

IN THE HIGH COURT OF ZIMBABWE

CASE NO HC /21

HELD AT HARARE

In the matter between:

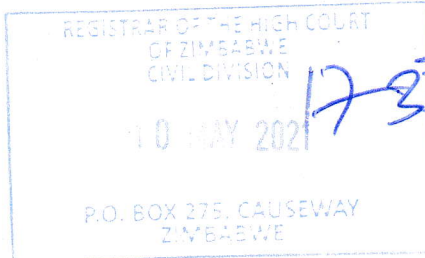
MUSA KIKA

APPLICANT

And

MINISTER OF JUSTICE, LEGAL &

PARLIAMENTARY AFFAIRS



1ST RESPONDENT

And

LUKE MALABA N.O

2ND RESPONDENT

And

ELIZABETH GWAUNZA N.O

3RD RESPONDENT

And

PADDINGTON GARWE N.O

4TH RESPONDENT

And

RITA MAKARAU N.O

5TH RESPONDENT

And

ANNE-MARY GOWORA N.O

6TH RESPONDENT

And

BEN HLATSHWAYO N.O

7TH RESPONDENT

And

BHARAT PATEL N.O

8TH RESPONDENT

And

ANTONIA GUVAVA N.O

9TH RESPONDENT

And

SUSAN MAVANGIRA N.O

10TH RESPONDENT

And

CHINEMBIRI ENERGY BHUNU N.O

11TH RESPONDENT

And

TENDAI UCHENA N.O

12TH RESPONDENT

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NICHOLAS MATHONSI N.O

13TH RESPONDENT

And

CHARLES HUNGWE N.O

14TH RESPONDENT

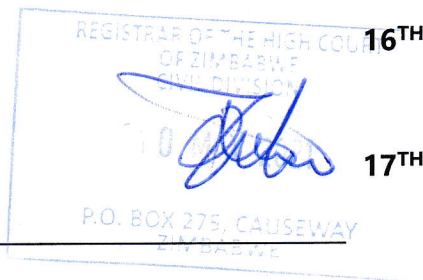
And

FELISTUS CHATUKUTA N.O

15TH RESPONDENT

And

ALFAS CHITAKUNYE N.O



16TH RESPONDENT

And

SAMUEL KUDYA N.O

17TH RESPONDENT

URGENT COURT APPLICATION

FOR DECLARATORY & ANCILLARY RELIEF ON THE TENURE OF JUDGES OF SUPERIOR COURTS

FILED BY:

**ZIMBABWE HUMAN RIGHTS NGO FORUM
APPLICANT'S LEGAL PRACTITIONERS
64B CONNAUGHT STREET,
AVONDALE
HARARE**

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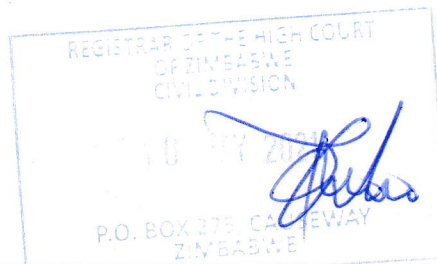
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INDEX TO URGENT COURT APPLICATION

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ITEM	DESCRIPTION	PAGES
1	Urgent Court Application	1-4
2	Certificate of Urgency	5-7
3	Founding Affidavit	8-20
4	Draft Order	21-23

DATED AT HARARE THIS 10th DAY OF MAY 2021

ZIMBABWE HUMAN RIGHTS NGO FORUM
APPLICANT'S LEGAL PRACTITIONERS
64B CONNAUGHT STREET,
AVONDALE
HARARE

AND TO

THE REGISTRAR

High Court of Zimbabwe

HARARE

AND TO

MINISTER OF JUSTICE AND PARLIAMENTARY AFFAIRS

New Government Complex

Samora Machel Avenue

HARARE

AND TO

2ND - 8TH RESPONDENTS

Constitutional Court of Zimbabwe

Samora Machel

HARARE

AND TO

9TH - 17TH RESPONDENTS

Supreme Court of Zimbabwe

Kwame Nkrumah Avenue

HARARE

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REGISTRAR OF THE HIGH COURT
OF ZIMBABWE
CIVIL DIVISION
10 MAY 2017
[Signature]

URGENT COURT APPLICATION

FOR DECLARATORY & ANCILLARY RELIEF ON THE TENURE OF JUDGES OF SUPERIOR COURTS

TAKE NOTICE that the applicant intends to apply to the High Court by way of an **URGENT COURT APPLICATION** for an Order in terms of the Draft Order annexed to this notice and that the accompanying Affidavits and documents will be used in support of the application.

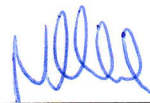
FURTHER TAKE NOTICE THAT if you intend to oppose this application you will have to so on an urgent basis and for that reason:

- 1 You will have to file a Notice of Opposition as provided for in the rules of court, together with one or more opposing affidavits within **3 (THREE)** days of service of this application upon you. **NB: Please note that the dies induciae has been truncated.**
- 2 You will also have to serve a copy of the Notice of Opposition and affidavits on the applicant at the address for service specified below.
- 3 Your affidavits may have annexed to them documents verifying the facts set out in the affidavits.

- 4 Applicant will in turn file her Answering affidavit and Heads of Argument within **2 (TWO)** days of service upon her of the opposing papers.
- 5 As this matter will be dealt with on an urgent basis, you will have to file your heads of argument in the period between your receipt of applicant's Heads of Argument and the set down of the matter.

FURTHER TAKE NOTICE THAT the judge seized with this matter may issue additional directions.

DATED AT HARARE THIS 10th DAY OF MAY 2021



**ZIMBABWE HUMAN RIGHTS NGO FORUM
APPLICANT'S LEGAL PRACTITIONERS
64B CONNAUGHT STREET,
AVONDALE
HARARE**

AND TO THE REGISTRAR
High Court of Zimbabwe
HARARE

AND TO MINISTER OF JUSTICE AND PARLIAMENTARY AFFAIRS
New Government Complex
Samora Machel Avenue
HARARE

AND TO 2ND - 8TH RESPONDENTS
Constitutional Court of Zimbabwe
Samora Machel
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AND TO 9TH - 17TH RESPONDENTS
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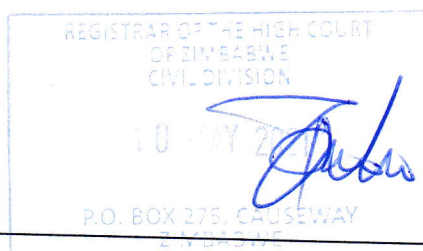
ALFAS CHITAKUNYE N.O

16TH RESPONDENT

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SAMUEL KUDYA N.O

17TH RESPONDENT



CERTIFICATE OF URGENCY

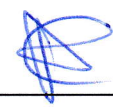
I **CINGINKOSI DUBE** a legal practitioner duly registered and practising as such with Scanlen and Holderness certify that:

- 1 I have considered the papers in this matter and wish to pass on to the court the view that this important matter is urgent and must be related to (i) as a court application and (ii) on an urgent basis in line with the decision in **Pascoe v Ministry of Lands & Rural Resettlement & Ors HH-391-17** for the following reasons:
 - 1.1 On the 7th May 2021 in the evening being a Friday, constitutional amendment no. 2 was promulgated into law.
 - 1.2 As a result of that amendment, there is need for the court to pronounce itself on whether the current judges of the Supreme and Constitutional courts are benefited by that amendment, whatever view one holds of its validity.
 - 1.3 The need for such a pronouncement is accentuated by the fact that the second respondent, turns 70 on the 15 of May 2021.
 - 1.4 If second respondent should not be in office after the 15th of May 2021, his actions would be invalid and there is need before those actions are

carried out or have otherwise grown in number, for the position of the law to be pronounced.

- 1.5 The nature of the matter requires that it be resolved on a complete record and that a final and definitive judgment be made one way or the other.
 - 1.6 In addition, there is no scope for the issue of a provisional order in such a matter. It would just confuse issues.
 - 1.7 Applicant has treated the matter with the utmost urgency and has not delayed in bringing this application.
 - 1.8 It is at any rate in the public interest that the matter be dealt with urgently.
 - 1.9 The constitutional amendment that has led to this application was itself fast tracked through Parliament.
- 2 For these reasons, I certify that the matter is urgent and that it must be related to as such.
- 3 In accordance with the case made by the applicant, it is my opinion that the following proposals are eminently sensible, consistent with the nature of the matter and may be adopted wholesome by the court:
- 3.1 Respondents must if they are so inclined file their opposing papers within 3 days of service upon them of this application.
 - 3.2 Applicant must then be required to file both his affidavit in answer and Heads of Argument within 2 days of receipt by him of respondent's papers.
 - 3.3 Upon receipt of applicant's Heads of Argument, the Registrar must set the matter down.
 - 3.4 Respondents will in the intervening period file their own heads of argument.
- 4 I accordingly certify that this is a matter that must be dealt with as an urgent court application and that the court may adopt the suggestions in paragraph 3 above.

DATED AT HARARE THIS 10th DAY OF MAY 2021



CINGINKOSI DUBE

IN THE HIGH COURT OF ZIMBABWE

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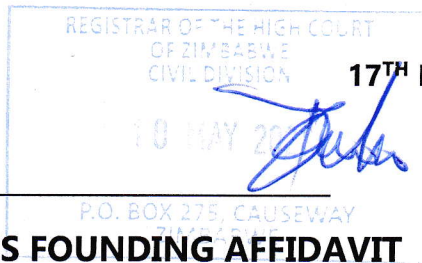
ALFAS CHITAKUNYE N.O

16TH RESPONDENT

And

SAMUEL KUDYA N.O

17TH RESPONDENT



APPLICANT'S FOUNDING AFFIDAVIT

(a) The deposition and the parties

I **MUSA KIKA** make oath and state as follows:

- 1 I am an adult Zimbabwean male, a legal practitioner and the Executive Director of **THE ZIMBABWE HUMAN RIGHTS NGO FORUM**. I am applicant in this matter. The facts to which I depose are known to me and are true and correct. Where I make averments regarding the law, I do so on the advice of my legal practitioners.
- 2 My address for service is care of the **ZIMBABWE HUMAN RIGHTS NGO FORUM** my legal representatives of 64B Connaught Street, Avondale, Harare.
- 3 First respondent is the **MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS** the Government of Zimbabwe minister responsible for the administration of justice in the republic. His address for service is care of 5th Floor, New Government Complex, Harare.
- 4 Second respondent is **LUKE MALABA** the **CHIEF JUSTICE OF ZIMBABWE** up until his 70th birthday at midnight on 15 May 2021. I cite him in his official

capacity as a judicial officer in view of the fact that this application relates to him in that capacity.

- 5 Third respondent is **ELIZABETH GWAUNZA** the **DEPUTY CHIEF JUSTICE OF ZIMBABWE** who must assume the position of **ACTING CHIEF JUSTICE** at midnight on 15 May 2021 until a substantive **CHIEF JUSTICE** is appointed. I cite her in her official capacity as a judicial officer in view of the fact that this application relates to her in that capacity.
- 6 Fourth respondent is **PADDINGTON GARWE** a judge of the Supreme Court and presently an Acting Judge of the Constitutional Court. He is cited in his official capacity as a judge as this application relates to him in that capacity.
- 7 Fifth respondent is **RITA MAKARAU** a judge of the Supreme Court and presently an Acting Judge of the Constitutional Court. She is cited in her official capacity as a judge since this application relates to her in that capacity.
- 8 Sixth respondent is **ANNE-MARY GOWORA** a judge of the Supreme Court and presently an Acting Judge of the Constitutional Court. She is cited in her official capacity as a judge since this application relates to her in that capacity.
- 9 Seventh respondent is **BEN HLATSWAYO** a judge of the Supreme Court and presently an Acting Judge of the Constitutional Court. He is cited in his official capacity as a judge given that this application relates to him in that capacity.
- 10 Eighth respondent is **BHARAT PATEL** a judge of the Supreme Court and presently an Acting Judge of the Constitutional Court. He is cited in his official capacity as a judge, as that capacity is the subject matter of this application.
- 11 Second to eighth respondent's address for service is care of Constitutional Court of Zimbabwe, Samora Machel Avenue, Harare.
- 12 Ninth respondent is **ANTONIA GUVAVA** a judge of the Supreme Court. She is cited in her official capacity as a judge. This application relates to her in her capacity as such.
- 13 Tenth respondent is **SUSAN MAVANGIRA** a judge of the Supreme Court. She is cited in her official capacity as a judge. This application relates to her in her capacity as such.
- 14 Eleventh respondent is **CHINEMBIRI ENERGY BHUNU** a judge of the Supreme Court. He is cited in his official capacity as a judge. This application relates to him in his capacity as a judge.

- 11
- 15 Twelfth respondent is **TENDAI UCHENA** a judge of the Supreme Court. He is cited in his official capacity as a judge. This application relates to him in his capacity as a judge.
- 16 Thirteenth respondent is **NICHOLAS MATHONSI** a judge of the Supreme Court. He is cited in his official capacity as a judge as this application relates to him in his capacity as such.
- 17 Fourteenth respondent is **CHARLES HUNGWE** a judge of the Supreme Court. He is cited in his official capacity as a judge. This application relates to him in his capacity as a judge.
- 18 Fifteenth respondent is **FELISTUS CHATUKUTA** an acting judge of the Supreme Court. In view of the developments that have led to this application, she may very well be a substantive judge of the Supreme Court by the time this application is filed and her joinder is justified on that basis. She is cited in her official capacity as a judge.
- 19 Sixteenth respondent is **ALFAS CHITAKUNYE** an acting judge of the Supreme Court. In view of the developments that have led to this application, he may very well be a substantive judge of the Supreme Court by the time this application is filed and his joinder is justified on that basis. He is cited in his official capacity as a judge.
- 20 Seventeenth respondent is **SAMUEL KUDYA** an acting judge of the Supreme Court. In view of the developments that have led to this application, he may very well be a substantive judge of the Supreme Court by the time this application is filed and his joinder is justified on that basis. He is cited in his official capacity as a judge.
- 21 Ninth to seventeenth respondents' address for service is care of Supreme Court of Zimbabwe, Kwame Nkrumah Avenue, Harare.

(b) **Nature of the application**

- 22 This is an **URGENT COURT APPLICATION** brought under section 85(1)(a) of the Constitution of Zimbabwe, 2013. I act in this matter in my own interests as a Zimbabwean knowledgeable in the law and directly interested in the administration of justice and the operation(s) of the court system.
- 23 I seek through the medium of this application to enforce my right to equal protection and benefit of the law as encapsulated in section 56(1) of the constitution.

24 In view of the fact that this is an **URGENT COURT APPLICATION** I draw the attention of the respondents to the reduced dies induciae as set out in the court application. I also draw attention to the certificate of urgency filed herewith.

(c) **Relief sought**

25 I seek by way of a declaratur the following relief:

25.1 That in accordance with provisions of sections 186(1) (a) and 186(2) (of the constitution of Zimbabwe 2013) and notwithstanding provisions of Constitutional amendment number 2, second to seventeenth respondents hold office until they reach the age of seventy years, whereupon they must by operation of law retire.

25.2 That the attempt to subvert the position encapsulated in the "original" section 186(1)(a) and 186(2) of the Constitution of Zimbabwe, 2013 is contrary to law and therefore in breach of my right to the protection of the law as set out in section 56(1) of the Constitution of Zimbabwe, 2013.

26 As consequential relief I seek the following:

26.1 That **LUKE MALABA** must or did at midnight on 15 May 2021 cease to hold the office of **CHIEF JUSTICE** of Zimbabwe.

26.2 That any action, conduct or deed of **LUKE MALABA** post the 15th of May 2021 purportedly as the **CHIEF JUSTICE OF ZIMBABWE** is null and void and of no effect.

26.3 That in accordance with provisions of section 181 of the Constitution of Zimbabwe, 2013, with effect from midnight on the 15th of May 2021, **ELIZABETH GWAUNZA** became/becomes the **ACTING CHIEF JUSTICE OF ZIMBABWE** until such a time as a substantive **CHIEF JUSTICE OF ZIMBABWE** is appointed.

26.4 That in accordance with provisions of section 181 of the Constitution of Zimbabwe, 2013, with effect from midnight on the 15th of May 2021, **PADDINGTON GARWE** became/becomes the **ACTING DEPUTY CHIEF JUSTICE OF ZIMBABWE** until such a time as a substantive **DEPUTY CHIEF JUSTICE OF ZIMBABWE** is appointed.

(d) **Joinder of the Honourable judges**

27 I am in an awkward position in which I have had to join all the judges of the Constitutional and Supreme Courts as parties to this matter. Their joinder is however, imperative. I must point out that this situation would not have resulted

had first respondent not been involved in the string of illegalities that I shall shortly enumerate.

- 28 I also draw attention to section 165(5) of the Constitution of Zimbabwe, 2013 which provides that members of the judiciary must not receive any gift or favour that may give the appearance of judicial impropriety. The developments that I complain against constitute either a gift or favour and would be frowned upon by section 165(5).
- 29 In accordance with provisions of section 164(1) and (2) the developments that have led to this application also constitute a deliberate and calculated assault on the independence of the judges concerned. Such independence has been assaulted by first respondent.
- 30 It is my hope that the distinguished men and women joined to these proceedings are able to overcome the awkwardness associated with their joinder, that they will objectively consider the matter and come to the inevitable conclusion that their joinder is necessary if the constitution of Zimbabwe is to be meaningfully defended.
- 31 It is in this regard my contention that the attitude demonstrated by the honourable judges must be consistent with provisions of section 165(2) of the Constitution.

(e) **Locus Standi**

- 32 I have already drawn attention to the fact that I am a Zimbabwean. I draw my standing to vindicate my rights from that fact. I point out that at issue are my Chapter 4 rights which I have the constitutional right to vindicate.
- 33 I also emphasize the fact that I am a registered Legal Practitioner. In my capacity as such and in discharge of my rights, I interface with the judiciary either directly or indirectly. I have an interest in ensuring the lawful and proper functioning of the court system.
- 34 I further point out that I am an avid defender of the constitution and have been engaged in many civic activities in my defence of the constitution. In that regard, I have championed a lot of programmes in defence of the constitution either as a director of the **ZIMBABWE HUMAN RIGHTS NGO FORUM** or in my personal capacity.
- 35 I point out that I have spent the bulk of my professional life vindicating the constitution and ensuring its observance. This is one such instance.

36 My legal interests in this matter are real and substantial. My standing is therefore established.

(f) **The basis of the application**

37 In the year 2013, the current constitution came into force after a nationwide referendum in which some 94.4% of those who voted, voted in favour of the constitution. The 1980 Lancaster House constitution had become moribund, removed from the nation's aspirations and an impediment to progress.

38 There are three key provisions of this constitution which I must refer to at the outset.

39 The first is section 2(1) which proclaims the supremacy of the constitution as at the date of its promulgation. Effectively therefore, any subsequent act, including the act of amending the constitution is taken within the drill of section 2(1) and must yield to its authority. Put differently, anything that comes post section 2(1) which is inconsistent with the design of the constitution is invalid, that is to say, it is invalid even in the absence of a court order. Being invalid even in the absence of a declaration of invalidity, it cannot be given effect to.

40 The second is section 3(1)(a-c) and (h) which speaks to the founding values of the constitution. These are inviolate. The point needs to be emphasized that they are also substantive.

41 The third is section 162 which provides that judicial authority derives from the people of Zimbabwe although it is vested in the courts. The effect is that the courts stand in a fiduciary relationship with the people of Zimbabwe. They exercise judicial authority by means of a public trust. In other words, courts have no authority unless that authority be given to them by the people of Zimbabwe. That authority is given for the benefit of the people of Zimbabwe and on terms on which they give it. It follows therefore that the people of Zimbabwe have a legitimate interest in knowing who exercises their authority and how that person(s) exercises such authority.

42 An essential provision in the 2013 constitution is the "original" section 186 which limits the tenure of office of judges of the superior courts to 70 years. (I use the word "original" so as to forestall any confusion that may be brought about by the developments that I will relate to) This is a provision that was purposefully inserted into the constitution by the people of Zimbabwe.

43 I would like to make the point that even the moribund Lancaster House Constitution made provision for a compulsory retirement age for judges. This is how it must be.

44 In order to secure provisions of section 186 in so far as they relate to the tenure of judges (and indeed of all officials appointed in terms of the constitution), the 2013 constitution has three provisions that are important to this matter. I relate to them.

45 The first is section 328(7), that provision provides that an amendment to a term limit provision, the effect of which is to extend the length of time that a person may hold office, must not benefit, inter alia, the person(s) holding office at the time the amendment is passed. A term limit provision is a provision of the constitution which limits the length of time that a person may hold or occupy a public office.

46 The second is section 328(8) which effectively means that section 328(7) cannot be tinkered with under circumstances where its object is frustrated or negated by a substantive amendment.

47 The third is section 328(9) which insulates the whole section 328 against an amendment, the nature of which is to defeat it in its object. Effectively, it takes a referendum to amend section 328. If there is no referendum, provisions of section 328(9) as read together with those of sections 2(1) and 3(1)(a-d) operate to render any amendment null and void and of no force and or effect.

48 I wish to emphasize the fact that these three important provisions enjoy the protection of sections 2(1) and 3(1) of the Constitution of Zimbabwe, 2013. That is to say, they are superior and may not be negated in their purpose.

(g) **The amendment**

49 On December 17, 2019, the nation became aware that the Cabinet had considered and approved a Constitutional Amendment Bill whose purpose was to increase the tenure of judges of the superior courts, that is to say of the Supreme and Constitutional Courts. Predictably, the effort became a subject of much attack and abuse and was stigmatised as a form of authoritarian consolidation.

50 It was also clear that the purpose behind the amendment was to assail judicial independence. It is a matter of regret that the impression is given that the honourable and distinguished judges concerned are being made to receive a favour, one which is fundamentally improper under the circumstances.

51 On the 20th of April 2021, the bill was however fast tracked by first respondent through the National Assembly. It is alleged that it garnered the requisite two thirds majority.

52 On the 4th of May 2021 the same bill sailed through Senate. It was also alleged that it had garnered the requisite two thirds majority.

53 The bill has now received presidential assent and is now the Constitution of Zimbabwe Amendment (No.2) Act, 2021 (Act No.2 of 2021). This assent was given on the 7th of May 2021 in the evening. I draw the court's attention to the manner it seeks to amend section 186 of the Constitution of Zimbabwe.

(h) **A fool's errand**

54 Aware of provisions of section 328(7) of the Constitution, first respondent sought to word the amendment in a way that would purportedly avoid the effect of section 328. He was unsuccessful in that regard. I am advised that by no lawful design can such a result be achieved. I submit that the attempt to avoid provisions of section 328 is incompetent for the reasons that I shall give.

55 The effect of section 328(7) on the tenure of judges of the Supreme Court can only be removed by an amendment to section 328(7). There is no such amendment.

56 By section 328(9) such an amendment must go through a referendum. There has been no referendum.

57 Effectively therefore, there is a declared conflict between section 328(7) and the amendment. That conflict is resolved by section 2(1) of the same constitution as read together with the relevant provisions of sections 328 and section 3(1). This is a matter of constitutional construction.

58 The need for this court to construe the constitution arises because there is now a dispute arising out of first respondent's attempt to violate the constitution, a law, and thereby breaching my right to the protection of the law as set out under section 56(1) of the constitution. I wish to protect my rights.

59 My right to the protection of the law means that:

59.1 Nothing that is contrary to the law, least of all the grundnorm, can validly and legitimately be done.

59.2 If anything that is contrary to law is done, it cannot be valid neither can it be given effect to.

59.3 The court must declare the correct position of the law in the event of there being a development whose sworn purpose is to bring confusion in the law.

59.4 That declaration does not have to be preceded by a declaration on the invalidity of the amendment.

60 There is therefore need that the court sets out what the law on this issue is. This as I have said is a matter of construction. The court simply has to decide whether the amendment had the effect of extending the tenure of second to seventeenth respondents. Such a declaration has to be made in the context of my right to the protection of the law which I now assert.

(i) **The correct legal position**

61 I submit in this regard that the law is clear. Whatever else the amendment purports to do, it does not and cannot have the effect of extending the tenure of second to seventeenth respondents. (I am careful in this regard to point out that fifteenth to seventeenth respondents may stand on a different footing should it happen that they have not yet been appointed into substantive positions). For now, I must join them.

62 In view of the correct legal position, whether the amendment be valid or otherwise, the fact of the matter is that it cannot benefit the respondents.

63 I am aware that second respondent turns 70 at midnight on 15 May 2021. He must in accordance with the law immediately cease to hold the position of **CHIEF JUSTICE OF ZIMBABWE**. This is by constitutional command.

64 Respectfully, second respondent has run his course. He has not been the only **CHIEF JUSTICE** under the 2013 constitution. The first **CHIEF JUSTICE** bowed out when he turned 70. Nothing stops second respondent from doing the same thing.

65 In view of the unnecessary confusion that has been generated, it is important that this court spells out what must happen upon the retirement of the second respondent. It is as follows:

65.1 Third respondent, the current **DEPUTY CHIEF JUSTICE OF ZIMBABWE** must immediately assume the office of the **CHIEF JUSTICE OF ZIMBABWE** up until a substantive **CHIEF JUSTICE** has been appointed.

65.2 Fourth respondent as the most senior judge after third respondent, must by law assume the office of **ACTING DEPUTY CHIEF JUSTICE** until a substantive **DEPUTY CHIEF JUSTICE** has been appointed.

(j) **The various unsatisfactory issues**

66 I must lament the fact that the developments in this matter cause much embarrassment to me as a Zimbabwean particularly when I have to be required to sue the entire superior court structure.

67 I however, have no option because the learned judges are the subject of the amendment. Judges after all have a constitutional duty to defend the constitution regardless of personal interest. This is what the oath of office they take requires of them.

68 This court also has a duty under section 165(1)(c) to safeguard my fundamental rights and the rule of law.

69 I also point out that the general failure to adhere to the law has caused an avoidable constitutional crisis. By now, second respondent should have proceeded on leave to make for a proper transitional mechanism.

70 It is an open secret for instance that as matter stand there is no constitutional court in Zimbabwe in view of provisions of section 166(1). The five acting appointments made by second respondent are not the kind of appointments contemplated under section 166(2) of the constitution.

71 There is need that things be done right particularly in the judiciary. Courts must never be the subject of such confusion.

(k) **On urgency**

72 I submit that this matter is manifestly urgent. I have however, considered that in line with the authorities, the matter be resolved once and for all as it is not susceptible of provisional relief. The importance of the matter requires that a final and definitive pronouncement be made.

73 That the pronouncement is now being made in the context of the retirement of the second respondent could hardly be my fault. It is the fault of the first respondent.

74 It is also the fault of the second respondent who by now should have proceeded on leave to allow for a smooth hand over and takeover. There was such a smooth handover and takeover when his predecessor left office. There has been no movement from second respondent's end even before the bill was signed into law. The impression created is that he had waited for the bill to be signed into law.

75 The amendment that has brought about this application was itself passed "as a matter of urgency". The challenge thereto must follow the same drill.

76 I submit however, that this matter is urgent for the following reasons:

76.1 On the 7th of May in the evening, being a Friday, amendment number 2 was signed into law.

76.2 The retirement age of the second respondent is the 15th of May 2021.

76.3 There is danger that second respondent may continue in office post the 15th of May 2021 and that if he does that, all his actions would be void. These include the administration of the judiciary and the resolution of disputes in court.

76.4 This is a matter which impacts the country's constitution in a big way and its resolution determines whether there is or there is not going to be a constitutional crisis.

77 For all these reasons, I submit that the matter is urgent and must be related to as such.

78 I have in accordance with precedent proposed the following by way of the management of the matter:

78.1 Respondents must if they are so inclined file their opposing papers within 3 days of service upon them of this application. I will in this regard ensure that correspondence drawing attention to the fact is served together with the application.

78.2 I must then be required to file both my affidavit in answer and heads of argument within 2 days of receipt of respondent's papers.

78.3 Upon receipt of my heads of argument, the Registrar must set the matter down.

78.4 Respondents will in the intervening period file their own heads of argument.

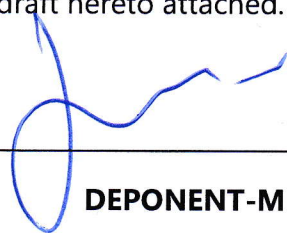
(l) **Costs**

79 As regards costs, I do not pray for an order for costs. Second to seventeenth respondents are cited in their official capacities. At any rate, I am sensitive to the fact that there is a strong public interest element to this application.

(m) **Conclusion and prayer**

80 In the premises, I submit that I have made a case for the relief that I crave.

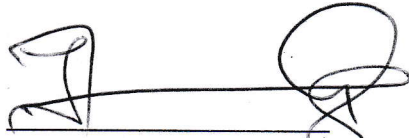
81 I accordingly pray for an order in terms of the draft hereto attached.



DEPONENT-MUSA KIKA

SIGNED AND SWORN TO BEFORE ME AT ZIMBABWE ON THIS THE 10th DAY OF MAY 2021, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH, AND CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE.

BEFORE ME:



COMMISSIONER OF OATHS



IN THE HIGH COURT OF ZIMBABWE

CASE NO HC /21

HELD AT HARARE

In the matter between:

MUSA KIKA

APPLICANT

And

MINISTER OF JUSTICE, LEGAL &

PARLIAMENTARY AFFAIRS

1ST RESPONDENT

And

LUKE MALABA N.O

2ND RESPONDENT

And

ELIZABETH GWAUNZA N.O

3RD RESPONDENT

And

PADDINGTON GARWE N.O

4TH RESPONDENT

And

RITA MAKARAU N.O

5TH RESPONDENT

And

ANNE-MARY GOWORA N.O

6TH RESPONDENT

And

BEN HLATSHWAYO N.O

7TH RESPONDENT

And

BHARAT PATEL N.O

8TH RESPONDENT

And

ANTONIA GUVAVA N.O

9TH RESPONDENT

And

SUSAN MAVANGIRA N.O

10TH RESPONDENT

And

CHINEMBIRI ENERGY BHUNU N.O

11TH RESPONDENT

And

TENDAI UCHENA N.O

12TH RESPONDENT

And

NICHOLAS MATHONSI N.O

13TH RESPONDENT

And

CHARLES HUNGWE N.O

14TH RESPONDENT

And

FELISTUS CHATUKUTA N.O

15TH RESPONDENT

And

ALFAS CHITAKUNYE N.O

16TH RESPONDENT

And

SAMUEL KUDYA N.O

17TH RESPONDENT

DRAFT ORDER

Harare, the of MAY 2021

Before the Honourable Mr(s) Justice _____

T. Mpopu for the Applicant

_____ for the Respondent

WHEREUPON after reading documents filed of record and hearing Counsel

IT IS DECLARED THAT:

- 1 In accordance with provisions of sections 186(1) (a) and 186(2) (of the Constitution of Zimbabwe 2013) in their original form and notwithstanding provisions of Constitutional amendment number 2, second to seventeenth respondents hold office until they reach the age of seventy years, whereupon they must by operation of law retire.
- 2 The attempt to subvert the position encapsulated in the "original" section 186(1)(a) and 186(2) of the Constitution of Zimbabwe, 2013 is contrary to law and therefore in breach of applicant's right to the protection of the law as set out in section 56(1) of the Constitution of Zimbabwe, 2013.

IT IS CONSEQUENTLY ORDERED THAT:

- 3 **LUKE MALABA** must or did at midnight on 15 May 2021 cease to hold the office of **CHIEF JUSTICE OF ZIMBABWE**.
- 4 Any action, conduct or deed of **LUKE MALABA** post the 15th of May 2021 purportedly as the **CHIEF JUSTICE OF ZIMBABWE** is null and void and of no effect.
- 5 In accordance with provisions of section 181 of the Constitution of Zimbabwe, 2013, with effect from midnight on the 15th of May 2021, **ELIZABETH GWAUNZA** became/becomes the **ACTING CHIEF JUSTICE OF ZIMBABWE** until such a time as a substantive **CHIEF JUSTICE OF ZIMBABWE** is appointed.
- 6 In accordance with provisions of section 181 of the Constitution of Zimbabwe, 2013, with effect from midnight on the 15th of May 2021, **PADDINGTON GARWE** became/becomes the **ACTING DEPUTY CHIEF JUSTICE OF ZIMBABWE** until such a time as a substantive **DEPUTY CHIEF JUSTICE OF ZIMBABWE** is appointed.
- 7 There shall be no order as to costs.

BY THE JUDGE