JEALOUSY MBIZVO MAWARIRE

v

(1) ROBERT GABRIEL MUGABE N.O.

(2) MORGAN RICHARD TSVANGIRAI N.O.

(3) ARTHUR GUSENI OLIVER MUTAMBARA N.O.

(4) WELSHMAN NCUBE

(5) THE ATTORNEY-GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GARWE JA, GOWORA JA, PATEL JA, HLATSHWAYO JA, CHIWESHE AJA & GUVAVA AJA
HARARE, MAY 24 & 31, 2013

J Mandizha, for the applicant

T Hussein, for the first respondent

Adv *Uriri*, for the second respondent

Adv *T. Mpofu*, for the fourth respondent

No appearance for the third and fifth respondents

CHIDYAUSIKU CJ: This is an application brought under s 24(1) of the Constitution of Zimbabwe (hereinafter "the Constitution") on the basis that the applicant's rights enshrined in ss 18(1) and 18(1a) have been contravened.

The Parties

The applicant is a citizen of Zimbabwe domiciled in this country and has always regarded this country as his only and permanent home. He is a registered voter in Zaka East Parliamentary Constituency and also a member of the non-governmental organisation, the Centre for Election Democracy in Southern Africa, based in Harare.

The first respondent is the President of Zimbabwe, Robert Gabriel Mugabe, who is cited in his official capacity and as the office-bearer responsible for fixing the date for Parliamentary, Presidential and local authority elections (hereinafter called "the harmonised elections"). He is also cited in his capacity as a principal of the Inter-Party Political Agreement (commonly referred to as the Global Political Agreement ("GPA")) between his political party, the Zimbabwe African National Union (Patriotic Front) ("ZANU-PF") and the two formations of the Movement for Democratic Change ("MDC"), referred to in Schedule 8 to the Constitution.

The second respondent is Morgan Richard Tsvangirai, who has been cited in his capacity as the Prime Minister of Zimbabwe, who also is a signatory to the "GPA", representing his formation of the MDC.

The third respondent is Arthur Guseni Oliver Mutambara, who has been cited as the Deputy Prime Minister of Zimbabwe and also due to the fact that he is a signatory to the "GPA".

The fourth respondent is Welshman Ncube, a Minister in Government and cited herein in his capacity as the representative of the other formation of the MDC, which organisation is a party to the GPA and is represented in the current coalition government.

The fifth respondent is the Attorney-General, who has been drawn into these proceedings in view of their constitutional nature and in his capacity as the principal legal advisor to the Government.

Background

On 2 May 2013 the applicant issued an urgent Court application against the above five respondents. Before any opposition was filed to the court application, the applicant was, on 6 May 2013, directed by the Registrar of the Supreme Court of Zimbabwe to file a separate urgent Chamber application seeking leave for the urgent hearing of his Court application, if such was his wish.

The application proceeded to do so in case Number SC 157/2013. This urgent Chamber application was subsequently heard on 15 May 2013. On 17 May 2013 the order sought by the applicant in the urgent Chamber application was granted.

The principal application was opposed by the first, second and fourth respondents. The applicant subsequently filed a replying affidavit as well as a notice of an amendment of the draft order to his principal application.

The amended order sought is as follows:

"(1) The First Respondent be and is hereby directed to forthwith proclaim an election date for a Presidential election, general election and elections for members of the governing bodies of local authorities in terms of section 58(1) of the Constitution of Zimbabwe.

(2) The elections referred to in paragraph 1 hereof shall be conducted no later than the 30th day of June 2013.

ALTERNATIVELY

The elections referred to above shall be conducted no later than (the) 25th day of July 2013.

(3) Any party (parties) who oppose(s) this application shall bear the costs of this suit jointly and severally, the one paying the other to be absolved."

Read together, the papers filed of record seem to pose the following as issues which fall for determination -

(a) Whether the applicant has *locus standi* to approach this Court in terms of s 24(1) of the Constitution of Zimbabwe;

(b) When do harmonised general elections fall due in terms of the laws of Zimbabwe?

(c) Whether the applicant has made out a case for the order sought.

Each issue will now be dealt with in turn.

Whether the applicant has *locus standi* to approach the Supreme Court in terms of s 24 (1) of the Constitution

The applicant avers in his founding affidavit that his application is premised on s 24 (1) of the Constitution, which provides as follows:

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him … then without prejudice to any other action with respect to the same matter which is lawfully available, that person … may apply to the Supreme Court for redress."

Essentially, the applicant contends that his right to the protection of the law in terms of s 18(1) of the Constitution has been, is being and is likely to continue being violated. He asserts that the failure by the first respondent to fix the date for the holding of Presidential, Parliamentary and local government elections when, at law, according to him, the said elections are looming and are now due, violates his right to the protection of the law. He further claims protection of the law as a person duly entitled to vote, with a vested right to vote in an election at a stipulated time.

He then proceeds to demonstrate his fears of the real or at least perceived violation of his Constitutional rights, as follows:

> "The first respondent for reasons that I am not clear about, has not carried out his functions in fixing a date for the elections, even as the expiry of Parliament looms dangerously close. His inaction will lead to a state where Zimbabwe may, in fact, run unconstitutionally. The misleading signals that have been sent by some of the respondents cited herein have been the cause for great concern and may be an indication, coupled with (the) first respondent's inaction, that come June 29, 2013, a general election will not have been called, and Zimbabwe will be hobbling along illegally, without a Parliament.

> No interpretation whatsoever of the Constitution could ever validate the existence of a situation of the State without the legislative arm of Government. Such an unprecedented situation would be a crippling negation of a fundamental tenet of our democracy which is a *sine qua non* of our constitutional order**."**

The applicant further bases his *locus standi* on s 18(1a) of the Constitution which, together with s 18(1), states as follows:

> **"18 Provisions to secure protection of law**
>
> (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.
>
> [Subsection amended by section 3 of Act No. 4 of 1993 (Amendment No. 12)]
>
> (1a) Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.
>
> [Subsection inserted by section 4 of Act No. 1 of 2009 (Amendment No. 19)]."

A "public officer" is defined as "a person holding or acting in any public office" and "public office" is defined as "a paid office in the service of the State".

Thus, s 18(1a) clearly confers a right on any and every Zimbabwean who is affected by a failure to uphold the law to approach this Court in terms of s 24(1).

The objections by the second and fourth respondents to the applicant's right to approach this Court for relief are based on a restrictive approach to *locus standi* in the pre-2009 period and a failure to appreciate that the 2009 Amendment No.19 has thrown wide open the right to seek relief in terms of s 24(1) to any and every citizen who is

affected by a failure by a public officer to uphold the law. Hence, the applicant states his apprehension of likely infringement of his rights under s 18(1a) as follows:

> "I also persist that the absence of Parliament is not only unconstitutional, and thus lead to a rule by decree, but will also lead to a paralysis in governance. In addition, the fact of the fourth respondent's insistence that elections can be held as late as 30 October 2013, coupled with his insistence that the Parliamentary vacuum that will eventuate between 29 June 2013 and 30 October 2013 is legal amounts to a violation, or likely violation, of my fundaments rights under the Bill of Rights."

The pre-2009 discourse pertaining to the need to establish a right infringed or likely to be contravened under *Chapter 3* before having recourse to s 24(1) is captured in the following opinion in *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Ors* 1997 (2) ZLR 254 (S):

> "Much turns on the meaning of the phrase 'likely to be contravened'. Certainly, it does not embrace any fanciful or remote prospect of the Declaration of Rights being contravened. Nor does it refer to the Declaration of Rights being liable to contravention … Rather it means a reasonable probability of such a contravention occurring."

In *Tsvangirai v Registrar General and Ors* 2002 (1) ZLR 268 (S) the following was said:

> "The first observation to be made is that a bald, unsubstantiated allegation will not satisfy the requirements of the section. The applicant must aver in his founding affidavit facts, which if proved would establish that a fundamental right enshrined in the Declaration of Rights has been contravened in respect of himself …" (p 25G–271a) .

And:

> "Although in the founding affidavit the applicant did not specify which section of the Declaration of Rights was contravened …. I do not think that the failure to do so is fatal (especially as) the omission was remedied by the heads of argument filed by counsel for the applicant …." (p 276E-F).

See also: *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Ors* 1993 (1) ZLR 242 (S), and *Law Society of Zimbabwe and Ors v Minister of Finance* 1999 (2) ZLR 213 (S)

Even under the pre-2009 requirements, it appears to me that the applicant is entitled to approach this Court for relief. Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.

(b) When do harmonised general elections become due?

It is common cause amongst all the parties that Parliament shall stand dissolved, by the effluxion of time, on 29 June 2013. Whilst the papers before this Court are voluminous and at times unnecessarily argumentative, the issue before this Court is in fact a simple one, which can be reduced to one question - "When, after the accepted dissolution of Parliament by the effluxion of time in terms of the Constitution should the harmonised elections be held?"

The response to this rather simple and straightforward question has elicited contradictory responses from the second and fourth respondents on the one hand, and the

applicant, on the other. The responses from the second and fourth respondents also show a serious divergence of opinion between them.

According to the second respondent, who is the Prime Minister and an important part of the Executive:

> "What is plain from section 58 (1) of the Constitution of Zimbabwe, as read with other relevant sections, is the fact that if the terms of Parliament, local government authorities, and of the President expire on 29 June 2013 through the natural passage of time (as opposed to induced dissolution or prorogation) elections must be conducted **within four (4) months** of the automatic dissolution of Parliament. (emphasis is added)"

The fourth respondent, who himself is a Minister of Government and leader of a party to the Global Political Agreement, takes the following similar position when he states:

> 'Alternatively, if the President does not dissolve Parliament and allows it to automatically dissolve by operation of law on the last day of its five year term, in that event the President must cause an election to be held **within four months** of the date of the automatic dissolution of Parliament." (emphasis added)

He then goes on to say:

> "The Constitution permits that an election be held anytime within four months after the dissolution of Parliament by operation of law at the expiration of its five year term and hence that Constitution, by so providing, contemplates and allows that **there may be no Parliament between its automatic dissolution and the holding of an election within four months of that dissolution**." (emphasis added)

The first respondent disagrees with the interpretation by the second and fourth respondents, saying it is not supported by the Constitution or the canons that govern its

interpretation. Instead, the first respondent agrees with the interpretation placed by the applicant on ss 58 and 63 of the Constitution.

Section 58 (1) simply states:

> "(1) A general election and elections for members of governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix."

Now, it is clear that s 58(1), read in its ordinary sense, deals with the timing of elections or the fixing of dates for elections by proclamation. If one were to pose the question "when are harmonised general elections to be held?" and seek an answer from the above quoted provisions of s 58(1), two possible answers emerge, depending on punctuation and emphasis and are juxtaposed below as READING "A" and "B":

READING "A"

> "PART 6
>
> *Elections and Sessions*
>
> **58 Elections**
>
> (1) A general election and elections for members of the governing bodies of local authorities shall be held on:
>
> i. such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or,
>
> ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette,* fix."

READING "B"

"PART 6

Elections and Sessions

58 Elections

(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after:

i. the issue of a proclamation dissolving Parliament under section 63(7) or,

ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix."

There could be any number of other variations the section 58(1) text can be broken into, but the two scenarios above will suffice for the purpose of this case. Both Reading "A" and Reading "B" answer to the question when elections are to be held but with one putting the emphasis on the preposition "on" and the other on "after". Both interpretations are compelling. Adopting one interpretation or the other results in starkly different outcomes. In one case elections must be held within the life of Parliament. In the other case, elections may be held up to four months after the dissolution of Parliament.

A Court faced with competing possible interpretations of a constitutional provision must call into aid principles or canons of construction. In this regard FIELDSEND CJ had this to say in *Hewlett v Minister of Finance* 1981 ZLR 571:

> "… in general the principles governing the interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation. It is necessary to look to the words used and to deduce from them what any particular section, phrase or word means, having regard to the overall context in which it appears."

Accordingly, s 58(1) must be examined, not in isolation, but having regard to the overall context in which it appears. In this regard it is important to immediately quote s 63 referred to in this provision, emphasising the key subss 63(7) and 63(4):

"**63 Prorogation or dissolution**

(1) The President may at any time prorogue Parliament.
[Subsection substituted by section 6 of Act No. 23 of 1987 (Amendment No. 7)]

(2) Subject to the provisions of this Constitution, the President may at any time dissolve Parliament.
[Subsection substituted by section 6 of Act No. 23 of 1987 (Amendment No. 7)]

(3) …
[Subsection repealed by section 6 of Act No. 23 of 1987 (Amendment No. 7)]

(4) Parliament, unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as President enters office in terms of section 28(5) after an election referred to in section 28(3)(*a*), and shall then stand dissolved:

Provided that, where the period referred to in this subsection is extended under subsection (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of that extended period.
[Subsection inserted by section 14 of Act No. 11 of 2007 (Amendment No. 18)]

(5) At any time when Zimbabwe is at war, Parliament may from time to time extend the period specified in subsection (4) by not more than one year at a time:

Provided that such period shall not be extended under this subsection for more than five years.

(6) At any time when there is in effect a declaration under section 31J(1), Parliament may from time to time extend the period specified in subsection (4) by not more than six months at a time:

Provided that such period shall not be extended under this subsection for more than one year.
[Subsection amended by section 26 of Act No. 23 of 1987 (Amendment No. 7)]

(7) Subject to the provisions of subsection (4), any prorogation or dissolution of Parliament shall be by proclamation in the *Gazette* and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58(1) for the holding of a general election.

(8) On the dissolution of Parliament all proceedings pending at the time shall be terminated and accordingly every Bill, motion, petition or other business shall lapse." (emphasis added)

Although on the face of it ss 58 and 63 deal with distinct but related constitutional matters - the fixing of dates for elections on the one hand and the life of Parliament on the other - the interrelatedness of these matters creates a maze of back and forth cross-referencing between s 58(1) and ss 63(4) and 63(7). These provisions are also subject to stipulations in the Constitution itself and the Electoral Act especially with regard to time limits. However, there are some conclusions that can be teased out of this maze to aid the interpretation of the provision in question -

a) There must be a proclamation fixing the dates for elections which is issued by the President in the *Gazette* according to ss 58(1) and 63(7).

b) Section 63(7) is subjected to the provisions in s 63(4) in the sense that the President may not dissolve Parliament and fix dates which fall outside the life of Parliament. In other words, elections following a Presidential dissolution of Parliament must be held before the expiry of the life of that Parliament. There are other provisions in s 64(4) which might have necessitated the subjection of s 63(7) to it, *viz.* that dissolution of Parliament following expiry of its extended period is automatic, whereas s 63(7) requires all other dissolutions to be by proclamation.

c) The fixing of election dates must take into account the mandatory time limits set out in the Constitution and the Electoral Law.

From the above conclusions, one can now pose a number of useful questions and try to answer them. What is this proclamation that is required for both the Presidential and the automatic dissolution of Parliament? What is its purpose? From a common sense position one could say a proclamation is issued in advance, giving a period of notice and time prior to the Presidential or automatic dissolution in order to afford the electoral authorities and the public time to prepare for the elections. That appears to also coincide with the legal requirements teased above. However, to get a real life "feel" of this phenomenon called "proclamation" I dug up Statutory Instrument 7A of 2008, which, of course, the Court is perfectly entitled to take judicial notice of. It was issued on 24 January 2008 dissolving Parliament "with effect from midnight, the 28th March, 2008", thus giving the electoral authorities and the public slightly over two months to prepare for the elections. In that case, the night of dissolution was perfectly followed by the day or days of elections as stipulated in s 63(7). The proclamation goes on to fix the dates, places and times of the sitting of the nomination courts and the presiding officials thereof throughout the country for Presidential, Parliamentary and local government elections.

This proclamation was issued by the President using his discretion to dissolve Parliament and call for elections in terms of s 63(7). It is important to note that the proclamation is prospective, not retrospective, pointing to a date in future when

Parliament will stand dissolved and complying with all statutory time limits. Since the date for the automatic end of the life of Parliament is known in advance, it would be perfectly feasible for a President to anticipate such a date and issue a similar proclamation announcing that Parliament shall stand dissolved by midnight of that day, followed by elections on the following day or days and complying with all statutory time limits. Not only would it be feasible, but, in my view, it would be the proper, constitutional and legal thing to do. In fact, the question may be asked - since the date of automatic dissolution is known in advance, what is the purpose of granting the President an additional four months within which to proclaim the dates for elections after dissolution of Parliament? Is it to shield that decision from Parliamentary scrutiny or to reward the President for having allowed Parliament to run its full course, by granting the Executive four months to rule by decree? The mind boggles at this strange effect of adopting Reading "B" of s 58(1).

The second scenario of interpreting s 58(1) also implies that the President must wait until the life of Parliament would have expired in terms of s 63(4) and then issue a proclamation recognising that fact and fixing dates within four months of the event. The expiry of the life of Parliament would have passed silently without notice to all concerned but with a dramatic effect of creating a deformed State without Parliament for up to four months. As would be shown below, this would lead to an absurdity and glaring anomalies.

There are two approaches open to a Court faced with apparent absurdities in the construction of statutes - the narrow and the wider approach.

The narrow approach was articulated in *The Queen v Judge of the City of London Court* [1892] QBD 273 by LORD ESHER as follows:

> "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion the rule has always been this – if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"

Under the narrow approach, the Court chooses between the two possible interpretations the one which does not lead to an absurdity. In this case, it would be the first interpretation or Reading "A" of s 58(1).

In *Venter v Rex* 1906 TS 910 at pp 914-915 INNES C.J. expressed the wider approach, thus:

> "That being so, it appears to me that the principle we should adopt may be expressed somewhat in this way – that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."

According to the "wider approach" the Court has a broad discretion in removing an absurdity being guided ultimately by the intention of the Legislature or in constitutional terms by the intention of the framers of the supreme law. Once an ambiguity or

absurdity has been established, it would appear that the proper approach to adopt would be the wider one, where the Court calls into aid historical, schematic, teleological and purposive approaches to interpretation.

In the case of *Buchanan & Co v Babco Ltd (C.A.*) [1977] QBD 208 at 213 LORD DENNING followed precisely this method of interpretation long adopted by the European Court of Justice at Luxembourg, thus:

> "They adopt a method which they call in English by strange words – at any rate they were strange to me – the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislation – at the effect which it was sought to achieve. They then interpret the legislation so as to achieve the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? To our eyes – shortsighted by tradition – it is legislation, pure and simple. But to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong with this. Quite the contrary."

If the framers of the Constitution wanted Zimbabwe to function without a Parliament for four months as suggested by the second and fourth respondents, they surely would have said so in clear and explicit terms and they would not have left this to speculation and interpretation. The Constitution itself states emphatically in s 52:

> "Provided that … no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms."

Therefore, the only interpretation that can be given to this section is one that favours constitutionalism. It is common cause that the current Constitution is based on the fundamental principles of separation of powers between the three arms of State - the Executive, the Judiciary and the Legislature. This principle is entrenched in the Constitution in the various sections which state in peremptory terms that there shall be a President, a Parliament and a Judiciary. Nowhere in the Constitution is there an excuse to function without any one of these branches for an extended period of time. Whatever exceptions are dictated by transitional imperatives of the going out and coming in of governments, these are always kept at the minimum possible. In fact, so important are the tripartite pillars of State that even in a time of emergency or war, these three institutions are preserved. See subss 63 (5) and (6).

The principle of constitutionalism which we referred to earlier, is embodied in s 3 of the Constitution which states:

> "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

If one applies both the doctrine of separation of powers and constitutionalism, it is inconceivable that an interpretation that permits or allows for any extended period without one or other arms of State, in this case Parliament, can be sustainable. To exist too long without a Parliament would be tantamount to shredding the Constitution and inviting a state of lawlessness and disorder. It would, with respect, be tantamount to an "annihilation" of the Constitution, in the words of MALABA JA (as he then was) in

Mike Campbell (Pvt) Ltd and Another v Minister of Lands and Another 2008 (1) ZLR 17 (S).

If s 58 is a repeal or amendment of the peremptory requirement that "there shall be a Parliament", it should have said so explicitly. It does not do this.

It is also instructive to note that in terms of s 158 of the new in-coming Constitution the timing of elections is such that they must be held before the expiry of the life of Parliament, thus:

> "**158 Timing of Elections**
>
> (1) A general election must be held so that polling takes place not more than –
>
> (a) thirty days **before** the expiry of the five-year period specified in section 143." (emphasis added)

The submission that the mischief of rule by decree consequent upon no elections being held by 29 June 2013 is obviated by the continuation in office of both the President and Cabinet in terms of s 29(1) of the Constitution totally misses the point that what is at issue is rule by the Executive in the absence of the checks and balances of a Parliament. It matters not whether the rule by decree is that of a single individual or that of a group, such as a Cabinet. The purpose of this section is to allow a smooth handover between the retiring and the incoming Executive in the shortest possible time. Its existence is also further proof of the need to ensure that the period between the dissolution of one Parliament and the inauguration of the next is as short as possible.

Furthermore, the applicant is correct in submitting that the fourth respondent fails to appreciate that the overarching philosophy in s 31E(2) is in fact constitutionalism and not proof that governance without Parliament is acceptable. The section is an exhortation to anyone appointed as Vice-President, Minister or Deputy Minister (from outside Parliament) to become members of Parliament within three months. The only time when such officials are allowed to exceed those three months is when during that period Parliament is dissolved (thus frustrating him or her from becoming a member). Only then can the period be extended to "until Parliament first meets after dissolution". In fact, this provision presupposes the prior existence of Parliament and not its wholesale absence and caters for a few desired members of the Executive who may not have made it to Parliament.

It is also instructive to have recourse to the history of this provision. The original provision stated that the terms of office of Vice-Presidents, Ministers or Deputy Ministers terminated on their ceasing to be members of Parliament, thus emphasising the centrality of an extant Parliament in the composition and functioning of the Executive in a democratic dispensation.

Section 31E reads:

31E Tenure of office of Vice-Presidents, Ministers and Deputy Ministers

(1) The office of a Vice-President, Minister or Deputy Minister shall become vacant –

(a) if the President removes him from office; or

(b) if he resigns his office by notice in writing addressed and delivered to the President; or

(c) upon the assumption of office of a new President.
[Subsection amended by section 9 of Act No. 15 of 1990 (Amendment No. 10)]

(2) No person shall hold office as Vice-President, Minister or Deputy Minister for longer than three months unless he is a member of Parliament:

Provided that if during that period Parliament is dissolved, he may continue to hold such office without being a member of Parliament until Parliament first meets after the dissolution.
[Subsection substituted by section 2 of Act No. 31 of 1989 (Amendment No. 9)]"

In the context of the GPA-based Government of National Unity (GNU) – not to be confused with the animal gnu with an ox-like head and a tufted tail and ironically also an inhabitant of the Savannas of Africa - whose existence is premised on political parties represented in Parliament the question arises as to what the justification constitutionally of its continued existence becomes once Parliament is no more. It becomes a Government made up of political parties *previously* represented in Parliament! And what would that say to other political parties patiently waiting for their chances at the polls?

In conclusion therefore, the proper construction of s 58(1) is that election dates should be fixed and notified whether pursuant to Presidential dissolution or automatic dissolution of Parliament in such a way that elections are held within the life of Parliament or a day/days immediately following its dissolution. The setting of these dates has to take into account the requirements of the Constitution and the Electoral Act, which stipulate a period of at least forty-four days between proclamation and actual

holding of elections. In terms of the provisions of the new Constitution, which came into force on publication day, s 157(3), the minimum period is forty-four days, thus:

> "157(3) The Electoral Law must provide for the nomination of candidates in any election to take place at least fourteen days after the publication of the proclamation calling for that election. Polling must take place at least thirty days after the nomination of candidates."

(c) Whether the applicant has made out a case for the Order sought

The essence of the applicant's case is that the first respondent has failed to fix and proclaim a date for Presidential, Parliamentary and local government elections as required by s 58(1) of the Constitution and failure by the first respondent to do so is unconstitutional in general and in particular is in violation of the applicant's rights as a voter and his legitimate expectation of protection of the law as enshrined in subss 18 (1) and (1a) of the Constitution.

As can be deduced from what is concluded above, the first respondent is already out of time in fixing and proclaiming dates for the harmonised general elections to be held before the expiry of the life of the current Parliament. The applicant's rights as already stated above have already been infringed and continue to be violated with each passing day. The applicant is entitled to the declaration of such infringement and an order correcting or rectifying as far as is possible such infringement. See *Commercial Farmers' Union v Minister of Lands & Ors* 2000 (2) ZLR 469 at 486-487.

When the first respondent failed to fix and proclaim a date for Presidential, Parliamentary and local government elections, as required by s 58(1) of the Constitution, to enable elections to be held on the dissolution of Parliament on 29 June 2013, not only did he violate the applicant's fundamental right as protected by s 18 of the Constitution, he thereby derailed the electoral process. From then onwards, the rule of law as regards the electoral process was no longer extant. It is imperative that the rule of law be restored to the electoral process and the applicant be afforded some relief.

The first respondent has placed himself in a serious legal quandary or predicament by his failure to issue the said proclamation timeously. The first respondent cannot remedy the situation by issuing the proclamation for elections to be held by 29 June 2013, as doing so will inevitably contravene the time lines set out in s 38 of the Electoral Act. Prospective Parliamentary candidates are entitled, in terms of s 38 of the Electoral Act, to fourteen days to organise their nominations and thirty days to campaign before the date of the elections. Thus, affixing the date of the elections now in terms of s 58(1) of the Constitution in anticipation of the dissolution of Parliament on 29 June 2013 will have the effect of violating the fundamental right of aspiring Parliamentary candidates, entitling them to bring similar applications to that of the applicant.

Apart from this, the coming into operation of the new Constitution of Zimbabwe has further complicated the situation. The new Constitution has introduced new time lines and necessitated amendments to the Electoral Law, making the immediate issuance

of a proclamation fixing the date for harmonised elections on the dissolution of Parliament on 29 June 2013 legally impossible.

The Court, in my view, is compelled to take into account the exigencies of this situation in the order that it makes. Thus compliance with the Court order must not of necessity compel the first respondent to contravene another electoral provision.

The applicant must have appreciated the first respondent's legal predicament. In his draft order, the applicant asked for the immediate issuance of a proclamation fixing the date of the harmonised elections upon the dissolution of Parliament on 29 June 2013. In the alternative, the applicant asked for the issuance of a proclamation forthwith setting the date of the harmonised elections by no later than 25 July 2013. I have no doubt that the applicant's alternative relief is out of the realisation and appreciation of the first respondent's legal predicament.

I am inclined to grant the alternative relief sought by the applicant and add six days to 25 July 2013 to compensate for the period between the hearing of this appeal and the handing down of this judgment. The first respondent, while not explicitly consenting to the alternative relief, indicated that he had no objection to such relief. The main litigants in this matter, namely the applicant and the first respondent, are accordingly in agreement over the alternative relief. This relief also accords with the Court's desire to issue an order that will help restore legality to the electoral process as quickly as possible.

(d) Costs

The applicant has won his case and costs should follow the result. As against the first respondent, the first respondent literally consented to the alternative relief sought by the applicant. Ordinarily a respondent who takes this attitude will not be ordered to pay the costs. However, in this case it is the conduct of the first respondent in failing to timeously fix a date for harmonised elections that has compelled the applicant to approach the Court. Apart from this, the first respondent represents the State, and in my view it is only fair and just that the State should pay the costs of a public spirited citizen like the applicant, who undertook the responsibility of doing something about an electoral process that has gone astray. The second and fourth respondents opposed the application on the basis of an interpretation of s 58(1) of the Constitution which this Court has found to be permissible although erroneous. In my view, it would be unjust to mulct the second and fourth respondents in costs. The second and fourth respondents should simply bear their own costs.

It is my hope that, although the order of the Court is not against the second and fourth respondents, they will use their good offices to assist the first respondent to restore the rule of law to the electoral process.

(e) Order

In the result, the Court makes the following order -

1. It is declared that the harmonised general elections in terms of s 58(1) of the Constitution of Zimbabwe are due upon the dissolution of Parliament

on 29 June 2013. However, due to the first respondent's failure to issue a proclamation fixing the date for the harmonised elections timeously it is no longer legally possible to hold the harmonised elections on that date.

2. It is declared that the failure by the first respondent to fix and proclaim date(s) for harmonised general elections to take place by 29 June 2013 is a violation of the first respondent's constitutional duty towards the applicant to exercise his functions as a public officer in accordance with the law and to observe and uphold the rule of law in terms of s 18(1a) of the Constitution.

3. It is further declared that by failing to act as stated in para 2 above, the first respondent has violated the applicant's rights as a voter and his legitimate expectation of protection of the law entrenched in s 18(1) of the Constitution.

4. Accordingly, the first respondent be and is hereby ordered and directed to proclaim as soon as possible a date(s) for the holding of Presidential election, general election and elections for members of governing bodies of local authorities in terms of s 58 (1) of the Constitution of Zimbabwe, which elections should take place by no later than 31 July 2013.

5. The first respondent shall bear the costs of the applicant.

ZIYAMBI JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

HLATSHWAYO JA: I agree

CHIWESHE AJA: I agree

GUVAVA AJA: I agree

MALABA DCJ: I have read the judgment prepared by the learned Chief Justice. I do not, with respect, agree with it for reasons I proceed to set out.

The applicant approached the court seeking redress in terms of s 24(1) of the former Constitution. I say the former Constitution because Zimbabwe has a new Constitution. Some of the provisions of the new Constitution came into effect on 22 May 2013 which is the publication day. Section 1 of Part 1 of the Sixth Schedule of the new Constitution provides that the "first elections" shall be held in terms of the new

Constitution. The "first elections" is defined in s 1 of Part 1 of the Sixth Schedule to mean:

> "(a) the first election for the office of the President under this Constitution;
> (b) the first general election of members of Parliament under this Constitution; and
> (c) the first elections of governing bodies of provincial and metropolitan councils and local authorities;
> held after the publication day."

The elections in relation to which the applicant sought redress in terms of s 24(1) of the former Constitution have become the "first elections" as they will be held after the publication day. The effect of the provisions of the new Constitution which came into operation together with express provisions of the Sixth Schedule on matters relating to the "first elections" are of greatest importance in the determination of the question raised by the application.

The question for determination is whether the interpretation by the applicant of s 58(1) of the former Constitution on the timing of the "first elections" which he wants the court to apply in deciding whether the first respondent (the President) has violated his fundamental right to the protection of the law is correct. In my view the clear and unambiguous provisions of s 58(1) of the former Constitution as read with the other relevant sections admit of nothing other than their ordinary grammatical meaning.

The applicant has turned the clear and unambiguous language of the provisions into a subject-matter of a question of interpretation which has unfortunately

plunged the court into irreconcilable differences of opinion. I, however, refuse to have wool cast over the inner eye of my mind on this matter.

The relevant provisions of the former Constitution are these:

"**Section 58(1) Elections**

(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix."

"**63 Prorogation or dissolution**

(1) The President may at any time prorogue Parliament.

(2) Subject to the provisions of this Constitution, the President may at anytime dissolve Parliament.

(3) ...

(4) Parliament, unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as President enters office in terms of section 28(5) after an election referred to in section 28(3)(a), and shall then stand dissolved:

(5) ....

(6) ...

(7) Subject to the provisions of subsection(4), any prorogation or dissolution of Parliament shall be by proclamation in the *Gazette* and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58(1) for the holding of a general election."

According to the interpretation of s 58(1) which the applicant wants the court to apply, the provision imposes on the President a duty to fix 29 June 2013 or a day after as the date of the first elections. He contends that s 58(1) requires the President to issue a proclamation fixing the date of the first elections within four months before the date of automatic dissolution of Parliament. It is common cause that, barring any

dissolution by proclamation, the Parliamentary term of five years will come to an end at midnight on 29 June 2013.

It is common cause that up until the hearing of the application on 24 May, the President had not fixed the date of the first elections. The applicant alleges that he has a right to the performance by the President of his legal duty to fix 29 June 2013 as the date of the first elections. He says his corresponding right derives from the fact that he is a registered voter. As a result of the alleged failure by the President to fix 29 June 2013 as the date of the first elections, the applicant alleges that his right to the protection of the law has been violated.

I have no difficulty in recognising in the applicant the right to approach the court in terms of s 24(1) of the former Constitution seeking the relief of an order of *mandamus* against the President. The principle on *locus standi* is after all that it is better to let people have access to the fountain of justice where they fail for the reasons of their folly than have them blame the gate keepers. An order of *mandamus* is a means of relief which the court in the exercise of its wide discretionary powers under s 175(6) (b) of the new Constitution can, in appropriate cases, grant.

In determining the question raised by the application I bear in mind the fact that elections are crucial to democracy. This is particularly so at this stage of the history of our country. The first elections which are due to be held under the new Constitution are bound to test the readiness of Zimbabweans to embrace the change

embodied in the new Constitution. The leadership that is going to emerge elected will have to embrace the new values prescribed by the new Constitution. Choosing the precise date to hold the first elections is therefore a matter of utmost importance to be handled with the greatest care.

There is no doubt that s 58(1) of the former constitution grants power for the fixing of the date of the first elections. For ease of understanding of the import of the provisions, I have analysed them against a framework which looks at the nature of the power, the repository, the contents, the conditions and restrictions on its exercise. The answers to these questions determine the democratic quality of the first elections as they depend on the guarantees that surround the different aspects of the choosing of the date of the elections.

Section 58(1) vests in the President discretionary power to fix a day or days of the first elections by a proclamation published in the official *Gazette*. The use of the word "may" is clearly indicative of the fact that the power conferred on the President is of a discretionary nature. It means that the President can act on his own discretion or judgment. It is not a power which is accompanied by a duty on the President to act in a specified manner at a specified time.

In matters in which the President has discretion he may seek advice from any quarter but he must discharge his duties to the best of his own judgment and ability. The power is vested in the President but he has the freedom to decide when to act

provided he observes all the requisite conditions of the exercise of the power. So s 58(1) as the source of the discretionary power defines the circumstances when the power may be exercised not when it must be exercised.

There is in my view of the nature of the power conferred on the President by s 58(1) no legal duty on him to fix 29 June 2013 or a day after as the date of the first elections as suggested by the applicant.

This is not a case where the date of a general election following automatic dissolution of Parliament is precisely determined in the Constitution. The date is left to be chosen by the authority vested with the power to do so within a framework of time determined by the Constitution. Within that time frame the authority is left with a fairly large margin of appreciation in choosing the day or days in which the election will have to take place. In that regard the court has no power to dictate to the President when and how he should exercise the discretion vested in him by the Constitution.

It is important that the repository of the discretionary power to fix the date of the first elections is the President. He is a democratically elected authority. As he is vested with the power to fix the date of the "first elections" in his capacity as the President of the Republic, he is expected to take into account all relevant factors relating to the proper conduct of the elections in the national interest. He does not in that capacity act as a leader of a political party.

The content of the discretionary power is very clear. It is the fixing of a day or days on which the first elections are to be held. The discretionary power is to be exercised in respect of a specific matter. Which day or days the President chooses to fix as the date or dates of the election is a matter strictly within his discretion.

The court cannot get involved in determining for the President the manner in which he should exercise his discretion. It cannot tell the President which day or days he should fix or that he was wrong in fixing a certain day. It is not the function of a court of law to substitute its own wisdom and discretion for that of the person to whose judgment a matter is entrusted by the law. Whilst a court can review a public officer's action for legality it cannot act as if it were the Executive.

The real issue in this case arises because of the interpretation of the conditions and restrictions imposed by the law on the exercise of the discretionary power by the President. The first condition is of course not so controversial. It relates to the form the exercise of the discretion should take. The President is required to give notice to the public of the day or days he has fixed for the holding of the first elections in the *Gazette*. Upon public notification, the date or dates fixed for the elections have legal effect.

The fact that the manner by which the President is required to make known to the public the result of the exercise of his discretion is by a proclamation published in the *Gazette* means that it is an unconditional notification. It cannot be

conditional upon the President reserving for himself the right to dissolve Parliament by proclamation. That would be the implication if the contention by the applicant that the proclamation fixing the date of the first elections must be issued some four months before the date of automatic dissolution of Parliament is accepted.

The next condition is one in respect to which the interpretation of s 58(1) by the applicant has given rise to the question for determination. In my view s 58(1) is clear. It gives the President the discretionary power to fix a day or days for the holding of the first elections to fall within a period of four months calculated from the date of occurrence of any of the events referred to in ss 63(4) and 63(7) of the former Constitution. The date or dates fixed for the holding of the first elections must follow the date of the happening of the event concerned.

If the dissolution of Parliament is by a proclamation issued by the President in terms of s 63(2) of the former Constitution the time within which the day or days for the holding of the elections must be fixed starts running from the date of the issuance of the proclamation. If the dissolution of Parliament is automatic as provided for in s 63(4) the time within which the day or days for the holding of the elections should be fixed starts to run from the date of the automatic dissolution.

It is generally accepted that in the absence of express provisions to the contrary dissolution of Parliament is usually followed and not preceded by a proclamation fixing the date of a general election. A general election is usually called

and polling dates fixed by a proclamation after and not before dissolution. I have no doubt in my mind that the period of four months referred to in s 58(1) relates to what should happen after the happening of either dissolution of Parliament by proclamation or operation of law.

The contention by the applicant that the time limit of four months relates to what the President should do before the date of automatic dissolution cannot be correct. It ignores the word "after" in s 58(1). It also does not put any weight at all on the words "or, as the case may be" in the section. According to the old legal maxim "Parliament does not speak in vain". These words must surely have been used in s 58(1) for a purpose. The purpose is precisely to subject each type of dissolution to the same mode of fixing the day or days for the holding of the elections.

The words "or, as the case may be" mean that whichever of the two events referred to in ss 36(4) and 63(7) occurs two things shall happen. The first consequence of the occurrence of the event is the need for the President to decide when to exercise his discretionary power and fix the date or dates of the election by issuing a proclamation. The second consequence of the occurrence of the event is the commencement of the running of the limitation period of four months referred to in s 58(1).

Whilst the two elements are the direct consequences of the issuance of a proclamation dissolving Parliament or of the automatic dissolution of Parliament, there is

an additional restriction on the exercise by the President of the discretionary power which applies to dissolution by proclamation only. The restriction is provided for in s 63(7).

The words "subject to the provisions of subs (4)" in s 63(7) emphasise the additional restriction. They also emphasise the fact that there are elements which are common to both methods of dissolution in so far as the direct consequences are concerned. In other words whilst the time limit is applicable to both forms of dissolution, the requirement that the dissolution shall take effect on the day preceding the first day of polling in the elections does not apply to the automatic dissolution of Parliament in terms of s 63(4).

It is important to understand the effect of s 63(7). The section must be read together with ss 63(1) and (2). Whilst these sections provide for the power to prorogue and dissolve Parliament respectively, they do not state the manner in which the power is to be exercised. Section 63(7) then provides that the power to prorogue or dissolve Parliament shall be exercised by means of a proclamation published in the *Gazette*. Where the proclamation dissolves Parliament as opposed to proroguing it s 63(7) then goes on to prescribe the restriction therein contained.

Section 63(4) fixes the Parliamentary terms at five years. This is clearly an upper limit to ensure regular accountability to the electorate. That principle is not offended by a shorter term by dissolution of Parliament by proclamation. The purpose or objective of accounting to the electorate is the same. The fixing of a day or days of the

holding of the elections facilitates accountability to the electorate in each case. Put differently s 63(7) does not affect a situation where s 63(4) applies.

The contention that the President is under a duty to issue a proclamation fixing the day or days of the election within a period of four months before the date of automatic dissolution of Parliament is difficult to justify. It requires that the word "after" in s 58(1) be ignored or expunged and in its place read the word "before". On what event would the proclamation fixing the date or dates of the elections be based except on itself.

The fact is that there is nothing in s 58(1) of the former Constitution which imposes on the President an obligation to fix a day or days of the election to coincide with the date of the end of the natural life of Parliament. If that were the case the date of the election would be known in advance as if it was fixed by legislation.

If the framers of the former Constitution had intended the date of the elections to fall on the last day of the maximum duration of the life of Parliament they would have said so. They would have imposed the duty on the President to simply issue the proclamation announcing that date. There would have been no need at all to vest the President with the power to "fix" "such day or days" of the holding of the elections.

It is clear to me that the words "fix" and "day or days" indicate the conferment of a discretionary power. In other words the date

of elections remains unknown to the public until the publication of the proclamation fixing it in the *Gazette*.

Reference to s 158(1)(a) of the new Constitution is inappropriate. Section 158(1) provides that "a general election must be held so that polling takes place not more than thirty days before the expiry of the five-year period specified in s 143". Section 158(1) cannot be used to support the applicant's contention. It is correct to say s 143 of the new Constitution relates to an automatic dissolution of Parliament. Section 3(1)(e) of Part 2 of the Sixth Schedule to the new Constitution makes it clear that s 158 does not come into operation on the publication day.

Section 1 of Part 1 of the Sixth Schedule provides that the "first elections" shall be held in terms of the new Constitution. In fact s 8 of Part 3 of the Sixth Schedule specifically provides that the "first elections" must be conducted "in terms of an Electoral Law in conformity with this Constitution".

In suspending the coming into operation of s 158 the framers of the new Constitution were aware of the provisions of s 58(1) of the former Constitution. They were aware of the clear conflict between the position provided for under s 58(1) and that enacted by s 158(1)(a) of the new Constitution. Section 158(1)(a) provides for the fixing of the date of elections within the specified period before the date of an automatic dissolution of Parliament. Section 58(1) to the contrary provides for the fixing of the date

of the election within the prescribed period after the date of automatic dissolution of Parliament.

For the purposes of the timing of the holding of the first elections the former Constitution operates simultaneously with the new Constitution. In any case the applicant's case is not that a general election must take place within four months before the President leaves office or Parliament is dissolved by operation of law. His case is that s 58(1) requires the issuance by the President of a proclamation fixing the date of the first elections on 29 June 2013 four months before the date of the automatic dissolution of Parliament.

It is important to refer to constitutions of other countries practising constitutional democracy. Section 55(3) of the Malaysian Constitution provides that:

> "Parliament unless sooner dissolved shall continue for five years from the date of its first meeting and shall then stand dissolved."

Section 55(4) then provides that the general election "shall be held within sixty days from the date of the dissolution of Parliament". During the debate on the 13th General Elections in Malaysia there was no question about the period of sixty days running after the date of the automatic dissolution of Parliament. The debate centred on when the Prime Minister would fix the date of the election.

The Kenyan situation is even closer to ours. Kenya has had a new Constitution as us. The Constitution of Kenya 2010 has prescribed a precise general

election date. Section 9 of the Sixth Schedule suspended the operation of some of the provisions of the new Constitution during the transitional period. The date of the first elections was fixed on the basis of the former Constitution. Section 9 of the Sixth Schedule provided that the "first elections for the President, the National Assembly and the Senate shall be held within sixty days after dissolution of the National Assembly at the end of its term".

Cases that went to the courts in Kenya did not raise the question of when the period of sixty days started to run. The cases which were eventually decided by the High Court of Kenya raised the question whether the courts should involve themselves in fixing the date of the first elections. In fact the High Court fixed the date of the first elections by calculating sixty days after the date of the automatic dissolution of Parliament.

In this case there are provisions of the new Constitution relating to the conduct of the first elections which the President would have to take into account in fixing the date of the elections. As pointed out earlier, s 8 of Part 3 of the Sixth Schedule requires that the first elections be conducted in terms of an Electoral Law in conformity with the new Constitution.

Section 6(3) of Part 3 of the Sixth Schedule requires that there be conducted by the Registrar-General of voters under the supervision of the Zimbabwe

Electoral Commission a special and intensive voter registration and voters' roll inspection exercise for at least thirty days after the publication day.

Section 157(3) of the new Constitution requires that the Electoral Law must provide for the nomination of candidates in any election to take place at least fourteen days after the publication of the proclamation calling for that election. It further requires that the polling in that election must take place at least thirty days after the nomination of candidates.

The presumption of constitutionality requires that the President in the exercise of the discretionary powers vested in him should take into account all these factors in deciding to issue the proclamation fixing the day or days on which the "first elections" are to be held. All these factors are designed to ensure not only accountability to the electorate but also that the electorate plays a meaningful role in the election and make informed choices.

In all matters relating to the "first elections" Chapter 7 of the new Constitution is the supreme and binding law. The President would have to take into account the amendments which have to be made by Parliament to the Electoral Law and other regulations relating to the conduct of the elections to make them in conformity with the new Constitution. Section 157(5) provides that after a proclamation of the date of the first elections no amendment to the Electoral Law or to any law relating to the elections

would have effect for the purposes of those elections. Any changes to such a law must be made before the proclamation is issued.

What all this means is that the President's exercise of discretion in calling the first elections and fixing the date when the poll should be held must in itself be in conformity with the new Constitution. The applicant, like all other potential voters, must wait for the exercise by the President of his discretion in accordance with the law.

The applicant seems to have been driven into making the application by his aversion for what he calls a situation in which the executive and judicial arms of government can function for four months without Parliament. The aversion is obviously based on the interpretation of the principle of separation of powers which is a characteristic feature of a constitutional democracy. Whilst the situation criticised by the applicant may be undesirable it is certainly not unconstitutional. It is a situation provided for by the Constitution.

The applicant exaggerates the case by saying that the second and fourth respondents want the affairs of the country to be run by the Executive and Judiciary without Parliament for four months. An honest and objective assessment of what the two respondents have said shows that they acknowledge that the President has a discretionary power to fix by a proclamation the date of the first elections. They accept that it is in the exercise of his discretion for the President to decide when, within the period of four

months after the date of the proclamation dissolving Parliament or the date of automatic dissolution of Parliament, the first elections are to be held.

Zimbabwe is not the only constitutional democracy with a provision of a Constitution allowing for a period in which the affairs of the country can be run by the Executive and Judiciary without Parliament following its dissolution by operation of law at the end of its full term. Section 55 of the Malaysian Constitution has already been referred to.

Article 16.3 of the Constitution of Ireland provides that after dissolution of the Dail Eireann (Parliament) a general election for members of Parliament shall take place not later than thirty days after the dissolution. Article 15(2) of the Constitution of Andorra provides that the President has the power to choose a date of an election to fall between the thirtieth and fortieth day following the end of the term of Parliament.

Article 64.3 of the Constitution of Bulgaria provides that the date for an election shall fall within two months from the expiry of the life of Parliament. Article 73(1) of the Constitution of Croatia provides that elections for members of the Croatian Parliament shall be held not later than sixty days after the expiry of the mandate or dissolution of the Croatian Parliament.

Even in countries such as Canada where the date of a general election is fixed by legislation the situation the applicant criticises has not been avoided. In terms of

the Canada Elections Act a general election is required to take place on 19 October of the end of four years of the life of Parliament. The dissolution of Parliament by proclamation prematurely terminated the life of Parliament. As a result of a general election which took place on 2 May 2011 the life of Parliament would end on 2 May 2015. The general election would have to be held five months later on 19 October 2015.

It is clear, therefore, that the principle that there can be a period following automatic dissolution of Parliament when the affairs of a country are run by the Executive and Judiciary is recognised. It is interesting to note that whilst the applicant is concerned about the fate of Parliament, he does not seem to be interested in the need to comply with the requirements of the new Constitution designed to ensure that the electorate plays a meaningful role in the electoral process.

There is no doubt in my mind that the requirements of the new Constitution are designed to ensure that the first elections are truly a legitimate democratic instrument for the people to choose and control the authorities that will act in their name. Taking into account the importance of the first elections the new Constitution tries to guarantee the democratic character of the decision making on the date of the election.

It appears to me that once it is accepted that the date of the first elections can be fixed to take place after 29 June 2013 the whole basis of applicant's argument collapses. He then clearly falls in the "within four months after automatic dissolution of

Parliament argument". It also defeats logic for the majority to find that the President has broken the supreme law of the land at the same time authorise him to continue acting unlawfully. That is a very dangerous principle to apply as it has no basis in law. The principle of the rule of law just does not permit of such an approach. A finding that the President has a discretionary power under s 58(1) which he has to exercise within the prescribed time limits would clearly avoid such a contradictory order by the majority.

For all these reasons I would dismiss the application with costs.

PATEL JA**:** On the question of *locus standi*, I entirely concur that the applicant has established the requisite standing to institute this application. Pursuant to s 18(1) of the former Constitution, which guarantees the protection of the law and constitutional due process, he undoubtedly has the right to have general elections held when they are due as prescribed by the law. By the same token, s 18(1a) of that Constitution bestows upon him a legitimate expectation that the President, the first respondent, will exercise his functions as a public officer in fixing election dates in accordance with the law. The fact that he has an alternative administrative law remedy by way of *mandamus* does not, in my view, preclude his entitlement to approach this Court for constitutional relief. In this regard, I respectfully adopt the reasoning and conclusions of the learned CHIEF JUSTICE.

Turning to the substantive merits of the matter, the principal issue for determination is the meaning of and interrelationship between ss 58(1), 63(4) and 63(7) of the former Constitution. On this aspect, I fully endorse the principle of constitutionalism that informs the approach taken by the learned CHIEF JUSTICE and the majority of the Court. However, I am constrained, with the utmost respect, to disagree with the construction that they place on the provisions under review, in particular, on s 58(1).

The tripartite structure of the State is the keystone of every constitutional democracy and the need to safeguard the attendant separation of powers is unquestionably paramount. However, as was recognised in *Mike Campbell (Pvt) Ltd and Anor v Minister of Lands and Anor* 2008 (1) 17 (S) at 33-35, the clear words of a Constitution must be construed to override any doctrine of constitutionalism predicated on essential features or core values. 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. See *Hewlett v Minister of Finance* 1981 ZLR 571 (S) at 580. If the words used are precise and unambiguous, then no more is necessary than to expound them in their natural and ordinary sense. See *The Sussex Peerage* (1843-1845) 65 RR 11 at 55. In essence, it is necessary to have regard to the words used and not to depart from their literal and grammatical meaning unless this leads to such an absurdity that the Legislature could not have contemplated it. See, in this regard, the case authorities cited by the learned CHIEF JUSTICE.

Section 58(1) of the Constitution, as amended by Act No. 11 of 2007 to accommodate harmonised elections, prescribes when general elections are to be held and the fixing of election dates, as follows:

> "A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix."

The prorogation and dissolution of Parliament are dealt with in s 63 of the Constitution. For present purposes, subss (4) and (7) are the pertinent provisions and they provide as follows:

> "(4) Parliament, unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as President enters office in terms of section 28(5) after an election referred to in section 28(3)(a), and shall then stand dissolved:
>
> Provided that, where the period referred to in this subsection is extended under subsection (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of that extended period."
>
> "(7) Subject to the provisions of subsection (4), any prorogation or dissolution of Parliament shall be by proclamation in the *Gazette* and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58(1) for the holding of a general election."

The first point to note is that both s 58(1) and subss 63 (4) and (7) have remained unaltered in substance since they were first enacted in 1980. The second more critical point is that they deal with two distinct though related constitutional processes, *viz.* the

fixing of elections on the one hand and the life of Parliament on the other. These two processes and their objectives have been unnecessarily conflated by the applicant *in casu*

.

The approach adopted by the learned CHIEF JUSTICE in relation to s 58(1) is to read it so that the two separate scenarios for the dissolution of Parliament are taken to follow after the words "shall be held on" rather than the phrase "within a period not exceeding four months after". In my respectful view, dividing s 58(1) in this fashion detracts from its grammatical structure and leads to an inchoate rendition of the provision. In particular, in the situation where Parliament is dissolved by operation of law under s 63(4), the literal result is that elections are to be held "on the dissolution of Parliament". Does this mean that elections are to be held simultaneously with the dissolution of Parliament, or immediately thereafter, or at some later stage? More importantly, this reading has the peculiar effect that no actual "election day or days" are fixed, contrary to the very purpose of s 58(1). Such a construction surely cannot reflect what the Legislature would have intended.

A plain reading of s 58(1) makes it clear that elections must be held after the dissolution of Parliament on such day or days as the President may fix by proclamation. This applies to both scenarios for the dissolution of Parliament. Where it is dissolved by the President under s 63(7), elections must take place within four months <u>after the issue of a proclamation dissolving Parliament</u>. Where Parliament stands dissolved by operation of law in terms of s 63(4), elections must be held within four months <u>after the dissolution of Parliament</u>. In my considered view, the wording used is unambiguous and

does not admit of any other interpretation, nor does it entail any absurdity. Consequently, there is no need to invoke any teleological or purposive approach in the construction of s 58(1).

The apparent ambiguity that might emerge arises from the wording of s 63(7) and its juxtaposition of the dissolution of Parliament with the first election day fixed under s 58(1). Read in their context, however, there is no real ambiguity as between ss 58(1) and 63(7). What the latter provision means is this. Any prorogation or dissolution of Parliament by the President must be effected by proclamation in the *Gazette*. In the case of a dissolution, this must take effect from the day preceding the day or days fixed by proclamation under s 58(1) for the holding of a general election. This would apply, in particular, where the President dissolves Parliament in terms of s 63(2) well before the expiration of its five year tenure. However, this is subject to s 63(4), so that the automatic dissolution of Parliament by operation of law may but need not take effect on the day preceding the day fixed for the holding of elections. In other words, the prescribed tenure of Parliament cannot be extended beyond five years in the event that the date fixed for elections falls outside that period. In that case, the dissolution of Parliament cannot immediately precede the election date fixed under s 58(1).

Reading all of the relevant provisions together, the relationship between the holding of elections and the life of Parliament is resolved as follows. Where Parliament is dissolved by the President acting under s 63(2), elections must be held within four months after the issue of the proclamation dissolving it in terms of s 63(7). In this case,

the two events must be synchronised so that the dissolution of Parliament takes effect on the day preceding the day or days fixed for elections in terms of s 58(1). Conversely, where Parliament is dissolved by operation of law after the effluxion of five years in terms of s 63(4), elections must be held within a period not exceeding four months after the dissolution of Parliament. In this case, elections need not be held immediately after such dissolution, so long as they are held on a day or days within the four month period after dissolution. In short, different time frames apply to the two forms of dissolution.

Does this differentiation necessarily entail an absurdity? I am inclined to think not. Where the President takes a deliberate decision, for whatever reason of political or practical expediency, to dissolve Parliament before the expiry of its prescribed five year tenure, that decision involves the exercise of an extraordinary executive power. And in that extraordinary eventuality, Parliament has deemed it fit to ensure that there should not be any delay between its dissolution and the holding of general elections. However, the need for such urgency or immediacy does not arise where Parliament continues in existence and operation throughout its ordinary term of five years.

Of course, it is a matter of concern that the plain reading of s 58(1) invites the "spectre" of rule by Executive decree for a maximum period of four months without the restraint of Parliamentary oversight. While the possibility of this hiatus may be undesirable from a democratic perspective, it is not necessarily absurd or unconstitutional. That scenario, unpalatable as it may be, is explicitly contemplated in

s 31E of the Constitution dealing with the tenure of office of members of the Executive. More specifically, s 31E(2) provides that:

> "No person shall hold office as Vice-President, Minister or Deputy Minister for longer than three months unless he is a member of Parliament:
>
> Provided that if during that period Parliament is dissolved, he may continue to hold such office without being a member of Parliament until Parliament first meets after the dissolution."

This provision was substituted by Parliament through Act No. 31 of 1989, in tandem with the advent of the executive presidency. It constitutes a clear recognition and acceptance by Parliament itself of the possibility of its abeyance for the duration of at least three months. In effect, it unequivocally fortifies the plain and unqualified construction of s 58(1) *vis-à-vis* the provisions of subss 63 (4) and (7).

For all of the aforestated reasons, I would dismiss the present application on its merits.

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