REPORTABLE (48)

(1) MOVEMENT FOR DEMOCRATIC CHANGE (2) NELSON CHAMISA (3) MORGAN KOMICHI
v
(1) ELIAS MASHAVIRA (2) ELIAS MUDZURI (3) THOKOZANI KHUPE (4) DOUGLAS MWONZORA

SUPREME COURT OF ZIMBABWE
GARWE JA, PATEL JA & GUVAVA JA
HARARE, OCTOBER 17 & 18 & 23, 2019 & 31 MARCH 31, 2020

T. Mpofu and S. M. Hashiti, for the appellants

A. Mutungura and S. Tatsanga, for the first respondent

R. Zimudzi, for the second respondent

L. Madhuku, for the third respondent

J. Kadoko, for the fourth respondent

PATEL JA: This is an appeal against the entire judgment of the High Court, sitting at Harare, handed down on 8 May 2019, in which the following order was granted:

1. The appointment of the 2nd and 3rd respondents as Deputy Presidents of the Movement for Democratic Change party were unconstitutional therefore null and void.
2. The appointments of the 2nd respondent as Acting President, and President of the Movement for Democratic Change party were unconstitutional and therefore null and void.

3. All appointments and/or reassignments and actions of the 2nd respondent in his purported capacities as Deputy/Acting or incumbent President were unconstitutional and therefore null and void.
4. The 1st respondent be and is hereby ordered to hold an Extra-Ordinary Congress after the lapse of at least one month after the date of this Order.
5. The respondents are ordered to pay the applicant's costs of suit, jointly and severally, the one paying the others to be absolved.

The Background

The first appellant is the Movement for Democratic Change, a political party which has capacity to sue and be sued in its own name ("the Party"). The remaining protagonists are members of the Party who were cited as follows in the court *a quo*. The second appellant is the President of the Party, while the third appellant is its National Chairman. The first respondent, who was the applicant *a quo*, is the Organising Secretary for the Gokwe Sesame District. The second respondent is the Deputy President, the third respondent is the Acting President and the fourth respondent is the Secretary General of the Party.

The facts relating to this matter are as follows. On 15 July 2016, the second appellant and the second respondent were appointed Deputy Presidents of the Party by the founding President, the late Dr Morgan Richard Tsvangirai. At the time these appointments were made, the post of Deputy President was occupied by the third respondent, having been elected as such at the Party's Congress held in October 2014. Following the death of Dr Tsvangirai on 14 February 2018, a special National Council meeting was convened on 15 February 2018, whereat the second appellant was confirmed as the Acting President of the Party.

On 24 September 2018, the first respondent launched an application in the High Court challenging the validity of the President's appointment of the second appellant and second respondents as Deputy Presidents of the Party. He averred that such appointments were made *ultra vires* the Party's constitution as they were not done *via* an election by Congress. The first respondent argued that the meeting of 15 February 2018 was a non-event as the National Council did not have powers to ordain an Acting President or a President of the Party. He further emphasised that Article 9.21.1 of Party's constitution was clear that upon the death of the President, the Deputy President assumed the role of Acting President. As such, he argued that the third respondent, as the duly elected Deputy President of the Party, became Acting President upon the death of Dr Tsvangirai, and was obliged to call for an Extra-Ordinary Congress within a year.

The third appellant opposed the application and deposed to an affidavit on behalf of the first and second appellants as well as the second and fourth respondents. He took four preliminary objections to the application. Firstly, he contended that the first respondent did not have *locus standi* to represent the first appellant as he had not produced a solemn declaration reflecting proof of acceptance of his membership of the Party. Secondly, he stated that the first respondent's delay in raising his complaints was inordinate and would cause prejudice as many developments had occurred since the appointments under challenge. Further, he claimed that the first respondent had waived his rights to challenge the appointments. Thirdly, he argued that the first respondent ought to have exhausted internal remedies provided in the Party's constitution by noting an appeal to its

appeal's tribunal. Lastly, the third appellant contended that the order directing the first appellant to hold an Extra-Ordinary Congress was incompetent relief in an application for a *declaratur*.

Regarding the merits of the application, the third appellant disputed the validity of the constitution relied on by the first respondent. He submitted that the "true constitution" was attached to the late President's opposing affidavit in the case of *Patson Murimoga & Anor* v *Morgan Richard Tsvangirai & Ors* HC 7453/16. The third appellant also argued that the appointments by the late President were made in terms of Article 9 of the constitution which gave the President power to appoint deputies to "officers of Congress" on the instructions of the National Executive and the National Council. It was submitted that the appointments were made on the instructions of the National Council and ratified by the same in terms of Article 18 of the Party's constitution. The third appellant further submitted that the subsequent occupation by the second appellant of the office of Acting President was valid as it was the result of unanimous assent and was based on the second appellant's valid election as Deputy President.

In his replying affidavit, the first respondent challenged the validity of the third appellant's opposing affidavit. He stated that, in the absence of a mandate from the other parties, the third appellant could not depose to solemn facts on their behalf. Further, he contended that the third appellant had not shown that he was authorised to represent the Party. Lastly, the first respondent took the position that the first appellant, together with

the second, third and fourth respondents, were barred for having failed to file their opposition to the application.

Determination of the Court *A Quo*

On the preliminary objections raised by the parties, the court *a quo* made the following rulings. It held that the first appellant was barred for having failed to file an opposing affidavit, as the third appellant who purported to act on its behalf had failed to show proof of his authority. The court also held that the second and fourth respondents were barred for having failed to file their own opposing papers, while the third respondent was barred for having failed to oppose the application. In relation to the first respondent's *locus standi* to institute the proceedings, the court held that his membership card was sufficient proof of his membership of the Party. Regarding the issue of exhaustion of internal remedies, the court *a quo* reflected that the relief sought by the first respondent would not be competently granted by the Party's appeals tribunal. The court reasoned that it was more probable that the appeal would not be heard in an impartial manner due to the composition of the appeals tribunal. On the issue of waiver of the first respondent's right to challenge the appointments, the court found that the first respondent had timeously approached the court after he became aware of his rights through a legal opinion furnished to the Party.

On the merits of the application, the court held that the appointments of the second appellant and second respondent as Deputy Presidents of the Party, having bypassed the electoral process, were *ultra vires* the Party's constitution. The court reasoned that the

constitution clearly provided that a Deputy President could only hold office by virtue of an election by Congress. This position was fortified by the court's interpretation of several provisions of the Party's constitution. The court considered the provisions of Article 6.4.4, which relate to the composition of the National Standing Committee. In particular, Article 6.4.4.1 was clear that a member could only occupy the office of Deputy President pursuant to an election at Congress. The late President had acted contrary to this provision by "picking" the second appellant and the second respondent as Deputy Presidents.

The court also had regard to Article 9 of the constitution which provides for the functions of various office bearers, including Deputy Presidents. In particular, Article 9.14 stipulates that all office bearers hold office by virtue of winning an election in Congress in terms of Article 6.4.4. The court highlighted that the President's powers of appointment in terms of Article 9.1.4 had to be exercised "where such is provided for in the Constitution." Thus, the President could only appoint the Secretary for Elections in terms of Article 6.4.4(k). The court further indicated that Article 9 listed office bearers and the Deputy President in the singular. In light of this, the court reasoned that the mention of Deputy Presidents in the plural was a typographical error.

The court further considered the powers of the National Council, in terms of Article 18 of the constitution, to cure an oversight or omission in the appointment of office bearers. The court held that the contention that the National Council had delegated to the late President the power to make the contested appointments was not supported by the evidence. The oversight or omission sought to be cured was not identified in the papers

pertaining to the deliberations of the National Council in 2016. Accordingly, Article 18 could not aid the appellants' case. Neither the President nor the National Council could bypass the requirement of holding an election at a Congress to fill those offices that were already provided for under the constitution.

Additionally, the court took the view that the Party was founded on constitutionalism and social democracy as *per* Article 3.1. Thus, the imposition of Deputy Presidents by the late President and the imposition of the second appellant as Acting President, acting in concert with the National Council at its meeting on 15 February 2018, was contrary to those founding values.

In light of these considerations, the court *a quo* held that the contested appointments were unconstitutional and granted the order aforementioned. Consequently, the court applied the provisions of Article 9.2.1(b) of the constitution, in terms of which the Deputy President becomes the Acting President, where the President is unable for any reason to perform his or her powers, functions, or administrative duties. The court accordingly concluded that at the time of the late Dr Tsvangirai's death, the third respondent was the Deputy President and ought to have assumed presidential duties, pending the holding of an Extra-Ordinary Congress to elect a new President, in terms of Article 9.21.1 of the constitution.

Grounds of Appeal

There are numerous grounds of appeal herein, some of which are repetitive or should have been conjoined. They are reproduced *verbatim* as follows:

1. The court *a quo* erred in coming to the conclusion that first appellant was barred for failing to file an opposing affidavit and so erred in treating a valid affidavit deposed to by third appellant as *pro non scripto* and in proceeding to determine the matter without hearing the first appellant.
2. *A fortiori*, the court *a quo* erred in proceeding in a manner which is in violation of first appellant's constitutionally protected right to be heard before an independent and impartial court as envisaged by section 69(2) of the Constitution of Zimbabwe, 2013.
3. Having found that the constitution relied upon by the appellants at least contemplated the appointment of deputy presidents, the court *a quo* misdirected itself in concluding without hearing evidence on this material issue, that the reference to deputy presidents in that constitution was a typographical error.
4. *A fortiori*, the court *a quo* erred in writing a constitution for the first appellant and in irregularly bringing it under the authority of such a document.
5. The court *a quo* erred in not concluding that the appointment of deputy presidents in the first appellant was in accordance with the constitution of that party, had been mandated by congress and the highest decision making organ outside congress and was for all purposes valid as a unanimous decision of a voluntary association.
6. Having been addressed on the law governing voluntary organisations and its effect on the subject before it, the court *a quo* misdirected itself in not pronouncing itself on that issue and in not deciding a question which was material to the decision required of it.
7. The question of the proper constitution for the first appellant having been previously resolved in terms of an extant judgment in a matter which involved the same parties and or at least their privies, the court *a quo* erred in allowing that issue to be re-opened and in founding its judgment on a constitution which is foreign to the first appellant.
8. The court *a quo* erred in treating without a valid legal or factual basis the domestic remedies set out under first appellant's constitution as ineffectual and in not requiring, in accordance with superior court authority, the exhaustion of those remedies *ante* the bringing of the matter to court.
9. The court *a quo* misdirected itself such misdirection amounting to an error in law in not finding that first respondent's participation in the activities of the first appellant under the leadership of the second appellant and duration of same estopped him from contending against the validity of his appointment to the prejudice of the first appellant.
10. The ordinary congress for the first appellant having become due, the court *a quo* erred in finagling upon that party an extra ordinary congress and so erred in creating a totally untenable position which is at variance with first appellant's constitution and is totally unworkable either in fact and or in law.
11. The court *a quo* erred in intervening without a valid legal or factual basis in the workings of a voluntary association and in subordinating its statutes and unanimous assent to the whims of a dishonestly disgruntled individual.

Procedural Issues

At the initial hearing of this matter Mr *Mpofu*, lead counsel for the appellants, complained that the appeal record was incomplete. The appellants had therefore filed an application in the High Court, in Case No. HC 8183/79, for the rectification of the record. This was because there were some essential documents that were missing, in particular, Dr Tsvangirai's opposing affidavit in *Murimoga & Anor* v *Tsvangirai & Ors* HC 7453/16, and Annexure A1 which was attached to that affidavit. Annexure A1, according to Mr *Mpofu*, was the authentic constitution of the Party. Given that these documents were necessary for this appeal, there was need to conclude the application for rectification before proceeding with the appeal.

Apart from this procedural aspect, Mr *Mpofu* noted that the second and fourth respondents (Messrs Mudzuri and Mwonzora) had not participated in the proceedings *a quo* and were only cited herein because they had been cited in those proceedings. He then withdrew the appeal against both these respondents with a tender of costs on the ordinary scale. As regards the third respondent (Ms Khupe), she too did not actively participate in the proceedings *a quo* and has resisted this appeal on purely technical grounds. Consequently, the appeal against the third respondent should also be withdrawn with a tender of costs on the ordinary scale. This would leave the first respondent (Mr Mashavira) as the only opposing party herein.

Messrs *Zimudzi* and *Kadoko*, counsel for the second and fourth respondents respectively, noted that their clients were only concerned with the question of costs claimed

against them in the draft order. Accordingly, they both accepted the withdrawal of the appeal in respect of their clients and the tender of costs.

Mr *Mutungura*, counsel for the first respondent, submitted that there was no need for the record to be rectified. This was because the Court itself had pre-empted this issue by having directed the production of the supposedly missing documents. These were identical to those contained in the record. He agreed with the Court that the record in Case No. HC 7354/16 be examined by all counsel to verify the correct position.

Counsel for the third respondent, Mr *Madhuku*, also agreed that all counsel should examine the record at the High Court to verify the correctness of the documents before the Court. However, he was opposed to the withdrawal of the appeal against his client who had a clear interest in the matter. In particular, she had an interest in defending the judgment *a quo* and, therefore, a right to participate in these proceedings. He submitted that once the matter was set down for hearing, the appellants could not unilaterally withdraw the appeal against the third respondent who was now entitled to pursue a judgment in her favour.

In reply, Mr *Mpofu* persisted with the argument that the third respondent had no right to any judgment because she was not involved in the proceedings *a quo*. In any event, he agreed with other counsel that the record in the High Court be inspected to ascertain the correctness of the documents availed by this Court.

Following argument by counsel, the matter was stood down to the end of the roll on the following day. The Court further directed all counsel present to proceed to the Registrar of the High Court to verify the authenticity of the questioned documents before the Court. The following day, Mr *Hashiti* for the appellants, advised the Court that the record in Case No. HC 7453/16 had been inspected. He confirmed that the affidavit of Dr Tsvangirai and the Party constitution attached thereto were the same as those before the Court. All other counsel concurred and duly confirmed this position.

Ruling on Withdrawal of Appeal

Having considered submissions by counsel, the Court was of the view that leave for the withdrawal of the appeal against the third respondent should be refused. Whilst it was clear that she was not directly entitled to insist on a judgment following withdrawal, it was however clear that she had a direct and substantial interest in the outcome of these proceedings. Case authority was agreed that this Court had a discretion whether or not to grant leave for the withdrawal of any appeal. In the particular circumstances of this appeal, therefore, the request for leave to withdraw the appeal against the third respondent was refused.

As regards the second and fourth respondents, no issues arose. The withdrawal of the appeal and tender of costs had been accepted by them.

In the result, the Court made the following order:

> "(a) The application for leave to withdraw the appeal against the second and fourth respondents is granted with costs.

(b) The application for leave to withdraw the appeal against the third respondent is refused with no order as to costs."

Preliminary Objections

In their heads of argument, the first and third respondents raised certain preliminary objections in terms of r 51 of the Rules of this Court. The first was that the first appellant, the Party, was not properly before this Court in that, having been found to be not properly before the court *a quo*, it remained barred and could not be an appellant *in casu*. The second objection was that the appellants had failed to comply with r 37(2) in that they did not serve the notice of appeal on the second, third and fourth respondents. The third and final objection was that the appellants had failed to file their heads of argument, as required by r 52, and consequently this appeal must be regarded as having been abandoned and deemed to be dismissed in terms of r 53.

At the hearing of the appeal, Messrs *Mutungura* and *Madhuku* indicated that the first and third respondents did not wish to persist with their objections *in limine*. Instead, they wished to argue and deal with the merits of the matter. Mr *Mpofu* retorted that the preliminary objections should be dismissed with costs to be borne by the respondents. Costs have been incurred by the appellants separately from the main appeal in filing their submissions to resist the preliminary objections raised by the respondents. The respondents have now retreated from their objections because of those submissions. The points *in limine* should not have been taken in the first place.

It is not in dispute that the appellants did not file any heads of argument when first called upon to do so by the Registrar. They did not seek or obtain any condonation for that failure and only filed their substantive heads of argument, following the directions of this Court, after the hearing of the matter had already commenced. Given this background, the Court is inclined to accept the submissions by counsel for the respondents that their non-persistence with the preliminary objections was proffered, not because the objections lacked merit, but in the spirit of making progress and avoiding purely procedural technicalities. In any event, the first point *in limine* taken by the respondents relates indirectly to the first ground of appeal challenging the conclusion of the court *a quo* that the first appellant was barred for failing to file an opposing affidavit.

All in all, I take the view that the first and third respondents have quite properly withdrawn their preliminary objections so as to enable this matter to proceed to its substantive merits. It is accordingly ordered that those objections shall be regarded as having been withdrawn, rather than dismissed, with each party bearing its own costs.

Issues for Determination

Before commencing his submissions, Mr *Mpofu* indicated that he was abandoning the tenth ground of appeal which avers that the court *a quo* had "finagled" upon the Party an Extra-Ordinary Congress which was at variance with the Party's constitution. In my view, he should also have been forthright in abandoning the related seventh ground of appeal which impugns the court *a quo* for having founded its judgment on a constitution which was "foreign" to the first appellant. Clearly, this latter ground

simply cannot be sustained given the position eventually accepted and confirmed by his co-counsel that the document availed by the Court, which was identical to that contained in the appeal record as well as that attached to Dr Tsvangirai's opposing affidavit in Case No. HC 7453/16, is the only true and authentic constitution of the Party for present purposes. It is that very document which was also relied upon by the court *a quo* in formulating its judgment. It follows that the seventh ground of appeal must also be jettisoned. It is accordingly ordered that both the seventh and the tenth grounds of appeal be struck out.

I now turn to the remaining nine grounds of appeal. As I have already intimated, some of the grounds of appeal ought to be combined so as to rationalise their disposition. On that basis, I consider the following to be the salient issues for determination *in casu*:

- Whether the first appellant was correctly barred *a quo* and consequently denied the right to be heard.
- Whether the first respondent should have exhausted the domestic remedies afforded by the Party constitution before instituting the application *a quo*.
- Whether the first respondent was estopped from challenging the validity of the second respondent's appointment as the leader of the Party.
- Whether the reference to Deputy Presidents (in the plural) in the Party constitution was a mere typographical error.
- Whether the appointment of the second appellant and the second respondent as Deputy Presidents of the Party and the subsequent appointment of the second appellant as its Acting President were valid as being in accordance with the Party constitution.

- Whether there was any valid legal or factual basis for the court *a quo* to intervene in the workings of the Party as a voluntary organisation.

Status of First Appellant *A Quo*

In his opposing affidavit *a quo* the third appellant (Mr Komichi) declares that he is "the National Chairman of the [first appellant] by whom I am duly authorised to depose to this affidavit in my capacity as National Chairman". The court *a quo* found that the first appellant was barred for having failed to file its own opposing affidavit and that the third appellant, who purported to act on its behalf, had failed to demonstrate his authority to do so.

Mr *Mpofu* submits that Mr Komichi's affidavit clearly speaks to the status and *locus standi* of the Party and that there was no need for him to have been authorised for that purpose. The judgment *a quo* materially affected the rights and interests of the Party to its prejudice and it should therefore have been afforded the right to be heard. In any event, the first respondent could not drag the Party to court and then claim that it had no *locus standi*. Furthermore, even if the Party were to be held to be in default *a quo*, it is entitled to appeal against the judgment *a quo* given that it was final and definitive in its effect *vis a vis* the Party.

Mr *Mutungura* counters that no person claiming to act on behalf of another can do so without authority. A body corporate being an artificial person, cannot act by itself and any person claiming to act on its behalf must be clothed with authority to do so. In the instant case, Article 6.6.1 (j) of the Party constitution allows its National Executive

Committee to institute and defend legal proceedings against the Party. It was therefore necessary for that Committee to appoint Mr Komichi to act on behalf of the Party.

Mr *Madhuku* supports this position and further submits that the holding of executive office did not entitle Mr Komichi to depose on behalf of the Party. In any event, the Party was fully heard *a quo* through the third appellant's averments and submissions.

I note first and foremost that the cases relied upon by counsel for the respondents, *i.e. Crown & Anor* v *Energy Resources Africa Construction* SC 3/17 and *Madzivire & Ors* v *Zvirivadza & Anor* 2006 (1) ZLR 514 (S), were both concerned with corporate bodies as opposed to voluntary organisations. In the latter instance, particularly where a political party bedevilled by a leadership wrangle is involved, it may be necessary to adopt a less rigid approach to questions of *locus standi* and authority to depose. The principal mischief that is to be guarded against is to avoid the situation where the organisation in question is litigated for by an unauthorised person without its specific sanction. As is reasoned by Herbstein and Van Winsen: *The Civil Practice of the Superior Courts in South Africa* (3rd ed.) at p. 304:

> "Any person who can swear positively to the facts will be sufficient and no special authority to him or her by the Plaintiff is necessary for the affidavit to be effective."

The difficulty *in casu*, however, is that Mr Komichi's opposing affidavit is somewhat laconic and lacking in particularity as to the specific mechanism by which he was authorised by the Party to depose to his affidavit. It is not evident whether this was by

resolution of the National Executive Committee or by some other committee or functionary within the Party. Nor does Mr Komichi affirm that he can swear positively to the facts deposed to in his affidavit.

Be that as it may, I do not think that it is necessary for present purposes to determine this particular aspect of the appeal. As is conceded by Mr *Mpofu*, the second and third appellants were represented and heard through the same counsel that represented the first appellant. Given this context, his belated prayer that the matter be remitted to the court *a quo* to hear the first appellant would entail nothing less than an exercise in judicial futility. I agree with Mr *Madhuku* that the first appellant was adequately represented in the proceedings *a quo* and, despite having been non-suited, was afforded the right to be heard. Insofar as concerns the present appeal, there can be no doubt that the first appellant has had more than ample opportunity to be very ably represented and fully heard in the proceedings before us. All in all, I take the view that the first ground of appeal is entirely otiose and need not detain this Court any further.

Exhaustion of Domestic Remedies and Estoppel

The general rule is that an aggrieved member of any voluntary organisation must first exhaust internal or domestic remedies before approaching the courts. The adequacy of such domestic remedies is a question of fact that must be established by evidence.

Mr *Mpofu* submits that no material was placed before the court *a quo* to enable it to reject the availability or adequacy of domestic remedies. The Party constitution sets out effectual structures for internal complaints to be addressed through the Appeals Tribunal under Article 14. The composition of the Tribunal is clearly objective and impartial and there can be no question of any predetermined hearing or decision.

As regards the question of estoppel, Mr *Mpofu* contends, quite correctly, that quiescence usually amounts to acquiescence. Many developments have taken place within the Party since the second appellant was appointed as Deputy President and later as Acting President and, more recently, as the Party President. The first respondent allowed this position to continue and only reacted to challenge that position several years later.

In terms of Article 14.3 of the Party constitution, the Appeals Tribunal consists of the Tribunal President, who must be at least forty years of age and a trained and qualified lawyer of at least seven years experience, together with eight other individual members of the Party. Additionally, all the members are elected by Congress for five years and no member of the National Council is eligible for appointment as a member of the Tribunal.

Having regard to these provisions, I have no doubt that the experience and credentials of the Tribunal's membership are impressive, no doubt minimising the possibility of bias or predisposition. Nevertheless, I am inclined to agree with the sentiments and findings of the court *a quo* rejecting the viability of the domestic grievance procedure for the situation *in casu*. Although the individual members of the Tribunal might

well have been persons other than the respondents *a quo*, the factual reality on the ground was that the second and third appellants herein were effectively in charge of the Party leadership and hierarchy. Following the special meeting of the National Council held on 15 February 2018, at which meeting the first appellant was reaffirmed without demurrer as the Acting President, there can be no doubt that he was the apparently unopposed and chosen leader of the Party. Given this scenario, there is little to indicate that the court *a quo* misdirected itself in holding that the first respondent could not and would not have found any comfort in pursuing the internal remedy theoretically availed under Article 14 of the Party constitution. There was no point in invoking domestic remedies that had been both politically and practically undermined. See *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 192; *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S) at 618. In short, there is nothing to show that the court *a quo* improperly exercised its discretion in the particular context of this case.

As regards the estoppel argument, I am again disinclined to interfere with the findings and decision of the court *a quo*. The learned judge found that the first respondent came to realise his right to challenge the Party leadership after he had read a legal opinion rendered by senior counsel, on the instructions of the Party, when a dispute arose between the three Deputy Presidents. Based on this finding, I agree with the learned judge that it cannot necessarily be inferred that the first respondent was aware of and acquiesced by his conduct to the appointment of two additional Deputy Presidents in 2016. He only became aware of the relevant constitutional legalities in 2018 and acted within a reasonable time to mount the application *a quo* in September 2018.

In the premises, I take the view that the eighth and ninth grounds of appeal are devoid of merit and legally unsustainable. They are accordingly dismissed.

Singular or Plural Deputy Presidents

The court *a quo*, after scrutinising the Party constitution, determined that it only provided for the existence of a single Deputy President and that the references to Deputy Presidents in the plural were purely typographical errors. There are at least three clauses in the constitution that indicate the possibility of more than one Deputy President. The first is Article 6.4.4.1 which relates to the composition of the National Standing Committee. Article 6.4.4.1(b) explicitly refers to "the Deputy Presidents" as office bearers of that Committee. The same applies to the composition of the National Executive Committee. In terms of Article 6.5.3(a), this Committee comprises, *inter alios*, "President and Deputy Presidents". The third more obliquely relevant provision is Article 9.1.4 which empowers the President to "appoint deputies to offices of Congress".

Mr *Mpofu* submits that the court *a quo* clearly erred in this respect. It could not, without hearing or receiving evidence from the draftsman or the rectification of the relevant provisions, come to the conclusion that the references to Deputy Presidents were nothing more than typographical errors. This was not simply a question of interpretation and the court was duty bound to enforce the constitution as it is in the absence of clear evidence or rectification.

Mr *Madhuku* relies on other provisions of the Party constitution, *viz.* Articles 9.2, 9.3.1(a), 9.21.1 and 10.16.1(a), which support the view that only one Deputy President of the Party is envisaged. These are all substantive provisions and they all provide for the exercise of powers and functions by a single Deputy President. To interpret the constitution to provide for more than one Deputy President would lead to absurdity and impracticability as to which Deputy President should perform which particular function. Additionally, the constitution only provides for the election of one Deputy President. There is no need for any evidence to prove that the references to Deputy Presidents were clearly typographical errors. It is in essence a question of interpretation and therefore a question of law rather than fact.

A closer consideration of the provisions relied upon by Mr *Madhuku* demonstrates that he is absolutely correct. Article 9.2.1 delineates the duties of "the Deputy President", including acting on behalf of the President in his absence and carrying out such functions as may be assigned to him by the National Council. Article 9.3.1(a) spells out the duty of the National Chairman to perform the duties of the President's office in the event that "both the President and the Deputy President" are unable to perform the functions of that office. Article 9.21.1 is a crucial provision which I shall revert to later. It stipulates that, in the event of the death or resignation of the President, "the Deputy President" assumes the role of "Acting President". It clearly does not contemplate the confusing and conflicting possibility of several Deputy Presidents assuming the pivotal and singular role of Acting President. Lastly, there is Article 10.16 which provides for the establishment of

an Advocacy Committee. Article 10.16.1(a) assigns the specific function of chairing that Committee to "the Deputy President".

In light of the aforestated provisions, it is reasonably clear that the Party constitution, read holistically, postulates the appointment and tenure in office of only one Deputy President at any given time. I acknowledge that it might be somewhat churlish to totally disregard the two provisions alluded to earlier which appear to suggest the existence of more than one Deputy President. In the final analysis, however, I take the view that these two provisions, but only to the extent that they refer to more than one Deputy President, are patently incongruous and incompatible with the overall structure and tenor of the Party constitution. Taken literally, they would lead to the glaring absurdities that I have already adverted to, stultifying the effective and fluid operation of the Party as a viable political organisation. To conclude on this aspect, I am satisfied that the third and fourth grounds of appeal cannot be upheld and must accordingly be dismissed.

Validity of Appointments to Presidency

The essential crux of this appeal is whether or not the appointment of the second appellant as Deputy President and then as Acting President was in conformity with the Party constitution. The second appellant and the second respondent were appointed as Deputy Presidents on 15 July 2016 by the President, Dr Tsvangirai. Thereafter, at the special National Council meeting held on 15 February 2018, the second appellant was confirmed as the Acting President of the Party. In my view, the entire appeal hinges on the critical question as to the validity of these appointments under the Party constitution.

As regards the first appointment, the opposing affidavit of Dr Tsvangirai, in Case No. HC 7453/16, sets out his perspective on the matter. According to that affidavit, both the National Executive Committee and the National Council, at their meetings held on 14 July 2016, directed that he should exercise his prerogative in appointing additional Deputy Presidents. He proceeded to do so the following day. Subsequently, on 3 August 2016, the National Council, with an overwhelming majority, endorsed the appointment of the second appellant and the second respondent to the positions of Deputy Presidents.

Mr *Mpofu* supports this position by placing reliance on Article 9.1.2(f) as read with Article 18 of the Party constitution. He submits that any omission in the constitution relating to the appointment or election of office bearers is to be resolved by the National Council in terms of Article 18. *In casu*, the decision of the National Council reflected the unanimous position of the Party and, once that decision was ratified by unanimous assent, it became the decision of the Party itself. Mr *Mpofu* buttresses his argument by reference to Articles 6.4.4.1(b) and 6.5.3(a), which refer to "Deputy Presidents", as well as Article 9.1.4, in terms of which the President is allowed to "appoint deputies to officers of Congress". Thus, the President can appoint additional Deputy Presidents on his own prerogative following a recommendation from the National Council. By virtue of Articles 6.4.1 and 6.4.2.1(a), the National Council is "the Party's main policy implementing organ" and has the power to "implement the decisions and resolutions of the Congress". The powers of the National Council under Article 6.4.2.1 are not exhaustive "but without prejudice to the generality of its powers". It operates as the highest decision making body

outside Congress and is effectively Congress outside Congress. It can make key decisions in relation to structural omissions in the constitution, which decisions can then be ratified through unanimous assent by Congress.

Mr *Mutungura* submits that the President and the National Council cannot authorise the appointment of any one or more Deputy Presidents. He, she or they must be elected by the Congress. As regards Article 9.1.4, this provision only allows the President to appoint deputies to officers of Congress and other office bearers where this is provided for in the constitution, for instance, in terms of Article 6.4.4.1(k), which allows the President to appoint the Secretary for Elections.

Mr *Madhuku* endorses the position that Article 9.1.4 must be confined to appointments in respect of which the constitution specifically so provides, as in the case of the Secretary for Elections. He further submits that the powers of the Deputy President under Article 9.2 are critical and it would be strange that the President would have the power to appoint the Deputy President. He or she is a possible or potential President and his or her appointment should not be totally dependent on the President. With reference to Article 18, this provision relates to omissions and oversights and not to the filling of the position of Deputy President where that position is already occupied by virtue of an election.

It is necessary in the first instance to place the relevant provisions of the Party constitution in their proper perspective. Article 6 sets out the organs of the Party and

elaborates their respective functions, powers and duties. Article 6.1 enumerates the upper echelons of the Party hierarchy in order of precedence, namely, the Congress, the National Conference, the National Council, the National Executive Committee and the National Standing Committee. Article 9 is titled "Office Bearers, National Council & Their Election Procedures". However, although all the office bearers and their respective functions are particularised, I am unable to discern any specific provision, whether in Article 9 or elsewhere in the constitution, that is germane to the election procedures applicable to the appointment of office bearers of the Party. Having outlined this broad framework, I turn to consider the salient provisions regulating the powers of the President and the National Council *vis-à-vis* the appointment of office bearers.

Article 6.4.2.1 spells out the powers of the National Council which, as I have already indicated, are "without prejudice to the generality of its powers" as being "the Party's main policy implementing organ". By virtue of Article 6.4.2.1(k), it is empowered "to fill any vacancy, by way of an election, in the National Council caused through resignation, death or any other cause" (my emphasis). According to Article 6.4.3(a), the National Council comprises, *inter alios*, "all members of the National Standing Committee" which, in terms of Article 6.4.4.1, is composed of "the following office bearers elected by Congress" (my emphasis), including the President and the Deputy President.

My reading of these provisions is that the National Council is vested with the power to fill any vacancy within its ranks, arising from any cause whatsoever, but only by way of an election. However, it is not clear precisely how any such election is to be

conducted. In any event, that process of filling any vacancy by election, presumably through a meeting of the National Council itself, only extends and applies to members other than those office bearers who comprise the National Standing Committee, including the President and the Deputy President, who must be elected by Congress and not by any other Party organ.

Turning to the powers of appointment specifically vested in the President, these are to be found in Article 9.1.4 as read with Articles 6.4.4.1(k) and 6.5.2(b). In terms of Article 9.1.4, the President "shall appoint deputies to officers of Congress …….. and other office bearers where such is provided for in this Constitution" (my emphasis).

The first point to note about the latter provision is that it appears to be designed to enable the President to appoint deputies to officers of Congress, other than himself, given that his deputy is already an officer of Congress. Secondly, and more significantly, his power to appoint deputies to officers of Congress and other office bearers is explicitly confined to those instances where this is specifically provided for in the constitution.

One such instance is stipulated in Article 6.4.4.1(k) with respect to the Secretary for Elections "who shall be appointed by the President". Another instance is that referred to in Article 6.5.2(c) which provides that the National Executive Committee shall be composed of, *inter alios*, "the twenty members appointed by the President provided that the President may appoint up to twenty five members with the approval of two thirds majority of the National Council". Apart from these two situations, there may well be other

instances where the President is expressly authorised to make appointments in terms of the constitution. What is critical in all of these cases is that the President's power to so appoint must be specifically conferred by the constitution.

The next question to consider is the scope of the power, if any, exercisable by the President, acting in conjunction with the National Council, to make appointments within the Party hierarchy. The provision that is assiduously relied upon by the appellants in this regard is Article 18. It is necessary to set it out in full:

> "In any place [*sic*] where the requirements of this Constitution cannot be satisfied because of an omission or oversight in draughtsmanship, or because a body provided for has not been established, or an officer provided for in this Constitution has not been elected or appointed, or because of a procedural problem; the National Council shall have the power to make such arrangements which, in their opinion, satisfy the spirit of this Constitution and shall seek approval for such arrangements at the next Congress." (My emphasis)

Also to be considered in tandem with this provision is Article 9.1.2(f) relative to the duties of the President:

> "It shall be the duty of the President: …….. (f) to perform such other functions and duties and exercise such powers as may be assigned to him or her in terms of this Constitution by the National Council." (My emphasis)

As I read these provisions, there are two principal obstacles that the appellants cannot surmount in their endeavour to apply them to the appointment of two additional Deputy Presidents by Dr Tsvangirai. First and foremost, in light of my earlier conclusion that the Party constitution only contemplates a single Deputy President, and given that the third respondent was already in occupation of that office, it cannot be said that an officer

provided for in the constitution had not been elected or appointed. In short, there was no *casus omissus* or *lacuna* in the constitution that needed to be cured or rectified. Secondly, whatever arrangements that the National Council might conceive or devise to obviate the omission or oversight in draughtsmanship, if any, and whatever power that the Council may assign to the President for that purpose, both the exercise of such power and such arrangements must satisfy the spirit of the constitution, albeit in the opinion of the Council.

As I have already emphasised, Article 6.4.4.1 makes it unquestionably clear that the incumbent of the office of Deputy President must be elected by Congress. Furthermore, as was aptly observed by the court *a quo*, Article 3.1 of the constitution enshrines the "core values" of the MDC as "a Social Democratic Party" with "humble and obedient leadership and accountability". To my mind, the appointment of supernumerary functionaries, by executive dictat and in violation of the prescribed elective process, simply cannot be countenanced as having satisfied the social democratic spirit of the Party constitution. It follows that the appointment of the second appellant and the second respondent as additional Deputy Presidents were patently unconstitutional and quite correctly nullified by the court *a quo*.

I now turn to the appointment of the second appellant as the Acting President of the Party on 15 February 2018. As already stated, this appointment was effectuated at a special meeting of the National Council. The meeting was convened through the normal channels before the death of Dr Tsvangirai on 14 February 2018. According to Mr *Mpofu*, the meeting was neither convened nor chaired by the second appellant. It was chaired by

the third appellant, as the National Chairman, in accordance with Article 9.3.1(h) of the constitution. The meeting was not orchestrated or controlled by the second appellant. Mr *Mpofu* further submits that, in the situation where the President dies, the National Council can determine which Deputy President should become the Acting President. The meeting was convened before the death of Dr Tsvangirai and the question of who should be the Acting President was already a contentious issue. The agenda of the meeting had not been altered and the question of cohesion within the Party was relevant.

A perusal of the minutes of the special meeting shows that the meeting was indeed opened by the third appellant who, at that time, was the Deputy National Chairman. However, the minutes also reveal that the second appellant was listed as "Acting President Chairing" and delivered a report as "the Acting President". In any event, the National Council unanimously reaffirmed and appointed the second appellant as the current incumbent Acting President of the Party for the next twelve months.

To my mind, the questions as to who convened or chaired the special meeting and for what specific objective are not of any particular relevance for present purposes. The critical issue *in casu* is whether or not the second appellant was validly appointed or reaffirmed as the Acting President of the Party. The answer to that question can only be in the negative for the following reasons.

Firstly, as I have already determined, the second appellant was not constitutionally appointed as an additional Deputy President. Consequently, he could not

at any stage validly assume the mantle of Acting President. Secondly, and equally significantly, immediately following the death of Dr Tsvangirai, Article 9.21.1 of the constitution came into play. It provides that:

> "In the event of the death or resignation of the President, the Deputy President assumes the role of Acting President, pending the holding of an Extra-Ordinary Congress that shall be held to elect a new President which Extra-Ordinary Congress to be [*sic*] held no later than a year from the death or resignation of the former President."

The import of this provision is clear and unambiguous. Its effect *in casu* is that upon the demise of Dr Tsvangirai, on 14 February 2018, the third respondent, as the only lawfully elected Deputy President, became the Acting President of the Party pending the holding of an Extra-Ordinary Congress to elect a new President. No other Party member, of whatever rank or position, could validly step in to assume the office of Acting President. Only the third respondent could lawfully wear that laurel.

It follows from the foregoing that the second appellant was not lawfully "appointed" or "reaffirmed" as the Acting President of the Party. The conclusion of the court *a quo* in this respect was eminently unimpeachable. It also follows that the fourth ground of appeal is devoid of merit and must be dismissed.

Intervention in Workings of First Appellant

The gravamen of the sixth and eleventh grounds of appeal is that the court *a quo* erred in ignoring the law governing voluntary organisations and thereby erred in intervening without a valid legal or factual basis in the workings of a voluntary association.

Mr *Mpofu*'s position in this regard is that, unless there are exceptional circumstances, the courts should not interfere in the affairs of voluntary organisations, especially political parties.

I cannot but agree with the proposition that the courts should ordinarily be astute not to trample upon the consensually crafted articles of governance adopted by voluntary organisations. In other words, they should be loath to intervene in the workings and affairs of a voluntary association. Nevertheless, as is quite correctly accepted by Mr *Mpofu*, such interference may be warranted and justified in exceptional circumstances. Such circumstances were clearly identified by the learned judge *a quo*. She aptly noted that the ethos of the Party was predicated on the foundation of social democracy. She then proceeded to observe that the anointing of additional Deputy Presidents in 2016 by the late President and the subsequent imposition of the second appellant as the Acting President on 15 February 2018 contradicted the democratic intention behind the selection of leadership within the Party. To use her own words:

> "Those actions were acts of disenfranchisement, not only of the applicant, who was not invited to participate, but potentially the first respondent's membership who have been deprived an election. Succession by choice is not *intra vires* the first respondent's Constitution."

I can do no better than to echo the above sentiments and I fully endorse the exercise of the court *a quo*'s discretion in interfering with the parlous affairs of the Party in the circumstances before the court. I am amply satisfied that the sixth and eleventh grounds of appeal are entirely unmeritorious and therefore cannot be upheld.

Mootness of the Matter

This matter was heard *a quo* on 14 March 2019 and judgment therein was handed down on 8 May 2019. Soon thereafter, in June 2019, the Party convened a Congress at which elections were held and officials were elected to lead the Party. More significantly, the second appellant was elected as the President of the Party. The question that then arises is whether or not this matter has been overtaken by events and thereby rendered moot.

Mr *Mutungura* accepts that the third respondent may have moved on. He contends, however, that she is still part and parcel of the Party. Furthermore, it was not MDC-T but MDC-A that elected the second appellant as its President. Therefore, the issues *in casu* are not moot.

Mr *Madhuku* denies that the third appellant has moved on. There are now two groups calling themselves MDC-T and there is therefore a leadership wrangle that must be resolved. In any case, what happened on 15 February 2018 was a blatant illegality and the failure to comply with the Party constitution is fatal. It is therefore necessary for the Party to have a properly convened Extra-Ordinary Congress to appoint a new President. Mr *Madhuku* further submits that this Court must act on the basis of the facts before it and cannot rely on questions of practicability or possible political outcomes. The law must be fully complied with and the Court does not have sufficient material before it to find mootness or otherwise.

Mr *Mpofu* points to the averments contained in the first respondent's founding affidavit *a quo* which indicate that the third respondent purported to hold her own Congress in April 2018 and is now leading her own party. The third appellant's opposing affidavit *a quo* also avers that the third respondent is no longer a member of the Party having decided to form her new party. These are undisputed averments and allegations of fact. The third respondent cannot possibly seek any relief from this Court. The judgment *a quo* has been overtaken by lawful election processes conducted by the Party at its Congress held in June 2019. The present matter is therefore clearly moot.

The principles governing mootness are relatively well established. The first is that a court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy between the parties. Thus, if the dispute becomes academic by reason of changed circumstances, the case becomes moot and the jurisdiction of the court is no longer sustainable – *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19, at p. 7. To put it differently, the controversy must be existing or live and not purely hypothetical – *Koko* v *Eskom Holdings Soc Limited* [2018] ZALCJHB 76, at para 21; *National Coalition for Gay and Lesbian Equality & Ors* v *Minister of Home Affairs* 2000 (2) SA 1 (CC), at para 21 (footnote 18).

The second principle is that mootness does not constitute an absolute bar to the justiciability of the matter. The court retains its discretion to hear a moot case where it is in the interests of justice to do so – *Khupe's* case, *supra*, at p.13; *J.T. Publishing (Pty) Ltd* v *Minister of Safety and Security* 1997 (3) SA 514 (CC), at 525A-B. This may arise where

the court's determination will have some practical effect, either on the parties concerned or on others, and the nature and extent of such practical effect, or because of the importance or complexity of the issues involved – *Independent Electoral Commission* v *Langeberg Municipality* 2001 (3) SA 925 (CC), at para 11. In short, the court may exercise its discretion to hear a moot issue by reason of its significance, practical or otherwise, and the need for an authoritative determination on that issue in the interests of justice.

It thus becomes necessary *in casu* to answer to interlinking questions: has the present matter been overtaken by events and thereby rendered moot; and, if so, should this Court nevertheless render its definitive determination in the matter in the interests of justice. It is at this juncture that I am confronted by what I perceive to be the ineluctable exigencies of *realpolitik*.

The evidence on record, as elaborated by submissions from counsel, suggests that the third respondent may have moved on to other political pastures. However, there is no clear evidence to the effect that she has unequivocally relinquished her political rights and interests in the Party. On the other hand, it seems relatively clear that the second appellant has become "the chosen leader" of the Party. The Court cannot but take judicial notice of the following political realities. Firstly, as appears from the voting results of the last general election held in July 2018, the second appellant was the only viable opposition contender for the presidency. He actually garnered 44.39% of the total valid votes cast in the presidential election, as compared with the winning candidate, the incumbent President of the country, who obtained 50.67% of the votes cast. In contrast, the next highest ranking

candidate, being the third respondent, only secured a paltry 0.94% of the valid votes cast. Secondly, and equally significantly, he was unanimously elected as the President of the Party, *i.e.* the one that is presently before this Court, at its Congress convened in June 2019. These are the inescapable facts that loom large on the country's political landscape.

What this factual conspectus brings to the fore is the concept of *de facto* and effective control as expounded in the renowned case of *Madzimbamuto* v *Lardner-Burke N.O. & Anor N.O.*; *Baron* v *Ayre N.O. & Ors N.N.O.* 1968 (2) SA 284 (RAD). This case revolved around the legitimacy of the Rhodesian Government and its enactments after it had usurped governmental authority following the infamous Unilateral Declaration of Independence on 11 November 1965.

Beadle CJ took the position that the status of the Government was that of a fully *de facto* government as one that was in effective control of the territory and that this control seemed likely to continue. However, it was not yet so firmly established as to justify a finding that its status was that of a *de jure* government. Quenet JP took a firmer position and held that the Government was not only the country's *de facto* government but had also acquired internal *de jure* status. Macdonald JA echoed that position and took the view that the Government was the government "for the time being" within the state of Rhodesia and therefore a *de facto* government within the meaning of English constitutional law. Consequently, insofar as a municipal court is concerned, a *de facto* government is a *de jure* government in the sense that it is the only law-making and law-enforcing government functioning "for the time being" within the state. Jarvis AJA also found that the

Government had effective control of the territory and that this control seemed likely to continue.

The only judge to take a firm dissenting position was Fieldsend AJA. He held that, while the authorities were factually in control of all executive and legislative powers in Rhodesia, they had not usurped the judicial function. Accordingly, they were neither a *de facto* nor a *de jure* government. However, necessity provided a basis for the acceptance as valid of certain acts of the authorities. This was so provided that the administrative or legislative act in question was directed to and reasonably required for the ordinary orderly running of the country, that the rights of citizens under the lawful 1961 Constitution were not defeated, and that there was no public policy consideration which precluded the court from upholding the act.

The judgment of the Appellate Division was taken on appeal to the Privy Council in *Madzimbamuto* v *Lardner-Burke & Anor* [1969] 1 AC 645. Lord Reed, writing for the majority, opined that the conceptions of international law as to *de facto* and *de jure* status were inappropriate where a court sitting in a particular territory had to decide on the validity or otherwise of a new regime which had gained control of that territory. Accordingly, the usurping government in control of Southern Rhodesia could not, for any purpose, be regarded as a lawful government. As regards necessity and the need to preserve law and order within the territory controlled by the usurper, no such principle could override the legal right of the United Kingdom to make such laws as it deemed proper for territories under the Queen's sovereignty. Thus, no purported law made by any person or

body in Southern Rhodesia, no matter how necessary such law might be for preserving law and order or otherwise, could have any legal effect whatsoever. Consequently, the emergency regulations, made by the Officer administering the Government in Rhodesia, were void and of no effect. The determination of the Appellate Division was therefore erroneous and the order under which the appellant's husband was detained was invalid.

Lord Pearce delivered a dissenting judgment affirming the views of Fieldsend AJA, based on the principle of necessity or implied mandate from the lawful sovereign. The court *a quo* was enjoined to accord recognition to certain of the acts, orders and legislation of the illegal regime because chaos would result if provisions made by the illegal regime for the lawful needs of the territory were to be disregarded. A reasonable margin of common sense was to be applied to the factual situation existing in Southern Rhodesia and it was not necessary to treat all the acts or legislation of the illegal regime as invalid for any purpose at all. Accordingly, the doctrine of necessity or implied mandate applied and the appeal should be dismissed.

In the event, the Privy Council, by a majority of four to one, reversed the decision of the Appellate Division. Consequently, the Queen was to be advised to declare that the determination of the court *a quo*, with regard to the validity of the Emergency Powers Regulations made in Southern Rhodesia since 11 November 1965, was erroneous and that such regulations had no legal validity, force or effect.

I fully appreciate that the principles enunciated by the Appellate Division and the Privy Council in the *Madzimbamuto* case derive from conceptions applicable to sovereignty and legitimacy in the realms of constitutional law and international law. Nevertheless, I take the view that these principles are equally relevant and germane to the factual situation *in casu*. Their application will assist the Court in evaluating the mootness or otherwise of the present matter and in determining the position that the Court should adopt in the event that the matter is found to be moot.

As I have already intimated, the Court is constrained to take judicial notice of the prevailing political realities within the Party that is presently before us. There can be no doubt that the second appellant and his lieutenants are in *de facto* and effective control of the Party. There is nothing to suggest that the situation will not continue for some time or that the second appellant is likely to be eclipsed and supplanted as the leader of the Party in the foreseeable future. While the Court cannot with any accuracy predict the future political path of the Party, we certainly cannot totally disregard the political realities on the ground.

In the premises, I am inclined to agree with the appellants that the present matter has indeed been rendered moot and academic. That, however, is not the end of the matter. The question that then arises is whether or not the Court should nevertheless proceed to deliver its definitive pronouncement pursuant to my earlier determination of the substantive merits of this appeal.

It is common cause that the Party is the main opposition political entity in this country, having secured 88 out of 270 seats in the National Assembly and 25 out of 60 seats in the Senate, at the last general election held in July 2018. It is not inconceivable, given the vagaries and vicissitudes of political fortune, that it might someday be electorally elevated to become the ruling party in Zimbabwe. As I have noted earlier, Article 3 of the Party constitution enshrines its status as "a Social Democratic Party whose core values shall be solidarity, justice, equality, liberty, freedom, transparency, humble and obedient leadership and accountability". These core values of the Party, if they are not to be reduced to merely hollow rhetoric, necessarily implicate the principles of good governance and adherence to the leadership requirements embodied in the constitution.

The analysis of the relevant provisions of the constitution that I have articulated in addressing the grounds of appeal makes it abundantly clear that the second appellant's ascent to the helm of the Party was fundamentally flawed by gross constitutional irregularities. To perpetuate that situation without appropriate correction would not only undermine the ethos and dictates of the constitution but would also infringe the rights of all the Party's members to a constitutionally elected leadership. It would further operate to violate the founding values enunciated in s 3(1) of the National Constitution, to wit, the rule of law and its concomitant doctrine of legality as well as the principles of good governance.

In the final analysis, I take the view that the corrective intervention of this Court in the affairs of the Party is a matter of significant public importance, not only in relation

to the Party and its members but also as regards the governance of political parties generally. It is necessary that the Court should deliver its definitive pronouncement on the legitimacy of the second appellant's ascent to the presidency of the Party. It is further necessary to ensure that the leadership of the Party is constitutionally and lawfully ensconced. The imbroglio that the Party's leadership has become entangled in may well be water under the bridge. But it is a bridge that, for the sake of the Party's stature and credibility, needs to be correctly and systematically constructed. In short, notwithstanding the political mootness of this matter, it is imperative that there should be an authoritative determination of this appeal in the interests of justice.

Disposition

The essence and objective of the corrective measures to be implemented by the Party is to restore the *status quo ante* that prevailed before the irregular and unlawful appointments to the Party presidency took place. This would necessitate having to extend the time limit prescribed in the Party constitution *apropos* the convening of an Extra-Ordinary Congress to elect a new President following the demise of Dr Tsvangirai. It would also involve modifying the judgment *a quo* to conform with that purpose.

In terms of Article 9.21.1 of the Party constitution, the Deputy President assumes the role of Acting President upon the death of the President, pending the holding of an Extra-Ordinary Congress to elect a new President. Such Congress must be held no later than one year from the death of the former President. The power to convene an Extra-Ordinary Congress is ordinarily vested in the President by dint of Article 9.1.2.1. It follows

that, by assuming the role of Acting President, the Deputy President is *ipso jure* equally empowered to convene any such Congress. By the same token, the National Chairperson, who is enjoined by Article 9.3.1(a) to perform the duties of the President's Office in the event that both the President and the Deputy President are unable to perform their functions, must also be vested with the power to convene an Extra-Ordinary Congress.

As regards costs, there can be no doubt that this matter is of great public importance. Moreover, it was necessary that the issues raised herein be fully ventilated and satisfactorily resolved in the interests of all the parties affected. In these circumstances, it seems to me that the Court's discretion on costs should be exercised so as to depart from the general rule that costs should follow the cause. I accordingly deem it just and proper that there should be no order as to costs in respect of this appeal as well as the proceedings *a quo*.

It is accordingly ordered as follows:

1. The appeal be and is hereby dismissed with no order as to costs.
2. The judgment of the court *a quo* be and is hereby confirmed, save for the deletion of paragraphs 4 and 5 of the operative order.
3. The third respondent, in her capacity as the Acting President of the first appellant, be and is hereby ordered to convene an Extra-Ordinary Congress, within a period of three months from the date of this order, in order to elect a new President.

4. In the event that the third respondent fails or is unable to comply with paragraph 3 above, the third appellant, in his capacity as the National Chairperson of the first appellant, be and is hereby ordered to convene the aforesaid Extra-Ordinary Congress, within a period of four months from the date of this order.

GARWE JA **:** I agree

GUVAVA JA **:** I agree

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