyers were admitted as advocates of the High Court. The liberation war struggle which saw the attainment of independence and a new Zimbabwe also brought in a wave of black lawyer activists who fought for the amendment of the legislature to give black lawyers rights equal to white lawyers. Herbert Chitepo was the first African in Southern Rhodesia to qualify as a Barrister. In 1954, Chitepo became Rhodesia's second black lawyer after Prince Nguboyenja Khumalo son of King Lobengula. A special

[171] Section 17 of the Advocates Act [*Chapter 2:16*].

law was required to allow him to occupy chambers with white colleagues.[172] It was the efforts of black lawyer activists such as the late Edison Sithole, late Advocate Lot Senda, late Washington Sansole J and late Advocate Kennedy Mbuso Sibanda J[173] which saw the creation of the fixed bar which is now operational to date.

After independence, the Legal Practitioners Act, Act 15 of 1981 repealed the Advocates Act and the Attorneys Notaries and Conveyancers Act. Although that Act did not define "legal practitioner", it substituted references in other laws to either "advocates" or "attorneys" with that term. It also spelt out a single admission process for those who wished to practice in either branch of the profession. Those who were already practising as either attorneys or advocates were permitted to continue as before.[174]

The promulgation of the Legal Practitioners Act, 1981 which has to date been repealed sixteen times, has seen the creation of the current Legal Practitioners Act.[175] The

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[172] Time Magazine, 31 March 1975.

[173] https://www.chronicle.co.zw/lawyers-worked-behind-the-scenes-in-pursuit-of-justice-in-zimbabwe/ (Accessed 29 September 2023).

[174] https://davidochieng.com/so-what-is-a-zimbabwean-advocate-anyway/ (Accessed 29 September 2023).

[175] Legal Practitioners Act [*Chapter 27:07*].

development and creation of the Legal Practitioners Act saw the admittance of more black lawyers. In a way, the current system adopted a dual system in that there are legal practitioners (who act as attorneys but now have the right of audience before Superior Courts) and advocates who largely provide services to other lawyers. Advocates work under instructions from their instructing attorneys. The fixed bar also saw the advancement of the Law Society into the main regulatory body of all legal practitioners and the creation of a self-governing body of Advocates Chambers for the regulation and admittance of advocates. However, it is the Law Society which issues advocates with practising certificates and as such all legal practitioners (including advocates) are under the jurisdiction of the Law Society.

In *Choto v Commercial Bank of Zimbabwe and Anor,*[176] the issue on taxing of advocates' fees was discussed: -

> *"In my view however, the change in terminology did not in any way affect the basic differences between the two types of legal practitioners. The definition provision in the Act states that "another legal practitioner means a legal practitioner who is instructed by a legal practitioner not of the same association or firm of legal practitioner." From this perspective the Act recognizes that there are legal practitioners who represent clients by virtue of being instructed by another legal practitioner. I am also fortified in this view by the fact that the main objective of the amendment was to avail*

[176] 2006 (2) ZLR 277 (H).

affordable legal representation to all litigants in the High Court and Supreme Court. Prior to the amendment only advocates had audience in the High Court and Supreme Court, and this meant that the cost of litigation was very high. The objective was therefore to place all legal practitioners on the same level without distinction in relation to their ability to appear in the superior courts and not to take away one's right to practice as an advocate."

The position articulated above still subsists, the role of an advocate cannot be taken away or overlooked. Advocates present a specialised type of lawyer with certain legal skills which equip such advocates with the ability to appear before superior courts. Sight must not be lost that, unlike with proceedings in lower courts, the procedure in superior courts carries more formality and a high standard of etiquette, decorum, and professionalism. This is also because they have more time to prepare as they are not inundated with the hustle and bustle of everyday litigation.

The ability, therefore, to be able to competently appear before superior courts is a skill that is cultivated and mastered through experience. With maturity and expertise comes the ability to make sound arguments. The enactment of the Legal Practitioners Act which created a "legal practitioner" in post-independence (1981), though largely progressive in empowering the

black lawyer, however, appears to have failed to take cognisance of the fact that there is a difference between inferior courts and Superior Courts and that such difference may require certain limitations of the right of audience of lawyers. This point will be discussed extensively under possible reforms to the current system.

4. THE LEGAL PRACTITIONERS ACT

The Legal Practitioners Act gives the right of audience to every registered legal practitioner who has been issued a valid practising certificate. It is from this practising certificate that a legal practitioner derives the right to appear before a court of law. As such, not all legal practitioners have the right of audience before a court, a certain authority[177] must be accorded to the legal practitioner so as to have a right to appear and make submissions.

As much as the Act gives the right of audience to all legal practitioners such right is not without limitations. The main limitation to this right is the court itself. The court sits to adjudicate, hear parties, and make a decision. In the exercise of this duty the court may limit a legal

[177] For example, with prosecutors from the National Prosecuting Authority derive authority to prosecute from the Prosecutor General through the dictates of the Constitution (section 258) and the National Prosecuting Authority Act [*Chapter 7:20*].

practitioner's right. DENNING LJ in *Jones v National Coal Board* [1957] 2 Q.B 55 made this point in the following terms:

> *"The judge's part ...; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their work; and at the end to make up his mind"*[178]

The judge regulates the conduct of the legal practitioner before him or her. Where the legal practitioner shows unprofessional conduct either towards a fellow legal practitioner or to the court, the judge must caution him or her. And most importantly where a legal practitioner shows a disregard for the rules of the court or lack of knowledge thereof, the judge must either bar, direct counsel to use proper procedure or condone (where such condonation is properly sought) the disregard. The right of audience exercised by the legal practitioner is thus not absolute, especially in superior courts where rules of the court take centre stage in litigation. Strict adherence to the rules of the court can never be over-emphasised. Such adherence guarantees that procedures for the conduct of business in the courts are done properly.

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[178] [1957] 2 Q.B 55.

Other limitations to the right of audience in superior courts include; the absence of the client's instructions to act on his, her or its behalf. As alluded to above a legal practitioner can only act on behalf of a client after being instructed to do so (and by extension an advocate acts after receiving instructions from the instructing legal practitioners). In the absence of such instructions, a legal practitioner has no right of audience. As such the litigant gives rise to the use and enjoyment exercised by the legal practitioner in appearing before the court.

Lastly, a legal practitioner who fails to observe the protocol and etiquette before the court when appearing may lose their right of audience. It is an accepted practice that a legal practitioner standing at the bar must accord the court due respect and likewise, the court must give such counsel respect. Such respect involves the ability to allow the court to ask questions and seek clarity without being interfered with by counsel to ask such questions. Respect further involves the use of a professional tone when responding to the legal practitioner of the other party as well as the court. Filing frivolous applications without a legal basis may incur the wrath of the court and attract an order of punitive costs against the legal practitioner.

Currently, appearances before the court have been characterised by legal practitioners of all ages. There is no limitation as to which legal practitioner can represent a litigant before the superior courts. The current situation is indeed in line with the spirit of creating equal opportunities for all legal practitioners as was envisaged in 1981. However, some noticeable problems are arising especially in the Supreme Court and Constitutional Court concerning the appearance of some legal practitioners, who are not yet experienced.

In this regard, it is important to have an analysis of the advantages and disadvantages of the current system where such lawyers can appear before superior courts.

4.1. Advantages

The main advantage of the current system at present flows from the obvious point that junior lawyers charge a lower tariff of fees. This means that litigants who do not have money can engage such lawyers and attain legal representation. This, therefore, guarantees litigants of access to justice.

The system ensures that all lawyers develop as they have access to Superior Courts. In doing so, they develop their legal understanding and ability to make arguments before the highest courts. The system guarantees the

future of competent lawyers as the young lawyers learn from their seniors and also from the court. It removes a monopoly from advocates as being the only lawyers who can appear before the superior courts.

4.2. Disadvantages

An unavoidable disadvantage stems from the fact that junior lawyers lack experience which can only be developed over years. As such many junior lawyers are at a disadvantage when they appear against more seasoned advocates.

Where a legal practitioner lacks requisite knowledge, for example of the rules of court or procedure, his or her matter will likely be found to be fatally defective, and this will result in the matter being struck off the roll. This in essence will mean that the litigant will not have his, her or its matter prosecuted to finality due to the legal practitioner's lack of requisite knowledge of the rules. This has also the added disadvantage that the litigants' costs will rise in an effort to rectify the defect.

The Supreme Court is the final court of appeal in non-constitutional matters. It would appear from this point that the Supreme Court and Constitutional Court may require senior legal practitioners and advocates to

represent clients so that the utmost assistance is rendered to the courts in coming to a determination.

During the course of hearing matters in any of the Superior Courts legal issues invariably arise and need to be dealt with there and then. The legal practitioner in these circumstances is called upon to think on their feet as there is no time to research. This requires a person of significant experience to be able to rise to the occasion.

5. ANALYSIS OF OTHER JURISDICTIONS

It is important to look at other jurisdictions in this discussion. This gives a broad picture of whether or not other countries have adopted a fused legal system, as in this jurisdiction, or have maintained the split legal profession. In this regard, I have chosen to have a quick look at position in the United Kingdom, Kenya, and South Africa.

5.1. United Kingdom

In English law, the right of audience is a right to appear and conduct proceedings in court.[179] In English law, there is a fundamental distinction between barristers, who have rights of audience in the Superior Courts, and

[179] Curzon, L.B. (2002). *Dictionary of Law* (6th ed.). London: Longman. pp. *p*.34.

solicitors, who have rights of audience in the lower courts, unless a certificate of advocacy is obtained, which allows a solicitor advocate to also represent clients in the Superior Courts. Barristers are legal practitioners that advocate and defend their clients during court proceedings. Similarly, solicitor advocates advise and support their clients on both contentious and non-contentious legal matters. Solicitor advocates and barristers are knowledgeable about a variety of different legal sectors but normally specialise in a particular area.

Barristers have full rights to audience in all courts. Traditionally, solicitors only appeared in the county courts and magistrates' courts, but they may now obtain higher rights of audience in the Crown Court, the High Court, the Court of Appeal, and the House of Lords. Many administrative tribunals have no rules concerning the rights of audience and a party may be represented by any person he chooses.[180]

Solicitors mainly work in a law firm or as part of a company's legal team and do not appear in court. On the other hand, solicitor advocates combine the roles of barrister and solicitor to work in a law firm while also

[180] https://www.oxfordreference.com/view/10.1093/oi/authority.20110810105734403.

representing their clients in a court of law. While solicitors can also request 'rights of audience' to allow them to represent their clients in court in one-off cases much like a barrister, solicitor advocates can raise their issues to higher levels of court much like barristers.[181] The English legal system is split in nature.[182]

The enabling Act for legal practitioners in the United Kingdom is the Legal Services Act 2007 [*Chapter 29*]. The Act sets out "regulatory objectives" that the regulators, the Office for Legal Complaints, and the Legal Services Board are under a duty to observe when exercising their functions. These objectives include protecting and promoting the public interest; supporting the constitutional principle of the rule of law; and promoting and maintaining adherence to professional principles. The Bar Standards Board (BSB) regulates barristers in England and Wales. It decides what's needed to qualify as a barrister and practise.

The Zimbabwean legal profession is different from the legal profession in the United Kingdom. The United

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[181] https://www.thelawyerportal.com/blog/solicitor-advocate-vs-barrister-what-are-the-main-Differences (Accessed 28 September 2023).

[182] James Tumbridge, '*The Split Profession*', February 2013- (Accessed 26 September 2023). http://www.thefoxfund.com/reports/court.pdf

Kingdom has three types of lawyers a solicitor, a solicitor advocate, and a barrister. This creates a split legal profession as the barrister has an automatic right to audience before the Superior Court, whereas the solicitor advocate work in law firms and attends court (more like the equivalent of the legal practitioner in this country) and solicitors who mainly work in the office and do not attend court. This system creates a wide range of specialisations for lawyers.

5.2. Kenya

The legal profession in Kenya is governed by the Advocates Act (*Chapter 16*) [consolidated in 1978]. The Act regulates the legal profession in Kenya, establishes the Council of Legal Education, and regulates admission to practice. It also deals with remuneration of advocates and disciplinary matters. The legal profession in Kenya does not distinguish between solicitors and barristers. However, only lawyers admitted to the Bar, referred to as Advocates of the High Court of Kenya, have the right of audience before courts (both superior and subordinate).[183]

[183] https://www.linkedin.com/pulse/legal-proffession-kenya-reuben-stephen/https://uk.practicallaw.thomsonreuters.com/

A person seeking admission to the bar needs to demonstrate their qualifications, service, and moral fitness to practice law. The qualifications for admission are specified under sections 12 and 13 of the Advocates Act. Section 13 (1) (i) of the Act provides that in the admittance of an advocate one must have practised for not less than five years in Kenya, Rwanda, Burundi, Uganda, or Tanzania.

The Kenyan legal profession has similar characteristics to our legal profession. A notable difference however is in the requirements for admission to be an advocate in Kenya. As shown above, to be an advocate one has to have practised for not less than five years. There is thus a strict provision to be adhered to in the admittance of an advocate. This position is at odds with the legal position in this country where, for a practitioner to practise as an advocate he or she must have been employed as a legal assistant for not less than thirty-six months after registration.

5.3. South Africa

The legal profession in South Africa is regulated by the Legal Practice Act, of 2014 (Act 28 of 2014). The Act provides for a legislative framework for the transformation and restructuring of the legal profession in

line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.[184] South Africa, like Zimbabwe, suffered through the hands of colonialism and the coming in of the Act ensured that access to legal services became a reality for South Africans and not just a fraction of its people.[185]

The South African legal profession is however similar to the English one. It has a split bar consisting of attorneys (solicitors) and advocates (barristers). Advocates cannot accept work directly from the public and must be briefed by an attorney who guarantees payment of the advocate's fees. Both attorneys and advocates have a right of audience before the High Court, although attorneys must apply to the Law Society for "rights of appearance". Both an attorney and an advocate must have completed separate courses, a period of practical training and passed admission examinations in order to practice. In practice, attorneys usually brief advocates to appear.[186]

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184 https://www.gov.za/documents/legal-practice

185 https://www.findanattorney.co.za/content_legal-practice-act-28-of-2014

186 Published in the Dispute Resolution multi-jurisdictional guide

6. SUGGESTED REFORM

The debate, therefore, is whether or not the profession should remain fused or should be separated into advocates and attorneys or perhaps adopts a hybrid of the two. A separated profession will see a return to a system where only advocates will appear before the Superior Courts and attorneys are relegated to appearances in inferior courts.

The Zimbabwe Lawyers for Human Rights drafted a paper in January 2015, titled 'Discussion Paper on the Mooted Division (Fission) of the Legal Profession in Zimbabwe' that challenged the proposed division of the legal profession. The organisation opposed the proposed division on the following grounds: -

> "It is of questionable constitutionality.
>
> 2. It would severely restrict access to justice, particularly to the most vulnerable and marginalised persons within Zimbabwe society.
>
> 3. It would limit freedom to contract.

2013/14
https://www.bowmanslaw.com/articledocuments/DisputeResolution-in-South-Africa.pdf

4. It obviates the real problem of no, or limited, post-graduate training and continuing legal education.

5. It overstates the efficacies of a divided bar.[187]

There can be no doubt that the fused legal profession has enabled a wider spectrum of litigants to have access to justice. However, there may be a need for some reform perhaps to extend the period under which a legal practitioner must have practised before one can appear before the superior courts'.

It may be prudent that the legislature does take into account the sentiments noted above. It would venture to suggest that a minimum of five years as a practising lawyer must be attained first before a legal practitioner can exercise the right of audience before the Superior Courts. Adopting such a stance will obviate the need for a split legal profession as the major concern that of inadequate experience will have been accommodated.

[187] https://www.zlhr.org.zw/wp-content/uploads/2021/02/Discussion-Paper-on-the-Mooted-Division-Fission-of-the-Legal-Profession-in-Zimbabwe.pdf

This is especially important in courts such as the Supreme Court and Constitutional Court as they are imbued with final jurisdiction in their respective spheres. Such a move will ensure that legal practitioners who appear before Superior Courts have a certain level of knowledge of court rules and processes, possess a standard of professionalism and can duly exercise their duty as officers of the court.

The Law Society has not been idle regarding the issue under discussion. They have had wide consultations with their members and in a proposed amendment to the Legal Practitioners Act, suggest that there must be continuous professional development and training of legal practitioners after graduation. In my view, this is a progressive proposal to ensure that legal practitioners are well-equipped when they appear before the Superior Courts.

7. CONCLUSION

The current legal framework provides that all legal practitioners who hold valid practising certificates have a right of audience in every court including before the Superior Courts. Zimbabwe has a fused legal profession which imbues such legal practitioners with the right to audience before the Superior Courts. This system is

progressive in that it ensures that all citizens have adequate access to justice as they are not only limited to instructing advocates where they seek to be represented before the Superior Courts. Although the fused system has clear advantages for litigants, it cannot be denied that there is a need for reform in the period of time that legal practitioners should have worked under pupillage before they have a right of audience before Superior Courts.

An amendment to the law on the minimum number of years of experience that a legal practitioner must have before enjoying a right of audience before Superior Courts will ensure that legal practitioners with expertise and experience appear before these courts. As already intimated, a minimum of five years may be necessary in this regard. This will in turn improve the quality of court processes filed with the court, and submissions made before the court and will most likely do away with matters which do not proceed on the basis of procedural irregularities. Further, training is imperative and legal practitioners should have continuous rigorous legal training. This may be in the form of regular workshops, court attendances to learn from the gallery how the more experienced legal practitioner conduct themselves in court, and frequent court appearances in

the lower courts so as to gain exposure, confidence, and practical experience.

COMMON ERRORS EMANATING FROM THE LABOUR COURT: PERSPECTIVE FROM THE SUPREME COURT[188]

Honourable Mr. Justice E. C Bhunu

Judge of Appeal, Supreme Court of Zimbabwe

Abstract

The Labour Court is a specialised court of law established in terms of section 172 of the Constitution and it enjoys a sui generis status. Its jurisdiction is circumscribed within the four corners of the Labour Act [Chapter 28:01]. This paper discusses the common errors emanating from the Labour Court, with particular emphasis of the role of the judge in circumventing the errors.

1. INTRODUCTION

People generally detest mistakes and errors; the courts are no exception. The Supreme Court is however somewhat unique in its perception of errors and mistakes made by lower courts. This is because it derives its very existence from errors and mistakes made by the lower courts. Without errors emanating from the lower courts there can be no Supreme Court in existence as an

[188] A paper presented at the End of First Term Judges' Symposium held at Great Zimbabwe Hotel, Masvingo in April 2022.

appellate court of final resort. The Supreme Court is also peculiar in that being a court of final jurisdiction; it does not make any errors. Its judgments are always correct save those which are within the purview of the Constitutional Court on appeal or by reference.

However, it must always be borne in mind that mistakes are an important part of the learning curve. Thus, judicial officers must always strive to learn from their mistakes and avoid repeating the same errors over and over again. When we stumble and fall, we must as judicial officers, pick ourselves up and continue with our journey on the road to justice.

2. ESTABLISHMENT AND JURISDICTION OF THE LABOUR COURT

The Labour Court is a special court of law established in terms of section 172 of the Constitution.[189] Unlike the High Court, it does not have inherent unlimited jurisdiction. Its jurisdiction is to be found strictly within the four corners of the Labour Act [*Chapter 28:01*]. It, therefore, has no

[189] Section 172 of the Constitution of Zimbabwe, 2013.

jurisdiction outside that conferred on it by section 89 of the Labour Act.[190]

Numerous errors have often been made by the Labour Court pertaining to the exercise of its jurisdiction. Jurisdictional errors should be avoided at all costs because jurisdiction is central to the court's authority and power to preside over and determine labour matters. Jurisdiction is everything. Without jurisdiction the court cannot do anything. Anything done by the court without jurisdiction is null and void and of no force or effect. It is, therefore, necessary to traverse some of the jurisdictional errors that the court has made over the years.

3. SOME ERRORS PERTAINING TO JURISDICTION

Given the centrality and importance of jurisdiction, a judge must check whether he has jurisdiction to hear and determine the matter before him or her at every stage of the proceedings. A common error made by Labour Court judges is to presume without checking whether or not the judge has the necessary jurisdiction to determine the matter.

[190] Labour Act [*Chapter 28:01*].

Section 89[191] provides for the functions of the Labour Court. It is therefore always wise whenever not sure to check against the section whether the matter placed before the court is within its jurisdiction. Although the section confers on the court the jurisdiction to hear and determine appeals and applications, its jurisdiction is limited to those appeals and applications brought in terms of the Act.[192] The jurisdiction of the Labour Court is provided for in section 89 of the Labour Act[193] as follows: -

> *"(1) The Labour Court shall exercise the following functions—*
> *(a) hearing and determining applications and appeals in terms of this Act or any other enactment; and*
> *(b) hearing and determining matters referred to it by the Minister in terms of this Act; and*
> *(c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;*
> *(d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section ninety-eight to hear and determine an application;*
> *(d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;*
> *(e) doing such other things as may be assigned to it in terms of this Act or any other enactment."*[194]

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[191] Section 89 of the Labour Act [*Chapter 28:01*].
[192] Section 89 of the Labour Act [*Chapter 28:01*].
[193] Section 89 of the Labour Act [Chapter 28:01].
[194] Section 89 of the Labour Act [*Chapter 28:01*].

The Labour Court quite often fails to appreciate that where the presiding officer whose judgment is being appealed has no jurisdiction, it follows that the court also has no jurisdiction to determine the appeal on the merits.

In the case of labour officers, there are various instances where they determine labour disputes without the necessary jurisdiction. A labour officer has no jurisdiction to determine a labour dispute determined or determinable in terms of a registered code of conduct. Section 101(5) of the Labour Act[195] expressly prohibits labour officers from intervening in such disputes. It provides as follows:

> *"(5) Notwithstanding this Part, but subject to subsection (6), no labour officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under an employment code, nor shall he intervene in any such proceedings.*
> *(6) If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour officer, who may then determine or otherwise dispose of the matter in accordance with section ninety-three."*

It is important to bear in mind that section 101(5)[196] is subject to subsection (6)[197]. The effect of subsection (6)

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[195] Section 101(5) of the Labour Act [*Chapter 28:01*].
[196] Section 101(5) of the Labour Act [*Chapter 28:01*].
[197] Section 101(6) of the Labour Act [*Chapter 28:01*].

leaves the labour officer with the residual power to regain his or her jurisdiction in the event that a matter subject to determination under a registered code of conduct is not determined within 30 days in terms of the registered code of conduct.

The purpose of subsection (6)[198] is to protect employees from delays which may be prejudicial to them particularly if he or she has been suspended without pay and benefits. It is also beneficial to the employer where for one reason or another an employee cannot be disciplined in terms of the registered code of conduct.

Section 93 of the Act[199] provides for the functions of the labour officer. That section does not confer any powers of review or appeal on the labour officer. It therefore follows that any labour officer who presides over a review or appeal matter acts without jurisdiction. His or her determination in that respect will be a nullity and of no force or effect.

Conversely where an employer dismisses any employee other than through the auspices of a registered code of

[198] Section 101(6) of the Labour Act [*Chapter 28:01*].
[199] Section 93 of the Labour Act [*Chapter 28:01*].

conduct commits a fatal procedural irregularity which is a nullity at law. Examples abound where presiding officers acted without jurisdiction, but the Labour Court proceeded to hear and determine the appeals on the merits oblivious of the fact that it too lacked the necessary jurisdiction in the circumstances. These include the following cases; *Econet Wireless v Machikichi*[200] *Esau Zhou v City of Harare*[201] and *Mukarati v Pioneer Coaches* (Pvt) Ltd.[202]

A perusal of section 89 of the Act[203] shows that nowhere does it confer jurisdiction on the Labour Court to make declaratory orders. The Labour court has often been found on the wrong side of the law by issuing declaratory orders in violation of the law. A case in point is *Air Zimbabwe v Mateko & Anor* which reads:[204]

> *"The Labour Court would have been aware of various decisions of this Court that have held that the Labour Court itself and the tribunals below it have no jurisdiction to grant a declaratur - in this regard see UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127(S), 130C-E, *where this Court remarked as follows:*

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[200] SC 126 of 20.
[201] SC 161/20.
[202] SC 34/22.
[203] Section 89 of the Labour Act [*Chapter 28:01*].
[204] SC 180/20.

> *"... nowhere in the Act is the power granted to the Labour Court to grant an order of the nature (declaratory order) sought by the respondents in the* court *a quo, nor have I been referred to any enactment. So, too, in this case, there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorising the Labour Court to issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction authorizing the Labour Court to grant such an order."*[205]

The above remarks on the lack of jurisdiction to issue declaratory orders by the Labour Court would of necessity apply to a labour officer. Such officer has no jurisdiction to issue a *declaratur* which relief is specifically bestowed on the High Court by statute.[206]

The situation where an employer has a registered code of conduct which for one reason or another is inapplicable to one or other employee is rather tricky for both the Labour Court and litigants. The problem pitched up for determination in the case of *City of Gweru v Masinire*.[207] The facts of the case are as follows: -

> *The appellant was employed as a senior officer in terms of the Urban Councils Act [Chapter 29:15]. The employer having found that its registered employment code of conduct was inapplicable to the respondent had*

[205] *Air Zimbabwe v Mateko & Anor* SC 180/20.
[206] *Air Zimbabwe v Mateko & Anor* SC 180/20.
[207] 2018 (2) ZLR 461.

recourse to the Labour (National Employment Code of Conduct S.I. 15 of 2006). The respondent was then dismissed by a labour officer in terms of the National Disciplinary code of conduct.

Aggrieved by the dismissal he appealed to the Labour Court on the grounds that the labour court had no jurisdiction to hear and determine the matter because he was subject to disciplinary action in terms of his employer's registered code of conduct.

His appeal found favour with the Labour Court. Placing reliance on the case of City of Mutare v Matamisa[208] *and section 101 (5) of the Act it held that the termination of employment of senior urban council employees was exclusively governed by the Urban Councils Act. Thereafter the court proceeded to uphold the respondent's objection to jurisdiction.*

On appeal the Supreme Court held that while the Matamisa case supra[209] *and all the cases determined before the 2005 Amendment which introduced the National Employment Regulations S.I. 15/2006 were good law at that time, they ceased to be good law by the advent of the regulations. The Supreme Court accordingly allowed the appeal, set aside the judgment of the Labour Court, and remitted the matter for it to hear and determine the matter on the merits.*

The lesson to be learnt from this case is the need for judges to check on the law before making far reaching determinations. This is because the practice of labour law is a fairly recent phenomenon in our jurisdiction. It is mainly based on statutory law which is constantly

[208] 1998 (1) ZLR 512 (S).
[209] 1998 (1) ZLR 512 (S).

changing to keep pace with changing times and circumstances.

The second lesson to be learnt is that the Labour Court, while it is enjoined to check whether it has the necessary jurisdiction, should not be too quick to relinquish its jurisdiction over labour matters. This is because as a special court it enjoys *sui generis* status. In terms of section 89(6),[210] it has exclusive jurisdiction to hear and determine any application, appeal or matter referred to it in the first instance. In that capacity it exercises the same powers of review as the High Court in labour matters. As provided for under section 89 (1) (d1).[211] It is the court of final resort on matters of fact in terms of section 92F (1).[212]

Considering that the general trend of modern labour law is to break away from archaic common law principles and move on with the times. Some elements in the sphere of labour law however seem to remain steeped in the past. This prompted GUBBAY CJ to characterise them as "ghosts of the past when he remarked in *Zimnat Insurance Co. Ltd v Chawanda*[213] that:

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[210] Section 89 (6) of the Labour Act [*Chapter 28:01*].
[211] Section 89(1)(d1) of the Labour Act [*Chapter 28:01*].
[212] Section 92F (1) of the Labour Act [*Chapter 28:01*].
[213] 1990 (2) ZLR 143 (S).

> *"When these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course is for the judge to pass them undeterred."*[214]

In elaborating the progressive stance to be taken by judges to facilitate modern employment codes based on the principles of justice and fairness, the learned Chief Justice in *Delta Corporation v Gwashu*[215] had this to say: -

> *"Departures from these codes only serve to undermine the labour standards agreed by employees and employers and risk reviving the old master and servant laws of the common law as the common law was tilted in favour of the employer, continued reliance thereon in labour relations is, in my view, retrogressive."*[216]

The Labour Court is further imbued with the benefit of exercising equitable jurisdiction unlike the ordinary courts of law which tend to be shackled to legal principles and legal technicalities. The benefits of equitable jurisdiction in labour matters were espoused by GWAUNZA JA, as she then was, in *Madhatter Minning Co. v Tafuma*[217] when she said: -

> *"The effect of the orders given in these two cases was to emphasise the position that it is the Labour Court and not the Supreme Court which is endowed with the*

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[214] *Zimnat Insurance Co. Ltd v Chawanda* 1990 (2) ZLR 143 (S).
[215] SC 96/2000.
[216] *Delta Corporation v Gwashu* SC 96/2000.
[217] SC 51/14.

jurisdiction to apply principles of equity in its determination of labour disputes."[218]

The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g., damages) suffered in Zimbabwean dollars but claimed in foreign currency for instance, the United States dollar.

Labour Court Judges should, therefore, have the courage and fortitude to embrace and give effect to progressive change for the sake of industrial justice fairness and equity. The Labour Court should ideally not slavishly adhere to legal technicalities at the expense of justice. It is the common person's court which must endeavour to do simple justice between employers and their employees. Because of their legal training and the involvement of lawyers, the Labour Court often strays into the morass of legal jargon and technicalities much to the bewilderment of the unsophisticated litigant. This unwelcome tendency has the undesirable effect of mystifying legal proceedings and justice. This acts as a

[218] *Madhatter Minning Co. v Tafuma* SC 51/14.

barrier to accessing industrial justice. This prompted MCNALLY JA in *Dalny Mine v Banda*[219] to remark that:

> "*As a general rule, it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this I do not mean that such irregularities should be ignored. I mean that such irregularities should be put right."*[220]

In *Edmore Taperesu Mazambani v International Trading Company (Private) Limited and Anor*[221] the court made similar observations: -

> *"A court of justice is required to resolve the real issues between the parties. It should not dabble too much into technicalities."*[222]

It is, therefore, clear from the authorities that the primary function of the Labour Court is to do simple justice between the parties without dwelling too much on technicalities. When interpreting statutes and codes of conduct, the Labour Court should always endeavour to give a broad liberal interpretation that is not shackled by flimsy legal technicalities.

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[219] 1999 (1) ZLR 220 (S).
[220] *Dalny Mine v Banda*1999 (1) ZLR 220 (S).
[221] SC 88/20.
[222] *Edmore Taperesu Mazambani v International Trading Company (Private) Limited and Anor* SC 88/20.

5. CONCLUSION

In conclusion, to achieve social justice, fair dismissal, and fair labour standards, it is imperative that the court must adopt an inclusive and accommodating approach. While judicial officers in the Labour Court are expected to be impartial and well-versed with the Labour Act, they can occasionally make errors that may impact the outcome of matters brought before them. Judges are responsible for ensuring that proper procedures are followed during the course of a labour matters brought before them. However, they may inadvertently make procedural errors, such as failing to adhere to prescribed timelines, disregarding procedural safeguards, or improperly applying rules of evidence. Procedural errors can impact the fairness and integrity of the proceedings. It is important to note that judges are human and can make errors. However, the legal system typically provides mechanisms for addressing these errors, such as appeals or review by higher courts. Parties dissatisfied with a judge's decision may have recourse to challenge or seek remedies for such errors through the established appellate processes.

AN APPRAISAL OF IECMS: THE JOURNEY THUS FAR[223]

The Honourable Mr. Justice J. Mafusire

Judge of the Commercial Division of the High Court

Abstract

The adoption of Integrated Electronic Case Management Systems (IECMS) has become increasingly prevalent in legal systems worldwide, aiming to streamline processes, enhance efficiency, and improve access to justice. This paper examines the implementation and utilisation of IECMS within the Zimbabwean judiciary and further evaluates its impact on key aspects of the due administration of justice. The paper interrogates issues of efficiency and accessibility, amongst others. It assesses the system's effectiveness in expediting case management processes, reducing administrative burdens, and improving overall efficiency within the judiciary. It further analyses how the IECMS has been deployed to improve the ease of doing business in the Commercial Court.

1. INTRODUCTION

The Integrated Electronic Case Management System [IECMS] was formally introduced into the Zimbabwean legal system in or about May 2022, although dry runs in the Constitutional Court of Zimbabwe and the Supreme

[223] Presentation by the Honourable Mr. Justice Mafusire, Judge of the Commercial Division of the High Court of Zimbabwe on the Occasion of the Bar Bench Colloquium 2022 at Carribea Bay Resort, Kariba.

Court of Zimbabwe had started several months earlier. The forerunner to the IECMS was the case tracking system in or about 2012. This was just a decentralised Microsoft Access case tracking. This was followed by the on-line case tracking system in or about 2016. This involved the digitalisation of existing and new records for enhanced security of records and ease of tracking of the cases. The current IECMS incorporates the case tracking system feature. One marvel about this system is that information on the life history and trajectory of a case in the courts' systems, i.e., from inception to conclusion, is displayed at the touch of a button. But the system has several other functionalities.

Phase One of the IECMS roll-out programme started in February / March 2022 with the Constitutional Court and the Supreme Court. But the highpoint was the establishment of a purely electronic or digital prototype court, the Commercial Court, a division of the High Court of Zimbabwe. It opened its doors to the public on 1 May 2022 with a compliment of six (6) Judges and critical support staff. However, preparatory work for its establishment, including the legal framework, had started in or about 2018. Commercial courts have also been establishment in the magistrates' courts. Phase Two of the IECMS was launched on 1 February 2023 in the

Labour Court and Administrative Court and Phase Three of the IECMS was launched on 1 September 2023 in the General Division of the High Court and Office of the Sheriff of the High Court.

The introduction of the IECMS in Zimbabwe was an initiative of the Judicial Service Commission [JSC] with strong support from central Government. The primary motivation was to enhance the rights of access to justice of the Zimbabwean populace. Among other things, unnecessary bottlenecks in the justice delivery system would be removed. The Judiciary was poised to contribute towards the improvement of the investment climate in the country. A judiciary that is clogged, lethargic or static, pedantic, inaccessible, and too formalistic drives away business and capital. Available statistics show that upon the introduction of the IECMS, and coupled with other interventions by Government, Zimbabwe's ranking on the World Bank's ease of doing business index, improved significantly.

2. BLUEPRINT & ETHOS FOR THE COMMERCIAL COURT

As part of efforts to transform attitudes and attune mindsets towards operating in the new dispensation of the digital courts, particularly the Commercial Court, the

guiding philosophy in the determination of disputes became “speed”, “cheap”, “simplicity”, and so on. In other words, disputes would be resolved fast and cheaply. Attendant features would entail streamlined and condensed processes, expeditious disposal of cases within a truncated period of twelve (12) months at the most, adoption of regional and international best practices on the back of intense and consistent skills training of all relevant personnel.

The ethos of the digital courts became the delivery of justice: -

- That would accord with common business sense;
- That would generate confidence in the community;
- That would reduce or minimize over-dependence on ADR [some kind of half-way house between the strict formalism of the General Division and the liberal informalism of ADR];
- That reduces over-dependence on offshore litigation [like the Singapore International Commercial Court];
- That grasps the factual and legal nuances in the new digital era;

- That eliminates or minimizes contradictory decisions; and
- That reduces appeals.

The purely electronic or digital court would have special attributes like:

- a custom-built court house;
- separate registry;
- digital / electronic processes;
- custom-made Rules of procedure;
- separate judges [in Zimbabwe the initial deployment was six (6) judges, including the Judge President – a number that seems consistent with experiences in other jurisdictions]; and
- continuous in-service training locally and abroad [bench-marking visits].

3. COMMERCIAL COURTS IN OTHER JURISDICTIONS

From a desk-top research, England was probably the first jurisdiction in the world to establish a modern concept Commercial Court. This was in 1895. Specialist commercial courts are still evolving as a special judicial

concept. In chronological order of dates, the jurisdictions covered by this research are as follows:

JURISDICTION	YEAR O IMPLEMENTATION
South Africa [Johannesburg]	1993
Kenya	1997
Rwanda	2007
Singapore [International Commercial Court]	2015
Zambia	2000

4. HIGH COURT [COMMERCIAL COURT] RULES, 2020 [SI 123/20

The High Court [Commercial Division] Rules, 2020 constitute the Rules of procedure in the Commercial

Court. They draw extensively from regional jurisdictions like Tanzania, Rwanda, and Uganda. The special feature of the Rules lies in the compression and streamlining of processes and procedures. All the necessary facts, information, documents, etc. are uploaded upfront. In-built are pre-trial case management and case mapping processes. Requests for further particulars are banned. In the case of a *lacuna*, resort is had to the Rules of the General Division. There is a constant review of the Rules and procedures in the light of experiences gained. Jurisprudence on the procedure of the Commercial Court shall inevitably develop.

5. SOME SPECIAL FEATURES OF THE IECMS

Some notable special features of the IECMS include: -

- customized rules for on-line filing;
- on-line document merging, consolidation, and pagination features;
- electronic signatures and date-stamping;
- intra-platform communication;
- on-line dashboard;
- pleadings portal for document filing;

- two court request portals: [i] user assignment request portal [for assumption of agency by legal practitioners for the respondents / defendants and [ii] document request portal [for requesting judgments and court orders];

- system notification [little bell besides a crimson red number];

- real-time service of process and notification – something so important in the computation of the *dies induciae*; and

- security of records and information.

Currently there may be a dichotomy between the requirements of on-line filing and the Rules of the Courts, with the one not speaking to the other. At the time of drafting the Commercial Court Rules, it was envisaged that both the physical method of service of processes and electronic service would be required. Actually, this may continue for some time, especially with process commencing action because of the experience regarding respondents or defendants disowning or dissociating themselves from the electronic address used by the applicant or plaintiff. The proof of physical service has to be uploaded.

Virtual sessions have proved to be quite efficient, compact, fast, cheap, and convenient. Among other things, the computer screen can be divided into two with the one side being the video conference room and the other being the documents section. Projections are that the estimated timeframes in the Rules will generally be achieved. There is an automatic real time notification system by either e-mail or SMS. For example, if a document is accepted or rejected upon up-loading the litigant is informed instantaneously. There is an online dashboard on the life of a case within the system. With the client's viewer functionality, the actual litigants are able to follow the proceedings and the processes, but only their legal practitioners can perform activities on the system. All in all, there is greater and real time interaction between the litigating world and the courts.

6. CHALLENGES OF THE IECMS

The case load is still building up in the Commercial Court. Therefore, the reliability and efficiency of the system at full functionality is still to be tested. There have been some birth pangs experienced to date:

- Connectivity problems have often caused constant glitches during sessions. An increase in the bandwidth should ease up the problem.

- Inception problems crop up from time to time as users, administrators, beneficiaries, and all are still navigating around the systems. Constant practice, use and training helps.

- There has been a slow up-take by the legal profession. It was lagging behind. The attitude was discernibly negative at inception. Training sessions organised by the JSC were poorly attended. The exhortation for systems upgrade was not readily embraced. Incompatible or inappropriate gadgets compounds the problem. But there has been a vast improvement in the last several weeks.

- There still exists interface challenges between the Rules of Court and the IECMS. Sometimes they don't speak to each other. A multi-pronged approach has been adopted. This includes the Rules Committee working on effecting amendments to the Rules and the System Administrator effecting changes within the

parameters of the warranty by the developers. Most problems should just fizzle out in time to come. In the rare instances of complete systems failure, sessions are simply converted to manual.

- There still exists significant challenges in the uploading of documents onto the system by litigants. Sometimes incorrect forms are completed leading to a high rejection rate. Some litigants have still not grasped the concept of real time service of process and notification. Until the case is completed and archived, litigants have to open their portals for notification via the little bell and bright red number beside it. Deadlines are sometimes being missed when a litigant fails to take action timeously despite a notification having been dispatched.

7. CONCLUSION

At optimal functionality, IECMS is a wonderful journey! Evidently and undoubtedly, it is the way to go. There can be no going back! The on-going review of the Rules and the constant tweaking around of the system by the

Administrator should reduce the glitches and eventually increase efficiency in the justice delivery system. No one is being left behind. The JSC has assistance programmes for unrepresented litigants. It has facilities in some outlying areas of the country. IECMS was manifestly a programme whose conception and inception were well thought out to take account of most conceivable variables. The drive is towards a judge-driven process as opposed to a party-driven system. One of the hallmarks of a party-driven system is a backlog of cases in the legal system. Sometimes cases lie dormant for months or years without the litigants moving them towards finality. IECMS should be able to flush them out. Electronic justice reduces the incidence of human interference or manipulation.

SENSITIVITY TO KEY POPULATIONS IN THE DIGITAL ERA[224]

The Honourable Justice P. Muzofa

Judge of the High Court of Zimbabwe

Abstract

This paper explores the importance of sensitivity to key populations in the digital era and examines the challenges and strategies for promoting inclusivity and access to justice by the key populations. With the rapid advancement of technology and increasing reliance on digital platforms, it is essential to ensure that these populations are not left behind or subjected to discrimination in the digital realm.

1. INTRODUCTION

Digitalisation is lauded as a way of making things simpler and has swept like a wild fire across many sectors across the board be it banking, business, agriculture, e-governance and increasingly in access to justice amongst others. It can only but continue to gain momentum. It is therefore important to fully grasp what

[224] Presentation by the Honourable Mr Justice Muzofa J Judge of the High Court on the Occasion of the Bar Bench Colloquium 2022 at Carribea Bay Resort, Kariba.

sensitivity to key populations in terms of access to justice in the digital era fully implies in our specific Zimbabwean context.

In many respects sensitivity to key populations who matter in access to justice such as the poor, the elderly, those from rural areas as compared to urban settings, those from different cultural backgrounds, those with specific disabilities, the young, gendered populations, prisoners, or those with low levels of education and legal literacy and so on, are all dictated by their unique experiences with the justice system. Attention needs to be paid to the reality that the courts are used by those who come from diverse backgrounds whose needs have to be considered.

As we move to full digitalisation, problems of access to justice such as lack of knowledge of the legal system and its processes; lack of awareness of services and procedures and inadequate access to legal resources needs to be appreciated and addressed. Some of the challenges can of course be addressed by ramping up sensitisation and promotional programmes which is where partnerships with other organizations come in for people with low levels of access, education and low levels of literacy of the legal system.

This paper addresses the topic by briefly analysing the legal context guaranteeing the right to access to justice, a brief comparative analysis of the use of technology in other jurisdictions and an assessment of existing digital innovations in our judicial system and a discussion on the way forward.

2. THE LEGAL FRAMEWORK AND DOMESTIC CONTEXT

Every country has historically or culturally specific practices and situations that hinder or promote access to justice for vulnerable groups. It is important to situate those country-specific experiences within the wider international legal context.

Every human being is reposed with the right to access justice despite their social, economic, political, religious, gender and cultural standing. Access to justice is universally recognised at both international, regional, and national levels. Article 8 of the Universal Declaration of Human Rights 1948 (UDHR) recognises the right to access to justice. The International Covenant on Civil and Political Rights (ICCPR) refers to the right to an effective remedy for all in Article 2. At the continental level, Article 7(1) of the African Charter on Human and Peoples' Rights enshrines the right to access to justice. At the regional level the 1992 SADC Treaty in Article 4(c)

enshrines human rights, democracy, and the rule of law as one of the founding principles.

Access to justice has been identified as one of the key components to sustainable development. The 2030 Sustainable Development Agenda that the UN General Assembly unanimously adopted in September 2015[225] recognizes the need to identify practical ways to protect vulnerable groups and to enhance their welfare. Its pledge to "leave no one behind" confirms its noble intention to be inclusive. Sustainable Development Goal 16 recognises the important role that law, and justice have to play. It specifically provides: -

> *'...promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels'.*[226]

For its part, Africa has adopted a development blueprint (Agenda 2063)[227], to link its developmental aspirations to

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[225] UN, Transforming our World: The 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015.

[226] Goals, represent the general objectives, and are accompanied by more detailed Targets. Target 16.3 sets out 'Promote the rule of law at the national and international levels and ensure equal access to justice for all'.

[227] Agenda 2063 is a 50-year development agenda for the period 2013-2063 adopted by African Heads of State and Government during the Golden Jubilee celebrations marking

the SDGs. In particular goals 11 and 12 of Agenda 2063 are directly responsive to SDG16, in that they seek to entrench democratic values, practices, universal principles of human rights, justice, the rule of law and capable institutions for transformative leadership. As a result, the African priority areas in this regard are underpinned by democracy and good governance, human rights, justice and the rule of law, institutional and leadership reforms and participatory development and local governance.

Despite the existence of the international and continental instruments providing for access to justice, it was however apparent that specific groups cannot assert and defend their rights as contemplated due to barriers inherent in those groups. Thus, a comprehensive set of rights and minimum guarantees that are specifically tailored to the needs and conditions of vulnerable groups[228] were established. Article 13, of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) requires that States Parties ensure

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the 50th anniversary of the formation of the Organization of African Unity/African Union in May 2013, with the vision of an "*Integrated, prosperous, and peaceful Africa, driven by its own citizens and representing a formidable force in the international arena*".

[228] CRPD, CRC, CEDAW.

effective access to justice for persons with disabilities on an equal basis with others.

At the national level, section 69 (3) of the Constitution guarantees the right to access to justice for all. It provides as follows,

> *"(1) every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.*
>
> *(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.*
>
> *(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.*
>
> *(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.'*

The concept of access to justice is broad. It includes access to information, access to well-resourced institutions for effective dispensation of justice, an

independent forum for dispute resolution, right to a fair hearing and expeditious resolution of disputes[229].

At the legislative level for instance the Domestic Violence Act [*Chapter 5:16*] specifically deals with violence in the domestic setting. This Act has increased access to justice for the vulnerable populations in abusive relationships. This area was once reserved for other dispute resolution mechanisms and not for court.

At policy level, the National Development Strategy 1, (SDG 1) aspires to achieve a digital economy by 2030. The national developments in infrastructure towards a digital economy presents opportunities that the justice delivery system can tap into in digitalising the institution.

3. COMPARATIVE ANALYSIS

The use of technology in judicial systems has been in existence for many years. As far back as 2008 the European Court of Human Rights and by 2010 the United Nations International Criminal Tribunal for Rwanda had already set up an e-justice platform. Other jurisdictions followed suit: for instance, the African Court on Human

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[229] Keynote address on Access to Justice for the poor, vulnerable and marginalised people in Zimbabwe by the Honourable Mr. Justice Luke Malaba, Chief Justice of the Republic Zimbabwe at the 2022 Right of Access to Justice Symposium, University of Zimbabwe.

and People's Rights in 2012, and in Singapore, legal practitioners can make applications by video link. In Dubai from 19 April 2020, all hearings are conducted on Microsoft Teams. In South Africa the COVID - 19 pandemic resulted in technological adjustments to the judicial system such as video conferencing by courts. Botswana, Namibia, Rwanda, Ghana, and several other African judiciaries are all using various types of e-justice systems.

The use of robots in the legal system is also slowly taking centre stage. For instance, the Do Not Pay which claims to be the world's first robot lawyer. It assists users to address a number of legal problems, drafting and filing claims in small claims courts - including scripts for hearings, and disputing parking tickets. The robot lawyer provides services at a reasonable cost thus promoting access to justice by the poor.

Artificial intelligence has presented innovative ways relating to access to justice focusing on prevention and education. The innovation on bot chats helps users to interface thereby getting help to spot early signs of abuse, to be assisted to assess what is healthy and

unhealthy behaviour, and thereby access resources for help.[230]

It is apparent that a sizable number of jurisdictions have embraced digitalisation in the delivery of justice. We have to consider the extent to which our system has embraced the use of technology in promoting access to justice for the key populations.

4. DIGITALISATION IN THE ZIMBABWE JUDICIAL SYSTEM

Digitalisation includes both internet based and traditional based technology in communication. Internet based communication pre-supposes that the user has access to the internet. Facebook, websites, twitter, and other internet based platforms provide a ready digital mechanism to enhance communication. The challenge is the cost of accessing the internet. Research has shown that Africa has the most expensive internet charges and Zimbabwe is no exception.

4.1. Internet Based Platforms

[230] Community Contributions, Rights Tags technology, United Nations, covid – 19,pandemic, coronavirus, gender identity, gender inequality, Singapore, Supreme Court, United Kingdom, artificial intelligence, Africa.

The Judicial Service Commission hosts a website that provides information on the available services, location of courts, the different laws, and court judgments. It also has a help desk platform where users can send their queries and access help. Its twitter handle provides information on developments in the judiciary. Users can retweet, comment, or react to posts. Use of Tik Tok is becoming popular and it can be used in the launch of some interventions by the judiciary. The IECMS provides a platform for electronic filing of pleadings and virtual hearings of cases. Litigants and Judges can access case information remotely. Moreover, the litigants can track their cases via their own electronic gadgets. Some law firms have websites and twitter handles that provide information on their services. Some even post research papers on specific legal subjects. Although there are no figures readily available, some legal practitioners conveniently use technology through laptops, tablets, phones in the court room to access case authorities, evidence, and key documents. These communication platforms provide interactive communication between the service provider and the user.

5. CHALLENGES

5.1. *Internet based platforms*

The challenges associated with these internet-based platforms include lack of appropriate gadgets like smart phones, the general connectivity problems and the high costs of data. The Herald on 16 November 2022 confirmed this position. It carried a news item on page 5 entitled High Device, data costs hinder access to internet. It acknowledged that most Zimbabweans now have access to the internet but that the cost of buying devices and data can leave a significant number out of touch. Internet penetration was said by POTRAZ to stand at 61.3 percent. The reality is that almost half of our population remain unconnected. Resources to get on line were said to be a main challenge.

Thus, for those in places where there is internet connectivity, they still face the challenge of high costs. Then there is the population with no connectivity at all. The high cost to access the internet is exacerbated for the ordinary citizen in the remote villages of the country. The blind and the illiterate cannot even access these internet-based platforms.

The Herald article shows, however, that there is light at the end of the tunnel. It shared information about community information centres being launched in provinces. To date there are 170 community information

centres, that would certainly improve connectivity to the internet. There are plans to increase 2G connectivity in rural areas. Therefore, the legal profession and the judiciary and relevant bodies should also ride on these developments in terms of increasing awareness of e-justice.

5.2. Victim Friendly Courts

These courts were introduced into the system in the 1990s. The Victim Friendly Court (VFC) was established in order to create a confidential and conducive criminal justice system for vulnerable witnesses. It is a special and different closed circuit court designed to allow victims to talk freely and comfortably about their ordeals at the hands of the perpetrator. Separate rooms are created for offenders and victims waiting for the trial.

During trial proceedings the victim is placed in a separate room from the courtroom with an intermediary or support person. A video camera is placed in the victim's room for the purpose of capturing and relaying the victim's testimony into the courtroom where a TV monitor receives and shows the victims conduct and testimony.

Although widely perceived to be used by children only, the wording in s 319 B of the Criminal Procedure and

Evidence Act [*Chapter 9:07*] speaks of measures to protect vulnerable witnesses. A vulnerable witness is a person who is likely to suffer substantial emotional stress from giving evidence or to be intimidated by the accused, the nature of the proceedings or by the place where they are being conducted or by any other person. Thus, the courts can be used by both children and adult witnesses.

The victim friendly courts are confined to criminal cases only. It can be argued that similar services must be made available in civil matters. There are civil matters that involve vulnerable witnesses that would surely need the service. Undoubtedly the VFC has increased access to justice to the vulnerable populations in the country.

5.3. Virtual Court Hearings

Slowly but surely the judicial system is making inroads in responding to the needs of the accused persons in custody. Their one main desire is to be heard, it could be in a bail applications or for any other purposes. The virtual bail court at the Harare High Court is a milestone. At provincial level, remand proceedings are now being heard virtually in Chinhoyi and Hwange.

If these initiatives are rolled out throughout the courts and prisons in the country it would be possible to hear

applications from applicants in any prison virtually. The same infrastructure can also be used for trials of accused persons in prison. At times Prison and Correctional Services are unable to take prisoners to court for bail applications or remand due to lack of resources like fuel or transport. The advent of virtual hearings may ease these challenges both for prison authorities and detainees.

5.4. Case Management System

The case management system is used to capture case details and store the information digitally in the JSC server. Safe storage of information enhances security of information and in the event of loss of the hard copies a soft copy is accessible. Currently the capturing of information is limited to Provincial Courts and Superior Courts. It is expected that the system will roll out to other stations.

6. WAY FORWARD IN ENHANCING SENSITIVITY TO KEY POPULATIONS

6.1. Partnerships

That internet costs pose a serious hurdle to the digitalisation drive is a reality that will require to be addressed across all sectors. Perhaps major internet

providers can be encouraged to come up with more affordable bundles as part of tax breaks and their contribution to the digital drive. Problems such as lack of access to smartphones and computers and computer illiteracy itself also need to be addressed.

In order to disseminate information to the remote areas where internet connectivity is not available or difficult to access due to constrained resources partnerships with service providers could assist for bulk messages. This presupposes that at least some people have the basic cell phones that can receive ordinary messages. Partnerships with telecommunications service providers like Econet, Netone and Telecel can ensure wide dissemination of information.

Provision of a smartphone or some other gadgets to access information to a few individuals in a community (such as paralegals) so that they are empowered to be more effective in assisting the other members of the said community is another solution. This intervention is widely used by community-based organisations.

Partnerships with organisations like Legal Resources Foundation, Zimbabwe Women Lawyers Association, Women and Law in Southern Africa, Musasa Project and Justice for Children that specialise in the provision of

legal services for vulnerable women and children can ramp up information dissemination. In addition, these organisations have a wealth of research based information from the lived realities of women and children on access to justice. They can be a valuable source of information on the challenges women and children face in accessing justice. The information can then be used to come up with responsive interventions to increase access to justice.

6.2. Radios

Although for the urban elite the traditional radio may seem defunct, a good portion of the rural population in particular still listen to radio for information and entertainment. Generally, most people have access to radios. The ordinary woman or man in the remote village can receive information through a radio. A consistent slot on radio disseminating information on available services would assist. The visually impaired can benefit greatly from such interventions.

6.3. Television

The onset of live streaming has provided alternative digital communication platforms apart from the traditional Zimbabwe Broadcasting Corporation

Television. As already stated, live-streaming is limited to certain groups that can access the internet.

Thus, the ordinary vulnerable groups may still access the traditional television. This, coupled with widespread use of sign language, would greatly benefit those with hearing impediments.

Players in the justice delivery system may consider live broadcasting of court proceedings through Television. The live broadcasting of the electoral challenge in the case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others* CCZ 42/18 was a welcome development to the public in general. Besides creating jurisprudence on live broadcasting of cases, it also provided a platform for information dissemination, and it demystified some beliefs that certain sectors of the society have about courts, lawyers, and Judges.

The JSC can partner with service providers to broadcast public interest cases. Legal practitioners can pool their resources together and sponsor such live broadcasts of cases. Besides providing information on court proceedings, this can actually improve confidence in the justice delivery system and at the same time ensuring accountability. It is an empowerment platform where

viewers may get to know how to deal with issues in court, the language and even the court decorum.

6.4. Investing in appropriate technology

Investing in digital technologies that are accessible, and leveraging on new and emerging technology in innovative ways to be responsive to the needs of the key groups would go a long way to improve access to justice. For instance, making braille widely available and providing technology for the hard to hear. Use of artificial intelligence like bot chats where a user can interact with the service provider and get a response immediately. This is different from a help desk which relies on telecommunications. The user has to call the service provider. In the future even robots can be used to assist and reach out to communities.

6.5. Other relevant issues

6.5.1. Language

The information that is disseminated through the various platforms predominantly originate from the courts and the pleadings by legal practitioners. The language used must be sensitive to key populations. For instance, in drafting pleadings there is no need to use abusive or derogatory terms like the disabled, the appropriate term

is people living with disability. The reference is premised on the fact that this is a human being living with a condition and not identified by their condition.

In family law matters particularly divorce matters, where emotions can blow over the roof, sensitivity to litigants is necessary by both the legal practitioners and Judges. There is always the silent but affected parties, the children. Some litigants in divorce, guardianship, custody, and maintenance matters settle their scores through the children. To what extent is the justice system being sensitive to these children? At times the children are identified in the pleadings and worse still they are identified in the court order. When these pleadings and court orders find their way into the public area, they are widely circulated on social media. This is one of the drawbacks of citizen journalism. The result is that they suffer silently. The children go to schools where they suffer immense stigma. At times such cases attract a backlash from other children. There is need for some sensitivity in that area and come up with practical ways to protect the identity of the children.

In sexual cases particularly rape, the complainant is usually at the receiving end. She has already suffered the embarrassment of reporting the matter and repeating

the ordeal to the police as they record statements. In court at times legal practitioners are merciless. There is a temptation to push a witness too much under cross examination to a breaking point. They will cross examine a complainant about the most private issues of her life. She has to speak in a public court about those issues like how 'many men have you bedded' 'this was not your first encounter', 'why did you not scream when you were raped, not screaming shows you consented'.

The language used in court proceedings is English. Interpreters are available to interpret any local language to English. For the purposes of information dissemination on the various digital platforms it is necessary to translate the information into other languages. Even on the web-based platforms it is necessary to have the information in local languages.

6.5.2. Jurisprudence

There is need to develop jurisprudence around the use of technology in the justice delivery system and access to justice for vulnerable groups.

Legal Practitioners therefore can deliberately identify appropriate cases for court so that jurisprudence on the use of technology in courts can be developed. For

instance, the High Court Rules, 2021[231] provide for service of process through electronic mail. Delivery of such electronic mail to the address is *prima facie* proof of service. Although the terms may appear obvious, we may consider a case of service through WhatsApp. Is the phone number a valid address for the purposes of the Rule since the process is delivered to the recipient's number? Such cases can go a long way in actively promoting digitalisation in the judicial system.

6.5.3. Document good practices

Identifying both good practices and challenges can support building roadmaps to increased ICT accessibility and broader access to justice.

6.5.4. Inclusivity

In coming up with sensitive digital mechanism to enhance access to justice for key populations it is important that the key populations are engaged. Nothing for them without them. Otherwise, the technology will remain a white elephant.

[231] Rule 16 and Rule 21 of the High Court Rules, 2021.

6.5.5. Simplification of procedures

Improving the rules of procedure for all in terms of simplifying procedures for accessing justice, goes hand in glove with digitalisation otherwise we could in reality miss the intended goal. As the justice system moves more rapidly towards digitalisation, one way of making this transition smoother would be to ensure that full digitalisation is implemented against the backdrop of key reforms in civil procedure that are designed to make access to justice simpler for ordinary citizens. If the courts are digitalised without a concomitant focus on and key understanding of how our legal system as a whole already excludes rather than accommodates a large part of citizens within the formal justice system, digitalisation will in reality be an exercise in vain.

7. CONCLUSION

It is possible to leverage on technology and establish a responsive judicial system to enhance access to justice for the key populations. This paper has shown some steps towards reaching the goal. Most barriers can be surmounted through appropriate partnerships. Legal practitioners must make use the available systems to

promote a wider use of technology. If we truly want to improve access to justice for the vulnerable groups, then we need to focus on the individual groups, and include them in the processes to develop an effective e-justice system so that services will truly be sensitive and responsive to their needs. In the wider context this is in line with the 2030 National Development Strategy 1 and the African Agenda 2063: that development must leave no one behind.

THE IMPORTANCE OF PRECEDENT IN THE EXERCISE OF JUDICIAL FUNCTIONS[232]

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Abstract

The doctrine of precedent is a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Accordingly, deviating from it is to invite legal chaos in that it removes certainty, predictability, reliability, equality, uniformity, and convenience, being the principal advantages to be gained by a legal system that relies on it. This paper discusses the importance and operation of legal precedent, examining its underlying principles, advantages, disadvantages, and the different levels at which it is applied.

1. INTRODUCTION

It is inelegant for the topic to refer merely to "precedent". In law, precedent more accurately arises as *"the concept of precedent*" or *"the doctrine of precedent"* or *"the principle of precedent"*. The doctrine of

[232] A paper presented at the End of First Term Judges' Symposium held at Great Zimbabwe Hotel, Masvingo in April 2022.

precedent is a state of affairs where authority is given to past judgments of the courts. It requires courts to follow the past decisions of coordinate and higher courts in the judicial hierarchy. The Latin maxim for the doctrine is *stare decisis et non quieta movere* (meaning, "one stands by decisions and does not disturb settled points"). Professors Hahlo & Kahn, in their celebrated book, "The South African Legal System and its Background" (1968) have the following oft-quoted passage:

> *"In the legal process, as in all human affairs, there is a natural inclination to regard the decisions of the past as a guide to the actions of the future…In the legal system the calls for justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent."*[233]

In the "English Legal System" (18th edition), Gary Slapper and David Kelly tell us the following about the doctrine of precedent:

> *"The doctrine of binding precedent, or stare decisis, lies at the heart of the English legal system. The doctrine refers to the fact that, within the hierarchical structure of the English courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In*

[233] Hahlo & Kahn, The South African Legal System and its Background (1968) at page 214.

general terms, this means that when judges try cases, they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow, but will certainly consider, it."[234]

2. WHAT IS THE IMPORTANCE OF PRECEDENT?

A convenient starting point under this section is to ask the question: Is `*precedent*` inevitable? Put differently, are there alternatives to a system based on `*precedent*`? Or is the doctrine of *precedent* mandatory? Despite raising the question or questions, the answers require a great deal of interrogation of jurisprudential concepts. Secondly, the doctrine of precedent is mandatory. It is important to note that not every legal system applies the doctrine of precedent in the manner defined above. In legal systems founded on the civil law tradition, the doctrine of precedent is weak. The doctrine of precedent as we know it today, has its origins in the English common law system. Some civil law systems

[234] Gary Slapper and David Kelly "*English Legal System*" (18th edition), at page 137.

specifically oust it. There is a great deal of learning around `alternatives to a system based on precedent`.

The proposition that the doctrine of precedent is mandatory stems from two bases, both of which are founded on the Constitution. The first basis is that the doctrine of precedent, as applied in England, was imposed on 10 June 1891. It started operating from that day and has been with us to today. At independence, section 89 of the 1980 Constitution entrenched it. Section 89 of the 1980 Constitution is still our law by virtue of section 192 of the 2013 Constitution.

The second basis is that under section 3 of the Constitution[235], Zimbabwe is founded, *inter alia*, on respect for the rule of law. The rule of law requires the doctrine of precedent because all the purposes sought to be achieved by the doctrine are the very essence of the rule of law. In this regard, successive judgments of the South African Constitutional Court have held that the doctrine of precedent is a core component of the rule of law, a founding value of the South African Constitution. Thus, in *Camps Bay Ratepayers and*

[235] Section 3 of the Constitution of Zimbabwe, 2013.

Residents Association & Another v Gerda Yvonne Ada Harrison,[236] the court held that:

> *"[28] Moreover, in seeking to meet the two threshold requirements for leave to appeal, the applicants further argued that this Court should now confirm that the interpretation of section 7(1) of the Building Act adopted in Walele constitutes binding authority from which the Supreme Court of Appeal; was not entitled to deviate as it did in True Motives and in this case. The argument raises issues concerning the principle that finds application in the Latin maxim of stare decisis (to stand by decisions previously taken) or the doctrine of precedent. Considerations underlying the doctrine were formulated extensively by Hahlo and Kahn. What it boils down to, according to the authors, is: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to the gained by legal system from the principle of stare decisis". Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfies that the decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."*[237]

In *Turnbull - Jackson v Hibiscus Coast Municipality & Others*[238] the court held that:

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[236] [2010] ZACC 19.

[237] *Camps Bay Ratepayers and Residents Association & Another v Gerda Yvonne Ada Harrison* [2010] ZACC 19.

[238] [2014] ZACC 24.

> *"[54] The Walele-True Motives controversy brings to the fore the important doctrine of precedent, a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. The doctrine is a means to an end. This Court has previously endorsed the important purpose it serves..."*[239]

The doctrine of *precedent* is mandatory; it is a manifestation of the rule of law and is decreed by the Constitution itself. Judges have no option but to be bound by it. The issue is not about the doctrine of precedent being mandatory. It is about its importance. The importance of the doctrine of precedent has been stressed by eminent authorities. With respect, we ought to give these eminent authorities their space to address the purposes of the doctrine of precedent. Three eminent authorities are adequate for our purposes. We start with Professors Hahlo and Kahn who iterated:

> *"The advantages of a principle of stare decisis are many. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being*

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[239] *Turnbull- Jackson v Hibiscus Coast Municipality & Others* [2014] ZACC 24.

dealt with alike, and it conserves the time of the courts and reduces the cost of law suits – as Cardozo said, 'the labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case'. Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis."[240]

Our second eminent authorities are Gary Slapper and David Kelly who in their English Legal System (18th edition), said the following: -

"There are a numerous perceived advantages of the doctrine of stare decisis, among which are the following:-

Consistency: This refers to the fact that like cases are decided on a like basis and are not apparently subject to the whim of the individual judge deciding the case in question. This aspect of formal justice is important in justifying the decisions taken in particular cases.

Certainty: This follows from, and indeed is presupposed by, the previous item. Lawyers and their clients are able to predict what the outcome of a particular legal question is likely to be in the light of previous judicial decisions. Also, once the legal rule has been established in one case, individuals can orientate their behaviour with regard to that rule, relatively secure in the knowledge that it will not be changed by some later court.

Efficiency: This refers to the fact that it saves the time of the judiciary, lawyers, and their clients for the reason that cases do not have to be reargued. In respect of potential litigants, it saves them money in court expenses

[240] Hahlo & Kahn, The South African Legal System, and its Background (1968).

because they can apply to their solicitor or barrister for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points. (it should of course be recognized that the vast bulk of cases are argued and decided on their facts rather than on principles of law, but that does not detract from the relevance of this issue and is a point that will be taken up later in chapter 13).

Flexibility: this refers to the fact that the various mechanisms by means of which the judges can manipulate the common law proved them with an opportunity to develop law in particular areas without waiting for Parliament to enact legislation. In practice, flexibility is achieved through the possibility of previous decisions being either overruled or distinguished, or the possibility of a later court extending or modifying the effective ambit of a precedent. (it should be re-emphasized that it is not the decision in any case which is binding, but the ratio decidendi. It is correspondingly and equally incorrect to refer to a decision being overruled)."[241]

The third eminent authority is the 1966 Practice Statement by Lord Gardiner, the Lord Chancellor, on behalf of himself and his fellow House of Lords,[242] held that: -

"The Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former

[241] Gary Slapper and David Kelly, English Legal System (18th edition).
[242] [1966] 3 All ER 77.

> *decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.*
>
> *In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property, and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this house."*[243]

The above are the purposes of the doctrine of precedent. Before saying whether or not those purposes are important, the disadvantages of the doctrine of precedent have to be recorded. There are some prominent disadvantages such as the following: -

a. *Too stringent a body of rules of precedent, "allows the law to become a petrified forest of erroneous notions" [Hahlo & Kahn] or "the law in relation to any particular area may become ossified on the basis of an unjust precedent, with the consequence that previous injustices are perpetuated." [Gary & Slapper].*
b. *It stifles law reform as the law may fail to develop and change to cater for changed circumstances and changing times or sentiments.*
c. *On the contrary, stare decisis may lead to more uncertainty by the many cases that have to be cited as authorities, given the ability of some judges to select the authorities they prefer to follow.*
d. *The doctrine of precedent lays bare the fallacy that judges do not make law. It has been said: "It is now probably a commonplace of legal theory that judges do make law. Perhaps the more interesting question is not whether judges make law, but why they deny that they do so."*

[243] House of Lords 1966 Practice Statement.

e. *Be that as it may, the advantages far outweigh the disadvantages, with the result that the purposes served by the doctrine of precedent are at the core of the rule of law. More fundamentally, without adherence to the doctrine of precedent, the judiciary will not comply with the dictates of sections 164 and 165 of the Constitution.*

f. *Section 164(1) of the Constitution requires the courts to be independent and be subject only to the law, which they must apply "impartially, expeditiously and without fear, favour or prejudice". It is impossible to comply with these dictates without a doctrine of judicial precedent. Impartiality necessarily requires the existence of standards that are independent of the judge. The idiosyncrasies of individual judges ought to be irrelevant in a justice delivery system.*

The principles set out in section 165 of the Constitution presuppose an adherence to the doctrine of judicial precedent. For example, only under a system of judicial precedent may a member of the judiciary ensure that justice is not delayed and perform his or her judicial duties with 'reasonable promptness". The inescapable conclusion under this section is that the doctrine of precedent is a constitutional imperative as part of the rule of law. Let us now turn to how the doctrine operates in practice.

3. HOW DOES PRECEDENT OPERATE IN PRACTICE?

There are three categories regarding precedents, these entail as follows: -

a. Binding precedent.
b. Persuasive precedent that must be followed unless there is *justa causa*.
c. Persuasive precedent that need not be followed but must be considered.

Before examining each of these three categories, two statements true for all categories must be made. These are that precedent refers to propositions of law. It is not the actual decision in a case that constitutes precedent. Decisions on questions of fact are irrelevant and may not be cited as precedent, see the case of *Qualcast (Wolverhampton) Ltd v Haynes.*[244] The propositions of law must appear in a written judgment. An *ex-tempore* judgment may not be a judgment for this purpose nor is an order of court issued without reasons a judgment for precedent purposes.

3.1. *Binding Precedent*

The general rule is that a court is only bound by decisions of a higher court or decisions of its full bench. Until 1966, the English legal system had a peculiar situation where both the Court of Appeal and the House of Lords (now Supreme Court) were bound by their own previous

[244] [1959] AC 743.

decisions: *London Tramways Co Ltd v London County Council* [245](for House of Lords) and *Young v Bristol Aeroplane Co. Ltd*[246] (for Court of Appeal). The 1966 Practice Statement changed the position for the House of Lords leaving the Court of Appeal still being bound by its own previous decisions.

Outside England, and broadly speaking, binding precedent operates on the basis that it is a lower court that is absolutely bound by decisions of a higher court, whether the decision is right or wrong, while the higher court itself (and indeed any court) is not bound by its own previous decisions.

In Zimbabwe, there is a fundamental difference between the High Court and higher courts regarding the concept of a "full bench". With the Supreme Court and Constitutional Court, a panel of three judges is not absolutely bound by a judgment of a panel of five or more judges. This is because by legislation, both courts are not bound by their previous judgments. With the High Court, the judgment of two or more judges absolutely binds a court consisting of a single judge. What is binding on the lower court is the *ratio decidendi*, the rule of law

[245] [1898] AC 375.
[246] [1944] KB 718.

on which the decision is founded. The celebrated description of *ratio decidendi* is the following: -

> *" The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury".*[247]

The *obiter dictum* (plural *obiter dicta*) is not binding on a lower court. An *obiter dictum* is a statement of law made in passing. It is a statement of law that is not part of the *ratio decidendi*. A lower court is absolutely bound by the *ratio decidendi* of the judgment of a higher court. There are three ways in which a lower court may properly "avoid" binding precedent from a higher court. These are: -

- By showing that the proposition of law is not the *ratio decidendi* but *obiter dictum.*
- By distinguishing the cases. Here the emphasis is on different material facts of the cases which make the precedent inapplicable. It has been said that: "Judges *use the device of distinguishing where, for some reason, they are unwilling to follow a*

[247] Cross and Harris, Precedent in English Law, 4th edition, 1991, p.72.

particular precedent and the law reports provide many examples of strained distinctions where a court has quite evidently not wanted to follow an authority that it would otherwise have been bound by."

- Where the judgment of the higher court has no discernible *ratio decidendi*. This would be the case where an appellate court consisting of a panel of two or more judges produces two or more written judgments with no majority on the *ratio*. There would be a majority on the result but different lines of reasoning leading to the same result.

Outside the above three situations, a lower court CANNOT escape being bound by the ratio decidendi of a higher court. Similarly, a court cannot escape being bound by the *ratio decidendi* of a judgment of its full bench. The highest courts are well-known for not tolerating any attempts by lower courts to avoid being bound. Let us use LORD DENNING`s example.

LORD DEVLIN, for the House of Lords, delivered judgment on exemplary damages.[248] The Court of Appeal took the

[248] *Rookes v Barnard* [1964] AC 1129.

view that the law on exemplary damages as expounded by LORD DEVLIN was "unworkable". The court held that the common law on exemplary damages had been well settled before 1964, that there were two House of Lords cases which had approved that settled doctrine and which LORD DEVLIN must have "overlooked" or "misunderstood," that *Rookes v Barnard* had not been followed in Commonwealth courts, and that the new doctrine was "hopelessly illogical and inconsistent". He concluded:

> *"I think the difficulties presented by Rookes v Barnard are so great that the judges should direct the juries in accordance with the law as it was understood before Rookes v Barnard. Any attempt to follow Rookes v Barnard is bound to lead to confusion."*
>
> *This matter went on appeal to the House of Lords before seven Law Lords. Lord Devlin's approach to exemplary damages was endorsed, with varying enthusiasm, by a majority. The approach of the Court of Appeal to Rookes v Barnard was roundly condemned. Lord Hailsham L.C.said: -*
>
> > *"It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, it if were open to the Court of Appeal to do so, it would be highly undesirable…*
> >
> > *"The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v Bristol Aeroplane Co. Ltd offers guidance to each tier in matters affecting its own decisions.*

> *It does not entitle it to question considered decision in the upper tiers with the same freedom."*[249]

The South African Constitutional Court has also had occasion to express similar strong sentiments:

> *"I am mindful of the proposition that, when strictly applied, the doctrine of precedent may inhibit judges in lower courts from performing their constitutional duty under section 39 (2) of the Constitution. But we do not have to concern ourselves with the effect of section 39 (2) on the binding authority of pre-constitutional decisions because Walele obviously does not fall into that category. As to the influence of section 39 (2) on post-constitutional decisions of higher tribunals, this court expressed itself in no uncertain terms when it said: -*
>
> > *"It does not matter... that the Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport, and objects of all the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.*
>
> *High Courts are obliged to follow legal interpretations of the Supreme Court of Appeal, whether they relate to constitutional issues or to other issues and remain so obliged unless and until the Supreme Court of Appeal itself decides otherwise or this Court does so in respect of a constitutional issue".*[250]

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[249] *Rookes v Barnard* [1964] AC 1129.

[250] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* (CCT 18/10) [2010] ZACC 19; 2011 (2) BCLR 121 (CC) ; 2011 (4) SA 42 (CC) (4 November 2010).

The conclusion in this section is this: there is only one form of binding precedent, namely the *ratio decidendi* of the judgment of a higher court.

3.2. *Persuasive precedent that must be followed unless there is justa causa.*

In this category is precedent which is not binding BUT must be followed unless there is *justa causa*. The only precedent here is a court`s own previous judgments. While a court is not bound by its previous judgments, it must follow them unless there is *justa causa*. This applies to the High Court, Supreme Court, and Constitutional Court.

In Zimbabwe, the legislative provisions that proclaim that the Supreme Court and the Constitutional Court are not bound by their previous judgments do not affect the doctrine of judicial precedent to the extent to which it requires these courts to follow their previous judgments unless there is *justa causa*. They are not bound but must follow their previous judgments unless there is *justa causa*. It is because of this principle that there is such a thing as "overruling its previous judgments" or "departing from previous judgments". This takes us to the question: in what circumstances is there *justa causa* for a court not to follow its previous judgments?

Two main grounds have emerged. I will call them- "We were wrong" or "clearly wrong" and "Things have changed". Under the doctrine of precedent, a "wrong judgment" must still be followed. It is only departed from if it is "clearly wrong". Similarly, the "things have changed" basis must only be resorted to where grave injustice would otherwise ensue if the precedent remained in force. For the "We were wrong" basis, refer to MCNALLY JA in *Hama v NRZ*[251] when the Supreme Court departed from *United Bottlers v Murwis*[252] within the space of one year.

For "clearly wrong", refer to *Magaya v Magaya*[253] when the Supreme Court overruled its previous judgment in *Katekwe v Muchabaiwa*.[254] *Book v Davidson*[255] may also be in the category of "We were wrong": here the Supreme Court departed from all its previous judgments on restraint of trade clauses and followed a South African judgment *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[256] that had been handed down a few years earlier.

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[251] 1996(1) ZLR 664 (S).
[252] 1995 (1) ZLR 246 (SC).
[253] 1999(1) ZLR 100(S).
[254] SC 87-84.
[255] 1988(1) ZLR 365(S).
[256] 1984 (4) SA 874 (A).

The phrase "Things have changed" is illustrated by *Zimnat Insurance v Chawanda.*[257] The doctrine of judicial precedent also requires the High Court to follow its previous judgments and only depart from them on either the "clearly wrong" or "things have changed" basis. Judgments of the High Court are not judgments of the individual judges who write and hand them down. There is no such thing as *"the judgment of my brother or sister".*

For the High Court, conflicting judgments are inevitable because of simultaneous sittings. A judge of the High Court faced with conflicting judgments must follow the judgment he or she considers to be a better view of the law. Only in exceptional circumstances may such a judge find both views "clearly wrong".

3.3. *Persuasive precedent that need not be followed but must be considered*

- *Ratio decidendi* of the highest courts of foreign countries with which we have a close connection (mainly Roman-Dutch jurisdictions and England).

[257] 1990(2) ZLR 143(S).

- *Ratio decidendi* of the highest courts of other foreign countries.
- *Obiter dicta* of the higher courts (for lower courts)
- *Obiter dicta* of the court itself.
- Both *ratio decidendi* and obiter dicta of lower courts.
- *Obiter dicta* of foreign courts.

3. CONCLUSION

Precedent refers to previously decided cases that establish a legal principle or rule that should be followed in similar cases in the future. It plays a crucial role in the exercise of judicial functions, particularly in common law legal systems. It also provides stability and predictability in the legal system. When courts consistently apply established legal principles, they ensure that similar cases are treated similarly. This promotes confidence in the legal system and allows individuals and businesses to make informed decisions based on predictable outcomes. Precedent helps to promote consistency and fairness in the application of the law. It prevents arbitrary or inconsistent decisions by requiring judges to follow established legal principles. Similar cases are decided in a similar manner, promoting equal treatment and fairness in the justice system. Precedent enhances

efficiency and judicial economy by providing a framework for decision-making. Instead of starting from scratch in every case, judges can rely on existing legal principles and reasoning to reach a decision. This reduces the time, effort, and resources required to resolve legal disputes. While precedent is important, it is not absolute. Courts have the ability to distinguish or overrule previous decisions in exceptional circumstances or when there is a compelling reason to do so. However, such departures from precedent are typically approached with caution and require persuasive justifications.