REPORTABLE (17)

(1) DIDYMUS MUTASA (2) TEMBA MLISWA

v

(1) THE SPEAKER OF THE NATIONAL ASSEMBLY

(2) THE PRESIDENT OF ZIMBABWE

(3) CHAIRPERSON ZIMBABWE ELECTORAL COMMISSION

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC
HARARE APRIL 1, 2015

L Madhuku, for the applicants

S Chihambakwe, for the first respondent

T Hussein, for the second respondent

T N Kanengoni, for the third respondent

MALABA DCJ: After perusing documents filed of record and hearing counsel, the unanimous decision of the Constitutional Court ("the Court") was that the matter be dismissed

with costs. The Court indicated that reasons for the decision would be given in due course. These are they.

BACKGROUND

The applicants are former members of the National Assembly, one of the two Houses of Parliament. They were elected members of the National Assembly on 31 July 2013 during the harmonised elections. Their candidature for election as Members of Parliament was on the ticket of the Zimbabwe African National Union (Patriotic Front) party ("ZANU-PF"). ZANU-PF is a political party with a detailed constitution that governs, *inter alia*, matters relating to membership.

The applicants approached the Court in terms of s 85(1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ("the Constitution"). The first applicant, in his founding affidavit, averred that ZANU-PF as a political party had been experiencing internal squabbles since the beginning of 2014. These squabbles culminated in a meeting held by some members in December 2014, which was referred to as a "congress" by those who attended. Amongst some of the resolutions of the meeting was the suspension of the applicants from ZANU-PF. On 3 March 2015 the first applicant instituted proceedings in the High Court seeking an order declaring the meeting illegal, which proceedings were still pending at the time of this application.

On 26 January 2015 the first applicant wrote a letter to the President and First Secretary of ZANU-PF. In his correspondence, the first applicant invited the party President to solve the conflicts in the party. This letter is filed of record. The first applicant claimed that this letter was not favoured with a response.

It was further averred by the first applicant that there was a meeting of the ZANU-PF Politburo on 18 February 2015, at which a decision was taken to expel him and the second applicant from the party. He claimed that he heard about the meeting and the decision to expel him and the second applicant through the media.

On 19 February 2015 the Secretary for Administration of ZANU-PF addressed a letter to the first respondent, advising him that the applicants had ceased to be members of ZANU-PF. This letter was received by the first respondent on 23 February 2015. Aggrieved by this correspondence, the first applicant wrote to the first respondent on 27 February 2015, stating that his expulsion and that of the second applicant from ZANU-PF were null and void. In the letter, the first applicant articulated reasons for his opinion that his dismissal and that of the second applicant were null and void.

By letter dated 2 March 2015 the first respondent replied to the letter of "protest" authored by the first applicant. In his response, the first respondent communicated that any allegation of unfairness in the first applicant's expulsion was supposed to be raised with his political party. With reference to s 129(1)(k) of the Constitution, the first respondent stated that he was under an obligation to act upon the notification by a political party that a Member of the National Assembly had ceased to be a member of the political party of which he or she was a member when elected to Parliament.

On 3 March 2015 the first applicant learnt from the second applicant that the first respondent had announced that his seat in the National Assembly had become vacant in terms of s 129(1)(k) of the Constitution. This announcement did not sit well with the applicants. It

prompted them to approach the Court in terms of s 85(1) of the Constitution. They sought an order couched in the following terms:

"IT IS ORDERED

1. That the applicants' fundamental right to the equal protection and benefit of the law protected by s 56(1) of the Constitution of Zimbabwe, 2013 has been infringed by the first respondent's conduct consisting of his announcement and/or declaration on or about 3 March 2015 that their seats in the National Assembly had become vacant;

2. That the applicants' fundamental right to stand for election for public office and, if elected, to hold such office protected by s 67(3)(b) of the Constitution of Zimbabwe, 2013 has been infringed by the first respondent's conduct consisting of his announcement and/or declaration on or about 3 March 2015 that their seats in the National Assembly had become vacant;

3. That the applicants' fundamental right to administrative justice protected by s 68 of the Constitution of Zimbabwe, 2013 has been infringed by the first respondent's conduct consisting of his announcement and/or declaration on or about 3 March 2015 that their seats in the National Assembly had become vacant;

4. That the applicants' fundamental right to a fair hearing protected by s 69(3) of the Constitution of Zimbabwe, 2013 has been infringed by the first respondent's conduct consisting of his announcement and/or declaration on or about 3 March 2015 that their seats in the National Assembly had become vacant;

5. That as appropriate relief in terms of s 85(1) of the Constitution of Zimbabwe, the first respondent's conduct consisting of his announcement and/or declaration on or about 3 March 2015 that their seats in the National Assembly had become vacant be and is hereby declared null and void and of no effect whatsoever;

6. That for the avoidance of doubt and as further appropriate relief in terms of s 85(1) of the Constitution of Zimbabwe:

    6.1. The first applicant is still a member of the National Assembly for the Headlands Constituency;

    6.2. The second applicant is still a Member of the National Assembly for the Hurungwe West Constituency;

7. That there are no vacancies for the Headlands and Hurungwe West Constituencies in the National Assembly;

8. That the second and third respondents be and are hereby ordered not to cause the holding of by-elections in the Headlands and Hurungwe West Constituencies pursuant to any notice of a vacancy they may have received from the first respondent.

9. That the first respondent pays costs of this application on an attorney and client scale."

ISSUE

The issue that fell for determination by the Court was whether any of the applicants' fundamental human rights were violated by the announcement and/or declaration that their seats in the National Assembly had become vacant in terms of s 129(1)(k) of the Constitution. The fundamental rights that the applicants alleged had been violated were the right to equal protection and benefit of the law in terms of s 56(1), the right to stand for election for public office and, if elected, to hold such office in terms of s 67(3)(b), the right to administrative justice in terms of s 68, and the right to a fair hearing in terms of s 69(3), of the Constitution.

At the heart of the application is the need for a correct interpretation of s 129(1)(k) of the Constitution. Its centrality to the issue under consideration necessitates its reproduction. It reads as follows:

"129 Tenure of seat of Member of Parliament

(1) The seat of a Member of Parliament becomes vacant -

a. – j. (not relevant);

k. if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it."

SUBMISSIONS BY THE PARTIES

THE APPLICANTS' SUBMISSIONS

A perusal of the applicants' heads of argument reveals one critical point taken in motivating the application. The point is that principles of constitutional interpretation dictate that the rule of law and good governance entrenched in s 3 of the Constitution must be promoted. The applicants urged the Court to adopt a purposive approach in interpreting s 129(1)(k) of the Constitution.

According to the applicants, s 129(1)(k) of the Constitution has two cumulative requirements that must be satisfied for its application. The first requirement is that a Member of Parliament must have lawfully ceased to belong to the political party of which he or she was a member when he or she was elected to Parliament. The second requirement is that a *bona fide* written notice must be forwarded to the Speaker of the National Assembly ("the Speaker") or the President of the Senate by the political party concerned declaring that the Member of Parliament has ceased to be its member. It is the applicants' submission that s 129(1)(k) is silent on how these two requirements must be fulfilled.

The applicants contend that the Speaker or the President of the Senate is under a duty to enquire from the Member of Parliament in question whether he or she has in fact ceased to be a member of the political party concerned. According to the applicants, if the member in question disputes the veracity of the declaration of the fact that he or she has ceased to be a member of the political party concerned, the Speaker or the President of the Senate cannot act in terms of s 129(1)(k) of the Constitution. It was argued further that the Speaker or the

President of the Senate has a duty to inform the political party concerned of the position taken by the Member of Parliament who claims that he or she has not ceased to be its member.

To buttress this interpretation of s 129(1) of the Constitution, the applicants invited the Court to take the view that the unbridled power of political parties to cause termination of membership of Parliament of elected Members is contrary to the spirit of the Constitution. The contention was that an interpretation of s 129(1)(k) of the Constitution which recognises in the Speaker or the President of the Senate power to "declare" the seat of a Member of Parliament vacant upon receipt of a written notice from a political party declaring that the Member no longer belongs to it would be contrary to the spirit of the Constitution.

THE RESPONDENTS' SUBMISSIONS

The respondents vehemently opposed the application. The main points advanced by the first respondent in particular were as follows. Upon receiving a written notice from a political party declaring that a Member of Parliament is no longer a member of the political party concerned, the Speaker or the President of the Senate is required by the provisions of s 129(1)(k) of the Constitution to announce in Parliament that the seat of the Member has become vacant. The Speaker or the President of the Senate has no power under s 129(1)(k) of the Constitution to create a vacancy in the seat of a Member of Parliament. The words used in s 129(1)(k) of the Constitution to describe what should be done, by whom, under what circumstances, and the effect thereof, are clear and unambiguous. The intended meaning of s 129(1)(k) of the Constitution is the ordinary and grammatical meaning of the words used by the makers of the Constitution. There is no cause for interpreting the provisions of s 129(1)(k) in terms of the spirit of the Constitution when the purpose of the constitutional provisions is served by the clear and unambiguous language used to give effect to it.

The Court was referred to the decision of the Supreme Court in *Capital Radio P/L* v *Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (S) at 246E-F where CHIDYAUSIKU CJ said:

> "It is trite that in interpreting statutes, including the Constitution, the golden rule is that in order to ascertain the intention of the legislature, the words of a statute or legislation are to be given their ordinary or primary meaning. It is only where that primary meaning of words is obscure or leads to absurdity that other principles of interpretation are invoked to assist in the ascertainment of the intention of the legislature."

It was also the first respondent's argument that s 129(1)(k) of the Constitution does not impose on the Speaker or the President of the Senate a duty to enquire into the legality or otherwise of the termination of membership of the political party concerned as declared in the written notice received by him or her.

INTERPRETATION OF SECTION 129(1)(K) OF THE CONSTITUTION

The Constitution provides guidelines on how it should be interpreted. Section 331 provides as follows:

> **"331 General principles of interpretation of the Constitution**
>
> Section 46 applies, with any necessary changes, to the interpretation of this Constitution apart from *Chapter 4*."

It is common cause that s 129(1)(k) of the Constitution is not part of *Chapter 4*. It therefore follows that s 46 applies, with any necessary changes, to its interpretation. Section 46 of the Constitution provides:

> **"46 Interpretation of Chapter 4**
>
> (1) When interpreting this Chapter, a court, tribunal, forum or body -

(a) must give full effect to the rights and freedoms enshrined in this Chapter;

(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;

(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and

(e) may consider relevant foreign law;

in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter."

In interpreting s 129(1)(k) of the Constitution, the Court is under an obligation to give full effect to the founding values enshrined in s 3 of the Constitution, including the supremacy of the Constitution and the rule of law.

The supremacy of the Constitution means that the provisions of the Constitution are supreme and any law repugnant to them is invalid. The rule of law also dictates that decisions must be based on and sanctioned by the law.

Section 129(1)(k) of the Constitution regulates the tenure of office of Members of Parliament. In terms of the section, the seat of a Member of Parliament becomes vacant if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it.

The Court on a previous occasion has held that, in general, the principles governing the interpretation of a Constitution are basically the same as those governing the interpretation of statutes. One must look to the words actually used and deduce what they mean within the context in which they appear. If the words used are clear and unambiguous, then no more is necessary than to construe them in their natural and ordinary sense. See *Mawarire* v *Mugabe N.O. and Others* 2013 (1) ZLR 469 (CC).

In *Chihava and Others* v *Provincial Magistrate and Another* 2015 (2) ZLR 31 (CC) at 35H the Court said:

> "In this respect, it is pertinent to note that a constitution is itself a statute of Parliament. Therefore, any rules of interpretation that are regarded as having particular relevance in relation to constitutional interpretation can only be additional to the general rules governing the interpretation of statutes."

In *Zimbabwe Revenue Authority and Anor* v *Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (S), the general principle of interpretation of statutes was set out at 218E as follows:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further – see *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at p 264D-E: *Madoda* v *Tanganda Tea Company Ltd* 1999 (1) ZLR 374(S) at p 377A-D."

The applicants bore the *onus* of showing that the grammatical and ordinary meaning of the words used in s 129(1)(k) of the Constitution would lead to an absurd result or inconsistency with the rest of the Constitution if adopted by the Court. It was necessary for the applicants to show that there was need to depart from the ordinary and grammatical meaning of the words used in s 129(1)(k) of the Constitution.

The ordinary meaning of the words used in s 129(1)(k) of the Constitution is that a Member of Parliament ceases to be a Member when he or she ceases to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, has declared that the Member has ceased to belong to it. The provisions of s 129(1)(k) of the Constitution do not clothe the Speaker or the President of the Senate with power to inquire into the legality or otherwise of the fact of cessation of membership of the political party concerned by the Member of Parliament.

Section 129(1)(k) of the Constitution envisages that every political party as an organisation has in its administrative structure an individual tasked with the duty of communicating the fact of the Member of Parliament having ceased to be its member in the appropriate form to the Speaker or the President of the Senate. The Constitution places a duty on the Speaker or the President of the Senate to act on the notification from a political party that communicates the prescribed fact in the prescribed form. Nothing in the provisions of s 129(1)(k) of the Constitution empowers the Speaker or the President of the Senate to interfere with the internal affairs of political parties and their members.

The status of having ceased to be a member of the political party concerned is a matter of fact, the legality of which is determined by reference to the provisions of the constitution of the political party concerned. It may be a fact resulting from a process of expulsion or voluntary resignation. When it occurs, it remains a matter affecting the internal affairs of the political party concerned. It may remain so without any effect on the tenure of seat of a Member of Parliament unless the political party concerned takes the action prescribed under s 129(1)(k) of

the Constitution and communicates the fact that the Member of Parliament has ceased to belong to it to the person appointed to receive the written notice.

If a Member of Parliament is unhappy with the manner his or her membership of a political party was terminated, he or she has the legal remedies for challenging the legality of the termination of his or her membership before the political party concerned forwards the written notice required by s 129(1)(k) of the Constitution to the Speaker or the President of the Senate. After all, it is he or she who is privy to the constitution of the political party, the rights enshrined therein, and the circumstances surrounding the termination of his or her membership of the political party.

The first respondent received a letter from the Secretary for Administration of ZANU-PF, the political party under whose tickets the applicants were elected into Parliament. The letter advised the first respondent that the applicants had ceased to belong to ZANU-PF. The first respondent acted in terms of s 129(1)(k) of the Constitution when he announced that the seats had become vacant and advised the second and third respondents of the development.

The vacancy in the seat of Parliament happens by operation of law when a written notice, which complies with the procedural and substantive requirements of s 129(1)(k) of the Constitution, is received by the Speaker or the President of the Senate. The Speaker or the President of the Senate announces the vacancy of a seat of Parliament which has occurred by operation of law. The creation of a vacancy in a seat of Parliament in terms of s 129(1)(k) of the Constitution is an event, the occurrence of which would not be determined by the Speaker or the President of the Senate.

It should also be emphasised that, in reading the Constitution as a whole, its founding provisions must be had regard to. The supremacy of the Constitution and the rule of law in particular are important to this case. The principle of the rule of law dictates that the conduct of the Speaker or the President of the Senate must be in accordance with the requirements of s 129(1)(k) of the Constitution. The conduct of the first respondent was consistent with the cumulative requirements set out in s 129(1)(k) of the Constitution. Each applicant ceased to belong to the political party of which he or she was a member at the time of his or her election to Parliament, and the political party concerned, by written notice to the Speaker, declared that each applicant had ceased to belong to it. The seat of each applicant as a Member of Parliament became vacant by operation of s 129(1)(k) of the Constitution. The Speaker did not have to do anything to create vacancies in either of the applicants' seats in Parliament.

In other words, the vacancy in the seat of Parliament is created as a direct consequence of events, the origin of which lies outside Parliament. Termination of the tenure of a Member to occupy the seat is what the Constitution, through the provisions of s 129(1)(k), says must happen when all the procedural and substantive requirements of the provision have been met.

The allegation that the announcement by the Speaker of the fact that the seats occupied by the applicants as Members of Parliament had become vacant violated the applicants' rights to equal protection and benefit of the law enshrined in s 56(1) of the Constitution implies that the Speaker acted contrary to the requirements of s 129(1)(k) of the Constitution. The question of the validity or otherwise of the conduct of the Speaker in announcing that the seats occupied by the applicants in the National Assembly had become vacant had to be determined by application of the provisions of s 129(1(k) of the Constitution, as interpreted by the Court, to the conduct. If the decision of the Court was that the conduct of the Speaker was inconsistent

with the requirements of the provisions of s 129(1)(k) of the Constitution, there would be no need to go further and say that the conduct of the Speaker violated s 56(1) of the Constitution.

The conduct complained of is either valid and constitutional or invalid and unconstitutional *vis-à-vis* the constitutional provision against the standard of which its legality is measured. Section 129(1)(k) of the Constitution is a complete provision that is not subject to the Bill of Rights. Like any other provision of the Constitution, s 129(1)(k) is a fundamental law partaking of the status of supremacy of the Constitution against which the validity of conduct can conclusively be measured.

It would be absurd to come to a conclusion that an act done in terms of the provisions of the Constitution can violate someone's rights under the same Constitution. In other words, the applicants could not have been successful in challenging an act that was sanctioned by the supreme law of the land.

The Constitution is one document that contains provisions that are consistent with each other. One provision of the Constitution cannot be used to defeat another provision in the Constitution. Different provisions of the Constitution must be interpreted with a view to ensuring that they operate harmoniously to achieve the objectives of the Constitution.

It is for these reasons that the Court found that the application was devoid of merit.

CHIDYAUSIKU CJ:

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

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